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I. Elimination of Cost Accounting Standards Exemption for Contracts and Subcontracts Performed Entirely Outside the United States

On August 10, 2011, the Office of Federal Procurement Policy (OFPP), Cost Accounting Standards (CAS) Board, issued a final rule eliminating the CAS exemption for contracts and subcontracts executed and performed entirely outside the United States, its territories, and its possessions.[1] The change was effective October 11, 2011, eliminating the "overseas exemption" formerly contained at 48 C.F.R. § 9903.201-1(b)(14).[2] After

* Mark J. Nackman of General Dynamics Advanced Information Systems, Kimberly A. Strosnider of Covington & Burling LLP, and Hartmann Young of Perkins Coie LLP were editors of the Aerospace and Defense Industries Committee's Year in Review for 2011. Mark J. Nackman authored Section I on the Elimination of the Overseas Exemption to the Cost Accounting Standards. Hollie Kapos, law student at George Mason University School of Law, authored Section II on the DFARS Prohibition on Interrogation of Detainees by Contractor Personnel. Meredith A. Rathbone of Steptoe & Johnson LLP authored Section III on the new Form I-129 certification. Timothy Bunting and Dustin Monokian, procurement attorneys with the U.S. Navy's Office of General Counsel, authored Section IV on the new DFARS rule on Organizational Conflicts of Interest. Priti Suri and Ashutosh Chandola of PSA authored Section V on Recent Changes to Indian Defense Procurement Policies and Procedures. Thomas Jones, Dominique Babin, and Carmen Francis of Heenan Blaikie LLP/SRL authored Section VI on the new ITAR dual and third-country nationals rule. Evelyn R. Nackman, reservist with the U.S. Air Force Legal Operations Agency/Environmental Law & Litigation Division and attorney-advisor with the National Oceanic and Atmospheric Administration's Office of General Counsel, authored Section VII on Liability for Clean-up on World War II Era Defense Contracts. W. Hartmann Young and T. Markus Funk of Perkins Coie LLP authored Section VIII on Proposed Changes to the Foreign Corrupt Practices Act. William M. Pannier of Holland & Knight authored Section IX on the Interim DFARS Business Systems Rule. The views of each author are not attributable to their law firms, companies, or government agencies. The article covers developments during 2011. For developments in 2010, *see* Mark J. Nackman et al., *Aerospace and Defense Industries*, 45 Int'l Law. 287 (2011). For developments in 2009, *see* Hartmann Young et al., *Aerospace and Defense Industries*, 44 Int'l Law. 337 (2010).

1. Cost Accounting Standards: Elimination of the Exemption From Cost Accounting Standards for Contracts and Subcontracts Executed and Performed Entirely Outside the United States, its Territories, and Possessions, 76 Fed. Reg. 49,365 (Aug. 10, 2011) (to be codified at 48 C.F.R. pt. 9903) (hereinafter Elimination of Exemption).

2. *Id.*

considering eliminating it in 2005[3] and deciding to keep it in 2008,[4] the CAS Board was finally directed by Congress to "review the inapplicability of the cost accounting standards, in accordance with existing exemptions, to any contract and subcontract that is executed and performed outside the United States . . ."[5] The exemption had existed since 1973.[6]

The CAS Board's three reasons for eliminating the exemption were: 1) lack of a statutory basis; 2) lack of an accounting basis; and 3) no hardship from eliminating the exemption.[7] The statutory basis for the exemption originated from the fact that the Defense Production Act, which was the statutory basis for the existence of the CAS Board at the time, was only applicable to the United States, its territories and possessions, and the District of Columbia.[8] However, once the CAS Board was reestablished under the OFPP Act, the applicability of the CAS was no longer statutorily limited to the United States.[9] While this would not necessarily require the elimination of the exemption, it meant that the exemption was no longer required, thus enabling its elimination.

As for an accounting basis, with little analysis or further explanation other than "the place of contract execution and performance is not germane to the fundamental requirements and practices set forth in CAS," the CAS Board rejected the argument that differences between U.S. Generally Accepted Accounting Principles (GAAP) and International Financial Reporting Standards (IFRS) justified the exemption.[10]

The exemption's scope was narrow and its elimination will have similarly narrow implications, however this change is significant for those foreign concerns that will no longer be exempt from the CAS.[11] The change means that, absent another applicable exemption, contractors performing entirely outside the United States will, at a minimum, now be subject to CAS 401—Consistency in Estimating, Accumulating and Reporting Costs,[12] and CAS 402—Consistency in Allocating Costs Incurred for the Same Purpose.[13] It also means foreign concerns receiving a CAS-covered contract or subcontract of $50 million or more, or those that received a net of $50 million or more in CAS-covered contracts in

3. *See* Office of Federal Procurement Policy; Cost Accounting Standards Board; CAS Exemption for Contracts Executed and Performed Entirely Outside the United States, Its Territories and Possessions, 70 Fed. Reg. 53,977 (Sept. 13, 2005) (to be codified at 48 C.F.R. pt. 9904).

4. *See* Cost Accounting Standards Board (CAS) Exemption for Contracts Executed and Performed Outside the United States, Its Territories, and Possessions, 73 Fed. Reg. 8,259 (Feb. 13, 2008) (to be codified at 48 C.F.R. pts. 9901 and 9903).

5. National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 823(a), 122 Stat. 4356, 179 (2008).

6. Elimination of Exemption, 76 Fed. Reg. at 49,365 (citing Defense Procurement Circular No. 115 (Sept. 24, 1973)).

7. *Id.* at 49,366.

8. Defense Production Act of 1950, 50 U.S,C. § 2163 (1973).

9. *See* Office of Federal Procurement Policy Act, 41 U.S.C. § 1501 (2011).

10. Elimination of Exemption, 76 Fed. Reg. at 49,366.

11. *See id.*

12. *See* Cost Accounting Standard—Consistency in Estimating, Accumulating, and Reporting Costs, 48 C.F.R. § 9904.401 (1992).

13. *See id.* § 9904.402.

their prior accounting period, will need to accomplish a disclosure statement, the form for which is currently only available in English.[14]

II. Prohibition on Interrogation of Detainees by Contractor Personnel

In the wake of alleged abuses against Abu Ghraib prisoners by contractor interrogators,[15] on July 25, 2011, the Department of Defense (DoD) published a final rule implementing Section 1038 of the National Defense Authorization Act (NDAA) for Fiscal Year 2010.[16] Section 1038 prohibits contractors from interrogating detainees that are under DoD control, unless the Secretary of Defense has waived the prohibition due to U.S. national security interests.[17] The final rule reflected no changes from the interim rule, which DoD published on November 3, 2010.

Section 1038 requirements are incorporated into the Defense Federal Acquisition Regulation Supplement (DFARS) at DFARS 237.173 and a new DFARS clause 252.237-7010.[18] Although contractors are prohibited from interrogating detainees, the DFARS permits a contractor to provide interrogation support such as training, advising, and interpretation, provided the contractor meets DoD criteria.[19]

Key definitions in the DFARS were the subject of public comment with respect to the new rule. For example, DFARS 237.173-2 defines "detainee" as "any person captured, detained, held, or otherwise under the effective control of DoD personnel (military or civilian) in connection with hostilities."[20] This includes, but is not limited to, enemy prisoners of war, civilian internees, and retained personnel.[21] One commenter was concerned that the term "hostilities" in the detainee definition was too vague.[22] DoD responded that this definition of detainee was derived from the definition in DoDI 2310.01E, the Department of Defense Detainee Program.[23] According to the DoD, DoDI 2310.01E "applies during all armed conflicts, however such conflicts are characterized, and in all other military operations."[24] The DoD determined that DoDI 2310.01E provides sufficient clarification and thus made no change.[25]

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14. Contract Coverage—General Requirements, 48 C.F.R. § 9903.202-1(b)(1) & (2); *see also* FORM CASB DS-1 (REV 2/96), *available at* http://www.whitehouse.gov/sites/default/files/omb/procurement/casb_ds-1.pdf.

15. *See, e.g.*, Saleh v. Titan Corp., 580 F.3d 1 (D.D.C. 2009); Al Shimari v. CACI Premier Tech., Inc., 657 F. Supp. 2d 700 (D. Va. 2009).

16. Defense Federal Acquisition Regulation Supplement; Prohibition on Interrogation of Detainees by Contractor Personnel (DFARS Case 2010-D027), 76 Fed. Reg. 44,282 (July 25, 2011) (to be codified at 48 C.F.R. pts. 237 & 252).

17. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, §§ 1038(a), 1038(d)(1), 123 Stat. 2190 (2009).

18. Prohibition on Interrogation of Detainees by Contractor Personnel, 76 Fed. Reg. at 44,282.

19. *Id.*

20. Prohibition in Interrogation of Detainees by Contractor Personnel, 75 Fed. Reg. 67,633 (Nov. 3, 2010) (to be codified at 48 C.F.R. § 237.173-2).

21. *Id.*

22. *See* Prohibition on Interrogation of Detainees by Contractor Personnel, 76 Fed. Reg. at 44,282.

23. *Id.* at 44,282–83.

24. *Id.* at 44,283.

25. *Id.*

III. I-129 Requirements - Employers of Non-Immigrant Workers Required to Certify Compliance with ITAR and EAR Deemed Export Rules

Beginning on February 20, 2011, a new "deemed export" certification requirement went into effect for employers petitioning for several visa categories, including a non-immigrant H-1B, H-1B1(Chile/Singapore), L-1, or O-1 employment visa.[26]

Under the new certification requirement, employers must certify whether a license is required under the Export Administration Regulations (EAR) or the International Traffic in Arms Regulations (ITAR) for any technology or technical data they intend to release to the prospective foreign national employee.[27] The EAR control the export of so-called "dual use" items,[28] including hardware, software, and technical data that have both commercial and military applicability, while the ITAR control the export of defense articles, related technical data, and defense services.[29] The new form makes export controls an explicit part of the immigration application process for the first time.[30]

Specifically, U.S. employers petitioning for an applicable visa category must now certify that

> [w]ith respect to the technology or technical data the petitioner will release or otherwise provide access to the beneficiary . . . it has reviewed the . . . EAR[ ] and the . . . ITAR[ ] and has determined that:
> 1. A license is not required from the U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign person; or
> 2. A license is required from the U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the beneficiary and the petitioner will prevent access to the controlled technology or technical data by the beneficiary until and unless the petitioner has received the required license or other authorization to release it to the beneficiary.[31]

This new certification requirement is intended to ensure that employers focus on the so-called "deemed export rule" under the EAR and ITAR early in the employment process. Under both sets of regulations, the transfer, release, or disclosure of technical data to a citizen or national of a foreign country is deemed to be an export of technical data to that person's country or countries of citizenship or nationality.[32] The deemed export rule applies differently under the EAR and the ITAR, and a slightly different licensing analysis may need to be undertaken depending on the regulatory regime involved.[33] The Department of Commerce, Bureau of Industry and Security, which administers the EAR, in most cases views only the foreign person's most recently acquired country of citizenship or

26. U.S. Citizenship and Immigration Services Form I-129, Petition for a Nonimmigrant Worker, Part 6, *available at* http://www.uscis.gov/i-129.

27. *Id.*

28. *See* Export Administration Regulations, 15 C.F.R. pts. 770–774 (2010).

29. *See* International Traffic in Arms Regulations, 22 C.F.R. pts. 120–130 (2011).

30. *See* Form I-129, *supra* note 26.

31. *Id.*

32. 22 C.F.R. § 120.17(a)(4) (2010); 15 C.F.R. § 734.2(b)(2)(ii).

33. *See* Deemed Export FAQs, U.S. DEPARTMENT OF COMMERCE, BUREAU OF INDUSTRY AND SECURITY, http://www.bis.doc.gov/deemedexports/deemedexportsfaqs.html#5 (last visited Jan. 9, 2012).

permanent residence as the destination country.[34] The Department of State, Directorate of Defense Trade Controls (DDTC), which administers the ITAR, takes the position that all prior countries of citizenship, nationality, or birth are considered destination countries for export licensing purposes.[35]

The new Form I-129 creates challenges for employers in predicting the type of technical data to which an employee will have access during the course of his or her employment, as many employers are unable to determine the exact technologies to which an employee will be exposed prior to the employee commencing employment. Even in cases where an export license may not initially be required, the scope of the technical data to which an employee may have access could expand, creating an export licensing requirement at a later date.

U.S. Citizenship and Immigration Services (USCIS) has not specified how it will use the new data it is acquiring through the certifications. USCIS has not indicated, for example, whether it will conduct a more extensive background check of an individual who is expected to receive controlled technical data prior to granting a visa.[36] At a minimum, U.S. government officials have said that the data collected by USCIS will be shared with other U.S. government agencies.[37]

Inaccurate certifications on Form I-129 may expose employers to criminal liability.[38] The employer is required to certify under penalty of perjury that the petition and the evidence with it are true and correct to the best of the employer's knowledge.[39] The knowing submission of false statements to the U.S. government may result in sanctions of up to $10,000 and imprisonment for up to five years, or both.[40]

Substantial criminal and civil penalties, including jail time for willful violations, also may be imposed under the relevant export control laws.[41] Failure to comply with the ITAR, including making unauthorized deemed exports to foreign national employees, may result in civil fines of up to $500,000 per violation, and criminal penalties as high as $1 million and twenty years imprisonment per violation.[42] Potential penalties under the EAR can reach $250,000 per violation, and criminal penalties may be as high as $1 million and twenty years imprisonment per violation.[43] These types of penalties are atypical for immigration violations, and highlight the significance of the new certification requirement.

The new certification requirement highlights the need for employers of foreign nationals to implement export compliance systems that enable early determination regarding the need for a foreign national employee to receive deemed exports requiring a license. At the same time, employers must be cognizant of maintaining compliance with workplace antidiscrimination laws and policies. While information on citizenship and nationality can be gathered on an as-needed basis to determine compliance with export controls, compa-

34. *See* 15 C.F.R. § 734.2(b)(2)(ii).

35. *See* 22 C.F.R. § 120.16.

36. U.S. Citizenship and Immigration Services Form I-129 Instructions, Petition for a Nonimmigrant Worker, Part 6, *available at* http://www.uscis.gov/files/form/i-129instr.pdf.

37. *Id.*

38. *Id.*

39. *Id.*

40. *See* Federal False Claims Act, 31 U.S.C. §§ 3729–33 (2010).

41. *See* 22 C.F.R. pt. 127 (2011); 15 C.F.R § 764.3 (2010).

42. *See* 22 C.F.R. pt. 127 (2011).

43. *See* 15 C.F.R § 764.3 (2010).

nies should confirm that the process implemented to gather that information and the use of the information after it is gathered is appropriate under U.S. law.

IV. Department of Defense Rule on Organizational Conflicts of Interest in Major Defense Acquisition Programs

The DoD issued a final rule amending DFARS part 209. The new DFARS subpart 209.571 implemented section 207 of the Weapon Systems Acquisition Reform Act of 2009 (WSARA).[44] WSARA required DoD "to provide uniform guidance and tighten existing requirements for organizational conflicts of interest (OCI) by contractors in major defense acquisition programs (MDAPs)."[45]

Although conflicts of interest issues exist government-wide, the new DFARS rule only applies to MDAPs and pre-MDAPs.[46] An MDAP is defined as a non-classified program that is estimated to cost $300 million or more for initial research, development, test, and evaluation or estimated to have a total expenditure of $1.8 billion or more, including all planned increments or spirals.[47] Pre-MDAPs are defined as programs that are in "the Material Solution Analysis or Technology Development Phases preceding Milestone B of the Defense Acquisition System and [have] been identified to have the potential to become a MDAP."[48]

The final rule requires DoD agencies to obtain advice on MDAPs and pre-MDAPs from "objective and unbiased" sources.[49] There are a myriad of situations in which a conflict of interest can arise, but typically conflicts arise where there is unequal access to nonpublic information, biased ground rules, or impaired objectivity.[50] In implementing this rule, agencies are to resolve OCI issues in ways that promote competition and retain DoD's access to the expertise and experience of qualified contractors.[51] Thus, agencies can no longer apply "*per se* restrictions or limitations" and instead should resolve OCI issues on an individual basis.[52]

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44. Weapons Systems Acquisition Reform Act of 2009, Pub. L. No. 111-23, § 207, 123 Stat. 1704, 1728–30 (2009).

45. *Id.* at 1728.

46. Federal Acquisition Regulation; Organizational Conflicts of Interest, 76 Fed. Reg. 23236 (proposed Apr. 26, 2011) (to be codified at FAR pt. 2-4, 7, 9, 11-16, 18, 37, 42, 52, and 53).

47. 10 U.S.C. § 2430 (Supp. III 2009).

48. DFARS 209.571-1 (2010).

49. *Id.* at 209.571-3(a).

50. *See* Maden Technologies, B-298543.2, 2006 CPD § 167, at 6 (Comp. Gen. Oct. 30, 2006) (unequal access to information arises "where a firm has access to nonpublic information as part of its performance of a government contract and where that information may provide the firm a competitive advantage in a later competition for a government contract"); Operational Resource Consultants, Inc., B-299131.1 et al., 2007 CPD § 38, at 5 (Comp. Gen. Feb. 16, 2007) (a biased ground rule "arises where a firm, as part of its performance of a government contract, has in some sense set the ground rules for the competition for another government contract by, for example, writing the [Statement of Work]"); Aetna Government Health Plans, Inc., B-254397 et. al., 95-2 CPD § 129, at 9 (Comp. Gen. July 27, 1995). (an impaired objectivity "arises where there is a concern "that the firm's ability to render impartial advice to the government could appear to be undermined by its relationship with the entity who's work product is being evaluated.").

51. DFARS 209.571-3(b) (2010).

52. *Id.*

When identifying OCIs for MDAPs or pre-MDAPs, agencies are required to consider whether: (1) the contractor "performing systems engineering and technical assistance, professional services, or management support services" simultaneously owns a business unit competing (or potentially competing) to perform as either a prime or supplier of a major system for the same program; (2) the prime contractor intends to award a contract for a major subsystem to its affiliated business unit, particularly for subcontracts for software integration or development of proprietary software system architecture; and (3) the contractor is performing a technical evaluation.[53]

Agencies can address OCIs through mitigation, which the rule suggests is the preferred method for resolving OCI issues. The rule defines mitigation as "any action taken to minimize an organizational conflict of interest."[54] If the agency and the contractor agree to resolve an OCI through mitigation, the rule requires an OCI mitigation plan that memorializes the "actions a contractor has agreed to take to mitigate a conflict."[55] This plan must be incorporated into the contract.[56] If the contractor cannot effectively mitigate the OCI, the agency must use another approach to resolve the OCI, select another contractor, or request a waiver.[57] For acquisitions exceeding $1 billion, the agency must "brief the senior procurement executive before determining that" the mitigation plan is unacceptable.[58]

For contractors that provide systems engineering and technical assistance on an MDAP, the final rule prohibits the contractor or its affiliate "from participating as a contractor or major subcontractor in the development or production of a weapon system" under the same program.[59] The term "major subcontractor" was refined to mean a "subcontractor that is awarded a subcontract that equals or exceeds [b]oth the cost or pricing data threshold and 10 percent of the value of the contract under which the subcontracts are awarded; or $50 million."[60] DoD did establish limited exceptions to ensure that it has continued access to advice on systems architecture and systems engineering matters from highly qualified contractors.[61] As a result, the prohibition "does not apply if the head of the contracting activity determines that . . . DoD needs the domain experience and expertise of the highly qualified, apparently successful" contractor and that the contractor "will be able to provide objective and unbiased advice."[62]

The new DFARS rule provides a strong path forward for agencies to address OCIs in MDAPs, but several of the concerns expressed during the public comment period remain.

53. *Id.* at 209.571-6.

54. *Id.* at 209.571-4(a).

55. *Id.* at 209.571-4(b).

56. *Id.*

57. *Id.* at 209.571-4(c).

58. *Id.* at 209.571-4(d).

59. *Id.* at 209.571 – 7(b)(1). Systems engineering and technical assistance is defined as "a combination of activities related to the development of technical information to support various acquisition processes." *Id.* at 209.571-1. Systems engineering is defined as an "interdisciplinary technical effort to evolve and verify an integrated and total life cycle balanced set of system, people, and process solutions that satisfy customer needs" while technical assistance means "the acquisition support, program management support, analyses, and other activities involved in the management and execution of an acquisition program." *Id.*

60. *Id.* at 252.209-7009(a).

61. Weapons Systems Acquisition Reform Act of 2009, Pub. L. No. 111-23, § 207, 123 Stat. 1704, 1728–30 (2009).

62. DFARS 209.571-7(c) (2010).

Despite the final rule's narrowed focus on MDAP OCI provisions, there are still concerns that the rule does not achieve the overall objectives of WSARA, either because the proposed coverage is too stringent or not sufficiently strong.[63] The final rule also does not address training and implementation despite several questions regarding whether contracting officers are appropriately trained to effectively recognize and mitigate OCIs.[64] In particular, the rule provides minimal guidance to assist contracting officers in determining when mitigation (over other methods of OCI resolution) should be used.[65] Furthermore, the final rule does not require contractors to disclose OCIs prior to contract award and on a continuing basis during contract performance, which makes it more difficult for contracting officers to identify OCIs.[66] Based on these concerns, the new DFARS rule might have unintended consequences in its implementation.

V. Changes in the Indian Defense Procurement Policy & Procedure

In February 2011,[67] the Indian government announced increased defense spending in line with its intention to modernize its armed forces, resulting in allocation of $37.3 billion towards defense procurement.[68] Spending on defense in India is governed by the guiding principles of the Defense Procurement Procedure 2011 (DPP 2011), the latest version of which was released by the Ministry of Defense (MOD) on December 27, 2010.[69] The DPP has been revised six times since its release in 2001. The revisions of 2003 to 2009 provided for public accountability and increased transparency, but several holes remained, necessitating the amendment in 2011.[70] A few of the key changes introduced in the DPP 2011 and the implications for foreign vendors are discussed below.

A welcome change has been made to Defense offsets under the DPP 2011. Defense offsets are a form of counter-trade that requires a foreign vendor who has contracted with the Indian government in excess of $58 billion to reinvest thirty percent of that amount. The MOD insists that the reinvestment of the offset amount be in the defense sector. Many foreign vendors faced problems in meeting their offset obligations since foreign direct investment in defense is limited to twenty-six percent. While the DPP has been revised many times since 2001, this issue has only been substantively addressed by the MOD under DPP 2011.

Answering the long-standing request of the foreign vendors, "civil aerospace," "internal security," and "training" were added to the ambit of eligible products and services for

63. Defense Federal Acquisition Regulation Supplement, 75 Fed. Reg. 81,908–09 (Dec. 29, 2010) (to be codified at 48 C.F.R pt. 209, 252).

64. *Id.* at 81,912.

65. *Id.* at 81,911–12.

66. Defense Federal Acquisition Regulation Supplement, 75 Fed. Reg. 20954 (proposed Apr. 22, 2010) (to be codified at 48 C.F.R. pt. 202–03, 212, 252).

67. *See* Key Features of Budget 2011–2012, Union Budget and Economic Survey, Government of India, (Nov. 21, 2011), http://indiabudget.nic.in/ub2011-12/bh/bh1.pdf.

68. *See* IANS, *Union Budget 2011: 11% hike in defence allocation*, THE TIMES OF INDIA (Feb. 28, 2011, 2:04 PM), http://timesofindia.indiatimes.com/home/union-budget-2011/Union-Budget-2011-11-hike-in-defence-allocation/articleshow/7594077.cms.

69. Defence Procurement Procedure – 2011, Minister of Defence, Government of India, http://mod.nic.in/dpm/welcome.html.

70. *See id.* at 2.

discharge of offset obligation.[71] The list of eligible offsets now covers almost all aspects of civil aerospace (*e.g.*, airframes, aero-engines, components, engineering, technical publications, and flying, and technical training).[72] For internal security, a wide range of weapons and services for counter-terrorist activities has been included.

The changes introduced have a dual impact on the domestic sector. Apart from broadening the scope of offset activities and increasing vendor participation, it will also encourage the building up of the domestic civil aviation sector with indigenous defense production capabilities for both internal security as well as the armed forces. It is also pertinent to consider the possibility of over-pricing the offsets, specifically in relation to offsets possible under services such as "training," which may have an adverse impact on the ultimate objective.

As shipbuilding is a capital-intensive industry, several industry requests led to the creation of a separate chapter, Chapter III,[73] in DPP 2011 specifically relating to naval acquisitions and a separate procedure for designing, constructing, and acquiring ships. Chapter III has undergone a sea change to incorporate competitive principles for procurement from private, government-owned, and nominated shipyards.[74] The new and improved Chapter III also provides a stepwise acquisition process,[75] including several clauses that strengthen the contracting mechanisms with payments now linked to stages of construction.[76] With these changes, the MOD is attempting to meet the dual goals of promoting development and increasing the competitive edge of the domestic shipbuilding industry players, both private and public.

Several provisions of the acquisition procedure have been tweaked based on past experiences and feedback to make the process more vendor-friendly and efficient. Vendors whose contract values exceed $20 million are required to execute an Integrity Pact and provide bank guarantees under the DPP. The Integrity Pact is essentially an undertaking from the CEO of the vendor whereby the vendor warrants against using or employing agents to influence the MOD's decision, and the bank guarantee acts as a deterrent. Previously, the bank guarantees under the Integrity Pact were required to be valid indefinitely at the bidding stage, causing significant cost and inconvenience to vendors. Under the DPP 2011, the Integrity Pact bank guarantee must be valid only until forty-five days after the expiry of the commercial offer for all vendors, and until the completion of the contract for the successful vendor.[77] Vendors were also required to furnish separate financial bonds for performance of contract and warranty of equipment. This has now been clubbed under a single bond for five percent of the contract value.[78] These practical inputs will substantially trim down the commercial quote of the vendors.

Since performance of defense procurement contracts takes a significant time, many foreign vendors suffered from fluctuations in foreign exchange. Consequently, Defense Public Sector Undertakings (DPSUs) had a competitive price advantage. In an effort to create

71. *See id.* at 55–56.
72. *Id.* at 56–57.
73. *Id.* at 183.
74. *Id.* at 194.
75. *Id.* at 195.
76. *Id.* at 197–200.
77. *See* Defense Procurement Procedure, Pre-Contracts Integrity Pact 8.3, *supra* note 69, at 117.
78. *See id.* art. iv, at 219.

parity between the private sector and DPSUs, the exchange rate variation clause is now applicable to all Indian vendors when they compete with their foreign counterparts under the "Buy Global" category, which provides them the benefit of variation in foreign exchange. This clause provides for the mechanism of calculation of the variation in contract price due to foreign exchange fluctuation. Furthermore, the base rate of Parliament Street Branch of the State Bank of India, New Delhi has replaced the prime lending rate, which is favorable to foreign vendors.[79]

A stark change is the removal of the stringent provision which provided for blacklisting of vendors in case of delay in delivery of equipment under fast-track procurement.[80] Instead, liquidated damages have been enhanced to ensure greater accountability on a vendor and protect the interest of the MOD in case only one vendor can provide the equipment.

The efforts of the MOD to tweak the DPP demonstrate its intention to develop and modernize domestic defense capabilities and alleviate foreign vendors' offset concerns. But a major remaining concern is the absence of a single window clearance system for defense acquisitions. This suggestion has been made to the MOD time and again, and—if heeded and implemented—would check the mammoth delays in acquisition, improvement in formulation of qualitative requirements, trial and technical evaluations, as well as make the process more transparent and vendor friendly. In sum, while the changes introduced show the government has come a long way since the first version was released in 2001, the amendments to the DPP are largely procedural in nature, and the impact may not be far reaching.

VI. Changes to ITAR: A Shift Away from the "Place of Birth" Standard?

In a much anticipated final rule published on May 16, 2011, effective August 15, 2011, the DDTC announced significant amendments to parts 124 and 126 of the ITAR.[81] These changes permit dual national and third-country national employees of DDTC-approved, non-U.S.-based[82] end-users of United States Munitions List (USML) articles (including technical data) to access such goods without the prior approval of DDTC. Thus, the "place of birth standard" alone will no longer prohibit access to ITAR-controlled articles by employees of non-U.S.-based entities.

The ITAR has a wide-reaching effect upon companies that produce or trade in regulated defense and aerospace articles of U.S. origin. Export authorization or licensing is required for all exports of USML goods or data, and non-U.S. recipients of USML goods or data are subject to the controls imposed under the ITAR regime.[83]

79. *See id.* Guidelines of Protection of Exchange Rate Variation in Contracts, at 104–05.

80. *See id.* Fast Track Procedure 27, at 208.

81. International Traffic in Arms Regulations, 76 Fed. Reg. 28,174 (May 16, 2011) (to be codified at 22 C.F.R. pts. 120, 124, 126).

82. *See* definitions for "U.S. Person" and "Foreign Person" pursuant to 22 C.F.R. § 120.15 and 120.16, respectively.

83. Canada is the only country subject to general export exemptions under 22 C.F.R. § 126.5, providing it with license-free access to a limited range of USML articles and data. All other USML articles not subject to the Canadian exemption or certain other limited exemptions are accessed through the process of applying for separate export authorizations issued by DDTC (for example, the full range of Export Licenses, General

The May 16, 2011 amendment to the ITAR is a component of the broader U.S. Export Control Reform Initiative proposed by the Obama Administration in 2009. This particular regulatory change was instituted in an effort to address complaints from non-U.S. trade partners regarding the "tremendous administrative burden" imposed upon end-users of USML articles.[84] Similarly, U.S. manufacturers and exporters had complained that the operative standards placed U.S. companies at a competitive disadvantage. The restrictive application of ITAR provisions to citizens with dual nationality, as well as third-country nationals employed by non-U.S.-based firms, was a significant issue. Under the previous ITAR interpretation, DDTC employed the "place of birth standard" in determining whether a foreign person working in a foreign country may have access to unclassified USML articles of U.S. origin. Because the ITAR treated a transfer of defense articles to a national of a country as the equivalent of a transfer to that country itself, dual nationals or third-country nationals of ITAR-prohibited countries[85] were effectively barred from handling ITAR-controlled goods or technical data. In order to maintain compliance with the standard, as interpreted and applied by DDTC, businesses were forced to limit access to ITAR-controlled articles to those employees who were not dual or third-country nationals of prohibited countries. As a result, complying with "place of birth" restrictions often meant that non-U.S.-based corporations risked complaints under domestic human rights laws and regulations.

The critical amendments under ITAR section 126.18(c) now establish two separate processes by which non-U.S.-based companies employing dual nationals or third-country nationals are able to access U.S.-origin USML articles and data. Additionally, the amended policy extends the definition of "regular employee" to include workers who have long-term employment relationships with licensed end-users. Accordingly, a new definition of "regular employee" was added under section 120.39.[86] The new definition includes permanent employees and full-time contractors who work exclusively for the end-user.

The first process available pursuant to ITAR section 126.18(c)(2) permits access where an ITAR-approved, non-U.S.-based business entity institutes a program that screens employees against set criteria, with the objective of determining whether the employee is likely to divert ITAR-controlled articles. Employees of approved foreign users/licensees must be vetted to reduce the risk of diversion of U.S. ITAR-controlled material. Once an employee is cleared under the "risk of diversion" assessment, employers need not distinguish them as dual or third-country nationals. DDTC presumes a risk of diversion for individuals who have "substantive contacts" with persons from proscribed countries, unless otherwise determined. Factors considered by DDTC in assessing whether "substantive contacts" exist include, inter alia, regular travel to a proscribed country, demonstrated allegiance to that country, maintenance of business relationships with individuals in a pro-

Correspondence Letters, Technical Assistance Agreements, Manufacturing License Agreements, and Warehouse and Distribution Agreements).

84. International Traffic in Arms Regulations, 76 Fed. Reg. at 28,175.

85. *See* 22 C.F.R. § 126.1(a) for the full list of prohibited countries.

86. U.S. Dep't of State Directorate of Defense Trade Controls, Guidelines and Implementation Considerations: Dual/Third-National Rule, 3 (2011) [hereinafter Implementation], *available at* http://www.pmddtc.state.gov/licensing/documents/D-TCN_Policy_ImplementationFinal.pdf.

scribed country, or maintenance of a residence in a proscribed country.[87] Thus, association with a proscribed country has not been eliminated as a basis for barring access to USML-controlled goods. Further, in instances where a foreign entity requests DDTC to vet specific individuals under licences or agreements, DDTC will consider country of origin or birth.[88]

ITAR section 126.18(c)(1) provides that the second process to "clear" dual and third-country nationals is by providing them "a security clearance approved by the host nation government for its employees." While this option may simplify the process of obtaining access to ITAR-controlled goods for those employees who already possess such clearance, it is unlikely to constitute a convenient or streamlined approach for others. However, it has the advantage of shifting the bureaucratic burden onto governmental authorities rather than companies, while applying local legislation and values.

These recent amendments relieved non-U.S.-based business entities from the previous risk of violating domestic human rights legislation in an effort to maintain access to ITAR-controlled articles. The shift to a "likelihood of diversion" analysis may signal a more nuanced and less discriminatory approach to the USML-controlled-articles regime. However, some non-U.S.-based entities allege that the amendments place the burden of instituting extensive and potentially invasive screening practices squarely upon the shoulders of end-users and local management.

VII. *Exxon Mobil Corp. v. United States*: Liability for Environmental Clean-up on WW-II Era Defense Contracts

In *ExxonMobil Corp. v. United States*,[89] an October 2011 case decided by the U.S. Court of Federal Claims, the Defense Supply Corporation (DSC) entered into aviation gas or "avgas" contracts between oil refinery plants in Louisiana and Texas, owned by Humble Oil & Refining Company and Standard Oil, the predecessor company to ExxonMobil and DSC.[90] Avgas allowed aircraft to fly with needed "power [and] speed" and was indispensable to the war effort.[91] This need drove the government to contract with refineries for increased production.[92] Excessive production resulted in large amounts of petroleum by-products that could not be recycled.[93]

In 1987, the State of Louisiana issued a Corrective Action Order directing ExxonMobil to conduct environmental cleanup at its Baton Rouge refinery.[94] In 1995, the State of Texas issued an Agreed Order for cleanup of ExxonMobil's Baytown refinery.[95] ExxonMobil incurred cleanup costs as a result and sought reimbursement from the U.S. Gen-

87. *Id.* at 2-3.
88. *See* U.S. Dep't of State Directorate of Defense Trade Controls, Guidelines for Preparing Electronic Agreements, Version 3 (2011) 23, *available at* http://pmddtc.state.gov/licensing/documents/PreparingElectronciAgreements-Guidelines.pdf.
89. ExxonMobil Corp. v. United States, Nos. 09-265C & 09-882C, 2011 WL 5143229 (Fed. Cl. Oct. 31, 2011).
90. *Id.* at *1.
91. *Id.*
92. *Id.*
93. *Id.* at *2, *4, n.3.
94. *Id.* at *2.
95. *Id.*

eral Services Administration (GSA) under 41 U.S.C. § 114 (a). The GSA did not respond, and ExxonMobil filed suit.[96]

ExxonMobil argued the government breached its contract by failing to reimburse ExxonMobil for cleanup costs.[97] Citing *Shell Oil Co. v. United States*,[98] ExxonMobil argued environmental cleanup costs were covered "charges" under the "Taxes" clause in its World War II (WW-II) contracts.[99]

The *Shell* case contained similar facts to *ExxonMobil*. Shell Oil Company contracted with the government during WW-II to produce avgas.[100] Also, the "Taxes" clause in *Shell* was identical to the clause in *ExxonMobil*.[101] In *Shell*, the court relied on several dictionary definitions of the word "charges" to reach the conclusion that the term included environmental cleanup liability.[102] The court reasoned "CERCLA[103] liability, while not contemplated by the parties at the time the contract was signed, was clearly a new charge which was contemplated by parties under the language of the contracts."[104] In addition to the "plain meaning" argument, the court seemed particularly swayed by the urgency of producing avgas to aid the war effort and the lack of alternatives for hazardous waste disposal.[105] It concluded, therefore, that the "Taxes" clause provided for costs incurred due to post-production environmental cleanup.[106]

The government in *ExxonMobil* argued that "charges" should not include environmental cleanup costs because there was no "nexus to the contract,"[107] and a finding that the word charges includes environmental cleanup would expose the government to "open-ended indemnity."[108] The government further argued the Anti-Deficiency Act (ADA) barred the term "charges" from including such costs.[109] As in *Shell*, the *ExxonMobil* court rejected these arguments. Quoting *Shell*, the court held that the "Taxes" clause "did not limit reimbursement to costs imposed only during contract performance."[110]

The government attempted to distinguish the case from *Shell*, arguing the "uncalculated amount of waste prevented the court from concluding that the waste was produced 'by reason of the avgas.'"[111] The court disagreed.[112] A September 1, 1943, Report of the Petroleum Administration for War on the 100 Octane Aviation Gasoline Program, stated that the "avgas production process result[ed] in various by-products that could not be

96. *Id.*
97. *Id.* at *3.
98. Shell Oil Co. v. United States, 93 Fed. Cl. 439 (Fed. Cl. May 27, 2010).
99. *ExxonMobil*, 2011 WL 5143229, at *3.
100. *Shell Oil*, 93 Fed. Cl. at 441.
101. *Id.* at 444.
102. *Id.*
103. Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) (Superfund Act), 42 U.S.C. § 9601 et seq. (2002).
104. *Shell Oil*, 93 Fed. Cl. at 444.
105. *Id.* at 445.
106. *Id.* at 446.
107. *ExxonMobil*, 2011 WL 5143229, at *3.
108. *Id.*
109. *Id.* at *4.
110. *Id.*
111. *Id.*
112. *Id.*

recycled for other purposes because all production was focused solely on avgas."[113] Because the government was aware of such a consequence, the court found that it was liable.[114] The court concluded that the "very purpose of the ["Taxes" clause] was to remove the potential risks any reasonable producer would be reluctant to take on" and doing so "ignores the plain language of the clause."[115] Finally, quoting *Shell*, the court rejected the government's ADA argument.[116] In *Shell*, the court held that Executive Order 9001 and the War Powers Act "authorized open-ended indemnification agreements."[117]

The holdings in *Shell* and *ExxonMobil* make a breach of contract claim a viable avenue of recovery for environmental cleanup costs for government contractors. While both *Shell* and *ExxonMobil* involved WW-II production of avgas and its byproducts, the court's interpretation of the "Taxes" clause would likely extend to other contaminants and possibly other wartime periods.

VIII. Proposed Changes to the Foreign Corrupt Practices Act

Aerospace and defense contractors have recently—and for good reason—fortified their compliance programs in response to a dramatically stepped-up Foreign Corrupt Practices Act (FCPA) enforcement regime. Increased enforcement activity on the part of twin-enforcers United States Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) has prompted close examination of how best to limit company risk profiles in this highly charged area. Although the industry has proposed a number of reforms to the current statutory regime—driven largely by a perceived lack of clarity in how the FCPA applies in various situations—the Administration has repeatedly signaled its stout resistance to such changes. These signals certainly have been mixed, and mainly have been based on the arguable[118] notion that such domestic reform, even if called for, would send the "wrong signal" to the rest of the world, which views the United States as a leader in the anti-corruption fight.

On the one hand, few would disagree with Assistant Attorney General (AAG) Lanny A. Breuer's November 8, 2011, comments, delivered at the 26th National Conference on the FCPA, that "[t]here are few more destructive forces in society than the effect of widespread corruption on a people's hopes and dreams, *and I believe it is incumbent upon us to work as hard as we can to eradicate corruption across the globe*."[119] That said, supporting the

113. *ExxonMobil*, 2011 WL 5143229, at *4, n.3.
114. *ExxonMobil*, 2011 WL 5143229, at *4.
115. *Id.*
116. *Id.*
117. *Id.*
118. *See generally* T. Markus Funk and M. Bridget Minder, The FCPA in 2011 and Beyond: Is Targeted FCPA Reform Really the "Wrong Thing at the Wrong Time?," Bloomberg Law Reports (2012) (" [G]ood public policy and due process considerations counsel that, when we evaluate the sufficiency of a criminal statute such as the FCPA, we should not leave problem areas unreformed simply because of the possibility that such reforms are capable of being misconstrued by foreign observers. Indeed, for those of us personally experienced in the challenging effort to promote the rule of law in developing and post-conflict jurisdictions—that is, those countries in which corruption is most rampant—the notion that, as a rule, slight adjustments to U.S. law could cause wholesale abandonment of reform efforts elsewhere is subject to dispute.").
119. Lanny A. Breuer, Assoc. Attorney Gen., Speech at the 26th National Conference on the Foreign Corrupt Practices Act, U.S. Dep't. of Justice (Nov. 8, 2011) http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html.

concept and objectives of the FCPA does not necessarily require one to support every present provision of the FCPA.

Indeed, 2011 has been nothing if not the year of calls for reform. The influential U.S. Chamber of Commerce and other industry groups have led the charge, as have members of the American Bar Association's Criminal Justice Section.[120] Moving from the general to the specific, recent calls for FCPA reform have called on Congress to:

1. Include within the Act an affirmative defense based upon a company's "adequate compliance procedures." The idea here is to allow industry to rely on good corporate governance and a robust culture of compliance in order to provide them some protection.
2. Limit the successor liability of companies that, after conducting appropriate due diligence, nevertheless acquire or merge with a company that was (unbeknownst to the acquirer) involved in conduct that violated the FCPA. The proposed reform would protect law-abiding companies from the difficult-to-control actions of rogue employees of partners in transactions.
3. Clarify the scope of the FCPA's imposition of civil liability for the offending acts of a company's subsidiary that are unknown to it. As with the above proposal, the idea is to protect companies from liability for conduct of which they are unaware and for which they are not responsible.
4. More clearly define the term "foreign official" and, specifically, to provide a clear definition of "instrumentality" government (many proposals identify "operational control" as the appropriate touchstone).[121]

The call for reform, however, has not been unchallenged. Not only have academics rushed to the defense of the FCPA as currently written,[122] but DOJ itself has left little doubt that it does not support reform—at least for now.

In his November 8 comments, for example, AAG Breuer responded to calls for reform by a wide range of industry groups and former prosecutors—including former Attorney General Michael Mukasey on behalf of the U.S. Chamber of Commerce—by stating that "[t]his is precisely the wrong moment in history to weaken the FCPA."[123] Breuer also mentioned that the government has "no intention whatsoever of supporting reforms whose aim is to weaken the FCPA and make it a less effective tool for fighting foreign bribery."[124] According to Breuer, "watering down" the FCPA—for instance, by removing the successor liability component—would only serve "to send exactly the wrong message" to countries that view the United States as an anti-corruption role model.[125]

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120. *See* Andrew Weissmann & Alixandra Smith, U.S. Chamber Institute for Legal Reform, Restoring the Balance: Proposed Amendments of the Foreign Corrupt Practices Act (2010), http://www.instituteforlegal reform.com/restoring-balance-proposed-amendments-to-the-foreign-corrupt-practices-act.html; ABA Ponders FCPA Reform, FCPA Professor (Nov. 8, 2011), http://www.fcpaprofessor.com/aba-ponders-fcpa-reform.

121. Weissmann & Smith, *supra* note 120, at 7.

122. *See* David Kennedy & Dan Danielsen, *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act*, OPEN SOCIETY FOUNDATION, (Sept. 2011), http://www.soros.org/initiatives/washington/articles_publications/publications/busting-bribery-20110916/Busting%20Bribery2011September.pdf.

123. Breuer, *supra* note 119.

124. *Id.*

125. *Id.*

Signaling what some have interpreted as an implicit admission that calls for reform may be justified, AAG Breuer during the same event also commented that, "whether or not certain clarifications to the Act are appropriate, now is the time to ensure that the FCPA remains a strong tool for fighting the ill effects of transnational bribery."[126] Commentators have noted that the notion of prioritizing legitimate domestic law reform behind foreign policy "signaling" reflects a distinct shift in DOJ thinking. Breuer, arguably further supporting critics' claims that the FCPA is not as clear as the government has long asserted, further promised that in 2012, DOJ will release "detailed new guidance on the Act's criminal and civil enforcement provisions."[127] Close monitoring of the anticipated 2012 developments in this ever-shifting, risky area of the law is certainly worth the attention of the aerospace and defense industry.

IX. DFARS Business Systems Rule

Following an initial proposed rule,[128] a revised proposed rule,[129] and the Ike Skelton NDAA,[130] the DoD issued an interim rule effective May 18, 2011, amending the DFARS to require inclusion of the Contractor Business Systems clause in covered contracts in order to improve the effectiveness of DoD oversight of contractor business systems.

The Contractor Business Systems clause (DFARS 252.242-7005) applies to CAS covered contracts[131] and contracts that include one or more of the following DFARS clauses: DFARS 252.215-7002, Cost Estimating System Requirements; DFARS 252.234-7002, Earned Value Management System; DFARS 252.242-7004, Material Management and Accounting System; DFARS 252.242-7006, Accounting System Administration; DFARS 252.244-7001, Contractor Purchasing System Administration; and DFARS 252.245-7003, Contractor Property Management System Administration. A contract that is not subject to CAS is still covered by the rule if it contains at least one of these six individual business system clauses.[132]

A contractor's business systems must be "acceptable" (*i.e.*, comply with the terms of the contract)[133] and not have any significant deficiencies. A significant deficiency is a "shortcoming in the system that materially affects the ability of officials of the [DoD] to rely upon information produced by the system that is needed for management purposes."[134] If the contracting officer (CO) determines that there is a "significant deficiency" in a contractor business system, the CO may withhold, under one or more contracts containing the Business Systems clause, a percentage of payments due,[135] including (a) interim pay-

126. *Id.*
127. *Id.*
128. Defense Acquisition Regulations System, 75 Fed. Reg. 3415 (Jan. 15, 2010) (to be codified at 48 C.F.R. pts. 215, 234, 242, 244, 252).
129. Defense Acquisition Regulations System, 75 Fed. Reg. 75550 (Dec. 3, 2010) (to be codified at 48 C.F.R. pts. 215, 234, 242, 244, 252).
130. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, PL 111-383, Jan. 7, 2011, 124 Stat 4137.
131. DFARS 242.7000(a).
132. DFARS 252.242-7005(a).
133. DFARS 252.242-7005(b).
134. DFARS 252.242-7005(a)(6).
135. DFARS 252.242-7005(d).

ments under cost-reimbursement contracts; incentive type contracts; time-and-materials contracts; and labor-hour contracts;[136] (b) progress payments;[137] and (c) performance-based payments.[138] Such withholding is not an exclusive remedy, nor does it waive the government's other rights.[139] Notably, payment under a fixed-price contract may not be withheld where performance is complete and has been accepted by the government.[140]

When the CO makes an initial determination of one or more significant deficiencies in one or more of the contractor's business systems, the CO must notify the contractor accordingly, and the contractor has thirty days to respond.[141] Thereafter, if the CO issues a final determination with a notice to withhold payments based on one or more significant deficiencies in a required contractor business system, the CO "will withhold five percent of amounts due from progress payments and performance-based payments, and direct the Contractor, in writing, to withhold five percent from its billings on interim cost vouchers on cost, labor-hour, and time-and-materials contracts until the Contracting Officer has determined that the contractor has corrected all significant deficiencies as directed by the contracting officer's final determination."[142] Five percent is the maximum withholding for a significant deficiency in one contractor business system.[143] If there are significant deficiencies in two or more contractor business systems, the maximum withholding is ten percent.[144] The contractor has forty-five days to correct the deficiencies or submit an acceptable corrective action plan to eliminate them.[145]

Upon timely submission of an acceptable corrective action and CO determination that the contractor is effectively implementing it, the amounts withheld may be reduced to two percent until the CO determines that all significant deficiencies have been corrected.[146] If the CO later determines the contractor has not followed the corrective action plan, the percentages originally withheld will be reinstated until the CO determines that all significant deficiencies have been corrected.[147]

The contractor must notify the CO in writing once it corrects all the deficiencies.[148] The CO must then confirm all significant deficiencies are corrected.[149] If so, withholdings shall discontinue and the contractor may bill for money previously withheld.[150] If not, the withholdings continue.[151] If the CO does not make a determination within ninety days, then the amount withheld must be reduced by at least fifty percent until the CO makes a determination.[152]

136. DFARS 252.242-7005(d)(4)(i)(A)-(D).
137. DFARS 252.242-7005(d)(4)(ii).
138. DFARS 252.242-7005(d)(4)(iii).
139. DFARS 252.242-7005(d)(6).
140. DFARS 252.242-7005(d)(5).
141. DFARS 252.242-7005(c)(1) & (2).
142. DFARS 252.242-7005(d)(1).
143. DFARS 252.242-7005(d)(3)(i)(A).
144. DFARS 252.242-7005(d)(3)(i)(B).
145. DFARS 252.242-7005(d)(1).
146. *See* DFARS 252.242-7005(d)(2).
147. *See* DFARS 252.242-7005(d)(2).
148. *See* DFARS 252.242-7005(e)(1).
149. *See* DFARS 252.242-7005(e)(2).
150. *See* DFARS 252.242-7005(e)(2)(i).
151. *See* DFARS 252.242-7005(e)(2)(ii).
152. *See* DFARS 252.242-7005(e)(2)(iii).