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FAC 2005-101 UPDATES INSTRUCTIONS FOR SYSTEM FOR AWARD MANAGEMENT REGISTRATION

Federal Acquisition Circular (FAC) 2005-101 consists of two relatively minor final rules. One clarifies the procedures for registering in the System for Award Management (SAM) database, in which all federal contractors must be registered to be eligible for a contract award; and removal of the requirement that business operations performed on government premises accept and dispense \$1 coins.

■ System for Award Management

Registration: This finalizes, with editorial changes, the rule that proposed to revise FAR 4.1102, Policy [for SAM registration], FAR 4.1103, Procedures [for SAM registration], FAR 52.204-7, System for Award Management, and FAR 52.204-8, Annual Representations and Certifications, to update the instructions for registration in the SAM (<https://www.sam.gov>) and to correct an inconsistency in when an offeror must register in SAM.

First, to update registration instructions, the rule proposed to amend FAR 4.1102(c) to require contracting officers to use the name and physical address from the contractor's SAM registration for the provided "unique entity identifier" to identify the contractor.

Second, the definition of "registered in the System for Award Management (SAM) database" in FAR 52.204-7 states that an offeror is registered in the SAM database when "the offeror has completed the Core, Assertions, and Representations and Certification, and Points of Contact sections of the registration in the SAM database." Furthermore, paragraph (d) of FAR 52.204-8, Annual Representations and Certifications, states that if FAR 52.204-7 is included in the solicitation, then the offeror verifies by submission of the offer that "the offeror has completed the annual representations and certifications electronically via the SAM Web site..." This means the offeror must have already completed its representations and certifications in SAM prior to the submission of its offer.

However, FAR 4.1102(a) states, "Prospective contractors shall be registered in the SAM database prior to award of a contract or agreement..." In addition, paragraph (a) of FAR 4.1103 requires that the contracting officer "verify that the prospective contractor is registered in the SAM database...before awarding a contract or agreement." To correct this inconsistency, the rule proposed to amend FAR 4.1102, FAR 4.1103, FAR 52.204-7, and FAR 52.204-8 to require offeror registration in SAM prior to submission of an offer. In addition, the rule proposed to remove paragraph (k) of FAR 52.212-1, Instructions to Offerors – Commercial Items, which

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states "...by submission of an offer, the offeror acknowledges the requirement that a prospective awardee shall be registered in the SAM database prior to award..."

Also, the rule proposed to change "acquisition.gov" to "sam.gov" throughout the FAR for consistency, and remove "database" from "SAM database" for consistency throughout the FAR.

Ten respondents submitted comments on the proposed rule, but none of the recommended changes were adopted. However, since the publication of the proposed rule in May 2016, there have been many changes to terminology used in the FAR. The most significant change made to the FAR that is incorporated into this final rule is the changing of the term "DUNS number" to "unique entity identifier" in FAR 2005-91 – see the October 2016 *Federal Contracts Perspective* article "FAC 2005-91 Finalizes Rule on Women-Owned Small Business Sole Source Contracts."

For more on the proposed rule, see the June 2016 *Federal Contracts Perspective* article "Four More FAR Rules Proposed."

■ **One Dollar Coins:** This final rule removes FAR 37.116, Accepting and Dispensing of \$1 Coin, and FAR 52.237-11, Accepting and Dispensing of \$1 Coin, to implement the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Public Law 115-91), Section 885, Exception for Business Operations from Requirement to Accept \$1 Coins, which provides an exception from the requirement to accept and dispense \$1 coins for business operations conducted by a contractor while performing under a government contract.

In 2006, Congress passed and President Bush signed into law the Presidential \$1 Coin Act of 2005 (Public Law 109-145). Section 104, Removal of Barriers to Circulation, amended Title 31 of the U.S. Code (USC), Section 5112, Denominations, Specifications, and Design of Coins (31 USC 5112), to add paragraph (p) to require "all entities that operate any business, including vending machines, on any premises owned by the United States...[to] take such action as may be appropriate to ensure that...any business operations conducted by any such agency, instrumentality, system, or entity that involve coins or currency will be fully capable of accepting and dispensing \$1 coins in connection with such operations..." FAR 37.116 implemented Section 104. FAR 37.116-1, Presidential \$1 Coin Act of 2005, stated that "Section 104 requires that business operations performed on government premises provide for accepting and dispensing of existing and proposed \$1 coins as part of operations on and after January 1, 2008." FAR 37.116-2, Contract Clause, required that FAR 52.237-11 be included "in solicitations and contracts for the provision of services that involve business operations conducted in U.S. coins and currency, including vending machines, on any premises owned by the United States or under the control of any agency or instrumentality of the United States." FAR 52.237-11(b) stated that "all business operations conducted under this contract that involve coins or currency, including vending machines, shall be fully capable of: (1) accepting \$1 coins in connection with such operations; and (2) dispensing \$1 coins in connection with such operations, unless the vending machine does not receive currency denominations greater than \$1."

The NDAA for FY 2016 (Public Law 114-92), Section 809, Advisory Panel on Streamlining and Codifying Acquisition Regulations, established an advisory panel on streamlining

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acquisition regulations. The panel's duties include "review the acquisition regulations applicable to the Department of Defense with a view toward streamlining and improving the efficiency and effectiveness of the defense acquisition process and maintaining defense technology advantage; and (2) make any recommendations for the amendment or repeal of such regulations that the panel considers necessary, as a result of such review..."

One of the Section 809 Panel's recommendations was to amend the Presidential \$1 Coin Act of 2005 because the intention of the act was to increase circulation of the \$1 coin, which is not directly related to agencies' missions. In response to the panel's recommendation, the NDAA for FY 2018 (Public Law 115-91) included Section 885, Exception for Business Operations from Requirement to Accept \$1 Coins, which added the following to the end of 31 USC 5112(p): "This paragraph does not apply with respect to business operations conducted by any entity under a contract with an agency or instrumentality of the United States..." Because of this exception, FAR 37.116 (including FAR 37.116-1 and FAR 37.116-2) and FAR 52.237-11 are removed.

DOD CONTINUES CLEANING UP THE DFARS

The Department of Defense (DOD) is continuing its scrubbing of the Defense FAR Supplement (DFARS), which it has been conducting the last several months to remove obsolete, duplicative, or unnecessary clauses and provisions. In addition, DOD issued a couple of class deviations and several policy memoranda providing guidance and information on various aspects of defense acquisition.

■ **Repeal of "Additional Services" Clause:** This final rule removes DFARS 252.247-7020, Additional Services, and its prescription at paragraph (n) of DFARS 247.271-3, Solicitation Provisions, Schedule Formats, and Contract Clauses, because the clause is outdated and no longer used.

According to DFARS 247.271-3(n), DFARS 252.247-7020 is to be included solicitations and contracts "when acquiring services for the preparation of personal property for movement or storage, or for performance of intra-city or intra-area movement..." DFARS 252.247-7020 requires the contractor to "provide additional services not included in the Schedule, but required for satisfactory completion of the services ordered under this contract, at a rate comparable to the rate for like services as contained in tenders on file with the Military Traffic Management Command in effect at time of order."

DFARS 252.247-7020 is no longer necessary because personal property movement and storage has evolved since the creation of this clause in 2000. Coordination with multi-functional teams and proactive communication with customers has better defined such additional services, and the requirement for these services is included in the performance work statement and resultant contract line item structure. As such, DFARS 252.247-7020 is no longer necessary, and it is removed, along with its prescription at DFARS 247.271-3(n).

■ **Repeal of "Indefinite Quantities – No Fixed Charges" Clause:** This final rule removes DFARS 252.247-7005, Indefinite Quantities – No Fixed Charges, and its prescription at paragraph (e) of DFARS 247.270-4, Contract Clauses, because the clause is no longer necessary.

DFARS 247.270-4(e) requires that DFARS 252.247-7005 be included in solicitations and contracts for stevedoring services when the contract is an indefinite-quantity type and will not provide for the payment of fixed charges. DFARS 252.247-7005 states, “The amount of work and services the contractor may be ordered to furnish shall be the amount the contracting officer may order from time to time. In any event, the government shall order, during the term of this contract, work or services having an aggregate value of not less than \$100.”

However, FAR 52.216-19, Order Limitations, is required to be included in all indefinite-delivery contracts, and the clause provides blank spaces to be filled-in by the contracting officer prior to solicitation to notify the offeror/contractor of the minimum and maximum values of orders to be placed under the contract. Since FAR 52.216-19 serves the same purpose as DFARS 252.247-7005, DFARS 252.247-7005 is removed, along with its prescription at DFARS 247.270-4(e).

■ **Repeal of “Indefinite Quantities – Fixed Charges” Clause:** This final rule removes DFARS 252.247-7004, Indefinite Quantities – Fixed Charges, and its prescription at paragraph (d) of DFARS 247.270-4, Contract Clauses, because the clause is no longer necessary.

DFARS 247.270-4(d) requires that DFARS 252.247-7004 be included in solicitations and contracts in indefinite-delivery, indefinite-quantity contracts for stevedoring services to notify the contractor that the government is obligated to pay the contractor the fixed monthly amount established in the contract. DFARS 252.247-7004 states “the amount of work and services the contractor may be ordered to furnish shall be the amount the contracting officer may order from time to time. In any event, the government is obligated to compensate the contractor the monthly lump sum specified in the Schedule entitled Fixed Charges, for each month or portion of a month the contract remains in effect.”

This notification is not necessary because line items are established in all contracts to describe the items being purchased, as well as the pricing, funding, and delivery information for each item. The award of the contract is the government’s agreement to pay the contractor for the line items, in accordance with the contract. Therefore, DFARS 252.247-7004 provides no additional benefit for the contractor or the government, so it is removed, along with its prescription at DFARS 247.270-4(d).

■ **Repeal of “Award Fee” Clause:** This final rule removes DFARS 252.216-7005, Award Fee, and its prescription at paragraph (e)(2) of DFARS 216.406, Contract Clauses, because the clause is no longer necessary.

DFARS 216.406(e)(2) requires that DFARS 252.216-7005 be included in solicitations when an award fee contract is contemplated and award fee contracts. DFARS 252.216-7005 states “the contractor may earn award fee from a minimum of zero dollars to the maximum amount stated in the award-fee plan in this contract. In no event will award fee be paid to the contractor for any evaluation period in which the government rates the contractor’s overall cost, schedule, and technical performance below satisfactory. The contracting officer may unilaterally revise the award-fee plan prior to the beginning of any rating period in order to redirect contractor emphasis.”

Paragraph (e)(3) of FAR 16.401, General [information about incentive contracts], specifies what must be included in the award fee plan. Paragraph (e)(3)(iv) specifies the award fee pool percentages that are available to the contractor and required for use by the government in an award fee plan – between 0% and 100% of the award fee pool; and paragraph (e)(3)(v), like

DFARS 252.216-7005, requires all award fee plans to prohibit contractors from earning any award fee when the contractor's overall cost, schedule, and technical performance is below satisfactory. Unlike DFARS 252.216-7005, the FAR does not address the unilateral ability of the contracting officer to make revisions to the award fee plan. However, FAR 16.401(a) does require award fee plans to contain reasonable and attainable targets that motivate contractors and discourage inefficiency or waste. Finally, DFARS 216.401 requires the award fee plan to be incorporated into the contract. This action provides contractors with an award fee plan that conveys all of the information required by FAR 16.401. Therefore, DFARS 252.216-7005 is unnecessary and is removed, along with its prescription at DFARS 216.402(e)(2).

■ **Class Deviation on Micro-Purchase and Simplified Acquisition Thresholds, and Special Emergency Procurement Authority:** This class deviation rescinds and supersedes Class Deviation 2018-O0013 (see the May 2018 *Federal Contracts Perspective* article “DOD Cranks It Up for Spring!”) and increases the micro-purchase threshold from \$5,000 to \$10,000.

The NDAA for FY 2018 (Public Law 115-91), Section 806, Requirements Related to the Micro-Purchase Threshold, increased the federal micro-purchase threshold in paragraph (a)(1) of Title 41 of the U.S. Code, Section 1902, Procedures Applicable to Purchases Below Micro-Purchase Threshold (41 USC 1902) by striking “\$3,000” and inserting “\$10,000”. However, Section 806 did not repeal 10 USC 2338, Micro-Purchase Threshold, which states “notwithstanding subsection (a) of Section 1902 of Title 41, the micro-purchase threshold for the Department of Defense for purposes of such section is \$5,000.” Because of this oversight, DOD was saddled with the \$5,000 micro-purchase threshold while the rest of the government had a \$10,000 micro-purchase threshold. To correct this oversight, the NDAA for FY 2019 (Public Law 115-232), Section 821, Increase in Micro-Purchase Threshold Applicable to Department of Defense, replaces the language in 10 USC 2338 with “the micro-purchase threshold for the Department of Defense is \$10,000.”

This deviation modifies the definition of “micro-purchase threshold” in DFARS 202.101, Definitions, to reflect the \$10,000 threshold, and makes changes throughout the DFARS to reflect the various exceptions to the micro-purchase threshold in Class Deviation 2018-O0013.

For more on this situation, see the March 2018 *Federal Contracts Perspective* article “CAAC Authorizes Deviation Increasing Simplified Acquisition and Micro-Purchase Thresholds” and the May 2018 *Federal Contracts Perspective* article “DOD Cranks It Up For Spring!” (which reports on the superseded deviation 2018-O0013). For more on Section 821 of the NDAA for FY 2019, see the September 2018 *Federal Contracts Perspective* article “\$717 Billion Defense Authorization Act Addresses DOD Micro-Purchase Threshold, Commercial Items.”

■ **Class Deviation on Permanent Supply Chain Risk Management Authority:** This class deviation amends DFARS 239.7300, Scope of Subpart, to remove the September 30, 2018, expiration date for DFARS subpart 239.70, Requirements for Information Relating to Supply Chain Risk. This implements the NDAA for FY 2019 (Public Law 115-232), Section 881, Permanent Supply Chain Risk Management Authority, which removed the expiration date that was originally imposed by the NDAA for FY 2011 (Public Law 111-383), Section 806, Requirements for Information Relating to Supply Chain Risk, and extended by the NDAA for FY 2013 (Public Law 112-239), Section 806, Extension of Authority Relating to Management of Supply-Chain Risk.

In addition, this class deviation requires the use of DFARS 252.239-7017, Notice of Supply Chain Risk (DEVIATION 2018-O0020), and DFARS 252.239-7018, Supply Chain Risk (DEVIATION 2018-O0020), in place of DFARS 252.239-7017 and DFARS 252.239-7018.

In a related memorandum, the Office of Defense Pricing and Contracting (formerly the Office of Defense Pricing/Defense Procurement and Acquisition Policy – see memorandum dated September 11, 2018) provides guidance on the use of the government purchase card (GPC) now that the micro-purchase threshold has been increased to \$10,000; for example, the micro-purchase threshold for construction remains \$2,000 and the micro-purchase threshold for services remains \$2,500. In addition, the memorandum specifies the conditions under which a cardholder’s single purchase limit may be raised.

■ **Reporting "Other Transactions" to the Federal Procurement Data System:** This memorandum reminds defense components that all “other transactions” (see Title 10 of the U.S. Code, Section 2371, Research Projects: Transactions Other than Contracts and Grants [10 USC 2371]) for prototype projects (see 10 USC 2371b, Authority of the Department of Defense to Carry Out Certain Prototype Projects) are to be reported to the Federal Procurement Data System (FPDS – <https://www.fpds.gov/>), and that “other transactions are reported in a specific module of FPDS by users that have other transactions reporting privileges.”

In addition, an attachment to the memorandum provides a summary of FY 2018 other transactions that have been reported to FPDS. “If your component has offices that have been or are planning to award other transactions for prototype projects and are not on the list, please have your FPDS system administrator contact Ms. Jovanka Caton, Jovanka.y.caton.civ@mail.mil, 703-607-4438, to assign the necessary privileges to your users.”

■ **Required AbilityOne® Program Training for Contracting and Purchasing Acquisition Career Fields:** This memorandum requires all personnel assigned to the contracting and purchasing acquisition career fields to complete the Defense Acquisition University’s Continuous Learning Module 023, “DAU AbilityOne Training” in FY 2019. This training may be counted toward the 80 hours of continuous learning requirements for workforce members assigned to acquisition-coded positions.

The training includes information specified in the NDAA for FY 2017 (Public Law 114-328), Section 898, Establishment of Panel on Department of Defense and AbilityOne Contracting Oversight, Accountability, and Integrity; Defense Acquisition University Training, and defines the contracting officer’s roles and responsibilities when awarding contracts in accordance with the purchasing priorities of FAR 8.002, Priorities for Use of Mandatory Sources, and FAR subpart 8.7, Acquisition from Nonprofit Agencies Employing People Who Are Blind or Severely Disabled.

USDA PROPOSES 30 NEW BIOBASED PRODUCTS

The United States Department of Agriculture (USDA) is proposing to add thirty (30) 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 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.

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

- 3201.120, Adhesives
- 3201.121, Animal Habitat Care Products
- 3201.122, Cleaning Tools
- 3201.123, Concrete Curing Agents
- 3201.124, Concrete Repair Materials
- 3201.125, Durable Cutlery
- 3201.126, Durable Tableware
- 3201.127, Epoxy Systems
- 3201.128, Exterior Paints And Coatings
- 3201.129, Facial Care Products
- 3201.130, Feminine Care Products
- 3201.131, Fire Logs and Fire Starters
- 3201.132, Folders and Filing Products
- 3201.133, Foliar Sprays
- 3201.134, Gardening Supplies and Accessories
- 3201.135, Heating Fuels and Wick Lamps
- 3201.136, Kitchenware and Accessories
- 3201.137, Other Lubricants
- 3201.138, Phase Change Materials
- 3201.139, Playground and Athletic Surface Materials
- 3201.140, Powder Coatings
- 3201.141, Product Packaging
- 3201.142, Rugs and Floor Mats
- 3201.143, Shopping and Trash Bags
- 3201.144, Soil Amendments
- 3201.145, Surface Guards, Molding, And Trim
- 3201.146, Toys and Sporting Gear
- 3201.147, Traffic and Zone Marking Paints
- 3201.148, Transmission Fluids
- 3201.149, Wall Coverings

In addition, USDA is proposing to amend the existing designated product categories of general purpose de-icers (3201.37, De-Icers); firearm lubricants (3201.38, Firearm Cleaners, Lubricants, and Protectants); laundry products (3201.40, Laundry Products); and water clarifying agents (3201.99, Water and Wastewater Treatment Chemicals). Since USDA finalized the designation of each of these product categories (2012 for water and wastewater treatment chemicals, 2008 for the others), USDA has obtained additional information on products within these four categories. Therefore, USDA is now proposing amendments to these four categories to more closely align the existing categories with the data gathered since the categories were originally designated.

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 November 13, 2018, identified with the Regulatory Information Number (RIN) 0599-AA26, by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) email: biopREFERRED_support@amecfw.com; or (3) mail or commercial/hand delivery to: Karen Zhang, USDA, Office of Procurement and Property Management, Room 1640, USDA South Building, 1400 Independence Avenue SW, Washington, DC 20250.

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

FEDERAL MINIMUM WAGE INCREASED TO \$10.60/HOUR FOR 2019

The Department of Labor (DOL) has announced that the applicable minimum wage rate to be paid to workers performing work on or in connection with federal contracts covered by Executive Order 13658, Establishing a Minimum Wage for Contractors, beginning January 1, 2019, is increased from \$10.35 to \$10.60 per hour.

Executive Order 13658 was signed by President Obama on February 12, 2014 (see the March 2014 *Federal Contracts Perspective* article “President Issues Executive Order Mandating \$10.10/Hour Minimum Wage”), which raised the hourly minimum wage paid by contractors to workers performing work on covered federal contracts to \$10.10 per hour, beginning January 1, 2015. Further, the executive order stated that the Department of Labor (DOL) would adjust the minimum wage annually (beginning January 1, 2016) to reflect inflation during the year as reflected in the Consumer Price Index (CPI) for Urban Wage Earners and Clerical Workers.

In 2015, the DOL determined that the CPI increased by 0.345% in 2015, so the minimum wage became \$10.15 per hour beginning January 1, 2016 (see the October 2015 *Federal Contracts Perspective* article “Federal Minimum Wage Increased to \$10.15/Hour for 2016”).

In 2016, the DOL determined that the CPI increased by 0.278% in 2016, so the minimum wage became \$10.20 per hour beginning January 1, 2017 (see the October 2016 *Federal Contracts Perspective* article “Federal Minimum Wage Increased to \$10.20/Hour for 2017”).

In 2017, the DOL determined that the CPI index increased by 1.691% in 2017, so the minimum wage became \$10.35 per hour beginning January 1, 2018 (see the October 2017 *Federal Contracts Perspective* article “Federal Minimum Wage Increased to \$10.35/Hour For 2018”).

Now, the DOL has determined that the CPI index increased by 2.337% in 2018, and this produces a minimum wage of \$10.60 per hour effective January 1, 2019.

In addition, the required minimum cash wage that must be paid to tipped employees performing work on or in connection with covered contracts is increased from \$7.25 to \$7.40 per

hour (\$4.90 per hour was the original minimum cash wage for tipped employees established in the executive order).

In a related rule change, the DOL is amending its regulations at Title 29 of the Code of Federal Regulations (CFR), Part 10, Establishing a Minimum Wage for Contractors, Section 10.4, Exclusions (29 CFR 10.4), to implement Executive Order 13838, Exemption from Executive Order 13658 for Recreational Services on Federal Lands, which exempts from the federal minimum wage requirements of Executive Order 13658 contracts for seasonal recreational services and seasonal recreational equipment rental when such services and equipment are offered to the general public on federal lands.

This final rule adds a paragraph (g) to 29 CFR 10.4, which contains language identical to that which Section 2 of Executive Order 13838 inserted to amend Executive Order 13658. New paragraph (g) is as follows: “(g) *Contracts in connection with seasonal recreational services and seasonal recreational equipment rental offered for public use on federal lands.* This part shall not apply to contracts or contract-like instruments entered into with the federal government in connection with seasonal recreational services or seasonal recreational equipment rental for the general public on federal lands, but this exemption shall not apply to lodging and food services associated with seasonal recreational services. Seasonal recreational services include river running, hunting, fishing, horseback riding, camping, mountaineering activities, recreational ski services, and youth camps.”

Section 1 of Executive Order 13838 provided the following explanation for exempting these service contracts from Executive Order 13658: “Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors), established a minimum wage to be paid by parties who contract with the federal government and applies to outfitters and guides operating on federal lands. These individuals often conduct multiday recreational tours through federal lands, and may be required to work substantial overtime hours. The implementation of Executive Order 13658 threatens to raise significantly the cost of guided hikes and tours on federal lands, preventing many visitors from enjoying the great beauty of America’s outdoors. Seasonal recreational workers have irregular work schedules, a high incidence of overtime pay, and an unusually high turnover rate, among other distinguishing characteristics. As a consequence, a minimum wage increase would generally entail large negative effects on hours worked by recreational service workers. Thus, applying Executive Order 13658 to these service contracts does not promote economy and efficiency in making these services available to those who seek to enjoy our federal lands.”

VA RESUMES CLEANING UP THE VAAR

The Department of Veterans Affairs (VA) has issued the third, fourth, and fifth final rules that conduct housekeeping on the VA Acquisition Regulation (VAAR) to revise or remove any policy that has been superseded by changes in the Federal Acquisition Regulation (FAR); remove any procedural guidance that is internal to the VA; incorporate new regulations and policies; correct inconsistencies within the VAAR; remove redundant and duplicate material already covered by the FAR; delete outdated material or information; and renumber VAAR text, clauses, and provisions to conform to the FAR format, numbering, and arrangement.

The following are summaries of the three final rules amending the VAAR:

■ **Contract Cost Principles and Procedures; and Protests, Disputes, and Appeals:** This rule, the third increment of the VAAR overhaul, finalizes, with minor changes, the rule that proposed to amend VAAR part 831, Contract Cost Principles and Procedures, and VAAR part 833, Protests, Disputes, and Appeals. The following are the significant changes made by this final rule:

– VAAR part 831

- The title of VAAR subpart 831.70 is changed from “Contract Cost Principles and Procedures,” to “Contract Cost Principles and Procedures for Veterans Services under 38 USC Chapter 31.” This new title more accurately reflects the subject matter.
- VAAR 831.7000, Scope of Subpart, is revised to clarify that the cost principles apply to the negotiation of prices under fixed-price contracts as well as to costs under cost-reimbursement contracts, and to contracts with educational institutions as well as those with commercial and non-profit organizations.
- New VAAR 831.7000-1, Definitions, contains the definitions of four terms used in VAAR part 831: “Chapter 31,” “Consumable Instructional Supplies,” “Similarly Circumstanced Non-Veteran Student,” and “Work Adjustment Training.”
- The title of VAAR 831.7001 is changed from “Allowable Costs Under Cost Reimbursement Vocational Rehabilitation and Education Contracts or Agreements” to “Allowable Costs and Negotiated Prices Under Vocational Rehabilitation and Education Contracts.” The new title more accurately describes the subject matter of VAAR 831.7001.
- VAAR 831.7001-1, Tuition, is amended to simplify the limitations on tuition and enrollment fees that may be paid under the programs authorized by Title 38 of the U.S Code, Chapter 31 (38 USC Chapter 31), Training and Rehabilitation for Veterans with Service-Connected Disabilities, to standardize the term “veteran student” for the beneficiary of the Chapter 31 programs.
- VAAR 831.7001-2, Special Services or Courses, is amended to clarify terms for services or courses that are supplementary to those customarily provided to similarly circumstanced non-veteran students.
- VAAR 831.7001-3, Books, Supplies, and Equipment Required to be Personally Owned, is amended to clarify the limitations on fees that may be paid for these and other miscellaneous items under the Chapter 31 program, and to further reorganize the section by combining limits that apply to several items or categories. This reorganization moves and combines certain paragraphs under more applicable category headings, and streamlines the language under paragraphs (a) through (e) and removes paragraphs (f) through (k).

– VAAR part 833

- VAAR subpart 833.1, Protests

- VAAR 833.102, General, is deleted because it contains guidance that is internal operational procedures of the VA. This guidance will be incorporated into the VA Acquisition Manual (VAAM).
- VAAR 833.103, Protests to VA, is renumbered as VAAR 833.103-70 to comply with FAR numbering conventions. In addition, outdated information is deleted from the renumbered VAAR 833.103-70, and new language is added to paragraph (a) that: (1) update information for where an interested party may protest to the contracting officer; or, (2) as an alternative, may request independent review above the level of the contracting officer; or (3) where in the VA interested parties may appeal a contracting officer’s decision on a protest.

In addition, paragraph (b)(2), which addresses protests of small business size standards and standard industrial classifications, is amended to add the following sentence: “Pursuant to Public Law 114-328, SBA [Small Business Administration] will also hear cases related to size, status, and ownership and control challenges under the VA Veterans First Contracting Program.”

New paragraph (b)(6), which addresses contracts for materials, supplies, articles, and equipment exceeding \$15,000, provides that challenges of the legal status of a firm as a regular dealer or manufacturer are determined solely by the procuring agency, the SBA (if a small business is involved), and the Secretary of Labor.

Paragraph (b)(7), which addresses subcontractor protests, is amended to clarify that “the contracting agency will not consider subcontractor protests except where VA determines it is in the interest of the government.”

- VAAR 833.104, Protests to GAO [Government Accountability Office], is removed since it contains procedural guidance that is internal to VA and the FAR provides adequate notice to potential offerors. The removed text will be incorporated into to the VAAM.
- VAAR 833.106, Solicitation Provisions, is renumbered as VAAR 833.106-70 to comply with FAR numbering conventions.

- VAAR subpart 833.2, Disputes and Appeals

- VAAR 833.209, Suspected Fraudulent Claims, is revised to clarify that the contracting officer may not initiate any collection, recovery, or other settlement action concerning suspected fraudulent claims reported to the Office of the Inspector General (OIG), and referred to the Department of Justice, without first obtaining the concurrence of the U.S. Attorney concerned, through the OIG.

- Paragraphs (a) and (b) of VAAR 833.211, Contracting Officer’s Decision, are deleted because the language is redundant to that in FAR 33.211. In addition, paragraph (c) is renumbered as paragraph (a) to align with the FAR and revised to clarify that “for purposes of appealing a VA contracting officer’s final decision, the Board of Contract Appeals referenced in FAR 33.211(a) and elsewhere in this [VAAR] subpart [833.2] is the Civilian Board of Contract Appeals [CBCA].…”
- VAAR 833.212, Contracting Officer’s Duties Upon Appeal, is removed because it contains procedural guidance that is internal to VA. The removed text will be updated and incorporated into the VAAM.
- Paragraph (b) of VAAR 833.213, Obligation to Continue Performance, is revised to clarify that, in the event of a dispute not arising under, but relating to, the contract, if the contracting officer directs continued performance and considers providing financing for such continued performance, the contracting officer shall contact the Office of General Counsel for advice prior to requesting higher level approval for or authorizing such financing. In addition, the contracting officer is required to document in the contract file any required approvals and to explain how the government’s interest would be properly secured with respect to such financing.
- VAAR 833.214, Alternative Dispute Resolution (ADR), is revised to clarify that guidance for ADR procedures may be obtained at the CBCA website at <http://www.cbca.gsa.gov>.

No comments were received on the proposed rule, so the proposed rule is adopted as final with minor stylistic and grammatical edits.

■ **Subcontracting Policies and Procedures; and Government Property:** This rule, the fourth increment of the VAAR overhaul, finalizes, with minor changes, the rule that proposed to add VAAR part 844, Subcontracting Policies and Procedures, and VAAR subpart 845.4, Title to Government Property. The following are the significant changes made by this final rule:

- VAAR part 844. This new part incorporates VA’s additional requirements for: (1) providing its consent to subcontract; (2) items that should be evaluated as a part of a Contractor’s Purchasing Systems Review (CPSR); and (3) establishing that contractors should determine whether subcontract items meet the FAR definition of a commercial item.
- New VAAR subpart 844.2, Consent to Subcontracts, consists of VAAR 844.202-2, Considerations [contracting officer must take into account]. VAAR 844.202-2 consists of one paragraph, (a)(14), which, in addition to the thirteen considerations specified in FAR 44.202-1, requires a contracting officer, before consenting to a subcontract where other than the lowest price is the basis for selection, to consider whether “the contractor adequately substantiated the selection as being fair, reasonable, and representing the best value to the government.”

- New VAAR subpart 844.3, Contractor's Purchasing Systems Reviews, consists of VAAR 844.303, Extent of Review. VAAR 844.303 consists of three paragraphs that supplement FAR 44.303, which lists 11 factors that must be given “special attention” by the administrative contracting officer (ACO) during a CSPR.

FAR 44.303(f) states that the ACO must give special attention to “policies and procedures pertaining to small business concerns, including small disadvantaged, women-owned, veteran-owned, HUBZone, and service-disabled veteran-owned small business concerns...” In addition to FAR 44.303(f), new VAAR 844.303(f) requires the ACO to give special attention to “policies and procedures pertaining to the use of VA-verified Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) and Veteran-Owned Small Businesses (VOSBs) and utilization in accordance with [VAAR] subpart 819.70 [Veteran-Owned and Operated Small Businesses] and the Veterans First Contracting Program.”

There are no corresponding paragraphs (l) and (m) in FAR 44.303; these two paragraphs constitute additional “special attention” factors that the VA ACO must consider during a CSPR. Paragraph (l) specifies that special attention be given to “documentation of commercial item determinations to ensure compliance with the definition of ‘commercial item’ in FAR 2.101 [Definitions]; and, for acquisitions involving electronic parts, paragraph (m) specifies that special attention be given “that the contractor has implemented a counterfeit electronic part detection and avoidance system to ensure that counterfeit electronic parts do not enter the supply chain.”

- New VAAR subpart 844.4, Subcontracts for Commercial Items and Commercial Components, consists of VAAR 844.402, Policy Requirements, which consists of paragraph (a)(3) (there is no corresponding FAR 44.402(a)(3)). Paragraph (a)(3) requires that contractors determine, when deciding which contract clauses to include in subcontracts, “whether a particular subcontract item meets the FAR definition of a commercial item. This requirement does not affect the contracting officer’s responsibilities or determinations made under FAR 15.403-1(c)(3) [Prohibition on Obtaining Certified Cost or Pricing Data (10 USC 2306a and 41 USC Chapter 35)].
- VAAR part 845, consists of VAAR subpart 845.4, Title to Government Property, which consists of VAAR 845.402, Title to Contractor-Acquired Property, which consists of VAAR 845.402-70, Policy. VAAR 845.402-70 implements and supplements FAR 45.402 by addressing procedures for contractors to: (1) document their acquisition of property for use in the service of VA contracts; (2) address the transfer of title to the government of contractor-acquired property; and (3) outline the procedures for the use of such property on a successor contract.

Paragraph (a) provides that “for other than firm-fixed-price contracts, contractor-acquired property items not anticipated at time of contract award, or not otherwise specified for delivery on an existing line item, shall, by means of a contract modification, be specified for delivery to the government on an added contract line item. The value of such contractor-acquired property item shall be recorded at the original purchase cost.”

Paragraph (b) provides that “following delivery and acceptance by the government of contractor-acquired property items, if these items are to be retained by the contractor for

continued use under a successor contract, these items become government-furnished property (GFP). The items shall be added to the successor contract as GFP by contract modification.”

Paragraph (c) provides that “individual contractor-acquired property items should be recorded in the contractor’s property management system at the contractor’s original purchase cost.”

Paragraph (d) provides that “all other contractor inventory that is excess to the needs of the contract shall be disposed of in accordance with FAR subpart 45.6 [Reporting, Reutilization, and Disposal].”

No comments were received on the proposed rule, so the proposed rule is adopted as final with minor formatting and grammatical edits.

■ **Taxes; Quality Assurance; Transportation; and Special Procurement Controls:** This rule, the fifth increment of the VAAR overhaul, finalizes, with minor changes, the rule that proposed to amend VAAR part 829, Taxes; VAAR part 846, Quality Assurance; VAAR part 847, Transportation; VAAR part 870, Special Procurement Controls; and corresponding clauses in VAAR part 852, Solicitation Provisions and Contract Clauses.

– VAAR part 829, Taxes

- VAAR 829.202-70, Tax Exemptions for Alcohol Products, is redesignated as VAAR 829.203-70 to comply with FAR numbering conventions. In addition, paragraph (d) is removed since there is no “free of tax” provision for beer in the Department of the Treasury regulation.
- VAAR 829.302, Application of State and Local Taxes to the Government, is removed because it is internal procedural guidance to the contracting officer. The removed text is moved it to the VAAM.
- VAAR 829.302-70, Purchases Made from Patients’ Funds, which prescribes VAAR 852.229-70, Sales or Use Taxes, is removed because it is redundant of paragraph (k) of FAR 52.212-4, Contract Terms and Conditions – Commercial Items, which requires contractors to include “all applicable federal, state, and local taxes and duties” in the contract price. While VA uses the personal funds of patients to maintain fiscal controls and accountability, such controls are administrative in nature and unrelated to contracting.
- VAAR 829.303, Application of State and Local Taxes to Government Contractors and Subcontractors, is added to delegate to the Head of the Contracting Activity (HCA), without power of redelegation, the authority to make the determination prescribed in FAR 29.303(a) to designate a prime contractor or subcontractors as an agent of the government for the purpose of claiming immunity from state or local sales or use taxes.

- VAAR part 846, Quality Assurance
 - New VAAR subpart 846.1, General, consists of VAAR 846.101, Definition, which includes the following definition of “rejected goods” since it is the subject of VAAR 852.246-71, Rejected Goods: “supplies and/or equipment failing to meet contractual terms and conditions and/or generally accepted quality standards that may be returned by the government at the contractor’s risk and expense.”
 - VAAR subpart 846.3, Contract Clauses
 - VAAR 846.302, Fixed-Price Supply Contracts, is redesignated as VAAR 846.370, Clauses for Supplies, Equipment or Perishable Goods, to comply with the FAR numbering conventions.
 - VAAR 846.302-70, Guarantee Clause, which consists of the prescription for VAAR 852.246-70, Guarantee, is removed because there are sufficient FAR warranty clauses that could be used, such as FAR 52.246-19, Warranty of Systems and Equipment Under Performance Specifications or Design Criteria.
 - VAAR 846.302-71, Inspection, is redesignated as VAAR 846.370-1, Rejected Goods. It contains the prescription for VAAR 852.246-71, Rejected Goods, and clarifies a contractor’s obligations to remove goods rejected by the government.
 - VAAR 846.302-72, Frozen Processed Foods, is redesignated as VAAR 846.370-2. It contains the prescription for VAAR 852.246-72, Frozen Processed Foods, and describes the requirements for safe handling of frozen foods.
 - VAAR 846.302-73, Noncompliance with Packaging, Packing and/or Marking Requirements, is redesignated as VAAR 846.370-3. It contains the prescription for VAAR 852.246-73, Noncompliance with Packaging, Packing and/or Marking Requirements, and describes corrective steps for compensating the government in the case of noncompliance.
 - Paragraph (b) of VAAR 870.111-3, Contract Clauses, is redesignated as VAAR 846.370-4, Purchase of Shellfish, to comply with the FAR numbering conventions. VAAR 846.370-4 contains the prescription for VAAR 852.246-70, Purchase of Shellfish (redesignated from VAAR 852.270-3), and describes the requirements for the safe handling of shellfish.
 - VAAR subpart 846.4, Government Contract Quality Assurance
 - VAAR 846.408, Single-Agency Assignments of Government Contract Quality Assurance, is removed because it contains no text and is unnecessary.

- Paragraph (a) of VAAR 846.408-70, Inspection of Subsistence, is removed because FAR 46.408, Single-Agency Assignments of Government Contract Quality Assurance, identifies the Food and Drug Administration, the Department of Agriculture, and the National Maritime Fisheries Service of the Department of Commerce as the entities to perform inspection. Paragraph (b) is redesignated as paragraph (a). Paragraph (c) is removed and transferred to the VAAM because it contains procedural guidance that is internal to VA. Finally, paragraph (d) is redesignated as paragraph (b) and amended to simplify the contractor's responsibilities.
- VAAR 846.408-71, Waiver of USDA Inspection and Specifications, is removed since no other agencies still require this type of inspection for subsistence.
- VAAR 846.471, Determination Authority, is removed because the authority it grants the contracting officer is provided in VAAR 846.470, Use of Commercial Organizations for Inspections and Grading Services. VAAR 846.471 is retitled "Food Service Equipment" and the text of VAAR 870.115, Food Service Equipment, is moved here to comply with the FAR numbering conventions.
- VAAR 846.472, Inspection of Repairs for Properties Under the Loan Guaranty Program and Direct Loan Programs, and its two subsections, VAAR 846.472-1, Repairs of \$1,000 or Less, and VAAR 846.472-2, Repairs in Excess of \$1,000, are removed because they are unnecessary given that a private contractor performs such inspection and repair functions on VA's behalf.
- VAAR subpart 846.7, Warranties
 - VAAR 846.710, Contract Clauses, is removed because it prescribes a FAR clause: FAR 52.246-21, Warranty of Construction.
 - VAAR 846.710-70, Special Warranties, is removed because the clause it prescribes, VAAR 852.246-74, Special Warranties, duplicates FAR coverage and is removed.
 - VAAR 846.710-71, Warranty for Construction – Guarantee Period Services, is replaced by new VAAR 846.702-70, Guarantee Period Services and Specifications, which states VA's policy regarding guarantee period services and prescribes VAAR 852.246-75, Warranty of Construction – Guarantee Period Services, in all solicitations and contracts for construction that include FAR 52.246-21.
- VAAR part 847, Transportation
 - New VAAR subpart 847.2, Contracts for Transportation or for Transportation-Related Services, consists of VAAR 847.207, Solicitation Provisions, Contract Clauses, and Special Requirements. VAAR 847.207 consists of the following

subsections: (1) VAAR 847.207-8, Government Responsibilities, which provides guidance to contracting officers for VA transportation contracts and subsequent payments on those contracts; and (2) VAAR 847.207-70, VA Solicitation Provisions, Contract Clauses, and Special Requirements, which provides guidance on contractual requirements for insurance provisions and contractor personnel performing on VA transportation contracts.

- VAAR subpart 847.3, Transportation in Supply Contracts
 - VAAR 847.302, Place of Delivery – F.o.b. Point, is added. It prescribes the use of VAAR 852.247-71, Delivery Location, in supply contracts when it is necessary to specify delivery locations, and states that the clause “may reference an attachment which lists various delivery locations and other delivery details (*e.g.*, quantities to be delivered to each location, etc.)”
 - VAAR 847.303, Standard Delivery Terms and Contract Clauses, and its subsections VAAR 847.303-1, F.o.b. Origin, and VAAR 847.303-70, F.o.b. Origin, Freight Prepaid, Transportation Charges to be Included on the Invoice, are removed and relocated to the VAAM because they include internal VA guidance.
 - Under VAAR 847.305, Solicitation Provisions, Contract Clauses, and Transportation Factors, are the following:
 - VAAR 847.305-10, Packing, Marking, and Consignment Instructions, is added. It specifies consignment instructions and provides prescriptions for two new clauses: VAAR 852.247-72, Marking Deliverables; and VAAR 852.247-73, Packing for Domestic Shipment.
 - VAAR 847.305-70, Potential Destinations but Quantities Unknown, is added. It prescribes VAAR 852.247-70, Determining Transportation Costs for Evaluation of Offers, when the contracting officer contracts, on an f.o.b. origin basis, with multiple bidders to provide items directly to VA field installations.
 - VAAR 847.305-71, VA Contract Clauses, is added. It prescribes two new clauses: VAAR 852.247-74, Advance Notice of Shipment; and VAAR 852.247-75, Bills of Lading. These new clauses will ensure proper receipt and documentation of shipments.
 - VAAR 847.306-70, Transportation Payment and Audit, is removed and replaced with VAAR 847.306-70, Records of Claims. This new section recommends that the contracting officer use an offeror’s record of claims involving loss or damage as an evaluation factor or subfactor for VA transportation contracts.

- VAAR part 852, Solicitation Provisions and Contract Clauses
 - VAAR 852.229-70, Sales or Use Taxes, is removed because it is redundant of paragraph (k) of FAR 52.212-4, Contract Terms and Conditions – Commercial Items, which requires contractors to include all applicable federal, state, and local taxes and duties in the contract price.
 - VAAR 852.246-70, Guarantee, is removed because it is redundant of several warranties clauses in the FAR.
 - The title of VAAR 852.246-71, Inspection, is changed to “Rejected Goods” to more accurately reflect its content, and to revise the prescription citation from VAAR 846.302-71 to VAAR 846.370-1 (see above).
 - VAAR 852.246-72, Frozen Processed Foods, is amended to revise the prescription citation from VAAR 846.302-72 to VAAR 846.370-2 (see above).
 - VAAR 852.246-73, Noncompliance with Packaging, Packing, and/or Marking Requirements, is amended to revise the prescription citation from VAAR 846.302-73 to VAAR 846.370-3 (see above).
 - VAAR 852.246-74, Special Warranties, is removed because it duplicates the coverage in several FAR warranty clauses (see above).
 - VAAR 852.246-75, Warranty of Construction – Guarantee Period Services, is amended to revise the prescription citation from VAAR 846.710-71 to VAAR 846.702-70 (see above).
 - VAAR 852.246-76, Purchase of Shellfish, is added. It was VAAR 852.270-3, but it is moved and renumbered to conform to the FAR numbering conventions (see below).
 - VAAR 852.247-70 is retitled “Determining Transportation Costs for Evaluation of Offers” to indicate it is applicable to negotiated as well as sealed bid contracts. It was previously titled “Determining Transportation Costs for Bid Evaluation.”
 - VAAR 852.247-71, Delivery Location, is added to ensure that the proper delivery locations are included in the contract, for accountability, tracking, and delivery.
 - VAAR 852.247-72, Marking Deliverables, is added to ensure that packages are properly marked for tracking, delivery, and acceptance.
 - VAAR 852.247-73, Packing for Domestic Shipment, is added to ensure acceptance by common carriers and safe delivery at destination.

- VAAR 852.247-74, Advance Notice of Shipment, is added for use when the f.o.b. point is destination, and special government assistance is required in the delivery or receipt of the items.
 - VAAR 852.247-75, Bills of Lading, is added to define when a commercial or government bill of lading is to be used when shipments of deliverable items under the contract are f.o.b. origin.
 - VAAR 852.270-2, Bread and Bakery Products – Quantities, is deleted since variations in quantities are adequately covered in FAR subpart 11.7, Variation in Quantity, and in its related clauses.
 - VAAR 852.270-3, Purchase of Shellfish, is moved and redesignated as VAAR 852.246-76 to comply with the FAR numbering conventions (see above).
- VAAR Part 870, Special Procurement Controls, is removed because its contents have been either deleted or moved elsewhere in the VAAR. The removed sections are:
- VAAR 870.111-3, Contract Clauses, because: (1) the clause prescribed in paragraph (a), VAAR 852.270-2, Bread and Bakery Products – Quantities, is removed since it is unnecessary (see above); and (2) the clause prescribed in paragraph (b), VAAR 852.270-3, Purchase of Shellfish, has been moved and redesignated as VAAR 852.246-76 to comply with the FAR numbering conventions (see above).
 - VAAR 870.111-5, Frozen Processed Food Products, is moved and redesignated as VAAR 846.370-2 to comply with the FAR numbering conventions (see above).
 - VAAR 870.115, Food Service Equipment, is moved and redesignated as VAAR 846.471 to comply with the FAR numbering conventions (see above).

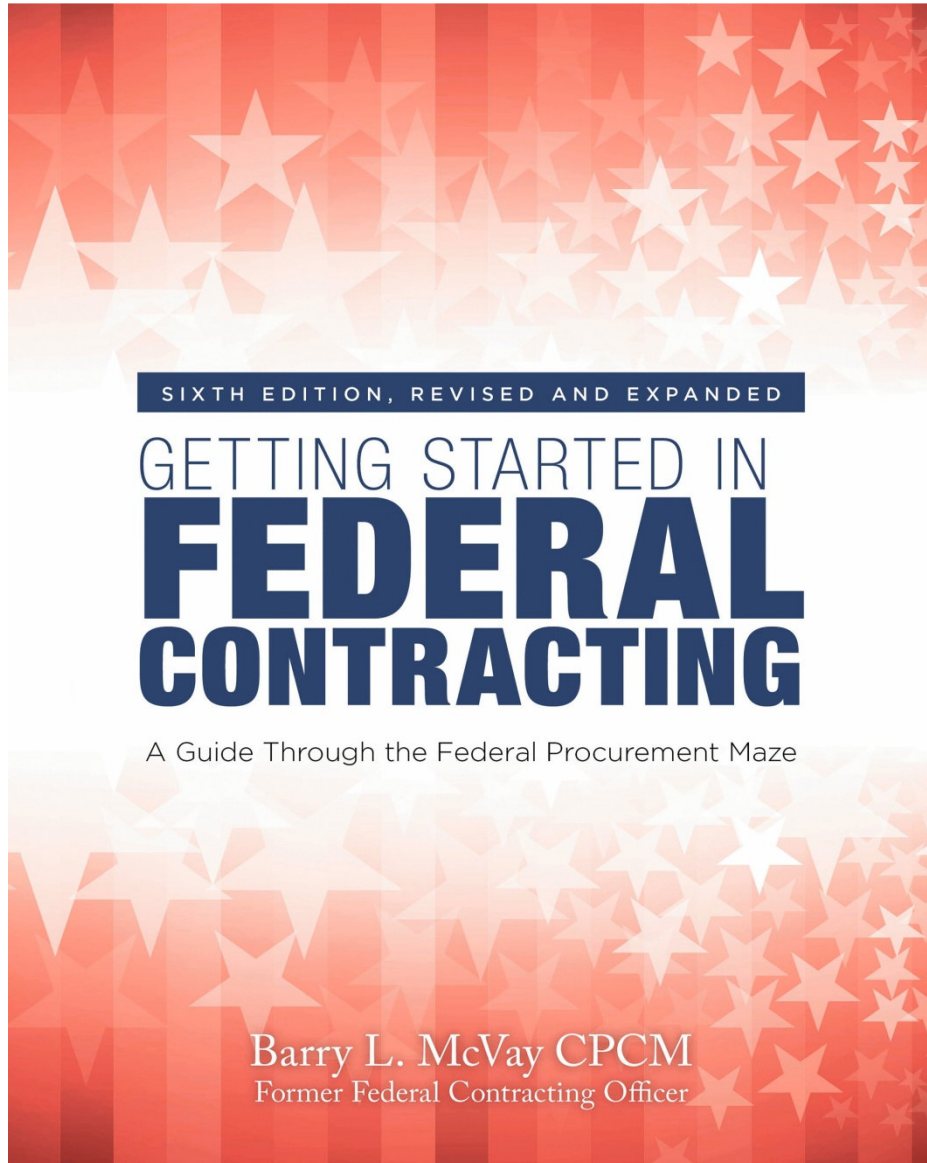
No comments were received on the proposed rule, so the proposed rule is adopted as final with minor formatting and grammatical edits.

For more on all three of the proposed rules that resulted in these final rules, see the May 2018 *Federal Contracts Perspective* article “Phase II of VAAR Update Finalized.”

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