On August 6, 2009 a proposed FAR rule (FAR case 2008-011) was published for public comment. The proposed rule results from the efforts of an Ad Hoc team formed by the Government to address "feedback" on the sweeping 2007 revisions to Government property rules, and is being proposed in order to "add clarity and correction to the previous FAR rule". Among the many changes being proposed is a revision to FAR Part 15.404 (Proposal Analysis) that would require contracting officers to establish prenegotiation objectives for contract profit by excluding from consideration all contractor-acquired property, unless an item is expressly called out as a contract deliverable. "Contractor-acquired property" is a term of art, and means property acquired, fabricated, or otherwise provided by the contractor for performing a contract, and to which the Government has title. (Ref: FAR 45.101, Definitions.)

The Government holds title to contractor work in process (WIP) in many circumstances, depending on contract type and whether the Government is providing contract financing payments. Title passage is a complex topic and has sparked much controversy and litigation. That said, the Government property clause (52.245-1, June 2007) can help in making some general statements regarding passage of title. For instance, in cost-reimburseable contracts, title generally passes to the Government as costs are reimbursed. Title passes to the Government in fixed-price contracts only if the item is called out as a deliverable. (No doubt Government property purists are shaking their heads while reading this. Let me emphasize once again that the foregoing are general statements, subject to much refinement and nuance.) As noted, title passes to the Government--on a temporary basis--when a fixed-price contract contains contract financing clauses. For example, when performance-based payments (PBPs) are in use, title passes to the Government upon payment of a PBP and returns to the contractor upon liquidation of the PBP payments. (Ref. the PBP contract clause at 52.232-32.)

There are some, mostly attorneys, who claim that the term "title" as used in the Government property clauses actually means "lien"--as in, the Government does not actually take title to the items or to indirect costs allocated to those Government contracts, but instead holds a lien against them. Many other people point out that "title" means "title." More importantly, the Department of Defense has taken the position that "title" does, indeed, mean "title".

(I did say this was a complex topic. Some people lead happy, productive lives, have successful careers, and never have to deal with Government property issues. Others, such as the author, are not as lucky.)

In sum, should this proposed FAR rule become final as drafted, it is likely that any given

proposal will have to address the new requirement. Further, it is likely that most contractors will be dealing with Government negotiators whose position(s) exclude fee or profit on the costs of contractor-acquired property. That is not to say that the Government's prenegotiation objectives must prevail in the negotiations, but this rule will almost certainly make it harder for contractors to achieve the levels of contract fee/profit that they have historically experienced.

One last note: the proposed rule says these changes to the Government's profit objective calculations are being made to FAR 15.404-4(a)(3). This makes no sense to me, as that is a section that contains only general statements regarding the Government's policy on contractor profit, and does not provide any detailed guidance. One would think that the appropriate home for this new direction would have been 15.4 04-4
(c), which covers contracting officer responsibilities, and discusses the "how to" of creating a prenegotiation position on contractor profit. Perhaps this issue will be addressed in the final rule. ...

See the proposed rule here .

Comments on the proposed rule may be submitted here

in accordance with the directions for doing so, found in the proposed rule.