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FEATURE COMMENT: DHS Issues Final Rule Revising The HSAR—Some Highlights

On Dec. 4, 2003, the Homeland Security Acquisition Regulation (HSAR) was published as an interim rule, and the Department of Homeland Security requested public comment. 68 Fed. Reg. 67867. DHS also issued the Homeland Security Acquisition Manual (HSAM) as a companion to the HSAR. As with other agency Federal Acquisition Regulation supplements, the purpose of the HSAR is not to duplicate the FAR; instead, the HSAR supplements it by providing specificity regarding DHS' organization, policies, procedures and delegations, and by implementing unique authorities provided by the Homeland Security Act (P.L. 107-29), as amended. These authorities include (1) increased use of FAR pt. 12 simplified acquisition and micropurchase procedures, if the department's mission would be seriously impaired otherwise; (2) a prohibition against most contracts with corporate expatriates, also referred to as inverted domestic corporations; and (3) personal services contracting authority, including waivers of pay limitations when needed for urgent homeland security purposes.

The HSAR (a) establishes the DHS Mentor-Protégé program to develop small-business sources; (b) designates the Department of Transportation Board of Contract Appeals as the DHS Board of Contract Appeals; (c) creates uniform DHS provisions and clauses, as well as organization element (OE)-unique clauses; and (d) identifies OEs with procurement authority. There are no HSAR parts relating to FAR pts. 7, 8, 10, 12, 14, 18, 20, 21, 25, 26, 29, 34, 38, 40, 41, 43, 44, 48-50 or 51. Finally,

both the original and amended HSAR do not apply to the Transportation Security Administration.

The HSAR final rule was issued on May 2, 2006, and incorporates changes resulting from public comments and statutory requirements, and changes to carry out the intent of the interim rule. The final rule takes effect on June 1, 2006. 71 Fed. Reg. 25759 (May 2, 2006). Many of the comments and, to a lesser extent, revisions relate to small-business issues. Indeed, in the preamble, DHS notes that a number of comments express concern that the rule would negatively impact small business. This FEATURE COMMENT, however, addresses some aspects of the HSAR and changes that are notable in areas apart from small business. They mainly relate to the need to update existing DHS contracts and the further refinements of DHS contracting rules that impact companies employing foreign nationals or that may be corporate expatriates.

Revised HSAR Pt. 3001 Regarding Implementation of HSAR Amendments—The HSAR update conforms to the FAR on the application of regulatory changes to existing solicitations and contracts. In other words, the revised HSAR 3001.301-71 makes it clear that HSAR changes apply to solicitations issued on or after the effective date of the change, but that contracting officers may, at their discretion, amend solicitations issued before that date, and may use the changes clause or other suitable authority to modify an existing contract to include HSAR changes.

As in contracts with other agencies, contractors need to monitor HSAR changes and work with their COs to implement appropriate modifications. Because of DHS' wholesale finalization of its regulations, the Government and the private sector should clean up existing contracts to remove outdated clauses.

Revised HSAR Pt. 3002 to Define 'Sensitive Information'—The new HSAR at 3002.101 defines "sensitive information" as

any information, the loss, misuse, disclosure, or unauthorized access to or modification of which

could adversely affect the national or homeland security interest, or the conduct of Federal programs, or the privacy to which individuals are entitled under 5 USC § 552a (the Privacy Act), but which has not been specifically authorized under criteria established by an Executive Order or an Act of Congress to be kept secret in the interest of national defense, homeland security or foreign policy

It also notes that protected critical infrastructure information, sensitive security information, for official use only information and any other information designated as “sensitive” counts as “sensitive information.” According to the final rule’s preamble, this provision was subject to several public comments regarding the sweeping original definition of sensitive information in the HSAR. The preamble notes that DHS has narrowed the definition, and the amended text clarifies that the Government must mark sensitive information furnished to contractors.

Despite these changes, the post-9/11 proliferation of sensitive but unclassified information categorizations by agencies such as DHS will continue to challenge many in the contracting community. Moreover, contractors lack experience understanding how an agency will administer—and possibly enforce—restrictions related to such information. Undoubtedly, dialogue between the Government and the contracting community will continue on these issues.

Revised HSAR Pt. 3004 Regarding Safeguarding Classified and Sensitive Information within Industry—As indicated above, DHS regulations regarding sensitive information have been difficult to decipher. Indeed, the new HSAR provision notes that basic safeguarding policies and procedures are set forth in various DHS management directives—not centrally accessible on the DHS Web site—rather than in the regulations themselves. The HSAR then notes that COs should include several clauses in contracts involving “information technology resources” or access to sensitive information. “Information technology resources” include, but are not limited to, “computer equipment, networking equipment, telecommunications equipment, cabling, network drives, computer drives, network software, computer software, software programs, intranet sites, and internet sites.” Apart from 3052.204-70, Security Requirements for Unclassified Information Technology Resources, retained from the original HSAR but modified, the main clause is 3052.204-71, Contractor

Employee Access, which, as its name suggests, deals with contractor employee access and implements a Government-mandated background check for access to unclassified information, possibly including fingerprinting or other investigations as requested by the CO. Moreover, contractors must ensure that their employees are trained to handle sensitive information. Flowdowns are required at all tiers.

The Contractor Employee Access clause notes that COs shall insert the basic clause with its Alternate I for acquisitions necessitating contractor access to federal IT resources. Alternate I calls for a security briefing of the individual employee and the completion of nondisclosure agreements by contractor employees. Moreover, there are strict restrictions against non-U.S. citizens, and, in this case, permanent resident aliens, or “green card” holders, are treated differently than U.S. citizens and grouped with foreign nationals.

For acquisitions in which the contractor will not have access to IT resources, but the department has determined contractor employee access to sensitive information or Government facilities must be limited to U.S. citizens and lawful permanent residents, the HSAR states that the CO should insert the clause with its Alternate II. The rule notes that neither the basic clause nor its alternatives are to be used unless contractor employees require recurring access to Government facilities or access to sensitive information. In the coming months, contractors may want to review draft requests for proposals for this provision and assess its potential impact on their bidding strategy and workforce.

Comments on the rule expressed some concern as to whether the academic community would be required to comply with these provisions. HSAR 3004.470-3, which provides the basis for the clause, notes that neither the basic clause nor its alternatives should ordinarily be used in contracts with educational institutions, but does not, on its face, appear to unequivocally exempt them from its coverage in instances in which their activities would otherwise implicate the clause. Only time will tell how DHS interprets and applies these requirements, and whether this clause becomes a stumbling block for certain work by universities.

Apart from potential concerns in the academic community if these rules were applied expansively, the 3052.204-71 clause may continue to be difficult to manage and prone to contractor challenges, because

it imposes restrictions akin to those on classified or highly sensitive export controlled information in settings in which that information may not be involved. For instance, Alternate I calls for a waiver process for non-U.S. citizens' access (Alternate II has a similar, but perhaps not as rigorous, process), but states that, for a waiver to be granted, (1) the individual must be a legal permanent resident of the U.S. or a citizen of Ireland, Israel, the Republic of the Philippines, or any nation on the Allied Nations list maintained by the Department of State; (2) there must be a compelling reason to use the individual instead of a U.S. citizen; and (3) the waiver must be in the best interest of the U.S. The treatment of green card holders is significant because, even under the International Traffic in Arms Regulation, green card holders are treated the same as U.S. citizens in unclassified settings. Moreover, contractors need to be aware that both Alternate I and II will require them to identify in their proposals the names and citizenship of all non-U.S. citizens who will work under the contract.

While these provisions may create difficulty, it is significant to note that DHS has removed certain provisions related to nationality-based employee qualifications, including one found at 3052.237-70, Qualifications of Contractor Employees. This was a broad—and sometimes criticized—provision applicable to companies that needed access to Government facilities or sensitive information. Arguably, the provision required every employee of a contractor—even if the employee did not work on the DHS contract—to be a U.S. citizen or green card holder. This provision, if read expansively (and illogically, in the view of industry), would potentially pose a problem for many large companies. While some challenges will remain on issues of foreign nationality, removal of the provision appears to be a sensible and pragmatic step.

Revised HSAR Pt. 3009 Regarding Contractor Qualifications—This amends the HSAR to comport with statutory changes regarding the prohibition against contracting with companies treated as inverted domestic corporations and waivers to that prohibition. The revised rule includes some new introductory language that cross-references a provision stating that the DHS secretary shall waive the prohibition for a specific contract if he determines that the waiver is in the interest of national security. The clause associated with this change includes a representation to be completed by contractors on their status as potential corporate expatriates: that the of-

feror is not an inverted domestic corporation, that the offeror should be treated as an inverted domestic corporation but has submitted a waiver request, or that the offeror should be treated as an inverted domestic corporation but plans to apply for a waiver. According to DHS, this representation will allow entities that do not meet the requirements to remain in line for award while their waiver requests are being processed. Some commenters believe the rule should include language suggesting the submission of waiver requests as early as possible or indicating that submission of an offer before a waiver is granted is at the offeror's own risk. DHS believes that these concepts are commonsensical and, as such, did not need to be formally incorporated into the rule.



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