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OFFICE OF MANAGEMENT AND BUDGET ELIMINATING, MODIFYING PROCUREMENT-RELATED GUIDANCE

Mike Mulvaney, Director of the Office of Management and Budget (OMB), issued a memorandum to the heads of departments and agencies announcing that "OMB is taking action to identify low-value, duplicative, and obsolete activities that can be ended…From administration to administration, agencies have been asked to respond to hundreds of guidance documents related to management areas such as information technology (IT), human capital, acquisition, financial management, and real property. Too often, burdensome tasks have piled up without consideration of whether the requirements collectively make sense. In many cases, agencies are asked to spend more time and resources complying with low-value activities versus allocating taxpayer dollars to meet their core agency mission…Through this memorandum, OMB begins providing relief to agencies by rolling back these requirements and allowing those who know their agencies best – agency managers – manage operations, adopt best practices, and find the best way possible to reduce costs and minimize staff hours responding to duplicative and burdensome reporting requirements."

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The memorandum categorizes the 60 OMB policy and guidance documents by type of action (that is, the document will be eliminated, modified, or "paused") and area of focus: information technology, financial management, procurement, performance management, customer service, program management.For example, seven of the OMB documents set out requirements and implementation guidance for agencies on planning for potential information technology (IT) disruption related to the Year 2000. Since these policies are obsolete and outdated, all of them are being eliminated.

The following are the procurement-related documents that are being eliminated, modified, or paused:

Eliminated:

- **Reporting Requirement of Implementation Guidance for Executive Order (EO) 13502, Use of Project Labor Agreements for Federal Construction Projects**: "Implementation guidance for this EO requires agencies to submit quarterly reports to OMB identifying all contracts awarded in connection with large-scale construction projects (*i.e.*, projects over $25

million) as well as information on the consideration and use of project labor agreements. The reporting requirement on the use of project labor agreements is eliminated." (For more on EO 13502, see the March 2009 ***Federal Contracts Perspective*** article "Obama Issues Four Labor-Related Executive Orders.")

- **Reporting Target of Improving the Collection and Use of Information about Contractor Performance and Integrity**: "This guidance requires agencies to improve the collection and use of performance information by, among other things, setting a 100% target for reporting past performance on awards above the simplified acquisition threshold. Emphasizing the quality of a contractor's past performance in future award decisions is an important tool for holding contractors accountable to the taxpayer and making sure the government receives good value from its contracts. However, to ensure agencies' efforts are focused on using this tool as an incentive to achieve successful performance outcomes, and not on rigid compliance with meeting a goal, OMB is eliminating the reporting target. OMB will work with agencies on more efficient and effective management strategies addressing the use of past performance information, especially for the highest risk, complex actions."

Modified:

- **Streamlining of Business Case Process:** "Office of Federal Procurement Policy (OFPP) Memorandum 'Development, Review and Approval of Business Cases for Certain Interagency and Agency-Specific Acquisitions' requires agencies to develop business cases when creating or renewing certain inter-agency and agency-specific contracts to optimize the use of existing contracts and reduce duplication. To improve the efficiency and effectiveness of this process and minimize unnecessary burden for agencies, OMB will pilot a new streamlined process consisting of the following steps that will replace the process required by the September 2011 memorandum:

  "1. **Informed Analysis** – During the early development of an acquisition plan for a procurement of $50 million, or such other threshold as identified by OMB, that may significantly overlap an existing government-wide acquisition contract, Federal Strategic Sourcing contract or agreement, best-in-class contract, or any other contract or vehicle identified by OMB, the agency will review relevant performance and pricing information on the Federal Acquisition Gateway on existing contracts.

  "2. **Upfront Engagement** – If the agency concludes, after reviewing the performance and pricing information, that use of an existing contract would not be suitable (*e.g.*, the agency believes it can negotiate better pricing or terms and conditions), or the agency believes the information is not sufficient to make a suitability determination, the agency will explain its position using a template furnished by OMB.

Vivina McVay, Editor-in Chief

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"3. **Facilitated Collaboration** – OMB will share the agency's explanation with the relevant Federal Category Manager and any other appropriate officials and facilitate discussion on the agency's evaluation.

"4. **Optimization of Results** – If an existing vehicle, as identified in paragraph 1, is not used, the agency will: (a) Issue a policy for agency-wide mandatory use of its agency-specific contract. if mandatory use is not practicable, the agency will establish enumerated exceptions; (b) provide: (1) prices paid and performance information on the Prices Paid Portal and Acquisition Gateway; (2) agency spend compliance and savings, and (3) other information as requested by OMB.

"The pilot will begin on August 1, 2017, before which OFPP will provide additional information on the pilot, including a template that agencies may use to develop their streamlined business cases. By March 1, 2019, OMB will evaluate pilot results, with appropriate stakeholder input, and consider whether to allow the pilot to expire or to issue a subsequent policy to continue, modify, or make the pilot permanent."

Paused:

- **Reporting Requirement for Conducting Acquisition Assessments under OMB Circular A-123 [Management's Responsibility for Enterprise Risk Management and Internal Control]:** "This policy memorandum requires agencies to conduct entity level internal control reviews of the acquisition function in accordance with OMB Circular A-123 and to integrate their assessment efforts with existing agency internal control processes and practices. This assessment requirement is paused through FY 2020 in order to allow agencies to instead focus their attention on reorganization planning and execution, as addressed in EO 13781, Comprehensive Plan for Reorganizing the Executive Branch, and OMB Memorandum M-17-22 [Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce]. However, agencies may wish to refer to questions posed in the guidance to help inform their reorganization analyses."

- **Reporting Requirement for Circular A-126, Improving the Management and Use of Government Aircraft:** "Section 10(c) of this circular requires agencies to provide a semi-annual summary report to OMB of non-mission travel by senior officials, members of the families of such officials, and any non-federal travelers (except as authorized under 10 U.S.C. § 2648 [Persons and Supplies: Sea, Land, and Air Transportation] and regulations implementing that statute). OMB intends to amend the circular to eliminate this report and is pausing this requirement until the circular can be amended. Agencies will be expected to continue reporting travel activities to GSA [General Services Administration] in accordance with the circular."

- **Reporting Requirement for Circular No. A-131, Value Engineering:** "Section VIII of Circular A-131 requires agencies to report annually to OMB on their use of value engineering (VE) as a management tool to achieve savings through more efficient and effective agency operations. OMB intends to amend the circular to eliminate this report and is pausing this requirement until the circular can be amended. However, usage of VE should

continue to be overseen by the agency's senior accountable official designated in accordance with section VII, and agencies are encouraged to work with OMB on case studies to highlight successful uses of VE in the Innovation Hallway on GSA's Acquisition Gateway." (**EDITOR'S NOTE:** For more on the Acquisition Gateway, see the March 2016 ***Federal Contracts Perspective*** article "GSA Opens Federal Acquisition Gateway to Public.")

In addition, five financial management OMB memoranda are of interest to the acquisition community: the five memoranda that required quarterly reporting of accelerate payments to small businesses and prime contractors with small business subcontractors are eliminated. However, agencies are encouraged to continue to accelerate payments to eligible contractors. (**EDITOR'S NOTE:** For more on accelerated payments to small businesses and prime contractors with small business subcontractors, see the September 2012 ***Federal Contracts Perspective*** article "OMB Orders Prompt Payment to Small Subcontractors.")

This is the first phase of an "extensive review process," in which OMB will continue working with agencies to identify additional areas of low-value, duplicative, and obsolete requirements, including those that are statutory in nature, and work with the appropriate parties, including Congress, to provide relief for agencies wherever possible.

DOD SEEKS RECOMMENDATIONS ON CLAUSES TO REPEAL

Jennifer Hawes, the editor of the Defense Acquisition Regulations System (which includes the Department of Defense [DOD] Federal Acquisition Regulation Supplement [DFARS]), is seeking comments on DFARS solicitation provisions and contract clauses that may be appropriate for repeal, replacement, or modification. (The DFARS solicitation provisions and contract clauses are in DFARS part 252, Solicitation Provisions and Contract Clauses.)

This request for comments is in response to President Trump's Executive Order (EO) 13777, Enforcing the Regulatory Reform Agenda, which requires each agency to establish a "Regulatory Reform Task Force," the function of which is to attempt to identify regulations that:

"(i) eliminate jobs, or inhibit job creation;

"(ii) are outdated, unnecessary, or ineffective;

"(iii) impose costs that exceed benefits;

"(iv) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;

"(v) are inconsistent with the requirements of…those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or

"(vi) derive from or implement Executive Orders or other presidential directives that have been subsequently rescinded or substantially modified."

Section 3(e) of EO 13777 requires the Regulatory Reform Task Force of each agency to "seek input and other assistance, as permitted by law, from entities significantly affected by federal regulations, including state, local, and tribal governments, small businesses, consumers, non-governmental organizations, and trade associations." This request for comments complies with the direction provided in Section 3(e). (For more on EO 13777, see the March 2017 ***Federal***

Contracts Perspective article "Trump's Executive Order Fleshes Out Regulatory Freeze Procedures.")

Comments must be submitted no later than August 21, 2017, identified as "DFARS-RRTF-2017-01," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) fax: 571-372-6099; or (3) mail: Defense Acquisition Regulations System, Attn: DFARS Subgroup RRTF, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

For a similar effort being undertaken by the General Services Administration (GSA), see the June 2017 ***Federal Contracts Perspective*** article "GSA Evaluating Regulations to Identify Those Suitable for Repeal, Replacement, or Modification."

CAAC DEVIATION REMOVES FAIR PAY RULE

The Civilian Agency Acquisition Council (CAAC) has issued a Federal Acquisition Regulation (FAR) class deviation removing the Fair Pay and Safe Workplaces final rule from the FAR. The final rule required each offeror, prior to award of a contract or subcontract exceeding $500,000, to represent "whether there has been any administrative merits determination, arbitral award or decision, or civil judgment...rendered against the offeror within the preceding three-year period for violations" of any of 14 labor laws and executive orders and "equivalent state laws," even if the offeror was not performing or bidding on a covered contract at the time of the determination, decision, or judgment. Among the laws covered were the Occupational Safety and Health Act (OSHA), Title VII of the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.

The Fair Pay and Safe Workplaces final rule implemented President Obama's Executive Order (EO) 13673, Fair Pay and Safe Workplaces. The final rule was included in Federal Acquisition Circular (FAC) 2005-90, which added FAR subpart 22.20, Fair Pay and Safe Workplaces. Concurrently with the issuance of FAC 2005-90 was the issuance by the Department of Labor (DOL) of 52 pages of guidance intended to assist contractors with complying with the executive order. (**EDITOR'S NOTE:** For more on Executive Order 13673, see the September 2014 ***Federal Contracts Perspective*** article "Obama Issues Order Requiring That Contractors Provide 'Fair Pay and Safe Workplaces'." For more on the FAR rule and the DOL guidance, see the September 2016 ***Federal Contracts Perspective*** article "FAC 2005-90 Establishes 'Fair Pay and Safe Workplaces' Representation.")

However, on October 24, 2016, the day before the FAC and the DOL guidance were to take effect, the District Court for the Eastern District of Texas granted an injunction suspending implementation of the parts of EO 13673, FAC 2005-90, and the DOL guidance that imposed new reporting requirements regarding labor law violations until a final decision on the merits was issued (the court did not issue an injunction against the "paycheck transparency" portion of EO 13673, FAC 2005-90, and the DOL guidance, which required contractors to provide wage statements and notice of any independent contractor relationship to their covered workers, because it was not scheduled to take effect until 2017). To ensure compliance with the court order, the Office of Federal Procurement Policy (OFPP) and the FAR Council issued a joint memorandum to all agency chief acquisition officers directing them to "take all steps necessary to ensure the enjoined sections, provisions, and clauses of the final rule are not implemented until further notice." (**EDITOR'S NOTE:** For more on the court injunction, see the November

2016 ***Federal Contracts Perspective*** article "Executive Order 13673, Fair Pay and Safe Workplaces, Put on Hold by Court.")

On March 27, 2017, President Trump signed Public Law 115-11, which states "that Congress disapproves the rule submitted by the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration relating to the Federal Acquisition Regulation (published at 81 Fed. Reg. 58562 (August 25, 2016)), and such rule shall have no force or effect." The disapproved rule is FAC 2005-90. Public Law 115-11 was passed in accordance with the Section 251 of the Contract with America Advancement Act of 1996 (Public Law 104-121), which permits Congress to disapprove of regulations issued by federal agencies by passing a joint resolution. Public Law 115-11 is that joint resolution (House Joint Resolution 37).

Concurrently with the signing of Public Law 115-11, President Trump issued EO 13782 revoking EO 13673 (as well as Section 3 of EO 13683, and EO 13738, both of which amended EO 13673). By revoking EO 13673 in its entirety, President Trump had revoked both the reporting requirements and the payment transparency requirements that the District Court left in force. (**EDITOR'S NOTE:** For more on Public Law 115-11 and EO 13782, see the April 2017 ***Federal Contracts Perspective*** article "Trump Revokes Obama's Fair Pay and Safe Workplaces Executive Order.")

While a rule is being prepared that would amend the FAR to formally remove FAC 2005-90, the CAAC issued this FAR class deviation to permit civilian agencies (except the National Aeronautics and Space Administration and the Coast Guard) to exclude the following provisions and clauses from solicitations and contracts: FAR 52.222-57, Representation Regarding Compliance with Labor Laws (Executive Order 13673); FAR 52.222-58, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673); FAR 52.222-59, Compliance with Labor Laws (Executive Order 13673); FAR 52.222-60, Paycheck Transparency (Executive Order 13673); FAR 52.222-61, Arbitration of Contractor Employee Claims (Executive Order 13673); and paragraph (s) of FAR 52.212-3, Instruction to Offerors – Commercial Items. (**EDITOR'S NOTE:** The Department of Defense, the National Aeronautics and Space Administration, and the Coast Guard are governed by the Defense Acquisition Regulation Council [DARC] and must either wait for a DARC class deviation to be issued before taking similar action or issue a class deviation on their own.)

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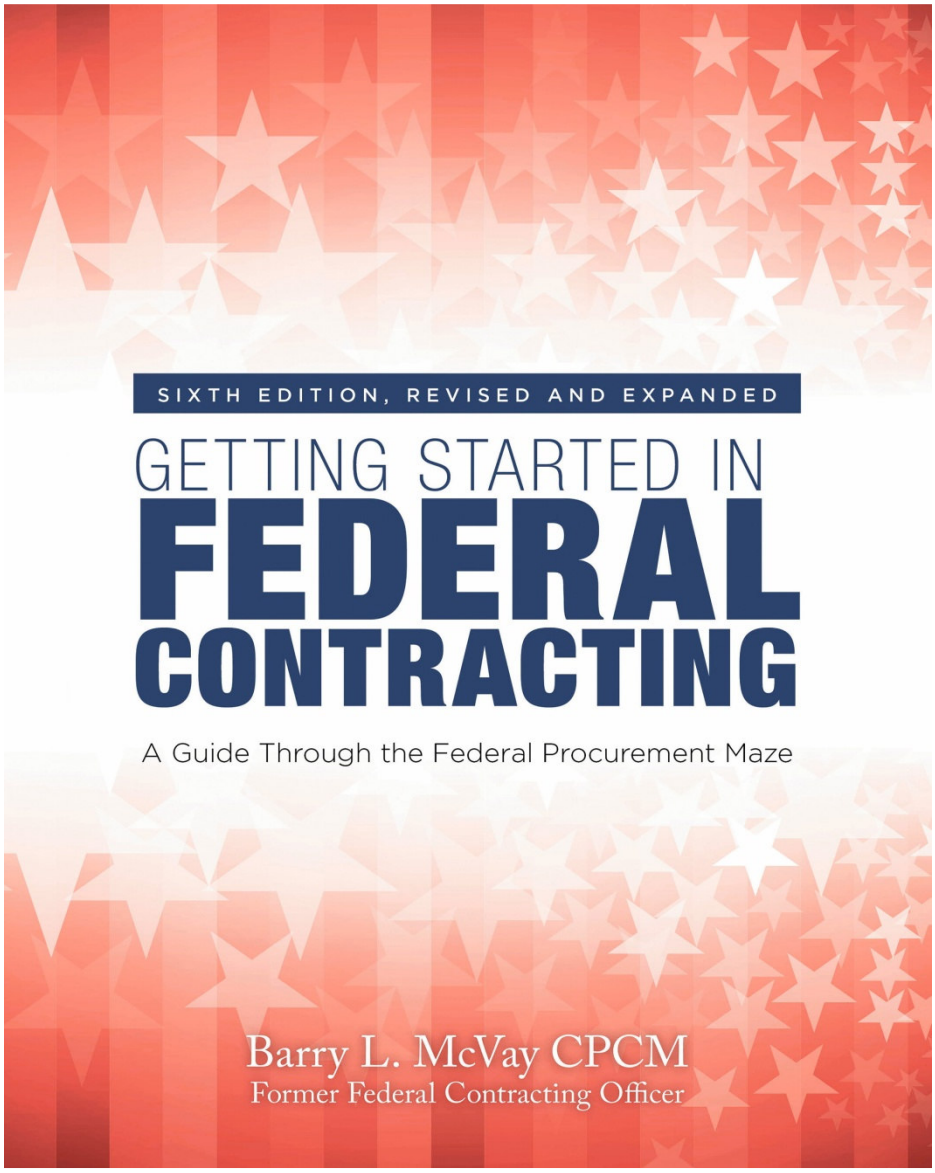

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