

August 19, 2011

Federal Acquisition Regulatory Council

FINAL Plan for Retrospective Analysis of Existing Rules

I. Executive Summary of Preliminary Plan & Compliance with Executive Order 13563

Executive Order 13563 recognizes the importance of maintaining a consistent culture of retrospective review and analysis throughout the executive branch. Before a rule has been tested, it is difficult to be absolutely certain of its consequences, including its costs and benefits. In federal acquisition, rules are designed to promote the timely delivery of the best value products and services to the taxpayer, while maintaining the public's trust and fulfilling public policy objectives.¹ Retrospective review will allow the Federal Acquisition Regulatory Council (FAR Council) – the body that oversees the development government-wide procurement regulations codified in the Federal Acquisition Regulation (FAR), found at 48 CFR Part 1 – to regularly consider whether these objectives are being met in the most efficient and effective manner possible. Such review will also promote elimination of unjustified costs, burdens, and complexity.

Executive Order 13563 calls not for a single exercise, but for “periodic review of existing significant regulations,” with close reference to empirical evidence. It explicitly states that “retrospective analyses, including supporting data, should be released online wherever possible.” Consistent with the commitment to periodic review and to public participation, the FAR Council will continue to assess its existing significant regulations in accordance with the requirements of Executive Order 13563. The FAR Council welcomes public suggestions about appropriate reforms. If, at any time, members of the public identify possible reforms to streamline requirements and to reduce existing burdens, the FAR Council will give those suggestions careful consideration.

The preliminary plan established a process and schedule for identifying certain significant rules that are obsolete, unnecessary, unjustified, excessively burdensome, or counterproductive. The preliminary plan identified rules that warrant simplification, repeal, or modification, or strengthening, complementing, or modernizing rules where necessary or appropriate. Particular attention was given to whether rules are creating barriers to entry or driving up the cost or length of the contracting process. The preliminary plan is available at <http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system>.

¹ See Statement of guiding principles for the Federal Acquisition System, FAR 1.102.

II. Scope of Plan

This plan covers government-wide acquisition rules addressed in the FAR. Individual agency supplements to the FAR will be addressed, as appropriate, in individual agency plans.

a. Sub-agencies included in this plan

Responsibility for maintaining the FAR is vested in the FAR Council, whose members consist of: the Administrator for Federal Procurement Policy and representatives of the Secretary of Defense, the Administrator of the National Aeronautics and Space Administration (NASA) and the Administrator of General Services.

The FAR Council is supported by two sub-councils that are responsible for preparing revisions to the FAR: the Defense Acquisition Regulations Council (DARC) and the Civilian Agency Acquisition Council (CAAC).

The DARC is chaired by a representative of the Department of Defense (DoD). The DARC membership includes representatives of the military Departments, the Defense Logistics Agency, and NASA.

The CAAC is chaired by the General Services Administration (GSA) and membership includes representatives of civilian agencies (other than NASA). Currently, the following Departments and agencies are represented with a permanent member of the CAAC: the Departments of Agriculture, Commerce, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, Interior, Justice, Labor, State, Transportation, Treasury, and Veterans Affairs; and the Agency for International Development, the Environmental Protection Agency, the Small Business Administration, and the Social Security Administration.

b. The types of documents covered under this plan include:

- Existing regulations
- Unfinished proposed rules
- Existing information collections

III. Public Access and Participation

Consistent with Executive Order 13563 and supporting guidance, the FAR Council requested public comment and conducted outreach on this preliminary plan before finalizing it. The public provided assistance by identifying additional improvements in existing practices and in eliminating unjustified barriers. This outreach builds on a number of efforts that the FAR Council has conducted to engage the public in its rulemaking activities (in addition to seeking comment on its rules). These efforts have included public meetings, advance notices

of proposed rulemakings, outreach sessions with interested stakeholders – including Congress, trade associations, advocacy organizations, public interest groups, and academia – and tribal consultation. Enhanced public input has been sought on a range of topics over the last two years, including strengthening the use of competition, decreasing reliance on high risk contracts, clarifying rules on conflicts of interest, and increasing opportunities for small business contractors. The FAR Council will continue to explore ways to improve public engagement in the rulemaking process, including pilot efforts that take advantage of new techniques and technologies for achieving more robust communication with stakeholders in the FAR rulemaking process.

IV. Current Agency Efforts Already Underway Independent of E.O. 13563

a. Summary of pre-existing agency efforts (independent of E.O. 13563) already underway to conduct retrospective analysis of existing rules

The FAR Council periodically undertakes initiatives to re-examine and improve the effectiveness of its rules. Reviews initiated within the past several years have looked at organizational conflicts of interest, small business contracting, use of cost and pricing information, the role of competition in the establishment of blanket purchase agreements (BPAs), and the development and use of contractor past performance information. Additional information is set forth in subsection b, below.

b. Specific rules, if any, already under consideration for retrospective analysis

Examples of ongoing or recently completed retrospective analyses are set forth below:

Organizational conflicts of interest: The FAR Council has been carefully re-evaluating the overall effectiveness of current regulatory coverage on organizational or personal conflicts of interest that may impair a potential contractor's ability to meet its obligations to the taxpayer if awarded a contract. This is an ongoing review – see section V of the preliminary plan for additional discussion and timelines.

Small business contracting: The FAR Council has worked with a Task Force on Small Business contracting, created by the President in April 2010, to identify where small business contracting rules need to be strengthened or clarified. This effort is part of an initiative to increase opportunities for small business contractors so that government agencies can take better advantage of the skill and ingenuity of the small business community to support agencies in carrying out their missions. This is an ongoing review. One key aspect of this effort will result in guidance authorizing agencies to set aside more work for small businesses when agencies award contracts to multiple contractors and then compete orders among contract holders as requirements arise. See section V of the preliminary plan for additional discussion and timelines.

Obtaining products and services at fair and reasonable prices: Agencies are responsible for purchasing supplies and services at fair and reasonable prices. While agencies seek to rely on competition to obtain good prices and quality, agencies are not always able to obtain competition. In certain circumstances, agencies need to request data from contractors to establish the fairness and reasonableness of offered prices. In doing so, agencies must take appropriate care not to ask for more data than is necessary. Unfortunately, unclear and overlapping definitions and confusing articulation of the underlying policy regarding the use of data has left contracting officers confused and agencies at risk of not asking for the information they need to protect the government from paying unreasonable prices. After review of agency experiences and public comment in response to a proposed rule and a public meeting, the FAR Council amended the FAR to clarify the rules for determining whether and how much data is required, in a given case, to establish price fairness and reasonableness.²

Contract closeout: Timely closeout of a contract helps to assure taxpayers that the contractor fulfilled its requirements and the contracting agency fulfilled its obligations. By some accounts, it is estimated that 10 percent of federal contracts are over age and require contract closeout. After careful review, the FAR Council revised FAR language to provide contracting officers the authority to withhold certain fees to ensure contractors submit the information needed to close out contracts in an effective, efficient, and timely manner. For a copy of the proposed rule, go to <http://frwebgate3.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=fQ0kgD/0/2/0&WAISaction=retrieve>.

Unfinished proposed rules and other old cases: The FAR Council has been re-evaluating proposed actions that have been pending on its docket for more than three years to identify barriers or obstacles to completion and to take action to either remove the barriers or drive forward to completion.

V. Elements of Preliminary Plan/Compliance with E.O. 13563

a. How the agency plans to develop a strong, ongoing culture of retrospective analysis

Review in connection with individual rulemakings: As part of the analysis conducted in connection with the Regulatory Flexibility Act, the FAR Council has routinely invited the public to comment not only on the impact of proposed FAR amendments, but also existing regulations in subparts that would be affected by the proposed changes. This broadened scope gives the public and the regulatory drafters a greater opportunity to identify regulations that warrant strengthening, modernizing, or repeal. The FAR Council intends to review the language incorporated into its notices to make sure the public is aware of this invitation and takes full advantage of the opportunity to bring matters to the drafters' attention that can make the rules more effective and efficient.

² The final rule is available at 75 Fed. Reg. 53135 (August 30, 2010).

Periodic FAR system-level reviews: In light of Executive Order 13563 and its emphasis on retrospective analysis, the FAR Council seeks to improve its ability to identify rules that are not directly connected with recent rulemakings and may be outdated, confusing, or otherwise in need of amendment or repeal. The FAR Council is considering periodic public notices, not less than once every three years, which may be accompanied by public meetings or other forms of outreach depending on the nature of the public feedback.

Improved case management: Late last fall, the FAR Council initiated a comprehensive review of the FAR system to improve the timeliness and quality of FAR rules. This review examined the processes used to develop and manage cases, including considerations for opening new cases. Based on this review, the FAR Council is updating its standard operating guides and training, and refining its oversight mechanisms, to clarify the roles and responsibilities of the individuals who serve as case managers and chairs of the FAR Teams. The “lookback” principles of E.O. 13563 will be addressed as part of these ongoing case management improvement efforts.

b. Prioritization. Factors and processes the agency will use in setting priorities

Priorities for retrospective analysis will focus around opportunities to make rules more efficient and effective in helping agencies obtain the best value for the taxpayer, while maintaining the public’s trust and fulfilling public policy objectives. In considering initiatives, the FAR Council will look for rules where there may be opportunities to accomplish one or more of the following objectives:

- reducing burden
- reducing barriers to entry into the federal marketplace
- simplifying regulatory requirements
- reducing or improving the management of risk
- increasing transparency
- improving communication between government agencies and contractors³

³ In February 2011, OFPP issued guidance to address misconceptions that may be inhibiting government-industry communications. See <http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/Myth-Busting.pdf>. E.O. 13563 provides an opportunity to review current rules addressing communications with vendors to determine if misconceptions are being driven by ambiguities or other infirmities with current FAR coverage on this subject, such as that in FAR 15.201 (addressing exchanges with industry before receipt of proposals) and 15.306 (addressing exchanges with offerors after receipt of proposals).

- increasing small business participation in federal contracting
- strengthening integrity and good business ethics
- taking better advantage of technology

c. Initial list of candidate rules for review over the next two years

The FAR Council has tentatively identified eight priority initiatives for new or continued retrospective analysis and follow-up action over the next two years. A summary of the initiatives, the primary FAR parts for review, and desired outcomes are set forth in Table 1. Additional information on each initiative is set forth below. This preliminary list may be refined and revised based on public input.

DRAFT

Table 1. Summary of Newly Proposed & Ongoing “Lookback” Initiatives

Initiative	Primary FAR Parts for Review	Opportunities to be explored through lookback	Status	Timeline
1. Re-examine FAR Council process for applying new regulatory requirements to commercial item acquisitions & small (simplified) purchases	Not addressed in regulation	<ul style="list-style-type: none"> • Improved economy and efficiency • Reduced barriers to entering the federal marketplace • Increased transparency • Simplified acquisitions • Increased small business participation 	<ul style="list-style-type: none"> • New initiative 	The FAR Council will complete its review of current practices by the end of the second quarter of FY 2012.
2. Explore opportunities to accelerate payments to small businesses	FAR 32.903 & 32.906	<ul style="list-style-type: none"> • Reduced barriers to entry • Increased small business participation 	<ul style="list-style-type: none"> • New initiative 	The government will complete its review in the Fall and will either issue a rule or a policy memorandum to reinforce existing accelerated payments authorities
3. Review rules governing communications with vendors before awarding contracts	FAR 15.201 & 15.306	<ul style="list-style-type: none"> • Improved economy and efficiency • Reduced barriers to entry 	<ul style="list-style-type: none"> • New initiative 	In addition to issuing its February Myth-busting memorandum, OFPP held a session in July/August with industry and government personnel to reduce barriers to entry. By the end of 2011, OFPP plans to issue another memorandum discussing rules governing communications with vendors before awarding contracts
4. Reduce number of competitions that result in only one offer	FAR Part 6	<ul style="list-style-type: none"> • Improved economy and efficiency • Reduced barriers to entry • Reduced exposure to high risk 	<ul style="list-style-type: none"> • New initiative 	If a regulatory change is determined to be beneficial, a rule will be issued in FY 2012.

5. Revisit the process for reviewing past performance information	FAR 42.1503	<ul style="list-style-type: none"> Improved economy and efficiency 	<ul style="list-style-type: none"> New initiative 	If a regulatory change is found to be beneficial, a rule will be issued in FY 2012.
6. Work with SBA to modernize rules for using contract-set asides & small business subcontracting plans	FAR Subparts 19.5 & 19.7	<ul style="list-style-type: none"> Reduced barriers to entry Increased small business participation 	<ul style="list-style-type: none"> Initial outreach sessions held 	The FAR Council is working closely with SBA on the issuance of regulations. Rules will be finalized in FY 2012 after comment is sought from the public.
7. Restructure rules addressing conflicts of interest -organizational conflicts of interest (OCIs) and personal conflicts of interest (PCIs))	FAR Subpart 3.11 & 9.5	<ul style="list-style-type: none"> Improved integrity and business ethics 	<ul style="list-style-type: none"> OCIs: proposed rule published on OCIs PCIs: final rule publication pending; Federal Register notice for additional outreach publication pending 	<p>The proposed rule was published on April 26, 2011 with an extended comment period until July 27, 2011.</p> <p>Anticipate finalizing the rule by December 2011.</p>
8. Clarify rules addressing the use of competition for blanket purchase agreements	FAR 8.405-3	<ul style="list-style-type: none"> Improved economy and efficiency Reduced exposure to high risk 	<ul style="list-style-type: none"> Interim rule published 	A rule will be finalized in FY 2012.

Re-examine process for applying new regulatory requirements to commercial items & small purchases

Primary parts for review: Issue is not addressed in the FAR

Opportunities to be explored through lookback:

- Increased transparency and openness in government decision-making
- Reduced barriers for contractors seeking to enter the federal marketplace and improved access to the commercial marketplace

Status of initiative: New initiative

Background

Sections 33, 34, and 35 of the OFPP Act (41 U.S.C. 1905-1907) address the application of new laws to contracts and subcontracts for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items (which essentially are commercial products sold in the marketplace that have not been modified for government use), and contracts and subcontracts valued below the simplified acquisition threshold (SAT), which is currently \$150,000. These sections of the OFPP Act exempt commercial item and small dollar acquisitions from the application of new laws unless the new laws (1) provide for criminal or civil penalties, (2) specifically state that they are applicable to these types of contracts, or (3) are applicable because the FAR Council (or, in the case of COTS items, the OFPP Administrator) makes a written determination that it would not be in the best interest of the Federal Government to exempt contracts from these laws. These laws help to minimize the application of government-unique requirements that can create barriers to entry and discourage contractors from doing business with the government.

For certain laws, the FAR Council has exercised its discretion to apply certain new statutory requirements that would not otherwise have been applicable to these acquisitions by operation of law. Last year, for example, the FAR Council made a determination that it was not in the best interest of the government to exempt commercial item and COTS acquisitions from a provision of the Federal Funding Accountability and Transparency Act that requires contractors to report executive compensation and first-tier subcontractor awards on contracts expected to be \$25,000 or more. The FAR Council based its determination on a finding that the reporting requirements of the Transparency Act are intended to provide the public with full and easy access to information on government spending to promote accountability and transparency. The Council concluded that waiving the applicability of these requirements would exclude a vast number of contracts, contractors and subcontractors, which would limit the information that is available to the public and undermine the overarching policy of achieving greater sunshine in government.

This lookback initiative will review current practices and processes used by the FAR Council to make determinations. Some members of the public have noted that the current process (which is not addressed in the FAR) is unclear and recommended that consideration be given to making the determination process more open, especially given the potential for added burden associated with each such determination. The Council will consider these and other comments as it reviews its processes and ways in which they may be improved.

Explore opportunities to accelerate payments to small businesses

Primary parts for review: FAR 32.903 and 32.906

Opportunities to be explored through lookback:

- Improved cash flow for small businesses doing business with the Government, thereby creating a corresponding improvement in the US economy.
- Increased small business participation in Federal contracting by implementing favorable contract payment terms.
- Greater consistency across the government with respect to payments to small businesses.
- Faster payments to small businesses allows them to meet their obligations on-time, and participate in other ventures.

Status of initiative: New initiative

Background

Pursuant to the Prompt Payment Act, agencies are generally required to pay contractors within 30 days after receiving a proper invoice from the contractor. Current FAR coverage, consistent with OMB's Financial Management Regulations, requires agencies to follow prudent cash management practices which generally call for agencies to pay contractors as close to the payment due date as possible. However, the Financial Management regulations permit agency payment offices to make accelerated payments to small businesses. Small businesses have been especially hard hit by the economic recession; accelerating payments is a way to improve cash flow for small businesses and improve the financial health of these firms. DoD recently issued a rule to revise its payment policies to facilitate faster payment of invoices to all small businesses as quickly as possible after invoices and all proper documentation (including documentation of acceptance) have been received.

This lookback initiative will consider possible regulatory changes to support accelerated payment to small businesses. The FAR Council will work with financial management officials to evaluate systems challenges and costs associated with accelerating payments. The impact of modifications to the DoD payment systems is being addressed by the adoption of a phased-in approach. In evaluating the merits of making this policy government-wide, the FAR Council will draw upon lessons learned from the DoD implementation. There is a statutory goal of awarding 23 percent of federal procurement dollar to small businesses. According to 2010 Small Business Economy Report to the President, in fiscal year 2009, small businesses received 21.89

percent of federal dollars, compared with 21.50 percent in FY 2008. Small businesses were awarded \$96.8 billion in federal prime contracts in FY 2009, an increase of almost \$4 billion from FY 2008. For a copy of this report, see http://www.sba.gov/sites/default/files/sb_econ_2010.pdf. Accelerating payments improves cash flow, making it easier for small businesses to perform and compete for new work, which, in turn, will allow them to hire more employees and stimulate the economy.

Review rules governing communications with vendors before awarding contracts

Primary parts for review: FAR 15.201 & 15.306

Opportunities to be explored through lookback:

- Reduced barriers to entry
- Improved economy and efficiency in contracting

Status of initiative: New initiative

Background

Access to current market information is critical for agency program managers as they define requirements and for contracting officers as they develop acquisition strategies, seek opportunities for small businesses, and negotiate contract terms. Our industry partners are often the best source of this information, so productive interactions between federal agencies and our industry partners should be encouraged to ensure that the government clearly understands the marketplace and can award a contract or order for an effective solution at a reasonable price. Early, frequent, and constructive engagement with industry is especially important for complex, high-risk procurements. The FAR authorizes a broad range of opportunities for vendor communication, but agencies often do not take full advantage of these existing flexibilities. Some agency officials may be reluctant to engage in these exchanges out of fear of protests or fear of binding the agency in an unauthorized manner. This winter, OFPP kicked off a “myth-busting” campaign to address misconceptions and improve communication with industry during the acquisition process.⁴

This lookback initiative will review regulatory requirements governing exchanges with industry before contract award -- both before and after receipt of proposals -- to determine if misunderstanding or unclear understanding of FAR authorities is contributing to reluctance to communicate with industry and opportunities to clarify or strengthen current FAR coverage.

⁴ See “Myth-Busting”: Addressing Misconceptions to Improve Communication with industry during the Acquisition Process (February 2, 2011), *supra* note 3.

Reduce number of competitions that result in only one offer

Primary parts for review: FAR Part 6

Opportunities to be explored through lookback:

- Improved economy and efficiency by increasing the options available to agencies to meet taxpayer needs.
- Reduced barriers to entry
- Reduced exposure to high risk

Status of initiative: New initiative

Background

The President's Memorandum on Government Contracting, issued in March 2009, directed agencies to reduce their use of high risk contracting, including the use of contracts awarded without the benefit of competition that can lead to cost overruns and wasteful spending of taxpayer dollars. OMB's July 2009 implementing guidance called on agencies to reduce not only noncompetitive awards, but also awards made from solicitations where only one offer was received. Competitions that yield only one offer in response to a solicitation deprive agencies of the ability to consider alternative solutions in a reasoned and structured manner. In the fall of 2009, OFPP issued guidelines to help Chief Acquisition Officers and Senior Procurement Executives evaluate the effectiveness of their agency's competition practices and identify opportunities to increase interest and participation in their competitions, but the FAR does not specifically speak to steps agencies should take where only one offer is received. According to GAO's 2010 report, from fiscal years 2005 to 2009, reported obligations for noncompetitive contracts decreased from about 36 to 31 percent of total obligations, while obligations under contracts competed with only one offer received were steady, at about 13 percent of the total in each year. The GAO recommended that OFPP consider whether FAR amendments might be beneficial.⁵

This look back initiative will consider whether tailored regulatory changes might assist agencies in their efforts to increase contractor interest in competitions that have received only one offer.

⁵ See *Opportunities Exist to Increase Competition and Assess Reasons When Only One Offer is Received* (GAO-10-833), see <http://www.gao.gov/new.items/d10833.pdf>.

Revisit the process for reviewing past performance information

Primary parts for review: FAR 42.1503

Opportunities to be explored through lookback:

- Improved economy and efficiency
- Reduced exposure to risk by eliminating awards to non-performing or poor performing contractors

Status of initiative: New initiative

Background

On an annual basis, the Government awards contractors over \$500 billion dollars of contracts for goods and services. The regular evaluation of contractor performance and the use of these evaluations in decisions for future awards motivate contractors to perform well and help ensure that agencies avoid doing business with firms that do not perform well. Agencies are now required to submit electronic records of contractor performance into a single, web-based government-wide repository, known as the Past Performance Information Retrieval System (PPIRS). PPIRS is broadening agency access to contractor assessments so that contracting officers can have greater insight into how well our contractors are performing for the taxpayer.

For many years, the FAR has required that contractors be given a minimum of 30 days to submit comments, rebutting statements, or additional information, if they believe the agency's assessment of its performance is incomplete or inaccurate. The FAR has also required agencies to provide for review of agency evaluations at a level above the contracting officer to consider disagreements between the parties regarding the evaluation. Some have raised concern that the appeal process increases burden on contracting officials without associated benefit. Others contend that the appeal process helps to ensure that evaluations are merit based.

This lookback initiative will consider the merits of modifying FAR requirements governing the appeal process and evaluate whether this change would improve or weaken the effectiveness of past performance policies and associated principles of impartiality and accountability.

Work with SBA to modernize rules for using contract set-asides & small business subcontracting plans

Primary parts for review: FAR Subparts 19.5 & 19.7

Opportunities to be explored through lookback:

- Reduced barriers to entry

- Increased small business participation

Status of initiative: Extensive outreach underway to obtain public input

Background

Small businesses are leaders in innovation and drivers of the economy. They also represent a critical source of cost-effective support and technical expertise for our federal agencies. See SBA's statistics on small businesses at <http://www.sba.gov/advocacy/7495/8420>. Over 30 years ago, Congress set a goal of having a certain portion of all federal contracting dollars go to small businesses and established sub-goals for small businesses owned by women, socially and economically disadvantaged individuals, service-disabled veterans of the Armed Forces, and for small businesses in Historically Underutilized Business Zones. The current government-wide goal for small businesses' share of contracting dollars is 23%. Every year since 2006, the Federal government has missed the 23% small business goal and all but one of the sub-goals. In April 2010, the President established a Task Force to help identify where small business contracting rules need to be strengthened or clarified. Members of the FAR Council participated in this effort. The Task Force issued its recommendations in September 2010,⁶ the same time that Congress passed the Small Business Jobs Act. The Task Force and Congress focused on many of the same areas. Of particular note, both efforts call for:

- Clarification on the use of set-asides. Set-asides – reserving contracts for a small business if there are two or more small businesses capable of performing the work at fair and reasonable prices – accounted for approximately half of all government contract awards to small businesses in FY 2009. However, current rules do not speak to how orders are to be placed under multiple award “task and delivery order” contracts, where large contracts are awarded to a number of companies, which then compete for specific orders after the contract has been awarded. These contracts represent a significant percentage of federal contracting. As a result, small businesses are not getting the benefit of set-asides in this significant segment of the Federal contracting marketplace. The Task Force and the Jobs Act call for the development of rules to close this gap.
- Improved rules on subcontracting. Subcontracting is an important avenue for small businesses to gain entry to the federal marketplace when they lack the capacity to compete at the prime contractor level and can also serve as a stepping stone to receiving work as a prime contractor. Subcontracting plans, where large business prime contractors explain how they will tap the talents of small businesses to help them in performing the contract, are the key tool agencies have to facilitate opportunities for small businesses as subcontractors. Concerns have been raised regarding the strength of a number of different aspects of subcontracting plan policy – including the quality of the information in the plan, the amount of emphasis placed on the plan in evaluating large business bidders, and the quality of

⁶ For a copy of the Task Force's recommendations, go to <http://www.whitehouse.gov/blog/2010/09/15/new-plans-underway-increase-contracts-small-business>.

contracting officials' evaluation of progress against the plan. Both the Task Force and the Jobs Act call for rules to be appropriately strengthened.

This lookback initiative will evaluate the best ways to strengthen regulations associated with these important small business contracting authorities. SBA conducted a nationwide outreach tour to obtain public input on these and other related small business contracting issues.⁷ For information about the nationwide outreach Jobs Act tour, see SBA website at <http://www.sba.gov/jobsacttour>. The FAR Council will work closely with SBA to make appropriate revisions to the FAR.

Restructure rules addressing conflicts of interest

Primary FAR Parts for review: Subpart 9.5

Opportunities being explored through lookback:

- Regulations that are more effective in protecting the government's interests and public confidence in the integrity of the federal acquisition process.

Status of initiative:

Proposed rule published addressing organizational conflicts of interest (04/26/2011); final rule issued addressing personal conflicts of interest (PCIs) for acquisition activities closely associated with inherently governmental functions (pending); notice issued for public input on potential additional areas for coverage on PCIs (pending).

Background

Maintaining public trust is a key tenet of a healthy federal contracting system. The integrity of the federal acquisition process is protected, in part, by rules that seek to mitigate or avoid conflicts of interest. The FAR Council is working to strengthen regulatory support for the identification and handling of both organizational conflicts of interest and personal conflicts of interest.

Organizational conflicts of interest

Organizational conflicts of interest (OCIs) may occur when a contractor, because of other activities or relationships with other contractors, is unable or potentially unable to render impartial assistance or advice to the Government, has or may have impaired objectivity in performing the contract work, or has an unfair competitive advantage. Several recent trends in government contracting have raised concern about the increased potential for these types of conflicts to arise. These trends include increased consolidation within industries that perform

⁷ For additional information on the issues addressed as part of this outreach effort, go to <http://www.sba.gov/sites/default/files/files/Condensed%20Tour%20GCBD%20PN%20FINAL%2003232011.pdf>

work for the government, increased reliance of the government on contractors who provide services that entail the use of judgment, and the broader use of “umbrella” contracts that allow award of a large amount of work to a relatively small pool of contractors.

Because of these trends, the FAR Council has been carefully re-evaluating the overall effectiveness of current regulatory coverage on OCIs. FAR coverage on OCIs has remained largely unchanged since the initial publication of the FAR in 1984. The FAR Council’s review has included a comprehensive lookback, including: (i) an extensive review of the caselaw that has shaped current FAR coverage, which may be found at FAR Subpart 9.5, (ii) findings made in 2007 by the Acquisition Advisory Panel, which was established by section 1423 of the Services Acquisition Reform Act (P.L. 108-136) to make recommendations for improving the efficiency and effectiveness of the acquisition process, (iii) public comments offered in response to an advance notice of proposed rulemaking, and (iv) comments in response to a proposed rule issued by the Department of Defense for its Defense Federal Acquisition Regulation supplement (DFARS) to implement provisions of the Weapon Systems Acquisition Reform Act addressing conflicts of interest.

Based on their review, the FAR Council concluded that the substantive principles of the current FAR coverage remain sound but must be updated to recognize the present-day challenges faced by acquisition officials in identifying and addressing OCIs in the procurement of products and services to satisfy agency requirements. The results of the FAR Council’s review were reflected in the recent publication of a proposed rule that lays out a substantial restructuring of current coverage that is designed to be clearer, easier to implement, and better suited to protecting the interests of the government.⁸ Details of the proposed restructuring are provided in the rule’s preamble. In addition to seeking comment on the proposed restructuring, the FAR Council is seeking comment on whether the proposed restructuring is preferable to an alternative approach reflected in a recent DoD proposed rule that also updates coverage on OCIs for Defense procurements to provide greater clarity but makes more modest revisions that more closely track to the current regulatory structure in the FAR. The FAR Council will be carefully considering public comment as it evaluates the benefits and drawbacks of each approach, whether features of each should be combined in the final rule, and whether there are other options that have not yet been considered.

Personal conflicts of interest

Personal conflicts of interest (PCIs) may arise when an individual has a financial interest, personal activity, or relationship that could impair the individual’s ability to act impartially and in the best interest of the Government. Federal personnel rules published by OPM do provide extensive coverage of personal conflicts of interest with respect to federal employees. Although many contractor employees work side-by-side with federal employees in agencies and

⁸ The proposed rule is published at 76 Fed. Reg. 23236 (April 26, 2011). It is available here: <http://www.federalregister.gov/articles/2011/04/26/2011-9415/federal-acquisition-regulation-organizational-conflicts-of-interest>. Publication information about the proposed DFARS rule is provided in the preamble of the proposed FAR rule.

Departments performing substantially the same tasks affecting billions in federal spending, few ethics policies are in place to prevent personal conflicts of interest for contractor employees. Given concerns with protecting the integrity of government operations and consistent with statutory requirements in section 841 of the FY 2009 NDAA, the FAR Council has worked with agencies to assess the adequacy of safeguards to prevent personal conflicts of interest for contractor employees when performing acquisition activities closely associated with inherently governmental functions. Based on this assessment, the FAR Council published a proposed rule on November 13, 2009.⁹ Publication of a final rule incorporating public comments is currently pending and scheduled for publication in the August/September 2011 timeframe. Additionally, the FAR Council is currently engaged in an assessment of whether additional coverage of PCIs in areas other than acquisition activities closely associated with inherently governmental functions is necessary. As part of this review, the FAR Council will publish a Federal Register notice seeking feedback on this question. This notice will be published, in August/September, concurrently with the final PCI FAR rule.

Clarify rules addressing the use of competition for blanket purchase agreements

Primary parts for review: FAR 8.405-3

Opportunities to be explored through lookback:

- Better pricing and increased contract savings
- Reduced exposure to contract risk

Status of initiative:

Interim FAR rule issued on March 16, 2011.¹⁰ 76 Fed. Reg. 14548 (March 16, 2011)

Background

Blanket purchase agreements (BPAs) are agreements with pre-negotiated terms and conditions that agencies establish with contractors so they can negotiate better deals for their recurring needs. They are an especially popular tool under GSA's Federal Supply Schedules Program, where billions of dollars are spent to acquire common commercial products and services. To capture the benefits of BPAs, an agency must actively negotiate with vendors for better pricing, deeper discounts, and more favorable delivery terms. However, reports in recent years, including one by GAO in 2008, found that agencies were failing to take advantage of opportunities for competition in either establishing BPAs or placing orders under them – sure ways to get better deals. This lookback initiative considers ways to strengthen the use of competition in the establishment of BPAs and the placement of orders under them.

⁹ The proposed rule was published at 75 Fed. Reg. 58584 (November 13, 2009).

¹⁰ The interim rule is published at 76 Fed. Reg. 14548 (March 16, 2011).

d. Structure and Staffing: official responsible for retrospective review.

The Federal Acquisition Regulatory Council (FAR Council), chaired by the Office of Federal Procurement Policy Administrator, includes the Department of Defense Director of Defense Procurement and Acquisition Policy, the National Aeronautics and Space Administration (NASA) Associate Administrator for Procurement, and the General Service Administration Chief Acquisition Officer. The FAR Council oversees development and maintenance of the FAR. The following individuals from these organizations were delegated responsibility for this plan.

Name/Position Title:

Mathew Blum
Associate Administrator
Office of Federal Procurement Policy
Office of Management and Budget

Linda Neilson
Director
Defense Acquisition Regulations Council
Department of Defense

Laura Auletta
Acting Director
Office of Governmentwide Acquisition Policy
General Services Administration

Leigh Pomponio
NASA FAR Principal
National Aeronautics and Space Administration

e. How the agency plans to ensure that agency's retrospective team and process maintains sufficient independence from the offices responsible for writing and implementing regulations

The FAR Council is considering a variety of options to ensure a fresh look and independent review occurs through its retrospective analysis. A number of options may be used and could include approaches such as: (1) collaboration with senior agency officials with expertise in acquisition and related fields such as finance and information technology, who do not have direct responsibility for FAR rulemaking, (2) use of ad hoc government advisors with specialized subject matter expertise, and (3) public meetings.

f. Agency actions, if any, to strengthen internal review expertise, such as training staff, regrouping staff, hiring new staff, or other methods

The FAR improvement process will include new training requirements for all analysts. This will include training on Executive Order 13563 and related guidance, in addition to training on the requirements of the Paperwork Reduction Act and Regulatory Flexibility Act.

g. How the agency will plan for retrospective analysis over the next two years, and beyond

As identified in subsection c, above, the FAR Council has identified eight initiatives for retrospective analysis over the next two years. Refinements may be made to this list of priorities based on input from the public and agencies. Periodic public feedback will be obtained (as described in subsection i, below) to identify additional areas for review, taking into account the factors identified in subsection b.

h. How the agency will decide what to do with analysis

Analyses will be reviewed by the FAR Council and, as appropriate, other agency stakeholders, which could include members of the Executive Committee of the Chief Acquisition Officer's Council (CAOC). As appropriate, revisions will be made to existing rules and new rulemakings will be initiated.

i. The agency's plans for revising rules - how the agency will periodically revisit rules (e.g., through sunset provisions, during regular intervals)

For a number of years, as part of the analysis conducted in connection with the Regulatory Flexibility Act, the FAR Council has routinely invited the public to comment not only on the impact of proposed FAR amendments, but also existing regulations in subparts that would be affected by the proposed changes. This broadened scope gives the public and the regulatory drafters a greater opportunity to identify regulations that warrant strengthening, modernizing, or repeal. The FAR Council intends to review the language incorporated into its notices to make sure the public is aware of this invitation and takes full advantage of the opportunity to bring matters to the drafters' attention that can make the rules more effective and efficient.

In addition, the FAR Council is considering periodic public notices, not less than once every three years, which may be accompanied by public meetings or other forms of outreach depending on the nature of the public feedback.

j. Description of how the agency will coordinate with other federal agencies that have jurisdiction or similar interests

The structure of the FAR teams provides for interagency and cross functional representation to ensure consideration of similar interests. The FAR Council is seeking to strengthen and

expand agency participation on the FAR Teams as part of its regulatory improvement process. To enhance communication and collaboration on its retrospective review, in particular, the FAR Council intends to solicit agency views on its preliminary plan through agency Chief Acquisition Officers and Senior Procurement Executives at the same time it seeks public input on its preliminary plan.

k. How the agency plans to use peer review in conducting analyses

Peer review is effectively included in the FAR process. The FAR teams include interagency, cross functional representation, which allows interested stakeholder agencies to exchange views and discuss individual agency efforts to implement federal acquisition policies and practices. Further interagency vetting occurs through review of FAR Teams' proposals by the DARC and CAAC.

VI. Components of Retrospective Cost-Benefit Analysis

a. Metrics the agency will use to evaluate regulations after they have been implemented

The FAR Council will seek input from the public, including vendors, on the cost impact of proposed regulatory changes and on appropriate ways to evaluate the outcome of actions taken as a result of its retrospective review initiatives.

b. Steps the agency has taken to ensure that it has the data available with which to conduct a robust retrospective analysis

The acquisition community's Integrated Acquisition Environment provides a number of electronic tools and databases that capture data to assist in analysis. For instance, the Federal Procurement Data System provides data on contracts and orders, including modifications with over 100 data elements covering award amounts, type of product or service, type of contractor, applicability of certain rules, etc. Other tools include the Central Contractor Registration which provides detailed information on contractors and potential contractors.

VII. Publishing the Agency's Plan Online

The FAR Council intends to publish its retrospective review plan on OMB's Open Government website (www.agency.gov/open) and on regulations.gov. The point of contact (who will also be responsible for posting updates to the plan) is Julia Wise, jwise@omb.eop.gov, (202) 395-7561.

VIII. Summary of Comments on the Preliminary plan

As required by this EO, the FAR Council published the preliminary plan in the Federal Register at 76 FR 32133 on June 3, 2011 – see <http://www.gpo.gov/fdsys/pkg/FR-2011-06-03/html/2011-13835.htm>. The period for public comment closed on July 5, 2011. Public

comments were received from the Council of Defense and Space Industry Association (CODSIA). Several comments were also received from two government agencies -DHS, and GSA. The comments and recommendation are discussed below.

Public Comments

CODSIA expressed support for the look-back reviews proposed in the plan, but stated that the FAR Council should also review the acquisition regulatory process. In particular, they raised a number of concerns that current regulatory practices are eroding the public's ability to provide input into the rulemaking process, including the issuance of "interim rules" that become effective before having the benefit of public comment. They also raised concerns that current analyses of the costs and benefits of rules are inadequate.

The FAR Council strongly agrees that early and meaningful public participation is critical to effective and quality rulemaking and is committed to identifying and pursuing new approaches to public engagement. In this regard, the FAR Council intends to identify and pursue pilot efforts to test techniques and technologies for achieving more robust communication with the public, including input on burden and costs.

Agency Comments

Agencies also offered a number of ideas on ways to take greater advantage of the look-back process to improve the FAR rulemaking process. Recommendations included:

- Keeping the FAR current by developing a process to regularly remove obsolete, revoked, or repealed Executive Orders (EO), OMB Circulars, and laws;
- Reducing the volume of regulatory coverage by removing language that is instructional or internal guidance that does not have an impact on contractors; and
- Clarifying the flow down requirements for subcontractors to help reduce overhead costs and risks for small and large businesses who may find themselves struggling to understand current prescriptions in order to ensure that they are operating in a manner that is compliant with the FAR.

The FAR Council welcomes ideas for simplifying, clarifying, and streamlining the FAR and plans to initiate processes to evaluate the initiatives described above. Should any regulatory coverage be identified for removal as unnecessary or internal guidance, the FAR Council would issue a proposed rule so that the public would have an opportunity to comment before any language was eliminated.

One agency commenter also offered a suggestion for reviewing the burden on contracting officers by evaluating the number of FAR mandates imposed on contracting officers and conducting a process to determine if each mandate remains appropriate. The FAR Council

appreciates the need to consider how burdens on agency contracting officials can be reduced. While such burden reduction on agency officials is not the immediate focus of the look-back plan, the FAR Council intends to evaluate the need for this review outside of this process.

DRAFT