

FEDERAL CONTRACTS PERSPECTIVE

Federal Acquisition Developments, Guidance, and Opinions

2018 DEFENSE AUTHORIZATION ACT INCREASES SIMPLIFIED ACQUISITION, MICRO-PURCHASE THRESHOLDS

On December 12, President Trump signed into law the \$696 billion National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91). Title VIII, Acquisition Policy, Acquisition Management, and Related Matters (Sections 801-891), contains the sections that usually have the most significant provisions ones for the Department of Defense (DOD) acquisition community (and sometimes the civilian acquisition community, too). This year, the most important changes made by the Defense Authorization Act are the increases in the simplified acquisition and micro-purchase thresholds and the authorizing of federal agencies to use commercial e-commerce portals to acquire commercial products instead of the Federal Supply Schedules.

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■ **Section 801, Statements of Purpose for Department of Defense Acquisition:** This requires that the Defense Federal Acquisition Regulation Supplement (DFARS) be amended to include the following statements of purpose: “The defense acquisition system...exists to manage the investments of the United States in technologies, programs, and product support necessary to achieve the national security strategy prescribed by the president...and to support the United States Armed Forces...The primary objective of Department of Defense acquisition is to acquire quality products that satisfy user needs with measurable improvements to mission capability and operational support, in a timely manner, and at a fair and reasonable price.”

■ **Section 803, Performance of Incurred Cost Audits:** Because the Defense Contract Audit Agency (DCAA) has an overwhelming backlog of audits, “the secretary of defense shall use qualified private auditors to perform a sufficient number of incurred cost audits of contracts of the Department of Defense to eliminate, by October 1, 2020, any backlog of incurred cost audits of the Defense Contract Audit Agency; ensure that incurred cost audits are completed not later than one year after the date of receipt of a qualified incurred cost submission; [and] maintain an appropriate mix of government and private sector capacity to meet the current and future needs of the Department of Defense for the performance of incurred cost audits...Not later than April 1, 2019, the secretary of defense or a federal department or agency authorized by the secretary shall award a contract or issue a task order under an existing contract to two or more qualified private auditors to perform incurred cost audits of costs associated with contracts of the Department of Defense.”

■ **Section 805, Increased Simplified Acquisition Threshold:** The simplified acquisition threshold applicable to Federal Acquisition Regulation (FAR) part 13, Simplified Acquisition Threshold, and elsewhere in the FAR, is increased from \$150,000 to \$250,000. **(EDITOR’S NOTE:** This change applies throughout the federal government.)

■ **Section 806, Requirements Related to the Micro-Purchase Threshold:** The micro-purchase threshold applicable to FAR subpart 13.2, Actions At or Below the Micro-Purchase Threshold, is increased from \$3,500 to \$10,000. **(EDITOR’S NOTE:** This change applies throughout the federal government. The micro-purchase threshold for the Department of Defense had already been increased to \$10,000 for DOD science and technology reinvention laboratories, institutions of higher education, related or affiliated nonprofit entities, nonprofit research organizations, and independent research institutes by Section 217 of the National Defense Authorization Act for Fiscal Year 2017 [Public Law 114-328]. Section 821 of Public Law 114-328 increased the micro-purchase threshold for all other DOD’s acquisitions to \$5,000. 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.”)

■ **Section 846, Procurement Through Commercial E-Commerce Portals:** This requires the General Services Administration (GSA), which operates the Federal Supply Schedules program so federal agencies can obtain commercial supplies and services at prices associated with volume pricing, to “establish a program to procure commercial products through commercial e-commerce portals for purposes of enhancing competition, expediting procurement, enabling market research, and ensuring reasonable pricing of commercial products. The administrator [of GSA] shall carry out the program...through multiple contracts with multiple commercial e-commerce portal providers, and shall design the program to be implemented in phases with the objective of enabling government-wide use of such portals...The head of a department or agency may procure, as appropriate, commercial products for the department or agency using the program.” The use of commercial e-commerce portals (such as those operated by Amazon and Staples) would be restricted to acquisitions not exceeding the simplified acquisition threshold (now \$250,000 – see above). Acquisitions made using the approved e-commerce portals “shall be made, to the maximum extent practicable, under the standard terms and conditions of the portal relating to purchasing on the portal.” The commercial e-commerce portals approved by GSA would be available to all government agencies.

■ **Section 851, Improvement of Planning for Acquisition of Services:** This requires the DOD to avoid the use of bridge contracts (defined as “an extension to an existing contract beyond the period of performance to avoid a lapse in service caused by a delay in awarding a subsequent contract; or a new short-term contract awarded on a sole-source basis to avoid a lapse in service caused by a delay in awarding a subsequent contract”). When a bridge contract is used for the first time due to inadequate planning, the service acquisition executive for the military

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The *Federal Contracts Perspective* is published monthly by Panoptic Enterprises, 6055 Ridge Ford Drive, Burke, VA 22015.

department must be notified. When a bridge contract is used for the second time due to inadequate planning, the Vice Chief of Staff of the armed forces and the service acquisition executive of the military department concerned, the head of the defense agency concerned, the combatant commander concerned, or the Under Secretary of Defense for Acquisition and Sustainment must be notified (as applicable).

TRADE AGREEMENTS THRESHOLDS REVISED

On December 11, the U.S. Trade Representative performed the biennial adjustment of the thresholds for the various trade agreements into which the United States has entered with other countries. The adjustments are made to account for inflation that occurred in the previous two years and changes in the value of the respective currencies. These thresholds will be incorporated into FAR part 25, Foreign Acquisition, (specifically FAR subpart 25.4, Trade Agreements).

The following are the revised thresholds (with the previous thresholds in parentheses):

- ***World Trade Organization (WTO) Agreement on Government Procurement (GPA)***
 - Supplies: **\$180,000** (\$191,000)
 - Services: **\$180,000** (\$191,000)
 - Construction: **\$6,932,000** (\$7,358,000)

- ***U.S.-Australia Free Trade Agreement (FTA)***
 - Supplies: **\$80,317** (\$77,533)
 - Services: **\$80,317** (\$77,533)
 - Construction: **\$6,932,000** (\$7,358,000)

- ***U.S.-Bahrain FTA***
 - Supplies: **\$180,000** (\$191,000)
 - Services: **\$180,000** (\$191,000)
 - Construction: **\$10,441,216** (\$10,079,365)

- ***U.S.-Dominican Republic-Central America FTA (CAFTA-DR)***
 - Supplies: **\$80,317** (\$77,533)
 - Services: **\$80,317** (\$77,533)
 - Construction: **\$6,932,000** (\$7,358,000)

- ***U.S.-Chile FTA***
 - Supplies: **\$80,317** (\$77,533)
 - Services: **\$80,317** (\$77,533)
 - Construction: **\$6,932,000** (\$7,358,000)

- ***U.S.-Columbia Trade Promotion Agreement (TPA)***
 - Supplies: **\$80,317** (\$77,533)
 - Services: **\$80,317** (\$77,533)
 - Construction: **\$6,932,000** (\$7,358,000)

- ***U.S.-Korea FTA***
 - Supplies: \$100,000 (unchanged)
 - Services: \$100,000 (unchanged)
 - Construction: **\$6,932,000** (\$7,358,000)

- ***U.S.-Morocco FTA***
 - Supplies: **\$180,000** (\$191,000)
 - Services: **\$180,000** (\$191,000)
 - Construction: **\$6,932,000** (\$7,358,000)

- ***North American FTA (NAFTA)***
 - Canada**
 - Supplies: \$25,000 (unchanged)
 - Services: **\$80,317** (\$77,533)
 - Construction: **\$10,441,216** (\$10,079,365)
 - Mexico**
 - Supplies: **\$80,317** (\$77,533)
 - Services: **\$80,317** (\$77,533)
 - Construction: **\$10,441,216** (\$10,079,365)

- ***U.S.-Oman FTA***
 - Supplies: **\$180,000** (\$191,000)
 - Services: **\$180,000** (\$191,000)
 - Construction: **\$10,079,365** (\$10,079,365)

- ***U.S.-Panama FTA***
 - Supplies: **\$180,000** (\$191,000)
 - Services: **\$180,000** (\$191,000)
 - Construction: **\$6,932,000** (\$7,358,000)

- ***U.S.-Peru TPA***
 - Supplies: **\$180,000** (\$191,000)
 - Services: **\$180,000** (\$191,000)
 - Construction: **\$6,932,000** (\$7,358,000)

- ***U.S.-Singapore FTA***
 - Supplies: **\$80,317** (\$77,533)
 - Services: **\$80,317** (\$77,533)
 - Construction: **\$6,932,000** (\$7,358,000)

- ***Israeli Trade Act***
 - Supplies: \$50,000 (unchanged)

Within a few days of the U.S. Trade Representative’s action, the Civilian Agency Acquisition Council (CAAC) issued a class deviation allowing civilian agencies to use the revised thresholds instead of the ones in FAR subpart 25.4, and the DOD issued a final rule incorporating the revised thresholds into DFARS part 225, Foreign Acquisition.

DOD FINISHES 2017 WITH A FLOURISH

Besides issuing the final rule implementing changes to the trade agreements thresholds (see above article), the Department of Defense (DOD) issued another final rule revising the DFARS and six class deviations. In addition, the Office of Defense Pricing/Defense Procurement and Acquisition Policy issued instructions on the mass modifications of contracts to implement earlier guidance.

■ **New Qualifying Country – Latvia:** This final rule amends the following DFARS clauses to add Latvia to the list of “qualifying countries”:

- DFARS 252.225-7001, Buy American and Balance of Payments Program
- DFARS 252.225-7002, Qualifying Country Sources as Subcontractors
- DFARS 252.225-7012, Preference for Certain Domestic Commodities
- DFARS 252.225-7017, Photovoltaic Devices
- DFARS 252.225-7021, Trade Agreements
- DFARS 252.225-7036, Buy American – Free Trade Agreements – Balance of Payments Program

A “qualifying country” is “a country with a reciprocal defense procurement memorandum of understanding or international agreement with the United States in which both countries agree to remove barriers to purchases of supplies produced in the other country or services performed by sources of the other country, and the memorandum or agreement complies, where applicable, with the requirements of Section 36 of the Arms Export Control Act (22 USC 2776) and with 10 USC 2457” (DFARS 225.003, Definitions [for foreign acquisitions]).

On April 10, 2017, the U.S. Secretary of Defense signed a reciprocal defense procurement agreement with the Minister of Defense of the Republic of Latvia. The agreement removes discriminatory barriers to procurements of supplies and services produced by industrial enterprises of the other country to the extent mutually beneficial and consistent with national laws, regulations, policies, and international obligations. The agreement does not cover construction or construction material. Because of the execution of this agreement, Latvia meets the criteria as “qualifying countries.” (**NOTE:** Latvia is already a “designated country” under the World Trade Organization Government Procurement Agreement [see FAR 25.003, Definitions].)

■ **Class Deviation on Nonelectronic Submission of Payment Requests for Packing, Crating, and Storage of Household Goods:** This deviation requires contracting officers to allow the submission of payment requests by nonelectronic means for contracts for packing, crating, and storage of household goods belonging to DOD employees and service members. Instead of including DFARS 252.232-7003, Electronic Submission of Payment Requests and Receiving Reports, contracting officers are to ensure that the contract or order specifies that invoices shall be submitted to the ordering office, and that the contract administration data section provide the ordering office’s mailing address, email address, and fax number.

DFARS subpart 232.70, Electronic Submission and Processing of Payment Requests and Receiving Reports, and DFARS 252.232-7003 require that contractors provide payment requests in electronic form (with several exceptions). This requirement was imposed by Section 1008 of the National Defense Authorization Act for Fiscal Year 2001 (Public Law 106-398), titled

“Electronic Submission and Processing of Claims for Contract Payments.” However, Section 1008 also provides that “if the secretary of defense determines that the requirement for using electronic means for submitting claims...is unduly burdensome in any category of cases, the secretary may exempt the cases in that category from the application of the requirement.” This deviation utilizes the secretary’s authority to exempt the covered contracts from this requirement.

■ **Class Deviation on the “Section 899 Pilot Program for Risk-Based Contracting for Smaller Contract Actions”:** This deviation implements Section 899 of the National Defense Authorization Act of Fiscal Year 2016 (Public Law 114-92), titled “Pilot Program Regarding Risk-Based Contracting For Smaller Contract Actions Under The Truth In Negotiations Act,” which permits the secretary of defense to conduct a pilot program “to demonstrate the efficacy of using risk-based techniques in requiring submission of data on a sampling basis for purposes of section 2306a of Title 10, United States Code (popularly known as the ‘Truth in Negotiations Act’).” The pilot program increases the threshold for the submission of certified cost or pricing data from \$750,000 to \$5,000,000.

The class deviation establishes the Section 889 pilot program, which requires that the Director of Defense Procurement and Acquisition Policy authorize the solicitations and contracts participating in the program. “This authority affords the Department [of Defense] a unique opportunity in a pilot setting to assess the impact(s) of raising the threshold for obtaining certified cost or pricing data on prime contracts or subcontracts.” For solicitations and contracts participating in the pilot program, contracting officers must include DFARS 252.215-7999, Pilot Program Regarding Risk-Based Contracting for Smaller Contract Actions (DEVIATION 2018-00003). This clause states that the certified cost or pricing data threshold for the participating solicitations and contracts is increased to \$5,000,000, but that the head of the contracting activity (HCA) may decide that the submission of certified cost or pricing data below the \$5,000,000 threshold is necessary for the evaluation of the reasonableness of the price. In addition, “as a condition of participating in this pilot program, in lieu of the submission of certified cost or pricing data below \$5,000,000, the contractor shall submit verifiable data documenting any savings (time or money) achieved as a result of this pilot within 3 months after award or modification of this contract.”

■ **Class Deviation Permitting Educational Service Agreements for Training in the Legal Profession:** This class deviation removes the prohibition against contracting officers making educational service agreements (which are “not a contract, but is an ordering agreement under which the Government may order educational services”) that would “result in the payment of government funds for tuition or other expenses for training in any legal profession, except in connection with the detailing of commissioned officers to law school.” This prohibition is in paragraph (a) of DFARS 237.7202, Limitations [on education service agreements]. This class deviation removes DFARS 237.7202(a) and its prohibition.

■ **Class Deviation on Evaluation Factors for Certain Multiple-Award Task- or Delivery-Order Contracts:** This class deviation permits contracting officers, when issuing a solicitation that will result in multiple-award contracts for the same or similar services, to exclude price or cost as an evaluation factor for the contract awards if the solicitation states that the government intends to make an award to all qualifying offerors (“an offeror that is determined to be a responsible source, submits a technically acceptable proposal that conforms to the requirements

of the solicitation, and the contracting officer has no reason to believe would be likely to offer other than fair and reasonable pricing”). However, the contracting officer must consider price or cost as one of the factors in the selection decision for each task- or delivery-order under the multiple-award contract in accordance with paragraph (b)(1)(ii)(E) of FAR 16.505, Ordering (“the contracting officer must consider price or cost under each order as one of the factors in the selection decision”).

This class deviation implements Section 825 of the National Defense Authorization Act of Fiscal Year 2017 (Public Law 114-328), titled “Exception to Requirement to Include Cost or Price to the Government as a Factor in the Evaluation of Proposals for Certain Multiple-Award Task or Delivery Order Contracts.”

■ **Class Deviation on Small Business Subcontract Reporting:** This class deviation rescinds and supersedes class deviation 2016-O0009, which directed contracting officers not to use FAR 52.219-9, Small Business Subcontracting Plans, or any of its alternates, or DFARS 252.219-7003, Small Business Subcontracting Plans (DOD Contracts), or its alternate, but instead to use FAR 52.219-9, Small Business Subcontracting Plans (DEVIATION 2016-O0009), and its Alternate III, and DFARS 252.219-7003, Small Business Subcontracting Plans (DOD Contracts) (DEVIATION 2016-O0009), and its Alternate I. (**EDITOR’S NOTE:** FAR 52.219-9 is required to be included in solicitations and contracts that offer subcontracting possibilities, are expected to exceed \$700,000 [\$1.5 million for construction of any public facility]. DFARS 252.219-7003 is required to be included in solicitations and contracts that contain FAR 52.219-9.)

Class deviation 2016-O0009 reduced the frequency of Summary Subcontract Report (SSR) submissions under an Individual Subcontracting Plan (ISP) from biannual to annual; eliminated the requirement for multiple SSRs under an ISP for construction and related maintenance and repair contracts so that only one consolidated SSR encompassing all contracts is necessary; changed the entity to which the contractor submits the SSR in the Electronic Subcontracting Reporting System (eSRS – <https://www.esrs.gov/>) for an ISP from the military department or defense agency to DOD; and, for orders placed against basic ordering agreements (BOAs) and blanket purchase agreements (BPAs), instructed contractors to submit the Standard Form 294, Subcontracting Report for Individual Contracts, instead of an ISP in eSRS because eSRS does not support the submission of an ISR for orders placed against BOAs and BPAs – the submission of Standard Form 294s allows DOD to capture that subcontracting data.

Unlike class deviation 2016-O0009, this class deviation 2018-O0007 reinstates FAR 52.219-9 and its various alternates and requires that they be supplemented by DFARS 252.219-7003, Small Business Subcontracting Plan (DOD Contracts) – Basic (DEVIATION 2018-O0007) and its various alternates. The reorganized class deviation 2018-O0007 continues to require the reporting procedures in class deviation 2016-O0009.

For more on the superseded class deviation 2016-O0009, see the September 2016 *Federal Contracts Perspective* article “DOD Issues Rules on Counterfeit Electronic Parts.”

■ **Class Deviation on Additional Access to Records in the United States Central Command:** This class deviation requires the inclusion of DFARS 252.225-7979, Additional Access to Contractor and Subcontractor Records in the United States Central Command Theater of Operations (DEVIATION 2018-O0008), in all solicitations and contracts with an estimated value exceeding \$50,000 that are to be performed, in whole or in part, in the United States Central Command (USCENTCOM) Theater of Operations, including solicitations and contracts

using the procedures in FAR part 12, Acquisition of Commercial Items. (**EDITOR'S NOTE:** The USCENTCOM Theater of Operations consists of Afghanistan, Bahrain, Egypt, Iraq, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Oman, Pakistan, Qatar, Saudi Arabia, Tajikistan, Turkmenistan, United Arab Emirates, Uzbekistan, and Yemen.)

The class deviation implements Section 842 of the National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291), titled "Additional Access to Records," which provides authority to access contractor and subcontractor records for contracts exceeding \$50,000 to the extent necessary to ensure that funds, supplies, or services available under covered contracts are not provided directly or indirectly to the enemy.

Class deviation 2018-O0008 replaces class deviation 2015-O0013, which implemented Section 842 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112-81) to authorize access to records for contracts and subcontracts performed in the USCENTCOM Theater of Operations exceeding \$100,000 to ensure that funds available under the contract or subcontract are not: (1) subject to extortion or corruption; or (2) provided to persons or entities that are actively supporting an insurgency or actively opposing U.S. or coalition forces in a contingency operation. The authority in class deviation 2015-O0013 expired on December 19, 2017.

For more on the expired class deviation 2015-O0013, see the April 2015 *Federal Contracts Perspective* article "DOD Conducts Mop-Up Operations."

■ **Mass Modifications to Implement DFARS 252.204-7012, Safeguarding Covered Defense Information Reporting:** This memorandum provides guidance to facilitate mass modifications of contracts to implement National Institute of Standards and Technology (NIST) Special Publication (SP) 800-171, Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations, by the December 31, 2017, deadline specified in paragraph (b)(2)(ii)(A) of DFARS 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting.

Section 941 of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239) and Section 1632 of the National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291) both require contractors to report network penetrations. Section 941 requires cleared defense contractors to report penetrations of networks and information systems and allows DOD personnel access to equipment and information to assess the impact of reported penetrations. Section 1632 requires that a contractor designated as operationally critical must report each time a cyber incident occurs on that contractor's network or information systems. NIST SP 800-171 is specifically tailored for use in protecting sensitive information residing in contractor information systems, so an interim rule was issued that modified DFARS 252.204-7012 to implement both Section 941 and Section 1632, including the requirement to implement NIST 800-171 (for more on this interim rule, see the September 2015 *Federal Contracts Perspective* article "DOD Issues Regulations on Network Penetration Reporting and Contracting for Cloud Services").

Many respondents submitted comments on the interim rule expressing the need for additional time to implement the security requirements of NIST SP 800-171. In response, a second interim rule amended DFARS 252.204-7012 to require that the security requirements specified by NIST SP 800-171 be in place no later than December 31, 2017 (for more on this second interim rule, see the January 2016 *Federal Contracts Perspective* article "DOD Addresses Acquisition Policies Outside the U.S.").

The second interim rule was finalized in October 2016 with several amendments to DFARS 252.204-7012 including additional guidance on requests to vary from NIST SP 800-171 (for more on the final rule, see the November 2016 *Federal Contracts Perspective* article “DOD Finalizes Network Penetration Reporting Rule”).

In September 2017, guidance was issued for contracting officers in anticipation of the December 31, 2017, deadline for contractors to implement NIST SP 800-171. The guidance provides a brief overview of NIST 800-171 requirements; NIST 800-171 implementation requirements; documentation of a contractor’s implementation; the role of the system security plan and plans of action in contract formulation, administration, and source selection; and additional resources for the contracting officer (for more on this guidance on NIST 800-171 implementation, see the October 2017 *Federal Contracts Perspective* article “DOD Issues Four Additional Class Deviations”).

This guidance, issued by the Director, Defense Pricing/Defense Procurement and Acquisition Policy, to the acquisition executives of the services and defense agencies, states that “it is anticipated that many contractors will request widespread modifications of their contracts to authorize the use of this latest version of NIST SP 800-171, Rev. 1. In accordance with DFARS 242.302(a)(S70) [“Contract Administration Functions”], I am requesting that contract administration components respond swiftly to such requests and act on behalf of all affected DOD components to issue mass modifications to DOD contracts in all appropriate circumstances. This will be accomplished with service/component agreement, through bilateral modification that will not result in a change to any contract price, obligated amount, or fee arrangement. Services/components may elect to use other available modification mechanisms in cases when such mass modification is not deemed appropriate.”

PROMPT PAYMENT INTEREST RATE SET AT 2 5/8%

The Treasury Department has established 2 5/8% (2.625%) as the interest rate for the computation of payments made between January 1, 2018, through June 30, 2018, under the Prompt Payment Act and the Contracts Disputes Act. This rate is also used in facilities capital cost of money calculations.

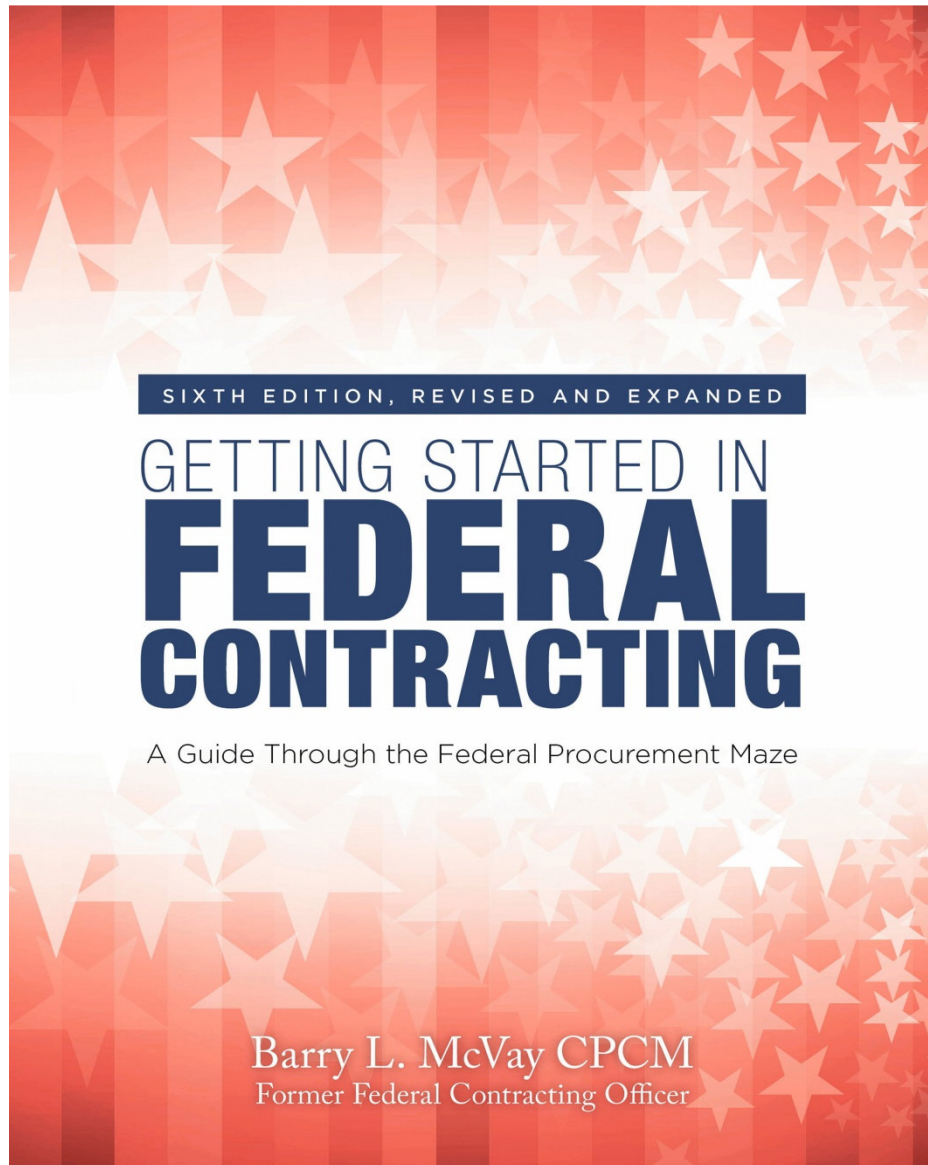
The interest rate for the prior six-month period (July 1, 2017, and December 31, 2017) was 2 3/8% (2.375%). The interest rate for January 1, 2016, through June 30, 2016, was 2 1/2% (2.5%).

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.

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468 pages, 2017, ISBN: 978-0-912481-27-2, \$39.95
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