

CONTRACTING NEWS TO NOTE
Compiled by NCMA Saguaro Chapter

The following is a summary of key or significant proposed rules and actual changes from June 1, 2011 through June 30, 2011 to the Federal Acquisition Regulations (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS). Where applicable, other acquisition related information is also provided.

If you are interested in more information on any of these subjects, the source document is referenced. FACs can be accessed at <http://www.acqnet.gov/far/index.html> , DFARS Change Notices at <http://www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html>, and all proposed, final, and interim rules are published in the Federal Register (FR) at <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR>

FAR CHANGES			
CASE NO.	DESCRIPTION	EFFECTIVE DATE	SOURCE
	NONE		

PROPOSED FAR CHANGES			
CASE NO.	DESCRIPTION	DATE PUBLISHED	COMMENTS DUE
2009-024	A proposed change to the FAR was issued to limit the section of the FAR addressing the priorities for use of Government supply sources to a discussion of the mandatory Government sources of supplies and services. Also, a new section is added to encourage agencies to give priority consideration to using certain sources, despite the fact that the use of the listed sources is not mandatory.	June 14, 2011	Aug. 15, 2011
2009-042	A proposed rule was issued to provide Governmentwide standardized past performance evaluation factors and performance ratings, and to require all past performance information be entered into the Contractor Performance Assessment Reporting System (CPARS), the Governmentwide past performance feeder system. This change was necessary because the Office of Federal Procurement Policy (OFPP) requested that FAR parts 8, 12, 15, 42, and 49 be revised to include recommendations from the Government Accountability Office Report GAO-09-374, Better Performance Information Needed to Support Agency Contract Award Decisions and OFPP's memorandum dated July 29, 2009, Improving the Use of Contractor Performance Information. These changes provide Governmentwide standardized evaluation factors and rating scales for the evaluation of contractor performance in the FAR.	June 28, 2011	Aug. 29, 2011

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PROPOSED FAR CHANGES			
CASE NO.	DESCRIPTION	DATE PUBLISHED	COMMENTS DUE
2011-001	A proposed rule on Organizational Conflict of Interest was published in the FR on Apr. 26, 2011. The comment period is being reopened for an additional 30 days to provide additional time for interested parties to review the proposed FAR changes.	June 29, 2011	July 27, 2011

DFARS CHANGES			
CASE NO.	DESCRIPTION	EFFECTIVE DATE	SOURCE
2011-D006	DoD is issuing a final rule amending the DFARS to make some administrative corrections relating to DFARS clause 252.203-7003, Agency Office of the Inspector General from a final rule published Sep. 27, 2010.	June 6, 2011	Change Notice 20110606
2011-D017	DoD is amending the DFARS to correct several anomalies resulting from recent changes relating to source of ball and roller bearing components, eligibility of Peruvian end products under trade agreements, and participation of foreign contractors in acquisitions in support of operations in Afghanistan.	June 6, 2011	Change Notice 20110606
2011-D021	DoD is issuing an interim rule to implement section 821 of the NDAA for FY 2011. Section 821 prohibits specification of the use of fire-resistant rayon fiber in solicitations issued before January 1, 2015.	June 6, 2011	Change Notice 20110606
2009-D018	DoD is issuing a final rule to amend the DFARS to implement a policy memorandum of the Undersecretary of Defense for Acquisition, Technology and Logistics (USD AT&L) dated Feb. 6, 2007, which required definition of the requirements to track warranties for Item Unique Identification-required items in the DoD Item Unique Identification Registry. This final rule stresses that the enforcement of warranties is essential to the effectiveness and efficiency of DoD's material readiness.	June 8, 2011	Change Notice 20110608
2011-D024	DoD is issuing this final rule amending DFARS to implement section 826 of the NDAA for FY 2011. Section 826 amended the DoD pilot program for transition to follow-on contracting after use of other transaction authority (OTA), to establish that the threshold limitation of \$50 million for contracts and subcontracts under the program includes the dollar value of all options.	June 8, 2011	Change Notice 20110608

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DFARS CHANGES			
CASE NO.	DESCRIPTION	EFFECTIVE DATE	SOURCE
2011-D030	DoD is issuing a final rule amending the DFARS to modify terminology and address internal contract administration requirements associated with the Synchronized Predeployment and Operational Tracker (SPOT) system. This DFARS case updates nomenclature associated with the letter of authorization required for contractor personnel to process through a deployment center or travel to, from, or within a designated operational area (see DFARS 225.7402-3). This final rule will revise the generic letter of authorization to use the formal title of “Synchronized Predeployment and Operational Tracker (SPOT)-generated letter of authorization.” The change in title is being made at DFARS 225.7402-3(e) and in the clause at 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States. In addition, the contract administration functions at DFARS 242.302 have been amended to add a requirement for DoD contract administrators, when the contract incorporates the clause at 252.225-7040, to ensure implementation of, and maintain surveillance over, contractor compliance with the SPOT business rules.	June 23, 2011	Change Notice 20110623
2011-D004	DoD issued a final rule amending the DFARS to specify Defense Procurement and Acquisition Policy (DPAP), Program Development and Implementation (PDI), as the office responsible for maintaining order code assignments. The order code procedures are moved from the DFARS to its companion resource, DFARS Procedures, Guidance, and Information (PGI). DPAP Policy letter dated Sep. 21, 2010, replaced the Defense Logistics Agency with DPAP/PDI as the responsible office for the maintenance of all order code assignments for use in the first two positions of an order number when an activity places an order against another activity's contract or agreement.	June 29, 2011	Change Notice 20110629
2011-D035	DoD issued a final rule to implement section 8102 of the DoD and Full-Year Continuing Appropriations Act, 2011 and similar sections in subsequent appropriations acts, to extend the restriction on the use of mandatory arbitration agreements, when awarding contracts that exceed \$1 million, to use of 2011 and subsequent fiscal year (FY) funds appropriated or otherwise made available by this Act or any subsequent DoD appropriation act. Section 8102 allows the Secretary of Defense to waive applicability to a particular contractor or subcontractor, if determined necessary to avoid harm to national security.	June 29, 2011	Change Notice 20110629

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DFARS CHANGES			
CASE NO.	DESCRIPTION	EFFECTIVE DATE	SOURCE
2011-D034	DoD issued an interim rule to amend the DFARS to implement section 866 of the National Defense Authorization Act (NDAA) for FY 2011. Section 866 authorized the Secretary of Defense to establish a pilot program to assess the feasibility and advisability of acquiring military-purpose nondevelopmental items in accordance with the streamlined procedures of the pilot program.	June 29, 2011	Change Notice 20110629
2011-D031	DoD issued an interim rule to implement section 812 of the NDAA for FY 2011. Section 812(b)(5) instructs DoD to issue guidance that, at a minimum, shall require appropriate consideration of the manufacturing readiness and manufacturing-readiness processes of potential contractors and subcontractors as a part of the source selection process for major defense acquisition programs.	June 29, 2011	Change Notice 20110629
2010-D023	DoD issued a final rule to ensure contractor employees accompanying U.S. Armed Forces are made aware of the DoD definition of sexual assault as defined in DoD Directive 6495.01, Sexual Assault Prevention and Response Program, and that many of the offenses addressed in the definition are covered under the Uniform Code of Military Justice. Further, sexual assault offenses in the definition, which are not covered by the Uniform Code of Military Justice, may nevertheless have consequences to contractor employees under DFARS clause 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States.	June 29, 2011	Change Notice 20110629
2011-D029	DoD issued a final rule to revise the definitions of “Caribbean Basin country” and “designated country” due to the change in the political status of the islands that comprised the Netherlands Antilles.	June 29, 2011	Change Notice 20110629

PROPOSED DFARS REGULATIONS			
CASE NO.	DESCRIPTION	DATE PUBLISHED	COMMENTS DUE
2011-D028	DoD is issuing a proposed rule to amend the definition of “qualifying country end product” by eliminating the component test for qualifying country end products that are commercially available off-the-shelf items.	June 6, 2011	Aug. 5, 2011

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PROPOSED DFARS REGULATIONS			
CASE NO.	DESCRIPTION	DATE PUBLISHED	COMMENTS DUE
2010-D020	DoD is proposing to amend the DFARS to require that offerors represent whether former DoD officials employed by the offeror are in compliance with post-employment restrictions. The principal statutory restrictions concerning post-government employment for DoD and other Federal employees after leaving Government employment are found in 18 U.S.C. 207 and 41 U.S.C. 2104 (formerly, 41 U.S.C. 423), and 5 CFR parts 2637 and 2641. 18 U.S.C. 207 prohibits an individual from representing a contractor to their former agency on particular matters involving specific parties that they handled while working for the Federal Government for defined cooling-off periods that vary according to the former official's involvement and position. 41 U.S.C. 2104 prohibits DoD and other Government acquisition officials from accepting compensation from a defense contractor during a one year cooling-off period if the official performed certain duties at DoD involving the contractor and a contract valued in excess of \$10 million. However, the individual may accept employment from a division or affiliate that does not produce the same or similar items. Section 847 of the NDAA for FY 2008 requires that senior DoD officials who have been personally and substantially involved in contracts over \$10 million request a written post-employment ethics opinion before receiving compensation from a contractor. It also applies to the employees who are affected by the one-year compensation ban of 41 U.S.C. 2104.	June 6, 2011	Aug. 5, 2011
2011-D039	DoD is proposing to amend the DFARS to add a new subpart and associated contract clauses to address requirements for safeguarding unclassified DoD information. The DFARS does not presently address the safeguarding of unclassified DoD information within industry, nor does it address cyber intrusion reporting for that information. The purpose of this proposed DFARS rule is to implement adequate security measures to safeguard unclassified DoD information within contractor information systems from unauthorized access and disclosure, and to prescribe reporting to DoD with regard to certain cyber intrusion events that affect DoD information resident on or transiting through contractor unclassified information systems. DoD published an Advance Notice of Proposed Rulemaking (ANPR), and notice of public meeting in the FR on March 3, 2010, to provide the public an opportunity for input into the initial rulemaking process.	June 29, 2011	Aug. 29, 2011

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OTHER CHANGES, NOTICES, AND MEMORANDA		
DESCRIPTION	DATE	SOURCE
<p>The Federal Acquisition Regulatory (FAR) Council has developed a preliminary plan for the retrospective analysis of provisions in the FAR, in accordance with Executive Order (E.O.) 13563, "Improving Regulation and Regulatory Review" and is requesting comments on the document. The E.O. sets forth principles and requirements designed to strengthen regulations and regulatory review by promoting public participation, improving integration and innovation, increasing flexibility, and increasing retrospective analysis of existing rules. The E.O. requires every agency to develop "a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether such regulations should be modified, streamlined, expanded or repealed to make the agency's regulatory program more effective and or less burdensome in achieving its regulatory objectives." The preliminary plan is available at http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system.</p>	<p>June 3, 2011 Comments due by July 5, 2011</p>	<p>Federal Register</p>
<p>The Office of the Assistant Secretary for Public and Indian Housing, Department of Housing and Urban Development (HUD) issued a notice soliciting public comments on certain key issues that will be addressed in HUD's forthcoming guidance on the Energy Performance Contracting (EPC) program. HUD will consider all comments as it updates its guidebook entitled "Energy Performance Contracting for Public and Indian Housing" (Greenbook). This notice also clarifies existing guidance related to EPCs.</p>	<p>June 8, 2011 Comments due July 8, 2011</p>	<p>Federal Register</p>
<p>GAO issued a report entitled, "Defense Acquisition: DOD Should Clarify Requirements for Assessing and Documenting Technical-Data Needs." The report found that some of DOD's weapon systems remain in the inventory for decades; therefore, decisions that program officials make during the acquisition process to acquire or not acquire rights to technical data, which may cost \$1 billion, can have far-reaching implications for DOD's ability to sustain and competitively procure parts and services for those systems. GAO found that DOD needs access to technical data to control costs, maintain flexibility in acquisition and sustainment, and maintain and operate systems. In response to a congressional request, GAO reviewed the extent to which: (1) DOD has updated its acquisition and procurement policies to reflect a 2007 law and 2006 GAO recommendations; (2) selected acquisition programs adhered to requirements to document technical-data needs; and (3) DOD took actions to improve technical-data decisions by program managers. GAO interviewed DOD officials, reviewed acquisition strategies and acquisition plans from 12 programs, and compared those documents to relevant DOD policies. The full report is found at: http://www.gao.gov/products/GAO-11-469</p>	<p>May 11, 2011 Released June 2011</p>	<p>GAO-11-469</p>

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OTHER CHANGES, NOTICES, AND MEMORANDA		
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<p>The Small Business Administration (SBA) published a correction notice for an address of a location listed in a document published in the FR on Friday, May 13, 2011, concerning 8(a) Business Development Program Regulation Changes; Tribal Consultation. SBA announced holding tribal consultation meetings to discuss the recent changes to the 8(a) BD program regulations, specifically to take comments on the mandatory reporting of community benefits provision scheduled to take effect on September 9, 2011.</p>	June 10, 2011	Federal Register
<p>GAO issued a report entitled, “Legislative Restrictions on Contractor Use of Mandatory Arbitration Agreements Have Had No Reported Impacts on National Security.” Section 8102 of the DOD and Full-Year Continuing Appropriations Act for FY 2011 directed GAO to evaluate the effect on national security resulting from the section's requirements. These requirements, as well as those previously included in Section 8116 of the DOD Appropriations Act for FY 2010, prohibit DOD's use of funds appropriated by the respective acts for any contract over \$1 million unless the contractor agrees not to use or enforce mandatory arbitration agreements to resolve specified employee claims, such as those under Title VII of the Civil Rights Act of 1964. These statutes also provide that the Secretary of Defense can waive the application of these restrictions on mandatory arbitration to avoid harm to U.S. national security interests. None of the DOD officials, trade association representatives, or others GAO contacted identified any specific national security impacts as a result of DOD's implementation of the legislative requirements regarding the use of mandatory arbitration agreements. As of May 2011, DOD had not issued any waivers and had not received any waiver requests. DOD officials stated, however, that administrative challenges in including the contract clause restricting mandatory arbitration hindered implementation across applicable contracts. Finally, some trade association representatives and others we contacted stated there are aspects of the regulation, such as the waiver process, that remain unclear. The full report can be found at: http://www.gao.gov/products/GAO-11-717R .</p>	June 13, 2011	GAO-11-717R
<p>GSA issued an interim rule amending the General Services Administration Acquisition Regulation (GSAR) to revise sections to implement policy and guidelines for contracts and orders that include information technology (IT) supplies, services and systems with security requirements. To verify that GSA has met the requirements of the Federal Information Security Management Act of 2002 (FISMA), GSA's Office of the Inspector General (OIG) conducted an audit of GSA's information and information technology systems. In regard to the regulatory process, a recommendation was made by the OIG to strengthen the requirements in contracts and orders for information technology supplies, services and systems. Working with the Office of the Chief Information Officer (CIO), the Office of Acquisition Policy developed the policy, guidance and requirements that would be utilized to protect GSA's</p>	June 15, 2011	Federal Register

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<p>information and information technology systems, regardless of the location. The actual requirements are currently being utilized in solicitations, contracts and orders issued by the CIO; however, they were not included in the GSAR. By revising the GSAR to include these requirements, GSA is agreeing with the recommendation of the OIG and strengthens the protection of information and information systems.</p>		
<p>GAO issued a report entitled, “Small Business Programs: Efforts to Address Internal Control Weaknesses and Potential Duplication.” This testimony report is based on related GAO work from 2008 to the present and updates as noted. GAO examined programs at the Departments of Commerce, Housing and Urban Development, and Agriculture and the SBA to assess program overlap, collaboration, and measures of effectiveness. GAO also reviewed data from SBA and the Department of Veterans Affairs (VA) and conducted site visits. The reports identified opportunities to increase program efficiencies and made recommendations to improve internal controls and develop outcome-oriented measures. The full report can be located at: http://www.gao.gov/products/GAO-11-558T.</p>	June 16, 2011	GAO-11-558T
<p>DPAP issued a memorandum entitled, “Section 811 of the National Defense Authorization Act for Fiscal Year 2010.” This memorandum provides guidance on the implementation of Section 811 and encourages Program offices and contracting officers to work closely with their respective small business specialists to identify 8(a) firms that could provide needed services or supplies. The full memo can be found at: http://www.acq.osd.mil/dpap/policy/policyvault/USA002648-11-DPAP.pdf</p>	June 16, 2011	DPAP website
<p>DPAP issued a memo “Awardee Search in FAPIIS and EPLS.” FAR 9.104-6 requires contracting officers to consider information in The Federal Awardee Performance and Integrity Information System (FAPIIS) when making a responsibility determination prior to awarding a contract over the simplified acquisition threshold. The government FAPIIS site provides information found in the Central Contractor Registration (CCR), the Excluded Parties List System (EPLS) and the Past Performance Information Retrieval System (PIIRS). This memorandum informs the contracting activities of the requirement to search the EPLS for information on individuals that are ineligible for awards in addition to FAPIIS prior to award. The full memo is located at: http://www.acq.osd.mil/dpap/policy/policyvault/USA002512-11-DPAP.pdf</p>	June 20, 2011	DPAP website
<p>In response to the President's E. O. 13563, “Improving Regulation and Regulatory Review,” SBA has developed a preliminary retrospective review plan for periodically analyzing its existing significant regulations to determine whether those regulations should be modified, streamlined, expanded or repealed. SBA is inviting members of the public to submit comments on this review plan, including the list of candidate rules for review. The goal of the retrospective review is to make SBA's regulatory program more effective and less burdensome in achieving the agency's regulatory</p>	June 23, 2011 Comments by July 25, 2011	Federal Register

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objectives, while continuing to promote economic growth, innovation, and job creation within the small business community. This plan can be found at: http://www.sba.gov/content/sba-preliminary-plan-retrospective-analysis-existing-rules .		
GAO issued a report entitled, “Federal Grants: Improvements Needed in Oversight and Accountability Processes” which discusses long-standing concerns remain about the federal government's grants management and the lack of effective oversight tools to reasonably assure that grants are used for their intended purposes and that risks of fraud, waste, and abuse are minimized. GAO made numerous recommendations directed at improving management and oversight. The full report is available at: http://www.gao.gov/products/GAO-11-773T	June 23, 2011	GAO-11-773T
DPAP issued a memorandum entitled, “Increase Dynamic Small Business Role in the Defense Marketplace.” This memorandum reminds the acquisition community to use market research to identify the capabilities of small businesses and new market entrants and to ensure that small business specialists are to be fully engaged in acquisition planning. It further reinforces the need to include the clause at FAR 52.219-9 when a small business subcontracting plan is part of the solicitation and contract. Contracting officers are to include FAR 52.219-10 with accompanying incentives to further motivate contractors to meet and improve their small businesses participation efforts. The full memo is at: http://www.acq.osd.mil/dpap/policy/policyvault/USA000428-11-DPAP.pdf	June 27, 2011	DPAP Website
DPAP issued a memo entitled “Class Deviation—Past Performance Reporting” which supersedes Class Deviation 99-O0002, dated Jan. 29, 1999. Effective immediately, all DoD contracting officers shall comply with the provided language in lieu of FAR 15.304(c)(3)(i) and 42.1502(b) when collecting and using past performance information. This class deviation updates thresholds for evaluation of past performance information. The full memo is located at: http://www.acq.osd.mil/dpap/policy/policyvault/USA003613-11-DPAP.pdf .	June 27, 2011	DPAP Website
DPAP issued a memo entitled “Class Deviation—Update to Accelerated Small Business Payments.” This class deviation supersedes Class Deviation 2011-O0007 of April 27, 2011. Effective immediately, all payments to small businesses processed through the Mechanization of Contract Administration Services (MOCAS) System will be processed in accordance with DFARS 232.903 and 232.906. The full memo is located at: http://www.acq.osd.mil/dpap/policy/policyvault/USA003585-11-DPAP.pdf .	June 28, 2011	DPAP Website

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CASES/DECISIONS OF INTEREST		
SYNOPSIS	DATE	CASE NO.
<p>Diebold, Inc., of North Canton, OH, protested the award of a contract to ADT Security Services, Inc., of Alexandria, VA, by the Department of the Treasury, Office of the Comptroller of the Currency (OCC) under a request for proposals (RFP) for interim security and compliance services in support of OCC's physical security program. After OCC selected competitor ADT for award, OCC sent a draft contract for ADT's review. The draft contract included numerous provisions, specifically those included in section H, which had not previously been included in the RFP. In response, ADT submitted an email requesting various changes to section H of the draft contract. ADT's email described these changes as necessary "to conform the contract to customary commercial practice in the security industry." After a review, OCC decided to permit certain of ADT's requested modifications to the draft contract. Section H.21-Harmless from Liability was included in the draft contract and generally provides for the contractor to hold and save the government harmless from liability for suits or damages based on the contractor's negligent or wrongful actions. ADT requested and OCC agreed to a proviso that ADT's "hold and save harmless" obligation under this section did not "apply to suits or damages arising from or due to Detection Events which are defined for purposes of this provision as criminal break-ins, unauthorized intrusions, or the consequences there from, that Contractor's equipment and/or services are intended to avert, detect, prevent or record." The agency also agreed to insert into Section H two new liability clauses. Section H.22-Safety Act Waiver waived claims against ADT arising from Qualified Anti-Terrorism Technologies (QATT) systems or services. Section H.23-Mutual Limitation of Liability provided that neither party would be liable to the other for any special, indirect, consequential or incidental damages arising out of any performance of the contract. As to the section H.18-Standard Commercial Warranty, the agency agreed to add a new section H.18.1-Equipment Warranty to permit ADT to include its standard commercial warranty. The protester argued that the terms and conditions of the RFP were materially altered. GAO sustained the protest finding that the agency made material modifications to the terms and conditions of a commercial item solicitation's clauses and made the award without requesting revised proposals from the other offerors. The full text of the decision can be found at: http://www.gao.gov/decisions/bidpro/404823.htm .</p>	<p>June 2, 2011</p>	<p>B-404823</p>

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CASES/DECISIONS OF INTEREST		
SYNOPSIS	DATE	CASE NO.
<p>MPRI, Division of L-3 Services, Inc., of Alexandria, VA, and LINC Government Services (LGS), of Hopkinsville, KY, protested the award of a contract by the Dept. of the Army, U.S. Army Materiel Command, to DynCorp International, LLC, of Falls Church, VA, under an RFP, for Combined Security Transition Command-Afghanistan (CSTC-A), Afghanistan Ministry of Defense (MoD), and Afghan National Army (ANA) mentoring and program support. The protesters challenged the evaluation of proposals. The solicitation contemplated the award of a cost-plus-fixed-fee contract, with a 2-month phase-in, a base period of 2 years, and 1 option year, for the services of qualified personnel to provide dedicated in-depth mentoring, training, subject matter expertise, and programmatic support to CSTC-A staff and the Afghan MoD for the purpose of assisting the MoD and associated Afghan National Army (ANA) forces in assuming full responsibility for their own security needs. The SOW provided for the contractor to provide 275 staff in 5 skill levels or categories, including senior mentor (8 staff), mentor (128), subject matter expert (32), senior trainer (30), and trainer (77), each with specified minimum educational and experience qualifications. Award was to be made on a "best value basis" considering four evaluation factors: (1) capability (with subfactors for key personnel, management plan, technical approach, quality control and transition plan); (2) performance risk, under which the offeror's past performance was to be evaluated; (3) small business participation; and (4) cost. The capability factor was significantly more important than the remaining factors combined, while the non-cost factors, when combined, were significantly more important than cost. MPRI was the incumbent contractor providing these services. While MPRI's proposal initially received an overall good rating under the capability factor, as well as good ratings under the key personnel and management plan subfactors, these ratings were ultimately downgraded to acceptable on the basis of agency concerns arising from MPRI's proposal of a significant reduction in direct labor rates relative to those under its incumbent contract. GAO sustained MPRI's protest and denied LGS's protest. GAO found that although the agency reasonably determined that MPRI had failed to adequately support its proposed substantial reduction in labor rates relative to those under its incumbent contract, the extent of the agency's resulting upward adjustment in the labor rates was unreasonable. The full decision is located at: http://www.gao.gov/decisions/bidpro/4025486.htm.</p>	<p>June 4, 2011 Redacted and released June</p>	<p>B-402548; B-402548.2; B-402548.3; B-402548.4; B-402548.5; B-402548.6,</p>