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FAR REISSUED, POSTED ON ACQUISITION.GOV

After 13 years and 101 Federal Acquisition Circulars (FACs), the General Services Administration (GSA), which prints, publishes, and distributes the Federal Acquisition Regulation (FAR), has reissued the FAR. The Fiscal Year (FY) 2019 FAR will be available for viewing and download at https://www.acquisition.gov/browsefar.

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Periodically, the FAR is reissued for administrative clean-up. After 101 sets of FAR amendments, GSA (along with the Department of Defense and the National Aeronautics and Space Administration, which jointly administer the FAR) decided it was finally time to issue a fresh copy of the FAR.

Although the reissue does not alter the language of the FAR, it does contain several administrative updates to improve the user experience and increase accessibility. The following updates are to features that do not appear in the Code of Federal Regulations (CFR) (the FAR is Chapter 1 of Title 48 of the CFR, Federal Acquisition Regulations System):

■ Future FACs will be renumbered so that the next issued FAC will be FAC 2019-01. This will replace the prior numbering system, which used FACs 2005-01 through FAC 2005-101.

■ The looseleaf FAR will no longer be offered by the Government Printing Office. Instead, a List of Sections Affected (LSA) will be included on **https://www.acquisition.gov** and updated for each FAC.

■ The provision and clause matrix in FAR 52.301, Solicitation Provisions and Contract Clauses (Matrix), will continue to be available in the PDF version of the FAR. However, **https://www.acquisition.gov** will be releasing a new "Smart Matrix." The new FAR Smart Matrix will include a filterable clause matrix, file saving options, improved search capabilities, as well as hyperlinked clauses, provisions and prescriptions to the current version of the FAR.

■ The FAR will be available in HTML, XML, Word, and PDF formats. Users intending to print the FAR should use the Adobe PDF file.

According to the GSA notice, "Although these changes do not alter the Code of Federal Regulations, they will provide smoother access to the FAR for new and experienced users alike."

DOD KEEPS DFARS CLEANUP ROLLING ALONG

The Department of Defense (DOD) is continuing its cleansing of the DOD FAR Supplement (DFARS), which has been going on for months. In October, DOD removed two clauses and one provision, updated one clause by removing an outdated requirement, finalized a proposed rule, proposed two other rules, withdrew a proposed rule, issued a class deviation that replaces another class deviation, and issued a memorandum providing directions to contracting officers. Whew!

■ **Repeal of "Acquisition Streamlining" Clause:** This final rule removes DFARS 252.211-7000, Acquisition Streamlining, and its prescription at DFARS 211.002-70, Contract Clause, because the clause is unnecessary.

DFARS 252.211-7000 was required to be included in all solicitations and contracts for systems acquisition programs. Paragraph (b) required contractors to "(1) prepare and submit acquisition streamlining recommendations in accordance with the statement of work of this contract; and (2) format and submit the recommendations as prescribed by data requirements on the contract data requirements list of this contract." Paragraph (c) gave the government the right to accept, modify, or reject the contractor's recommendations. Finally, paragraph (d) required the contractor to include this clause in all subcontracts valued over $1,500,000 that were awarded in the performance of the contract.

FAR subpart 7.1, Acquisition Plans, includes acquisition streamlining and industry engagement as considerations to be made when preparing a written acquisition plan. Since FAR subpart 7.1 addresses acquisition streamlining, DFARS 252.211-7000 is unnecessary and removed, along with its prescription at DFARS 211.002-70.

■ **Repeal of "Option for Supervision and Inspection Services" Clause:** This final rule removes DFARS 252.236-7009, Option for Supervision and Inspection Services, and its prescription in paragraph (a) of DFARS 236.609-70, Additional Provision and Clause, because the clause is no longer necessary.

DFARS 252.236-7009 was required to be included in solicitations and contracts for architect-engineer services when the contract was expected to be fixed price, and supervision and inspection services by the architect-engineer contractor might be required during construction. The clause stated that the government could direct the contractor to perform any or all of the supervision and inspection services for the construction contract, and that the government could direct the contractor to perform the supervision and inspection services up to six months after satisfactory completion and acceptance of the work under the architect-engineer contract.

However, the need for architect-engineers to perform supervision and inspection services during construction is uncommon. When it is necessary, an option that accurately describes the scope of services can be included in the contract in accordance with FAR subpart 17.2, Options. Contracting activities can better address these services, to the extent they are needed, within the scope of a contract. As such, DFARS 252.236-7009 is unnecessary and removed, along with its prescription at DFARS 236.609-70 (which is now retitled as "Additional Provision").

Vivina McVay, Editor-in Chief

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■ **Repeal of "Bonds or Other Security" Provision:** This final rule removes DFARS 252.228-7004, Bonds or Other Security, and its prescription at DFARS 228.170, Solicitation Provision, because the provision is no longer necessary.

While contractors on certain construction contracts are required to post bonds that guarantee performance of the contract and payment to subcontractors and suppliers, bonds are not required for contracts for demolition, dismantling, or removal of improvements. However, FAR 37.302, Bonds and Other Security, permits the contracting officer to require a performance bond or other security, in accordance with FAR 28.103, Performance and Payment Bonds for Other than Construction Contracts, on such contracts when it is necessary to ensure completion of the work or protect property or payment of suppliers.

When a DOD contracting officer decided performance bonds or other securities are necessary for contracts that involve dismantling, demolition, or removal of improvements, DFARS 252.228-7004 was required to be included in the solicitation. The provision required offerors to furnish a bid guarantee with their bid; required the successful offeror to provide the government with the performance bond and any payment due within a specified period after receiving the notice of award, and identified the acceptable sureties that can be used to support the bond (those listed in Treasury Department Circular 570 – **https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570_a-z.htm**).

FAR 52.228-1, Bid Guarantee, and FAR 52.228-16, Performance and Payment Bonds – Other than Construction, provide the information and requirements contained in DFARS 252.228-7004, and they can be included in solicitations and contracts that involve dismantling, demolition, or removal of improvements. Since FAR 52.228-1 and FAR 52.228-16 can be used to provide the same information as DFARS 252.228-7004, DFARS 252.228-7004 is unnecessary and removed, along with its prescription at DFARS 228.170.

■ **Update of "Section 8(a) Direct Award" Clause:** This final rule deletes an obsolete requirement in paragraph (c)(2) of DFARS 252.219-7009, Section 8(a) Direct Award, which stated that the 8(a) contractor "will not subcontract the performance of any of the requirements of this contract without the prior written approval of the SBA [Small Business Administration] and the contracting officer." However, this requirement no longer exists in SBA's regulations on the 8(a) Business Development Program in Title 13 of the Code of Federal Regulations (CFR), part 124, 8(a) Business Development/Small Disadvantaged Business Status Determinations (13 CFR part 124), so paragraph (c)(2) is removed.

■ **Mentor-Protégé Program Modifications:** This finalizes, without changes, the rule that proposed to amend DFARS Appendix I, Policy and Procedures for the DOD Pilot Mentor Protégé Program, to implement the NDAA for FY 2017 (Public Law 114-328), paragraph (b) of Section 1813, Improving Contractor Compliance, and Section 1823, Amendments to the Mentor-Protégé Program of the Department of Defense, which revise the definition and requirements associated with affiliation between mentor firms and their protégé firms, and add new types of assistance for mentor firms to provide to their protégé firms.

The final rule makes the following changes to DFARS Appendix I:

– To DFARS I–101, Definitions, is added the definition of "affiliation" that is in Section 1823 ("With respect to a relationship between a mentor firm and a protégé firm, a

relationship described under 13 CFR [Code of Federal Regulations] 121.103 [How does SBA (Small Business Administration) determine affiliation?]").

– To DFARS I–102, Participant Eligibility, is added new paragraph (e), which specifies that a mentor firm may not enter into an agreement with a protégé firm if the SBA has made a determination of affiliation. In addition, paragraph (e) addresses the conditions under which DOD will request a determination from SBA regarding affiliation.

– To DFARS I–106, Development of Mentor-Protégé Agreements, is added paragraph (d)(6)(v), which adds women's business centers as a form of assistance that a mentor firm can obtain for a protégé firm.

– To DFARS I–107, Elements of a Mentor-Protégé Agreement, is added paragraph (h) to implement the requirement in Section 1813 for mentor-protégé agreements to include the assistance the mentor firm will provide to the protégé firm in understanding federal contract regulations, including the FAR and DFARS.

One respondent submitted a comment on the proposed rule but it was not adopted, so the proposed rule is finalized without changes. For more on the proposed rule, see the June 2018 ***Federal Contracts Perspective*** article "DOD Unleashes a Torrent of Rules, Removes Unnecessary DFARS Clauses and Provisions."

■ **Amendments Related to General Solicitations:** This rule proposes to amend DFARS part 234, Major System Acquisition, and DFARS part 235, Research and Development Contracting, to implement the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Public Law 115-91), Section 221, Expansion of Definition of Competitive Procedures to Include Competitive Selection for Award of Science And Technology Proposals, and Section 861, Contract Authority for Advanced Development of Initial or Additional Prototype Units.

Paragraph (2) of Title 10 of the U.S. Code, Section 2302, Definitions (10 USC 2302), consists of a definition of "competitive procedures." Paragraph (2)(B) stated that "the term 'competitive procedures' means procedures under which the head of an agency enters into a contract pursuant to full and open competition. Such term also includes…(B) the competitive selection for award of *basic research* proposals resulting from a general solicitation and the peer review or scientific review (as appropriate) of such proposals…" (*emphasis* added).

Section 221 of the NDAA for FY 2018 amended 10 USC 2302(2)(B) by replacing "basic research" with "science and technology". Changing the words "basic research" to "science and technology" expanded the authority to use other competitive procedures for other types of research proposals, such as applied research, advanced technology development, and advanced component development and prototypes research.

One of the solicitation methods for research and development proposals is a "broad agency announcement" (BAA), which is defined in FAR 2.101, Definitions, as "a general announcement of an agency's research interest including criteria for selecting proposals and soliciting the participation of all offerors capable of satisfying the government's needs." In addition, paragraph (d)(2) of FAR 6.102, Use of Competitive Procedures, states, "competitive selection of basic and applied research and that part of development not related to the development of a specific system or hardware procurement is a competitive procedure if award results from: (i) a broad agency

announcement that is general in nature identifying areas of research interest, including criteria for selecting proposals, and soliciting the participation of all offerors capable of satisfying the government's needs; and (ii) a peer or scientific review." Since Section 221 parallels FAR 2.101 and FAR 6.102, Section 221 now permits the use of BAAs for competitive selection of science and technology proposals.

Section 861 of the NDAA for FY 2018 adds 10 USC 2302e, Contract Authority for Advanced Development of Initial or Additional Prototype Units, which authorizes "a contract initially awarded from the competitive selection of a proposal resulting from a general solicitation referred to in section 2302(2)(B) of this title [10 USC 2302(2)(B)] may contain a contract line item or contract option for: (1) the provision of advanced component development, prototype, or initial production of technology developed under the contract; or (2) the delivery of initial or additional items if the item or a prototype thereof is created as the result of work performed under the contract." The term of such contract line item or option cannot exceed two years, nor can its value exceed $100,000,000 in FY 2017 constant dollars (meaning the $100,000,000 limit will be adjusted to reflect inflation).

To implement Section 221 and Section 861, the following changes are proposed to the DFARS:

- DFARS subpart 206.1, Full and Open Competition, would be added. It would consist of DFARS 206.102, Use of Competitive Procedures, which would consist of paragraph (d)(2): "In lieu of FAR 6.102(d)(2), competitive selection of science and technology proposals resulting from a broad agency announcement with peer or scientific review, as described in [DFARS] 235.016(a) (10 USC 2302(2)(B))."

- Paragraph (a)(4) of DFARS 215.371-4, Exceptions [to requirement to promote competition when only one offer is received], lists "acquisitions of basic or applied research or development, as specified in FAR 35.016(a) [Broad Agency Announcement], that use a broad agency announcement…" as an exception. This would be changed to "acquisitions of science and technology, as specified in [DFARS] 235.016(a)…"

- DFARS 234.005-1, Competition [for major system acquisitions], would be amended as follows:

    - Paragraph (2), which states "A contract line item or contract option may not be exercised under this authority after September 30, 2019," would be removed because Section 861 repealed the deadline, making the authority permanent.

    - In paragraph (1), "general solicitation" would be replaced with "broad agency announcement."

    - In paragraph (1)(ii), the limit on the use of the contract line item or contract option would be changed from "12 months" to "2 years."

    - Paragraph (1)(iii), which places a $20,000,000 limitation on the value of the contract line item or contract option, would be revised to state, "The dollar value of the work

to be performed pursuant to the contract line item or contract option shall not exceed $100 million in fiscal year 2017 constant dollars. (10 USC 2302e)."

– A new paragraph (a) would be added to DFARS 235.006-71, Competition [for research and development contracts], which would state "Use of a broad agency announcement with peer or scientific review for the award of science and technology proposals in accordance with [DFARS] 235.016(a) fulfills the requirement for full and open competition (see [DFARS] 206.102(d)(2))."

– DFARS 235.016, Broad Agency Announcement, would be added. It would state, "A broad agency announcement with peer or scientific review may be used for the award of science and technology proposals. Science and technology proposals include proposals for the following: (i) basic research (budget activity 6.1); (ii) applied research (budget activity 6.2); (iii) advanced technology development (budget activity 6.3); [and] (iv) advanced component development and prototypes (budget activity 6.4)."

Comments on this proposed rule must be submitted no later than December 31, 2018, identified DFARS Case 2018-D021, by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) email: **osd.dfars@mail.mil**; (3) fax: 571-372-6094; or (4) mail: Defense Acquisition Regulations System, Attn: Heather Kitchens, OUSD (A&S) DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Brand Name or Equal:** This rule proposes to amend DFARS part 206, Competition Requirement, DFARS part 211, Describing Agency Needs, and DFARS part 213, Simplified Acquisition Procedures, to implement the NDAA for FY 2017 (Public Law 114-328), Section 888, Requirement and Review Relating to Use of Brand Names or Brand-Name or Equivalent Descriptions in Solicitations, which requires that competition on DOD contracts not be limited through the use of brand name or equivalent descriptions, or proprietary specifications or standards, in solicitations, unless a justification for such specification is provided and approved. FAR 6.303, Justifications, and FAR 6.304, Approval of the Justification, address the content, format, and approval authorities for justifications for other than full and open competition.

Paragraph (c)(2) of FAR 6.302-1, Only One Responsible Source and No Other Supplies or Services Will Satisfy Agency Requirements, states "brand name or equal descriptions, and other purchase descriptions that permit prospective contractors to offer products other than those specifically referenced by brand-name, provide for full and open competition and do not require justifications and approvals to support their use." This rule proposes to amend DFARS 206.302-1 to add a new paragraph (c) to advise contracting officers that, notwithstanding FAR 6.302-1(c)(2), a justification and approval described at FAR 6.303 is required when using brand name or equal descriptions. In addition, a new paragraph (S-70) would be added to provide a similar instruction for proprietary specifications or standards.

In FAR subpart 13.5, Simplified Procedures for Certain Commercial Items, paragraph (a) of FAR 13.501, Special Documentation Requirements, requires a justification and approval for sole source (including brand name) acquisitions. The content and approval requirements for these justifications are similar to those required under FAR 6.303. This rule proposes to amend DFARS 213.501 by adding paragraph (ii) to advise contracting officers that "the justification and

approval addressed in FAR 13.501(a) is required in order to use brand name or equal descriptions or proprietary specifications and standards."

Finally, because FAR 11.104, Use of Brand Name or Equal Purchase Descriptions, addresses requirements for the use of brand name or equal purchase descriptions, this rule proposes to add DFARS 211.104 to direct contracting officers to the new requirements at DFARS 206.302-1 and DFARS 213.501 to complete a justification and approval prior to using brand name or equal purchase descriptions. Similar direction for use of proprietary specifications and standards would be provided in new DFARS 211.170, Use of Proprietary Specifications or Standards.

Comments on this proposed rule must be submitted no later than December 31, 2018, identified DFARS Case 2017-D040, by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) email: **osd.dfars@mail.mil**; (3) fax: 571-372-6094; or (4) mail: Defense Acquisition Regulations System, Attn: Carrie Moore, OUSD (A&S) DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Withdrawal of Proposed Performance-Based Payments and Progress Payments Rule:** This notice announces that the proposed rule on performance-based payments and progress payments that was published on August 24, 2018, is being withdrawn so DOD can conduct additional outreach with industry regarding contract financing methods.

The proposed rule was intended to implement Section 831 of the NDAA for FY 2017 (Public Law 114-328), which establishes a preference for performance-based payments (see FAR subpart 32.10, Performance-Based Payments, and DFARS subpart 232.10). In addition, the proposed rule would have revised progress payments and performance-based payments policies for DOD contracts, which have not been updated since 2001 (see FAR subpart 32.5, Progress Payments Based on Costs, and DFARS subpart 232.5). For more on the withdrawn proposed rule, see the September 2018 ***Federal Contracts Perspective*** article "DOD Returns from Summer Vacation with Lots of Rules."

■ **Class Deviation on Commercial Item Omnibus Clause for Acquisitions Using the Standard Procurement System:** This class deviation rescinds and replaces Class Deviation 2013-O0019, Commercial Item Omnibus Clause for Acquisitions Using the Standard Procurement System, which was issued on September 25, 2013, with a validity of five years, meaning it expired on September 25, 2018 (see the October 2013 ***Federal Contracts Perspective*** article "Lots More Changes to DOD Acquisition Regulations and Policies").

Class Deviation 2013-O0019 directed contracting activities to deviate from FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders – Commercial Items. FAR 52.212-5 requires the contracting officer to "check a box" to identify the clauses that are applicable to the acquisition of commercial items. Rather than requiring contracting officers to "indicate the applicable clauses," the Standard Procurement System (SPS) (DOD's contract writing system) has a clause logic capability that automatically selects the appropriate clauses under FAR 52.212-5. Therefore, the class deviation required contracting officers to use FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders – Commercial Items (DEVIATION 2013-O0019), when using the SPS to acquire commercial items. The most important portion of FAR 52.212-5 (DEVIATION 2013-O0019) was paragraph (b)(1), which stated "notwithstanding the requirements of any other clauses of this contract, the contractor is not required to flow down any FAR clause, other than

those in this paragraph…in a subcontract for commercial items." Paragraph (b)(1) went on to list 22 clauses that implement statutes or executive orders that had to be included in subcontracts.

New Class Deviation 2018-O0021 replaces Class Deviation 2013-O0018 and extends it for another five year. While FAR 52.212-5 (DEVIATION 2018-O0021) is essentially the same as FAR 52.212-5 (DEVIATION 2013-O0019), the dates of the clauses to be included in subcontracts are updated to indicate the current version. In addition, six clauses are added to paragraph (b)(1). These six clauses have been added to the FAR during the five year period following the issuance of Class Deviation 2013-O0019 in 2013. Those clauses are:

- FAR 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements (Jan 2017)
- FAR 52.204-23, Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab and Other Covered Entities (Jul 2018)
- FAR 52.222-21, Prohibition of Segregated Facilities (APR 2015)
- FAR 52.222-55, Minimum Wages Under Executive Order 13658 (Dec 2015)
- FAR 52.222-62 Paid Sick Leave Under Executive Order 13706 (Jan 2017)
- FAR 52.224-3, Privacy Training (JAN 2017)

■ **Use of National Industrial Security Program Contract Classification System:** This memorandum from the Office of Defense Pricing and Contracting requires contracting offices to use the DD Form 254, Department of Defense Contract Security Classification Specification, to provide defense contractors and subcontractors the required classification and security guidance when their performance on a contract requires access to classified information.

The National Industrial Security Program (NISP) Contract Classification System (NCCS) has been developed to automate the DD Form 254 processes and workflows for DOD components, other federal agencies, and cleared contractors participating in the NISP. NCCS establishes a centralized repository to collect the security requirements and supporting information for classified contracts. DOD components must begin using NCCS by September 14, 2018.

CAAC DEVIATION REMOVES DETERMINATION REQUIREMENT

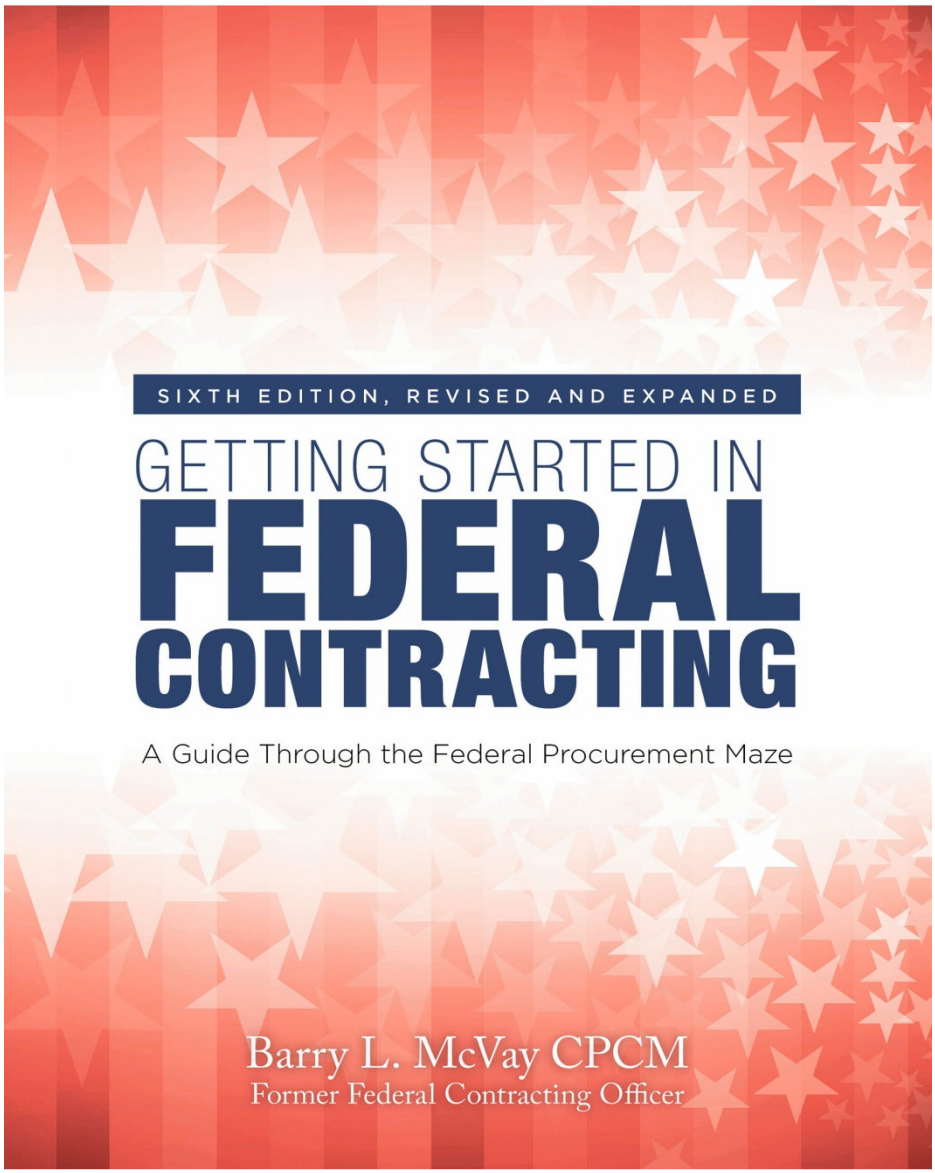
The Civilian Agency Acquisition Council (CAAC), which represents the civilian agencies in maintaining the FAR (except the National Aeronautics and Space Administration and the Coast Guard, which are on the Defense Acquisition Regulations Council (DARC)), has issued a memorandum authorizing the members of the CAAC to remove the best procurement approach determination requirement to use an interagency acquisition that is in paragraph (a) of FAR 17.502-l, General [procedures for interagency acquisitions].

This implements the NDAA for FY 2019 (Public Law 115-232), Section 875, Promotion of the Use of Governmentwide and Other Interagency Contracts, which strikes the requirement imposed by the NDAA for FY 2009 (Public Law 110-417), Section 865, Preventing Abuse of

Interagency Contracts, that all interagency acquisitions "include a determination that an interagency acquisition is the best procurement alternative…"

The primary change made by this class deviation is the deletion of FAR 17.502-1(a), which addresses the "determination of best procurement approach." Other changes are editorial – they delete references to FAR 17.502-1(a). The memorandum has an attachment with the additions and deletions to the FAR text identified. These changes are being processed through the FAR rulemaking process as FAR Case 2018-015, Governmentwide and Other Interagency Contracts.

REVISED AND EXPANDED!



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