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OMB ISSUES INSTRUCTIONS FOR ENFORCING BUY AMERICAN ACT DOMESTIC PREFERENCES

Mike Mulvaney, Director of the Office of Management and Budget (OMB), and Wilbur Ross, Secretary of the Department of Commerce, issued a joint memorandum to the heads of departments and agencies to provide "guidance to agencies to help the federal government maximize, consistent with law, the policy and the statutory mandate to buy domestically manufactured products in its contracts and grants, and minimize use of exceptions and waivers, so that the federal government may optimize the positive impact of these laws for the betterment of United States citizens and taxpayers."

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The memorandum implements Executive Order 13788, Buy American and Hire American, which was issued ""to promote economic and national security and to help stimulate economic growth, create good jobs at decent wages, strengthen our middle class, and support the American manufacturing and defense industrial bases…" To do that, the executive order states "it shall be the policy of the executive branch to maximize, consistent with law, through terms and conditions of federal financial assistance awards and federal procurements, the use of goods, products, and materials produced in the United States…" The primary law mandating this preference is the Buy American Act. (For more on Executive Order 13788, see the May 2017 ***Federal Contracts Perspective*** article "Trump Issues 'Buy American and Hire American' Executive Order.")

The Buy American Act of 1933 (BAA – Title 41 of the U.S. Code, Chapter 83, Buy American; Trade Agreements; and Other Laws and Regulations), which is covered in Federal Acquisition Regulation (FAR) subpart 25.1, Buy American Act – Supplies, and FAR subpart 25.2, Buy American Act – Construction Materials, discourages the federal government from buying foreign products for three reasons: to make American industry stronger; to protect domestic labor markets; and to keep federal funds in the United States. While the BAA does not prohibit the acquisition of foreign products, it handicaps them by requiring the application of evaluation factors to the prices of the foreign products, thus making them less competitive – an additional 6% if the lowest domestic offer is from a large business concern, and 12% if the lowest domestic offer is from a small business concern (see FAR subpart 25.5, Evaluating Foreign Offers – Supply Contracts).

The BAA provides a two-part test for determining if a product qualifies as a domestic end product: (1) the item must be manufactured in the United States; and (2) more than 50% of the

cost must be attributed to components mined, produced, or manufactured in the United States. However, the BAA provides five exceptions and waivers to this requirement: (1) domestic nonavailability, (2) unreasonable cost, (3) purchase of commercial information technology (IT), (4) items for resale, and (5) public interest determination. In addition, the BAA is not applicable to purchases at or below the micro-purchase threshold ($3,500; $5,000 for the Department of Defense – see article below) or to procurements for use outside of the United States. In addition, the Trade Agreements Act (TAA – see FAR subpart 25.4, Trade Agreements) requires procuring agencies to purchase goods only from domestic sources *or* designated countries, which includes countries that are party to the World Trade Organization Agreement on Government Procurement, a U.S. Free Trade Agreement, or are designated as a "least developed country." Furthermore, the TAA waives the BAA under certain circumstances. And both the BAA and the TAA contain waivers which allow for products under Department of Defense Reciprocal Agreements to be excepted from these requirements.

Furthermore, there are other laws that place restrictions on foreign acquisitions such as the Berry Amendment of 1941 (Title 10 of the U.S. Code, Section 2533a), which imposes domestic source requirements on certain agencies for the acquisition of textiles, food, and hand or measuring tools.

The BAA (and the TAA and the waivers and the exceptions and exceptions to the exceptions) has produced a very complex regime. "Acquisitions made pursuant to these exceptions and waivers, which annually result in billions of federal taxpayer dollars being spent for foreign made products, must be carefully monitored," state Secretary Ross and Director Mulvaney in the memorandum, thus the perceived necessity for the guidance.

The memorandum requires each federal agency to "evaluate and report on their oversight of the BAA and other Buy American Laws…" The evaluations and reports are to address the following:

Oversight of Buy American Laws

1. "*Procedures and Guidance*. Provide links to, or copies of, any department level guidance in place to assist the workforce in meeting the requirements of Buy American Laws and the application of the TAA…"

2. "*Internal Reviews*. Briefly describe reviews the agency…has conducted or has directed bureaus to conduct in Fiscal Years 2015 and 2016 to evaluate compliance with Buy American Laws and the TAA…"

3. "*Marketing and Outreach*. Discuss steps your agency has taken to promote and enhance visibility for the acquisition workforce of products compliant with Buy American Laws, including BAA-compliant products (referred to as 'domestic end products') and to meet its obligations under the TAA, when applicable."

Vivina McVay, Editor-in Chief

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4. "*Training*. Describe training tools or resources…that are used to ensure the acquisition workforce understands the parameters and technical mechanics of Buy American Laws and the TAA, including the applicability of the BAA and its exceptions and waivers."

Enforcement of Buy American Laws and Waiver Usage

"To assist the [Department of Commerce] and other agencies in evaluating the impact of agency spending for foreign items on domestic jobs and manufacturing, agencies should review the level of spending conducted under each exception, the most prevalent products that were subject to BAA exceptions and waivers, and, government-wide, the largest contracts subject to BAA exceptions and waivers, for each of the last three fiscal years. In particular, agencies should take the following specific steps:

1. "Agencies should report whether their contracting officers record exceptions and waivers in the Federal Procurement Data System (FPDS [**https://www.fpds.gov/**]) (i) only for items that represent the predominant product on the contract, (ii) whenever an exception or waiver is used, irrespective of whether it is for the predominant product, or (iii) in accordance with a different reporting structure (please explain).

2. "Agencies should review the MAX webpage, found at **https://community.max.gov/x/MAgIT**, which contains information about the agency's use of exceptions and waivers – both by dollar amount and by type of product – that OMB has culled from FPDS. Agencies must confirm if this summary is accurate and provide any necessary refinements, revisions, or clarifications.

3. "As a further step, on the MAX page, OMB has identified the 25 largest contracts under each exception, as well as spending subject to waivers in accordance with (i) the TAA and (ii) for use outside the United States. If one or more of your agency's contracts is listed, please review the contract files and report whether the exception or waiver was associated with the predominant North American Industry Classification System (NAICS) codes and product service codes (PSCs) reported in FPDS. If the waiver or exception was not tied to the predominant item, the agency should identify the NAICS/PSC for which the listed waiver was used."

Steps to Strengthen Implementation of Buy American Laws

"Agencies should develop and propose policies for their agencies to ensure that federal procurements maximize the use of materials produced in the United States, consistent with law. At a minimum, reports should address the following:

1. "*Improved Guidance*. Identify actions the agency intends to take to review and update relevant agency guidance, including areas of FAR part 25 [Foreign Acquisition] that your agency believes may benefit from further clarification to improve workforce understanding and compliance with domestic source restrictions.

2. "*Improved Reporting Instructions*. Identify any instructions or workforce support associated with recording data in FPDS (*e.g*., user manual, data dictionary, training modules on the BAA, FAR language, etc.) regarding the coding of BAA procurements and exceptions to Buy American Laws that may benefit from governmentwide clarification…

3. "*Improved Internal Reviews*. Describe any plans for strengthened internal reviews, including the nature ofthe improvements…

4. "*Improved Marketing and Outreach*. Identify steps that your agency intends to take, and recommendations to category managers, on how they might improve the visibility of domestic-end products in the marketplace.

5. "*Improved Training*. Describe any planned enhancements to internal training…This may include training to ensure contracting officers can accurately determine the applicability of the BAA, including for procurements over the TAA threshold where the BAA applies because the procurement is a small business set aside, and set asides are not subject to the TAA.

6. "*Additional Actions for Strengthening Buy American Laws*. Provide your agency's ideas for strengthening Buy American laws that may require statutory, executive, regulatory, or administrative action across the government.

7. "*Additional Steps for Ensuring Compliance with the TAA*. Provide your agency's ideas for ensuring compliance with the TAA to make certain that the benefits of the TAA go to designated countries, particularly countries that have provided appropriate reciprocal competitive government procurement opportunities to United States products and suppliers of such products."

The agencies are to submit their reports to the Department of Commerce (DOC) and OMB by September 15, 2017, at the MAX Collect Page address: **https://community.max.gov/x/MAgIT**.

PROMPT PAYMENT INTEREST RATE SET AT 2 3/8%

The Treasury Department has established 2 3/8% (2.375%) as the interest rate for the computation of payments made between July 1, 2017, through December 31, 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 (January 1, 2017, and June 30, 2016) was 2 1/2% (2.5%). The interest rate for July1 1, 2016, through December 31, 2016, was 1 7/8% (1.875%).

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.

DOD INCREASES MICRO-PURCHASE THRESHOLD

As mandated in by the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328), the Department of Defense (DOD) has issued a deviation increasing the micro-purchase threshold as follows:

- From $3,500 to $10,000 for basic research programs and activities of the DOD science and technology reinvention laboratories (see Section 217 of Public Law 114-328, Increased Micro-Purchase Threshold for Research Programs and Entities); and

- From $3,500 to $5,000 for the acquisition of all other products and services except for the acquisition of construction (the micro-purchase threshold remains $2,000), the acquisition of services (the threshold remains $2,500), and the acquisition of supplies or services that are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical or radiological attack (the threshold remains $20,000 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States, and $30,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States) (see Section 821 of Public Law 114-328, Increased Micro-Purchase Threshold Applicable to Department of Defense Procurements).

This deviation will remain in effect until the Defense FAR Supplement (DFARS) is amended to incorporate this change.

In addition, DOD issued a memorandum providing governmentwide commercial purchase card guidance related to the micro-purchase deviation. Many purchase card holders have a limit set at the micro-purchase threshold. However, the memorandum does not permit the automatic increase of an individual's purchase card limitation to the new micro-purchase threshold. Instead, each agency's governmentwide commercial purchase card program coordinator must determine "that anticipated mission requirements and historical spending patterns demonstrate a need for raising the account's currently authorized single purchase limit…"

For more on Public Law 114-328, see the January 2017 ***Federal Contracts Perspective*** article "2017 Defense Authorization Act Increases Micro-Purchase Threshold, Extends SBIR/STTR."

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VOSB/SDVOSB VERIFICATION GUIDELINES FINALIZED

The Department of Veterans Affairs (VA) has finalized, without changes, the interim final rule that requires re-verification of the ownership and control of veteran-owned small businesses (VOSB) and service-disabled veteran-owned small businesses (SDVOSB) every three years rather than every two years.

Title 38 of the Code of Federal Regulations (CFR), Part 74, Veterans Small Business Regulations, enables VA to operate a procurement program in which VA contracting officers are required to conduct acquisition actions limited to VOSBs or SDVOSBs (which have priority over VOSBs) when two or more such businesses appear as "verified" in the Vendor Information Pages (VIP) database at **https://www.va.gov/osdbu**. (**EDITOR'S NOTE:** This is not the same program as the set-aside program in FAR subpart 19.14, Service-Disabled Veteran-Owned Small Business Procurement Program, which applies governmentwide. This particular program is separate and limited to VA only; see the VA Acquisition Regulation [VAAR] subpart 819.70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Acquisition Program.)

Section 74.15, What length of time may a business participate in VetBiz VIP Verification Program?, required the VA's Center for Veterans Enterprise (CVE) to verify the continued eligibility of each firm in the VIP database every two years. This verification involved ascertaining the owners' veteran status or service-disabled veteran status and reviewing the following: financial statements; federal personal and business tax returns; personal history statements; articles of incorporation/organization; corporate by-laws or operating agreements; organizational, annual and board/member meeting records; stock ledgers and certificates; state-issued certificates of good standing; contract, lease and loan agreements; payroll records; bank account signature cards; and licenses.

Because VA was confident that the integrity of the verification program would not be compromised by lengthening the two-year eligibility period to three years (in 2016, only 10 out of 1,019 reverification applications were denied), VA revised paragraph (a) of Section 74.15 to change the reverification period from "2 years" to "3 years" and asked for comments on the change.

Though many comments were submitted regarding the change, most requested clarification on whether currently verified VOSBs/SDVOSBs would be automatically extended. VA responded in the preamble of the final rule that "all firms that were verified and in the VIP database automatically had their eligibility term extended by one year." Since VA decided not to adopt any of the other comments it received, the interim final rule is finalized without changes.

For more on the interim final rule, see the March 2017 ***Federal Contracts Perspective*** article "VA Revises Veteran-Owned Small Business Verification."

NASA FINALIZES AWARD TERM POLICY

The National Aeronautics and Space Administration (NASA) is finalizing, with an editorial change, the proposed rule that would add NFS 1816.405-277, Award Term, and clause NFS 1852.216-72, Award Term, to provide policy on the use of additional contract periods of performance, or "award terms," as a non-monetary contract incentive that a contractor may earn if (1) the contractor's sustained performance under a service contract is superior, (2) the

government has an on-going need for the requirement, and (3) funds are available for the additional period of performance.

An award term would be used where a longer term relationship (generally more than five years) between the government and a contractor would provide benefits to both parties, such as a more stable business relationship both for the contractor and its employees (thus retaining a skilled, experienced workforce), a motivation for excellent performance (including cost savings), fostering contractor capital investment, increasing the desirability of the award (potentially increasing competition), and reduced administrative costs and disruptions in preparing for and negotiating replacement contracts. The awarding of additional terms would be at the sole discretion of NASA even if the contractor met the standards of eligibility delineated in the contract for an award term.

The proposed NFS 1816.405-277 would explain what an award term is; describe when the use of an award term is appropriate; explain how award terms are constructed and exercised; limit award terms to acquisitions for services exceeding $20,000,000; specify the required elements of an award term plan and require that the plan be incorporated into the contract; and establish the government's unilateral right not to grant or to cancel award terms.

The proposed NFS 1852.216-72 would incorporate the policy in NFS 1816.405-277 into a contract clause.

Two respondents submitted comments on the proposed rule, and a minor editorial change is made in the final rule to NFS 1852.216-72:

> The proposed paragraph (a) stated, "…the contracting officer may extend the contract for the number and duration of award terms as set forth in the Award Term Plan subject to the government's continuing need for the contract and the availability of funds." The proposed paragraph (f) stated, "(1) The government has the unilateral right not to grant or to cancel award term periods and the associated Award Term Plan if – …(iii) The contracting officer has notified the contractor that the government no longer has a need for the award term period before the time an award term period is to begin;…or (v) The contracting officer has notified the contractor that funds are not available for the award term." To eliminate this overlap, "subject to the government's continuing need for the contract and the availability of funds" is removed from paragraph (a).

For more on the proposed rule, see the January 2017 ***Federal Contracts Perspective*** article "NASA Adds Financial Reporting of Property Requirement."

OMB ORDERS CONSOLIDATION OF PACKAGE DELIVERY SERVICES

The Office of Management and Budget (OMB) has directed all agencies to use one package delivery contract established under the purview of the Department of Defense's (DOD) U.S. Transportation Command – the recently awarded Next Generation Delivery Services (NGDS), which is considered to be "best in class." Though the memorandum states that this directive is "effective immediately," performance under the NGDS commences October 1, 2017.

"Each year, the federal government spends over $358 million for domestic and international package delivery services with nearly 90% of these dollars going to just three vendors [UPS, FedEx and DHL]," OMB states in its memorandum. "However, despite earlier efforts to better

leverage our buying power in this mature and commercial market, agencies still manage about 100 separate contracts, with different requirements and prices. These contracts are awarded and administrated across multiple agencies, which limits the application and benefit of comprehensive demand management practices, resulting in increased expense for the government. There is tremendous opportunity to improve the way the government both buys and manages domestic and international package delivery services…"

Agencies are to develop transition plans and submit them to the U.S. Transportation Command by September 1, 2017.

There are some exceptions to this requirement:

- Agencies are permitted to enter into separate agreements for package delivery services with the U. S. Postal Service (USPS) when agency or statutory requirements, or unique mission needs, require the use of USPS.

- An agency may elect not to use the NDGS if it concludes that use of the NDGS is not in the best interest of the government. The agency must prepare a justification for electing not to use the NDGS, and it must be approved by the head of the agency or the deputy secretary of the agency, and any such justification shall be subject to renewal and approval by OMB every two years. An agency justification must include conditions, pricing, performance, contract award and administrative costs, fees, and savings under the agency agreement relative to the governmentwide solution, the length of the requested exception, and which, if any, of the following circumstances support the exception:

  – BETTER VALUE

    (1) The agency expects to negotiate better pricing for products or specified services.
    (2) The agency expects to negotiate better terms and conditions.

  – UNAVAILABILITY

    Although the agency's requirements generally fall within the same product service code as existing contracts:

    (1) The agency expects to use contract types not available on existing contracts.
    (2) The agency's needs cannot be adequately met by these contracts (for example, the agency needs a type of expertise not available on the existing contract).
    (3) A portion of the agency's requirements fall outside the scope of the existing contract.
    (4) There is an established industrial base for the work that is not adequately reflected in the mandatory governmentwide contract solution.

  – ADMINISTRATIVE COST

    The agency believes the administrative cost of the existing agency-wide solution is significantly lower than the proposed governmentwide solution.

– OTHER CONTRACTING CONSIDERATIONS

(1) The agency is at risk of not meeting its small business contracting goals and does not believe its requirement can be adequately met by small businesses on an existing contract.
(2) Other considerations not in the list above, with a detailed explanation.

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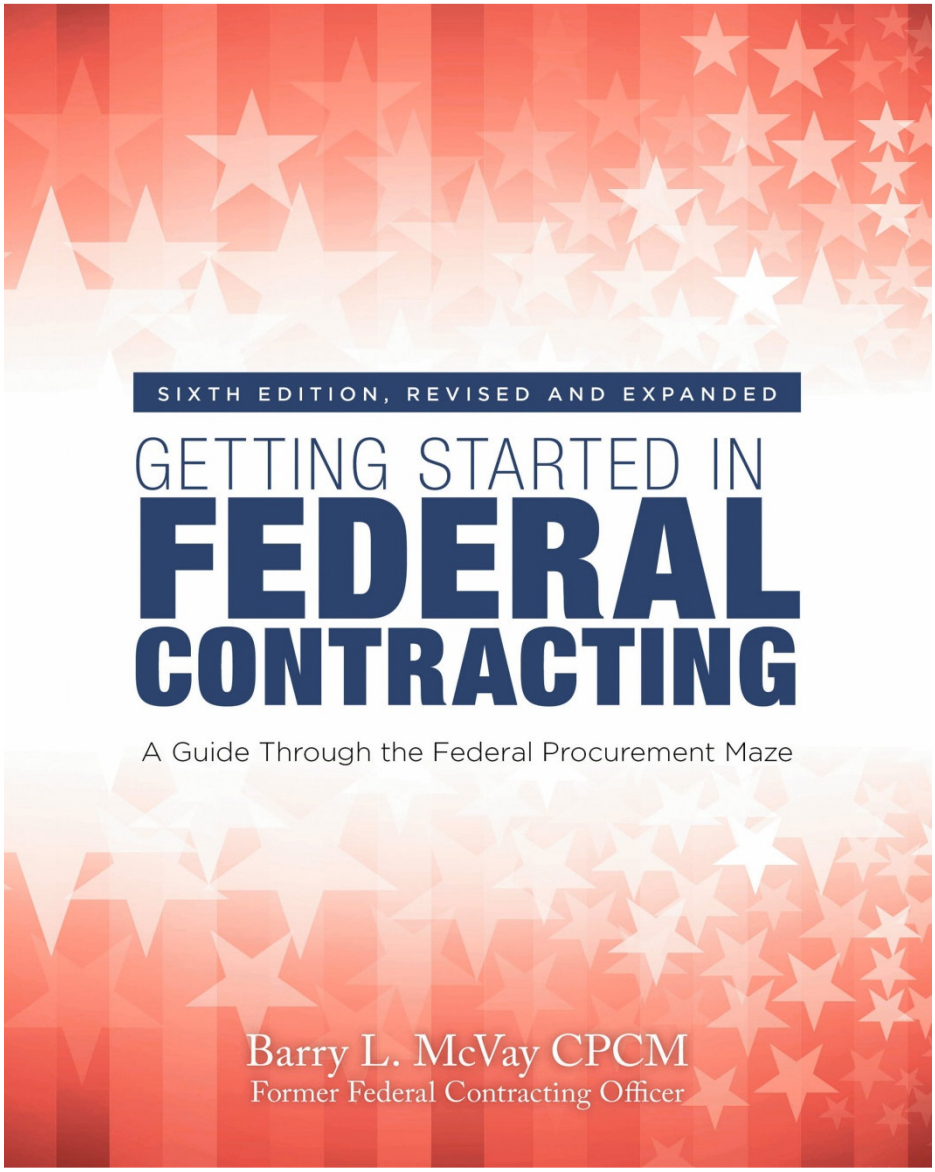

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