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PRESIDENT TRUMP ORDERS REGULATORY FREEZE

It didn't take long from newly inaugurated President Donald Trump to place a freeze on all pending regulatory actions – Reince Priebus, assistant to the president and chief of staff, issued a memorandum on Inauguration Day, January 20, 2017, to federal agencies directing them to “send no regulation to the Office of the Federal Register until a department or agency head appointed or designated by the president after noon on January 20, 2017, reviews and approves the regulation.” The Office of Management and Budget (OMB) may make exceptions “for emergency situations or other urgent circumstances relating to health, safety, financial, or national security matters, or otherwise...”

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Priebus went on to direct agencies to “immediately withdraw” all regulations that have been sent to the Office of the Federal Register but not published in the *Federal Register*, provided none of the emergency situations authorizing an exception applies.

“With respect to regulations that have been published in the *Federal Register* but have not taken effect...temporarily postpone their effective date for 60 days from the date of this memorandum...for the purpose of reviewing questions of fact, law, and policy they raise. Where appropriate and as permitted by applicable law, you should consider proposing for notice and comment a rule to delay the effective date for regulations beyond that 60-day period. In cases where the effective date has been delayed in order to review questions of fact, law, or policy, you should consider potentially proposing further notice-and-comment rulemaking.”

Excluded from these directions are “any regulations subject to statutory or judicial deadlines...”

In addition, President Trump issued Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, on January 30 stating “unless prohibited by law, whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed...The heads of all agencies are directed that the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by the Director of the Office of Management and Budget.”

FAC 2005-95 IS OBAMA ADMINISTRATION'S LAST HURRAH

Just one week before President Obama's administration was to come to an end, Federal Acquisition Circular (FAC) 2005-95 was issued to conduct some final clean up for the new president's administration. Four of the five rules went into effect January 13; one went into effect January 19, one day before President Trump was sworn in. Because all the FAC 2005-95 rules went into effect before President Trump was inaugurated on January 20, they are not affected by President Trump's executive order freezing regulations that have not gone into effect (see previous article).

■ **Uniform Use of Line Items:** This finalizes, with changes, the proposed rule that would amend FAR subpart 4.10, Contract Line Items, to mandate the establishment of line items and subline items (if necessary). Mandating a uniform line item identification structure "is designed to improve the accuracy, traceability, and usability of procurement data...The need for this rule stems from the lack of access to reliable and comprehensive data on federal procurement actions that is essential to management and program decisions that result in delivering services to taxpayers in the most efficient and effective manner. Lack of standards for identifying and tracing tax dollars across the acquisition contributes to duplication in spending, gaps in reporting, and inefficiencies in management decisions. The implementation of these standards will facilitate the identification and traceability of spending from appropriation through expenditure, supporting automated collection of information using key identifiers."

The proposed rule would require that a deliverable line item or subline item must have each of the following characteristics: be separately identifiable; a single unit price or a total price; a single accounting classification citation; a separate delivery schedule, destination, period of performance, or place of performance; and a single contract pricing type (such as fixed price or cost reimbursement) (FAR 4.1003, Establishing Line Items). In addition, the proposed rule would identify the circumstances when subline items should be used: items that are basically the same except for minor variations, such as size or color; accounting classification; date of delivery, destination, or period or place of performance; different packaging or handling; different transportation method; or for informational purposes, such as to identify parts of an assembly or parts of a kit (FAR 4.1004, Establishing Subline Items).

Three respondents submitted comments on the proposed rule and, in response, agencies have been granted until October 1, 2019, to apply the requirements of FAR subpart 4.10. This will give agencies time to transition their information systems and train their workforces.

For more on the proposed rule, see the September 2014 *Federal Contracts Perspective* article "Uniform Line Item Identification Proposed."

■ **Acquisition Threshold for Special Emergency Procurement Authority:** This finalizes, without changes, the proposed rule that would implement Section 816 of the National Defense

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Authorization Act for Fiscal Year 2016 (Public Law 114-92) to raise the simplified acquisition threshold for acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack from \$300,000 to \$750,000 within the United States and from \$1,000,000 to \$1,500,000 outside the United States.

Two respondents submitted comments on the proposed rule but no changes were made to the final rule. Therefore, the following FAR sections are amended to reflect to reflect this special emergency procurement authority: (1) the definition of “simplified acquisition threshold” in FAR 2.101, Definitions; (2) paragraph (b)(1) of FAR 13.003, Policy [for simplified acquisition procedures]; (3) paragraph (b) of FAR 19.203, Relationship Among Small Business Programs; and (4) paragraph (a) of FAR 19.502-2, Total Small Business Set-Asides.

For more on the proposed rule, see the July 2016 *Federal Contracts Perspective* article “Three Rules Proposed for the FAR.”

■ **Contractor Employee Internal Confidentiality Agreements or Statements:** This finalizes, with changes, the proposed rule that would amend FAR subpart 3.9, Whistleblower Protections for Contractor Employees, to add FAR 3.909, Prohibition on Contracting with Entities That Require Certain Internal Confidentiality Agreements; add provision FAR 52.203-18, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements – Representation; and add clause FAR 52.203-19, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements, to implement Section 743 of the Consolidated and Further Continuing Appropriations Act for Fiscal Year 2015 (Public Law 113-235), which prohibits the use of funds for a contract “with an entity that requires employees or contractors of such entity seeking to report fraud, waste, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or contractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a federal department or agency authorized to receive such information.”

Four respondents submitted comments on the proposed rule, and the following significant changes were made to the final rule:

- FAR 3.901, Definitions, and FAR 52.203-19(a) (“Definitions”) are amended to add definitions of “internal confidentiality agreement or statement” (“a confidentiality agreement or any other written statement that the contractor requires any of its employees or subcontractors to sign regarding nondisclosure of contractor information, except that it does not include confidentiality agreements arising out of civil litigation or confidentiality agreements that contractor employees or subcontractors sign at the behest of a federal agency”); “subcontract” (“any contract as defined in [FAR] subpart 2.1 [Definitions] entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders”); and “subcontractor” (“any supplier, distributor, vendor, or firm (including a consultant) that furnishes supplies or services to or for a prime contractor or another subcontractor”).
- FAR 3.909-2, Representation of the Offeror, FAR 52.203-18(d) (“Representation”), FAR 52.203-19(b), and paragraph (u)(3) of FAR 52.212-3, Offeror Representations and Certifications – Commercial Items (“Representation”), are revised to clarify that the

representation applies to future internal confidentiality agreements or statements (from “the offeror represents that it *does not* require employees or subcontractors...to sign or comply with internal confidentiality agreements or statements” to “the offeror represents that it *will not* require its employees or subcontractors to sign or comply with internal confidentiality agreements or statements...” [*emphasis added*]), and to specifically identify the agency Office of the Inspector General as a designated investigative or law enforcement representative authorized to receive such information.

- FAR 52.203-19(c) is amended to clarify that the contractor is required to give notice only to current employees and subcontractors that any prohibitions and restrictions of any preexisting confidentiality agreements or statements covered by the clause are no longer in effect (amended from “the contractor shall notify employees that the prohibitions and restrictions of any internal confidentiality agreements covered by this clause are no longer in effect” to “the contractor shall notify current employees and subcontractors that prohibitions and restrictions of any preexisting internal confidentiality agreements or statements covered by this clause, to the extent that such prohibitions and restrictions are inconsistent with the prohibitions of this clause, are no longer in effect”).

For more on the proposed rule, see the February 2016 *Federal Contracts Perspective* article “Two Changes Proposed to the FAR.”

■ **Contracts Under the Small Business Administration 8(a) Program:** This finalizes, with changes, the proposed rule that would amend FAR subpart 19.8, Contracting with the Small Business Administration (The 8(a) Program), to implement the first revisions made in more than ten years by the Small Business Administration (SBA) to its regulations implementing Section 8(a) of the Small Business Act (referred to as the “8(a) Business Development Program” or “8(a) program”) (see the March 2011 *Federal Contracts Perspective* article “SBA Revises 8(a) Program, Small Business Size Regulations”). In addition, the rule proposed to provide: (1) additional coverage regarding protesting an 8(a) participant’s eligibility or size status (proposed FAR 19.813, Protesting an 8(a) Participant’s Eligibility or Size Status); (2) that a formal size determination may be requested if the size of an 8(a) participant nominated for award of an 8(a) sole source contract is called into question (proposed FAR 19.814, Requesting a Formal Size Determination (8(a) Sole Source Requirements)); (3) procedures for releasing a requirement for non-8(a) procurements (proposed FAR 19.815, Release for Non-8(a) Procurement); and (4) the ways a participant could exit the 8(a) program (proposed FAR 19.816, Exiting the 8(a) Program).

Six respondents submitted comments on the proposed rule, and the following changes are made to the final rule in response:

- Paragraph (a) of FAR 19.804-6, Indefinite Delivery Contracts, is revised to clarify that “offers and acceptances are required for individual orders under multiple-award contracts that have not been set aside for competition among 8(a) contractors.”
- FAR 19.814(a) is revised to indicate that the SBA Inspector General can request a formal size determination.

- FAR 19.815(a) is revised to clarify that any follow-on 8(a) requirement shall remain in the 8(a) program unless *there is a mandatory source for the requirement as specified in FAR 8.002, Priorities for Use of Mandatory Government Sources, or FAR 8.003, Use of Other Mandatory Sources*, or SBA agrees to release the requirement for procurement outside the 8(a) program (clarifying language is *<I>italized</I>*).

For more on the proposed rule, see the March 2014 *Federal Contracts Perspective* article “FAR Changes Would Reflect 8(a) Program Revisions.”

■ **Prohibition on Reimbursement for Congressional Investigations and Inquiries:** This finalizes, with editorial changes, the proposed rule that would amend FAR 31.205-47, Costs Related to Legal and Other Proceedings, to implement Section 857 of the National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291), which disallows costs incurred by a contractor in connection with a congressional investigation or inquiry into an issue that is the subject matter of a proceeding resulting in a disposition (that is, a conviction in a criminal proceeding; a determination of contractor liability in a civil or administrative proceeding; the imposition of a monetary penalty or an order to take corrective action in a civil or administrative proceeding; or a decision to debar or suspend the contractor, to rescind or void the contract, or to terminate the contract for default). The rule proposed to add FAR 31.205-47(f)(9), which would identify costs associated with “a Congressional investigation or inquiry into an issue that is the subject matter of a proceeding resulting in a disposition as described in paragraphs (b)(1) through (5) of this section (see 10 U.S.C. 2324(e)(1)(Q))” as unallowable.

Two respondents submitted comments on the proposed rule, and though FAR 31.205-47(f)(9) remains unchanged in the final rule, several editorial changes were made elsewhere in the final rule to simplify sentence structure for clarity.

For more on the proposed rule, see the March 2016 *Federal Contracts Perspective* article “Costs of Congressional Inquiries Would Be Disallowed.”

USDA PROPOSES 12 NEW BIOBASED PRODUCTS

The United States Department of Agriculture (USDA) is proposing to add twelve (12) more sections to Title 7 of the Code of Federal Regulations (CFR), Part 3201, Guidelines for Designating Biobased Products for Federal Procurement (7 CFR Part 3201), to designate product categories composed of intermediate ingredient and feedstock materials that would be given preference in federal procurements as provided under Section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA) (Public Law 107-171), and to specify the minimum level of biobased content to be contained in the procured products. (**EDITOR’S NOTE:** The term “intermediate ingredient and feedstock” is defined in FSRIA as “a material or compound made in whole or in significant part from biological products, including renewable agricultural materials (including plant, animal, and marine materials) or forestry materials, that are subsequently used to make a more complex compound or product.” The term “intermediates” is used in the titles of the product categories being proposed for designation to distinguish these proposed categories from the finished, consumer products previously designated by USDA.)

The following are the proposed new designated product categories and their Title 7 section numbers:

3201.108, Intermediates – Plastic Resins
3201.109, Intermediates – Chemicals
3201.110, Intermediates – Paint and Coating Components
3201.111, Intermediates – Textile Processing Materials
3201.112, Intermediates – Foams
3201.113, Intermediates – Fibers and Fabrics
3201.114, Intermediates – Lubricant Components
3201.115, Intermediates – Binders
3201.116, Intermediates – Cleaner Components
3201.117, Intermediates – Personal Care Product Components
3201.118, Intermediates – Oils, Fats, and Waxes
3201.119, Intermediates – Rubber Materials

As a general rule, procuring agencies must purchase biobased products within these designated items where the purchase price of the procurement item exceeds \$10,000 or where the quantity of such items or functionally equivalent items purchased over the preceding fiscal year equaled \$10,000 or more, unless products within a designated item: (1) are not reasonably available within a reasonable period of time; (2) fail to meet the reasonable performance standards of the procuring agencies; or (3) are available only at an unreasonable price. The \$10,000 threshold applies to federal agencies as a whole and not to agency subgroups such as regional offices or subagencies of the larger federal department or agency. In addition, federal contractors are subject to the procurement preference provisions of Section 9002 of FSRIA.

Comments on this proposal must be submitted no later than March 14, 2017, identified with the Regulatory Information Number (RIN) 0599-AA24, by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) email: biopREFERRED_support@amecfw.com – include “RIN 0599-AA24” and “Proposed Designation of Product Categories” on the subject line; or (3) mail or commercial/hand delivery to: Marie Wheat, USDA, Office of Procurement and Property Management, Room 361, Reporters Building, 300 7th St. SW, Washington, DC 20024.

For more information on the biobased program and the products in the program, go to <https://www.biopREFERRED.gov/>.

PROMPT PAYMENT INTEREST RATE SET AT 2 1/2%

The Treasury Department has established 2 1/2% (2.5%) as the interest rate for the computation of payments made between January 1, 2017, through June 30, 2017, under the Prompt Payment Act and the Contracts Disputes Act. This rate is also used in facilities capital cost of money calculations.

The interest rate for the prior six-month period (July 1, 2016, and December 31, 2016) was 1 7/8% (1.875%). The interest rate for January 1, 2016, through June 30, 2016, was 2 1/2%.

All prompt payment interest rates since 1980 (in six-month increments) are available at <https://www.fiscal.treasury.gov/fsservices/gov/pmt/promptPayment/rates.htm>.

FAR subpart 32.9, Prompt Payment; FAR subpart 33.2, Disputes and Appeals; FAR 31.205-10, Cost of Money; and Cost Accounting Standard (CAS) 9904.414, Cost of Money as an Element of the Cost of Facilities Capital, are affected by this interest rate.