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GSA AUTHORIZES ORDER-LEVEL MATERIALS ON FEDERAL SUPPLY SCHEDULE ORDERS

The General Services Administration (GSA) is amending the GSA Acquisition Regulation (GSAR) by adding GSAR subpart 538.72, Order-Level Materials, and GSAR 552.238-82, Special Ordering Procedures for the Acquisition of Order-Level Materials, to clarify the authority to acquire order-level materials (OLMs) when placing an individual task- or delivery-order against a Federal Supply Schedule (FSS) contract or FSS blanket purchase agreement (BPA). Authorizing the acquisition of OLMs will provide the same flexibility for the FSS program that is currently authorized for other indefinite-delivery, indefinite-quantity (IDIQ) vehicles, which will reduce contract duplication and the associated administrative costs and inefficiencies. (EDITOR'S NOTE: The FSS program is commonly known as the "GSA Schedules" program or the "Multiple Award Schedule" [MAS] program; OLMs are also known as "Other Direct Costs" [ODCs].)

CONTENTS

New GSAR 538.7200, Definitions, states that OLMs are "supplies and/or services acquired in direct support of an individual task or delivery order placed against an authorized Federal Supply Schedule (FSS) contract or FSS Blanket Purchase Agreement (BPA) , when the supplies and/or services are not known at the time of schedule contract award or FSS BPA. The prices of order-level materials are not established in the FSS contract or FSS BPA."

Prior to 1997, it had been common practice for contracting officers issuing orders against FSS contracts to add "incidental" non-FSS items to the order for convenience – for example, adding non-FSS cables to an FSS order for computers. However, the U.S. Court of Federal Claims (COFC) ruled in ***ATA Defense Industries, Inc., No. 97-382C*** (June 27, 1997), that "it is fundamentally inconsistent with Congress' unambiguous statutory mandate in the CICA [Competition in Contracting Act of 1984, which is Sections 2701-2753 of the Deficit Reduction Act of 1984 (Public Law 98-369)] to allow a contracting officer, when purchasing products against the FSS, to include in the purchase order 'incidental' products that are competitively available, unless the prices charged for these 'incidental' products are the product of full and open competition…The authority of an agency to purchase products against the FSS does not extend to incidentals."

In response to the ***ATA Defense Industries*** decision, Federal Acquisition Circular (FAC) 2001-8 amended the Federal Acquisition Regulation (FAR) by adding paragraph (f) to FAR 8.402, General, to permit the addition of "items not on the Federal Supply Schedule (also referred to as open market items) to a Federal Supply Schedule blanket purchase agreement (BPA) or an individual task or delivery order only if (1) all applicable acquisition regulations have been followed (*e.g.*, publicizing ([FAR] Part 5), competition requirements ([FAR] Part 6), acquisition of commercial items ([FAR] Part 12), contracting methods ([FAR] Parts 13, 14, and 15), and small business programs ([FAR] Part 19)); (2) the ordering office contracting officer has determined the price for the items not on the Federal Supply Schedule is reasonable; (3) the items are clearly labeled on the order as items not on the Federal Supply Schedule; and (4) all clauses applicable to items not on the Federal Supply Schedule are included in the order." (**EDITOR'S NOTE:** For more on FAC 2001-8, see the July 2002 ***Federal Contracts Perspective*** article "FAC 2001-08 Restricts 'Incidental Items' on FSS Orders, Moves Definitions, Adds Relocation Costs.")

The ***ATA Defense Industries*** decision has been costing GSA money. GSA assesses an "industrial funding fee" (IFF) of 0.75% of the cost of each FSS order – in essence, a 0.75% sales tax. Removing "incidentals" from FSS orders deprives GSA of 0.75% of the cost of the "incidentals" – $7,500,000 for every billion dollars that would have been spent on "incidentals" in FSS orders.

GSA has decided that it can get around the ***ATA Defense Industries*** decision by relying on Title 41 of the United States Code, Section 152, Competitive Procedures (41 U.S.C. 152), which states, "the term 'competitive procedures' means procedures under which an executive agency enters into a contract pursuant to full and open competition. The term also includes…(3) the procedures established by the Administrator of General Services for the multiple awards schedule program of the General Services Administration if…(B) orders and contracts under those procedures result in the lowest overall cost alternative to meet the needs of the federal government…"

The preamble to the final rule contains the logic: "GSA has long recognized the lowest overall cost alternative does not just include the actual price paid to the contractor, but also the administrative cost of conducting the acquisition. For example, GSA charges a low transactional fee for orders to be placed against a schedule and the efficiency of the simplified acquisition process translates to time and cost savings. The administrative cost to acquire similar goods or services combined with possible fees on a new contract duplicates efforts resulting in a less efficient way to acquire those goods or services." Whether this reasoning holds up in a court if challenged remains to be seen.

GSA originally proposed four primary requirements:

- OLMs would be restricted to orders placed against the following FSS:
  - 03 FAC, Facilities Maintenance and Management
  - 56, Buildings and Building Materials/Industrial Services and Supplies

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  - 70, General Purpose Commercial Information Technology Equipment, Software, and Services
  - 71, Comprehensive Furniture Management Services
  - 738X, Human Resources and Equal Employment Opportunity Services
  - 84, Total Solutions for Law Enforcement, Security, Facilities Management, Fire, Rescue, Clothing, Marine Craft and Emergency/Disaster Response
  - 99, Professional Services Schedule (also identified as "00CORP")

- That contractors proposing OLMs as part of a solution would be required to submit a minimum of three quotes for each OLM above the micro-purchase threshold ($3,500).

- The total value of OLMs would be limited to 33% of the overall order value.

- OLMs would have to be purchased under a separate Special Item Number (SIN) so "GSA can monitor the sales for order-level materials and evaluate the appropriate usage." (**EDITOR'S NOTE:** Each FSS is composed of SINs, which group similar products, services, and solutions together to aid in the acquisition process. For example, SINs under Schedule 70 include SIN 132-52, Electronic Commerce; SIN 132-56, Health Information Technology Services; SIN 132-41, Earth Observation Solutions; and many others. The preamble to the final rule states "the OLM SIN will be added to all existing contracts for schedules authorized to allow for OLMs by a government-initiated bilateral modification. New contracts under any schedule authorized to allow for OLMs will include the OLM SIN once the schedule solicitation is updated. However, the OLM SIN cannot be the only awarded SIN on a FSS contract or a FSS BPA.")

Four respondents submitted comments on the proposed rule. In response, the final rule includes the following changes:

- Instead of listing the seven FSS authorized to allow for OLMs, GSAR 538.7201, Applicability, has been revised to reference the website **https://www.gsa.gov/olm**. If GSA decides to authorize additional FSS to allow for OLMs, GSA can revise the website and avoid having to go through the lengthy regulation-revision process. (**EDITOR'S NOTE:** The website has not yet been established but will include the seven FSS originally proposed.)

- The threshold for the "three quote" requirement is increased from the micro-purchase threshold ($3,500) to the simplified acquisition threshold ($150,000), and the quotes are no longer submitted with the offer but should be maintained in the contractor's file because they are subject to review and audit (GSAR 552.238-82(d)(7)(i)).

- The limit on the total value of OLMs is changed from 33% of the overall order value to 33.33% (or 1/3) of the overall order value to make the limitation easier to understand and remember (GSAR 552.238-82(d)(4)).

- Travel OLMs will continue to be handled in accordance with FAR 31.205-46, Travel Costs. This means travel OLMs are: (1) exempt from the requirements in GSAR 552.238-74,

Industrial Funding Fee and Sales Reporting; (2) the 33.33% threshold; and (3) the price reasonableness determination in GSAR 552.238-82(d)(7).

- The instructions to contracting officers in paragraph (a)(3) of GSAR 538.7204, Contract Clauses, have been revised to allow for indirect costs, consistent with the procedures in FAR 52.212-4, Contract Terms and Conditions – Commercial Items, Alternate I (which is to be used when a time-and-materials or labor-hour contract is contemplated), paragraph (i)(1)(ii)(D)(2) ("Insert 'Each order must list separately the fixed amount for the indirect costs and payment schedule; if no indirect costs are approved, insert "None"'.")

For more on the proposed rule, see the October 2016 ***Federal Contracts Perspective*** article "Acquisition of Order-Level Materials Proposed for FSS."

SBA PROPOSES SDVOSB OWNERSHIP AND CONTROL RULES

The Small Business Administration (SBA) is proposing to amend its regulations at Title 13 of the Code of Federal Regulations (CFR), Part 125, Government Contracting Programs (13 CFR part 125) to implement Section 1832 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Public Law 114-328), Uniformity in Service-Disabled Veteran Definitions, which standardizes the definitions for Veteran-Owned Small Businesses (VOSBs) and Service-Disabled Veteran-Owned Small Businesses (SDVOSBs). In addition, Section 1832 requires the Department of Veterans Affairs (VA) to use the regulations established by the SBA for establishing ownership and control of VOSBs and SDVOSBs. This proposed rule would establish those regulations. The VA would continue to determine whether individuals qualify as veterans or service-disabled veterans and would be responsible for verification of applicant firms.

In addition, VA proposes to remove all references to ownership and control of VOSBs and SDVOSBs in its regulations at 38 CFR part 74, Veterans Small Business Regulations, and to add and clarify certain terms and references that are currently part of the verification process.

The following are the significant changes SBA proposes to make 13 CFR part 125:

- Section 125.11, What definitions are important in the Service-Disabled Veteran-Owned (SDVO) Small Business Concern (SBC) program?, would be amended as follows:

  - Definitions would be added from VA's regulations (38 CFR 74.1,What definitions are important for VetBiz Vendor Information Pages (VIP) Verification Program? – "service disabled veteran," "veteran," and "veteran-owned small business") and from SBA's 8(a) Business Development program's regulations (13 CFR part 124, 8(a) Business Development/Small Disadvantaged Business Status Determinations; specifically, 13 CFR 124.3, What definitions are important in the 8(a) program? – "daily business operations," "negative control," "participant," and "unconditional ownership").

  - A definition of "surviving spouse" would be added ("has the meaning given the term in 38 U.S.C. 101(3)" [that is, Title 38 of the U.S. Code, Section 101, Definitions, paragraph (3): "a person of the opposite sex who was the spouse of a veteran at the time of the

veteran's death, and who lived with the veteran continuously from the date of marriage to the date of the veteran's death…"]).

- A definition of "Employee Stock Ownership Plan" (ESOP) would be adopted from paragraph (a)(6) of Section 1832 of the Public Law 114-328 ("the meaning given the term 'employee stock ownership plan' in section 4975(e)(7) of the Internal Revenue Code of 1986 (26 U.S.C. 4975(e)(7)").

- SBA is also proposing to replace the definitions of "permanent caregiver," "service-disabled veteran," and "service-disabled veteran with a permanent and severe disability" that are currently in 13 CFR 125.11, What definitions are important in the Service-Disabled Veteran-Owned (SDVO) Small Business Concern (SBC) Program? These definitions are being updated in consultation with VA in an effort to ensure consistency across programs at both agencies.

- A definition for "small business concerns" would be added ("a concern that, with its affiliates, meets the size standard corresponding to the NAICS [North American Industry Classification System] code for its primary industry, pursuant to part 121 of this chapter [Small Business Size Regulations]").

- A definition would be added for "extraordinary circumstances" under which a service disabled veteran owner would not have full control over a firm's decision-making process, but would not render the firm ineligible as a firm owned and controlled by one or more service disabled veterans. SBA proposes five limited circumstances in which a service-disabled veteran owner will not have full control over the decision making process: "(1) adding a new equity stakeholder; (2) dissolution of the company; (3) sale of the company; (4) the merger of the company; and (5) company declaring bankruptcy." This definition would allow minority equity holders to have negative control over these five circumstances (13 CFR 121.103, How does SBA determine affiliation?, states that "negative control includes, but is not limited to, instances where a minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders").

■ Section 125.12, Who does SBA consider to own an SDVO SBC?, would be amended as follows:

- SBA is proposing to amend paragraph (b), which addresses partnerships, requires service-disabled veterans to own "at least 51% of each type of partnership interest." Therefore, if a partnership has general partners and limited partners. the service-disabled veteran is required to be both a general and limited partner. Amended paragraph (b) would require that service-disabled veterans "own at least 51% of the aggregate voting interest" in the partnership.

- SBA is proposing to amend paragraph (d), which addresses corporations, requires service-disabled veterans to own "at least 51% of the aggregate of all stock outstanding and at least 51% of each class of voting stock outstanding." Amended paragraph (d)

would add the following sentence: "In the case of a publicly-owned business, not less than 51% of the stock (not including any stock owned by an ESOP) must be unconditionally owned by one or more veterans." Note that this sentence does not include any equity held by an ESOP when determining ownership for a publicly-owned business.

- New paragraph (g) would be added to address dividends and distribution. Paragraph (g) is adopted from paragraph (f) of 13 CFR 124.105, What does it mean to be unconditionally owned by one or more disadvantaged individuals?, to reflect a service-disabled veteran's right to receive benefits, compensation, and the ultimate value of his or her equity commensurate with the purported amount of equity. For example, it is not consistent with SBA's regulations for a firm to state that a service-disabled veteran owns 60% of the equity but records show he or she is entitled only to a smaller amount of the firm's profit, or that the residual value of that equity is less than 60 % if the firm is sold.

- New paragraph (h) would be added to state that "ownership will be determined without regard to community property laws." This is similar to SBA's ownership regulations for women-owned businesses in paragraph (a) of 13 CFR 127.201, What are the requirements for ownership of an EDWOSB [Economically-Disadvntaged Women-Owned Small Business] and WOSB [Women-Owned Small Business]?

- New paragraph (i) would be added to allow the transfer of ownership in a SDVOSB from a serviced-disabled veteran to his or her spouse upon the death of the service-disabled veteran without adversely affecting the firm's status as a SDVOBC.

■ Section 125.13, Who does SBA consider to control an SDVO SBC?, would be amended as follows to incorporate provisions from SBA's 8(a) Business Development regulations (13 CFR part 124, 8(a) Business Development/Small Disadvantaged Business Status Determinations) and VA's ownership and control regulations (38 CFR 74.3, Who does the Center for Veterans Enterprise (CVE) consider to own a veteran-owned small business?, and 38 CFR 74.4, Who does CVE consider to control a veteran-owned small business?).

- Paragraph (e), which addresses control over a corporation, would be amended to add language describing how to determine if a service-disabled veteran controls the Board of Directors.

- New paragraph (f) would require firms to provide notification to the VA of supermajority voting requirements.

- New paragraph (g) would require firms to obtain and keep current any and all required permits, licenses, and charters, required to operate the SDVOSB.

- New paragraph (h) would address a service-disabled veteran's unexercised right to cause a change in the control or management of the SDVOSB.

- New paragraph (i) would prohibit non-service-disabled veterans or entities from controlling the firm, and would provide seven illustrations of such control by non-service-disabled veterans or entities.

- New paragraph (j) would state that "a non-service-disabled veteran individual or entity may be found to control the concern through loan arrangements with the concern or the service-disabled veteran(s)." While a loan on commercially reasonable terms does not, by itself, give a non-service-disabled veteran individual or entity control over an SDVOSB, the loan along with other factors may indicate the non-service-disabled individual or entity controls the SDVOSB.

- New paragraph (k) would state that "there is a rebuttable presumption that a service-disabled veteran does not control the firm when the service-disabled veteran is not able to work for the firm during the normal working hours that businesses in that industry normally work." This does not require that the service-disabled veteran devote full-time to the SDVOSB, merely that it is a factor SBA will consider when determining control, one that is clearly rebuttable by providing evidence of control.

- New paragraph (l) would state that "there is rebuttable presumption that a service-disabled veteran does not control the firm if that individual is not located within a reasonable commute to firm's headquarters and/or job-sites locations, regardless of the firm's industry." The main issue is over delegation of authority to non-service-disabled veterans who do work at the office and who are at the work sites. SBA's regulations require control over day-to-day operations, but this is rebuttable by providing evidence of control.

- New paragraph (m) would provide an exception to the control requirements under the five "extraordinary circumstances" defined in 13 CFR 125.11 (see above).

- New paragraph (n) would provide an exception to the control requirements when an individual in the reserves is recalled to active duty.

■ Section 125.23, When may a contracting officer award sole source contracts to SDVO SBCs?, would be revised to update the values for sole source awards from $6,000,000 to $6,500,000 for a requirement within the NAICS codes for manufacturing, and from $3,500,000 to $4,000,000 for a requirement within all other NAICS codes. This makes the thresholds consistent with the inflationary adjustments made to those amounts in the FAR (see the September 2010 ***Federal Contracts Perspective*** article "Federal Acquisition-Related Thresholds Adjusted for Inflation").

Comments on this proposed rule must be submitted no later than March 30, 2018, identified as "RIN 3245-AG85," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; or (2) mail, paper, disk, or CD/ROM submissions, or delivery by hand or courier: Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416.

The following are the significant changes VA proposes to make to 38 CFR part 74:

- Section 74.1, What definitions are important for Vendor Information Pages (VIP) Verification Program?, would be revised to remove six definitions that relate to ownership and control: "day-to-day management," "day-to-day operations," "immediate family member," "negative control," "same or similar line of business," and "unconditional ownership." In addition, VA proposes to remove the definition for "VetBiz.gov" in anticipation of changes to the location of the VIP database. This change will allow VA to transition to a new host site without requiring further amendments to 38 CFR part 74.

  In addition, VA proposes to create two new definitions: "applicant" (to clarify the use of the term throughout 38 CFR part 74); and "application days" (to clarify the manner by which the time period in paragraph (a) of 38 CFR 74.11, How does CVE [Center for Verification and Evaluation] process applications for VIP Verification Program?, is computed).

  Also, VA proposes to amend 16 other definitions: "Center for Veterans Enterprise," "joint venture," "Office of Small and Disadvantaged Business Utilization," "non-veteran," "participant," "primary industry classification," "principal place of business," "service-disabled veteran," "service-disabled veteran owned small business," "small business concern," "surviving spouse," "vendor information pages," "verification eligibility," "veteran," "Veterans Affairs Acquisition Regulation" [VAAR], and "veteran-owned small business."

  Finally, for consistency, VA proposes to remove all references to VetBiz, and replace various terms with abbreviations titles and the body of 38 CFR part 74: "Center for Verification and Evaluation" with "CVE"; "service-disabled veteran-owned small business" with "SDVOSB"; "Department of Veterans Affairs" with "VA"; "Vendor Information Pages" with "VIP"; and "veteran-owned small business" with "VOSB."

- Section 74.2, What are the eligibility requirements a concern must meet for the VIP Verification Program?, would be amended as follows:

  – Paragraph (a), which addresses the procedures for becoming listed as "verified" in the VIP database, would be amended to add that the small business must have "submitted required supplemental documentation at **http://www.va.gov/osdbu**" to more clearly explain the key steps necessary to submit an application and obtain verification.

  – Paragraph (b), which addresses the requirement for those with an ownership or control interest in a verified business must have "good character," would be amended to address the effect of criminal activity on eligibility.

  – Paragraph (d), which states, "Neither a firm nor any of its eligible individuals that fails to pay significant financial obligations owed to the federal government, including unresolved tax liens and defaults on federal loans or other federally assisted financing, is eligible for [VIP] verification," would be amended to add the *italicized* language: "…including unresolved tax liens and defaults on federal loans or other federally assisted financing *or state or other government assisted financing, owed to the federal government, the District of Columbia or any state, district, or territorial government of the United States*, is eligible for [VIP] verification."

- Paragraph (f) would be added. It would state the following: "All applicants for VIP Verification must be registered in SAM [System for Award Management] at **http://www.sam.gov**, or its successor prior to application submission." Registration in SAM is required by paragraph (a) of FAR 4.1102, Policy [for SAM].

■ Section 74.3, Who does CVE consider to own a veteran-owned small business?, would be amended as follows:

- Paragraphs (a) through (d), which address ownership issues, would be deleted. A replacement paragraph (a) would be inserted to state, "Ownership is determined in accordance with 13 CFR part 125" [the SBA regulations – see above]. Paragraph (e), which addresses change in ownership, would be redesignated as paragraph (b) and would add a 30-day time period for submission of a new application after a change in ownership.

- In redesignated paragraphs (b)(1) and (b)(3), "application" would be replaced with "VA Form 0877" [VetBiz Vendor Information Pages Verification Program] to clarify the requirement.

■ Section 74.4, Who does CVE consider to control a veteran-owned small business?, would be amended to remove paragraphs (a) through (i) and replaced with: "Control is determined in accordance with 13 CFR part 125."

■ Section 74.5, How does CVE determine affiliation?, would be reworded to clearly establish that 38 CFR part 74 does not supersede 13 CFR part 121 with respect to size determinations. In addition, a paragraph (b) would be added to address eligibility of joint ventures.

■ Section 74.10, Where must an application be filed?, would be amended to remove the CVE's physical address so any CVE change of address would not require a regulatory change.

■ Section 74.11, Where must an application be filed?, would be amended as follows:

- Paragraph (a) would be amended to revise the period for reviewing and processing applications from "60 days" to "90 application days."

- New paragraph (c) would address instances where CVE does not receive all requested documentation: "CVE, in its sole discretion, may request additional documentation at any time in the eligibility determination process. Failure to adequately respond to the documentation request shall constitute grounds for a denial or administrative removal."

- Current paragraph (c) would be redesignated as paragraph (d) and would be amended to add the following as the last sentence: "The applicant bears the burden to establish its status as a VOSB."

- Current paragraph (d) would be redesignated as paragraph (e) and revised to delete the third sentence, which refers to withdrawal or removal of verified status. This will be addressed in Section 74.21, What are the ways a business may exit VIP Verification Program status? (see below). In addition, bankruptcy would be added as a changed circumstance, and the requirements applicable to firms undergoing the bankruptcy process would be added.

- Paragraph (e) would be redesignated as paragraph (f), and paragraph (f) would be redesignated as paragraph (g).

- Paragraph (g) would be redesignated as paragraph (h) and revised to add the following as the second sentence: "It is the responsibility of the applicant to ensure all contact information is current in the applicant's profile."

■ Section 74.12, What must a concern submit to apply for VIP Verification Program?, would be amended to expand the list of required documentation, from "financial statements, federal personal and business tax returns, payroll records and personal history statements" to "articles of incorporation/organization; corporate by-laws or operating agreements; shareholder agreements; voting records and voting agreements; trust agreements; franchise agreements, organizational, annual, and board/member meeting records; stock ledgers and certificates; state-issued Certificates of Good Standing; contract, lease and loan agreements; payroll records; bank account signature cards; financial statements; federal personal and business tax returns for up to 3 years; and licenses."

■ Section 74.13, Can an applicant appeal CVE's initial decision to deny an application?, would be amended to remove paragraphs (b), (c), and (d), which address the reconsideration process. Appeals of initial denials on the grounds of ownership and control are now adjudicated by SBA's Office of Hearings and Appeals (OHA) in accordance with 13 CFR part 134, Rules of Procedure Governing Cases Before the Office of Hearings and Appeals, so paragraph (a) would reference 13 CFR part 134. In addition, paragraph (e) would be redesignated as paragraph (b) and revised to remove mention of the reconsideration process. Finally, paragraphs (f) and (g) would be deleted because they pertain to the reconsideration process, so they are no longer pertinent.

■ The text of Section 74.14, Can an applicant or participant reapply for admission to the VIP Verification Program?, would be redesignated as paragraph (a). This paragraph (a) would revised to remove references to requests for reconsideration and to include notices of verified status cancellation and denials of appeals to the list of determinations that trigger a six-month waiting period before a concern may submit a new verification application. In addition, a new paragraph (b) would clarify that a finding of ineligibility during a reapplication will result in the immediate removal of the participant from the VIP Verification database.

■ Section 74.15, What length of time may a business participate in VIP Verification Program? would be amended by splitting paragraph (a) into paragraphs (a), (b), and (c); revise redesignated paragraph (b) to require participants to inform CVE within 30 days of changes affecting eligibility; add to redesignated paragraph (c) a list of all the situations in which the

eligibility period may be shortened; remove paragraph (b), which deals with affiliation and would be addressed in Section 74.5 (see above); and redesignate original paragraphs (c), (d), and (e) as paragraphs (d), (e), and (f), respectively.

- Paragraph (a) of Section 74.20, What is a verification examination and what will CVE examine?, would be revised for simplicity and clarification. In addition, since the proposed revisions to Section 74.12 would address the required documentation necessary for verification, the complete list would be removed from paragraph (b) to avoid redundancy and confusion.

- Section 74.21, What are the ways a business may exit VIP Verification Program status?, would be amended and reordered for clarity and to conform with changes made to other sections by this proposed rule.

- Section 74.22, What are the procedures for cancellation?, would be amended to change "The Notice of Proposed Cancellation Letter will set forth the specific facts and reasons for CVE's findings, and will notify the participant that it has 30 days from the date *it receives the letter* to submit a written response to CVE…" to "The Notice of Proposed Cancellation Letter will set forth the specific facts and reasons for CVE's findings and will notify the participant that it has 30 days from the date *CVE sent the notice* to submit a written response to CVE…" (*emphasis added*). This change would give VA the ability to definitively and accurately track the cancellation proceedings, and to control the regulatory time period.

- Section 74.27, How will VA store information?, would be amended to reword the first sentence, which reads "VA intends to store records provided to complete the VetBiz Vendor Information Pages registration fully electronically on the Department's secure servers", to "VA stores records provided to CVE fully electronically on the VA's secure servers." This change would specify that all documents submitted to the program, not only those used to complete applications, will be stored electronically.

- Section 74.29, When will VA dispose of records?, would be amended to change "the records…will be kept intact and in good condition for seven years…" to "the records…will be kept intact and in good condition and retained *in accordance with VA records management procedures*…" (*emphasis added*).

Comments on this proposed rule must be submitted no later than March 12, 2018, identified as "RIN 2900-AP97 – VA Veteran-Owned Small Business (VOSB) Verification Guidelines," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) mail or hand-delivery: Director, Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Ave. NW, Room 1063B, Washington, DC 20420; or (3) fax: (202) 273-9026.

VAAR TO BE REVISED TO ALIGN WITH THE FAR

Besides amending its VOSB/SDVOSB regulations (see preceding article), the VA is proposing to amend and update its VA Acquisition Regulation (VAAR) in phased increments to revise or remove any policy superseded by changes in the FAR, to remove procedural guidance internal to VA into the VA Acquisition Manual (VAAM), and to incorporate any new agency specific regulations or policies. These changes are intended to streamline and align the VAAR with the FAR and remove outdated and duplicative requirements. VA will rewrite the VAAR in a series of proposed rules, with each increment revising VAAR parts that address related topics.

This is the first proposed rule, and it would amend VAAR part 812, Acquisition of Commercial Items, VAAR part 813, Simplified Acquisition Procedures, and the corresponding clauses and provisions in VAAR Part 852, Solicitation Provisions and Contract Clauses, to reflect current FAR titles of parts, subparts, and sections; reflect current FAR format, numbering, and arrangement; reflect current FAR requirements and definitions; correct inconsistencies with the FAR; remove redundancies and duplicate material already covered by the FAR; and delete outdated material and information.

Comments on this proposed rule must be submitted no later than March 12, 2018, identified as "RIN 2900-AP58 – Revise and Streamline VA Acquisition Regulation to Adhere to Federal Acquisition Regulation Principles (VAAR Case 2014-V005 – Parts 812, 813)," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) mail or hand-delivery: Director, Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Ave. NW, Room 1063B, Washington, DC 20420; or (3) fax: (202) 273-9026.

FAC 2005-97 REVISES TRADE AGREEMENTS THRESHOLDS

Federal Acquisition Circular (FAC) 2005-97 amends FAR subpart 25.4, Trade Agreements, other FAR sections that include trade agreements thresholds, and related provisions and clauses in FAR part 52, Solicitation Provisions and Contract Clauses, to incorporate revised thresholds for application of the World Trade Organization Government Procurement Agreement and the Free Trade Agreements, as determined by the United States Trade Representative (see the January 2018 ***Federal Contracts Perspective*** article "Trade Agreements Thresholds Revised").

Paragraph (b) of FAR 25.402, General, contains a table of all the trade agreements thresholds for supplies, services, and construction. This has been revised to reflect the new thresholds.

The following are the other sections, provisions, and clauses with revised thresholds:

- Paragraph (b)(3) of FAR 22.1503, Procedures for Acquiring End Products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor, changing $77,533 to **$80,317**.
- Paragraph (c) of FAR 25.202, Exceptions [to FAR subpart 25.2, Buy American – Construction Materials], changing $7,358,000 to **$6,932,000**.
- Paragraph (c)(1) of FAR 25.603, Exceptions [to FAR subpart 25.6, American Recovery and Reinvestment Act – Buy American Statute – Construction Materials, changing $7,358,000 to **$6,932,000**.

- FAR 25.1101, Acquisition of Supplies:
  - Paragraph (b)(1)(i)(A), changing $191,000 to **$180,000**;
  - Paragraphs (b)(1)(iii), (b)(1)(iv), (b)(2)(iii), and (b)(2)(iv), changing $77,533 to **$80,317**; and
  - Paragraphs (c)(1) and (d), changing $191,000 to **$180,000**.
- FAR 25.1102, Acquisition of Construction:
  - Paragraphs (a) and (c), changing $7,358,000 to **$6,932,000**; and
  - Paragraphs (c)(3) and (d)(3), changing $7,358,000 to **$6,932,000**, and $10,079,365 to **$10,441,216**.
- Paragraphs (c)(1)(xx)(C) and (c)(1)(xx)(D) of FAR 52.204-8, Annual Representations and Certifications, changing $77,533 to **$80,317** (and changing the date of the provision to **(JAN 2018)**).
- FAR 52.222-19, Child Labor – Cooperation with Authorities and Remedies:
  - Paragraph (a)(3), changing $77,533 to **$80,317**;
  - Paragraph (a)(4), changing $191,000 to **$180,000**; and
  - Changing the date of the clause to **(JAN 2018)**.

Also, because the date of FAR 52.222-19 is changed, paragraph (b)(26) of FAR 52.212-5, Contract Terms and Conditions Required To Implement Statutes or Executive Orders – Commercial Items, and paragraph (b)(1)(ii) of FAR 52.213-4, Terms and Conditions – Simplified Acquisitions (Other Than Commercial Items), both of which reference FAR 52.222-19, must be revised to incorporate the new date. Finally, because of the changes made to the date of FAR 52.222-19 in FAR 52.212-5 and FAR 52.213-4, those two clauses' dates must be changed to "**(JAN 2018)**" as well.

DOD PROVIDES GUIDANCE ON COMMERCIAL ITEM PROCUREMENT

The Department of Defense (DOD) started 2018 with the publication of a rule implementing eight different sections of three different National Defense Authorization Acts (NDAAs) that address the procurement of commercial items. In addition, DOD reinstated North Korea as a "state sponsor of terrorism," issued two class deviations, and published a memorandum addressing a provision of the FY 2018 NDAA.

■ **Procurement of Commercial Items:** This final rule amends the DFARS to implement the requirements of sections 851 through 853 and 855 through 857 of the FY 2016 NDAA (Public Law 114-92), as well as the requirements of section 831 of the FY 2013 NDAA (Public Law 112-239). This rule provides guidance to contracting officers for making price reasonableness determinations, promotes consistency in making commercial item determinations, and expands opportunities for nontraditional defense contractors to do business with DOD. In addition, this final rule implements section 848 of the FY 2018 NDAA (Public Law 115-91), which addresses the written determination required when the appropriate senior procurement executive concludes that the prior use of commercial procedures was inappropriate or is no longer appropriate. (**EDITOR'S NOTE:** New DFARS 212.001, Definitions [for acquisitions of commercial items], provides the following definition of "nontraditional defense contractor": "an entity that is not currently performing and has not performed any contract or subcontract for DOD that is subject

to full coverage under the cost accounting standards prescribed pursuant to 41 U.S.C. 1502 [Title 41 of the U.S. Code, Section 1502, Cost Accounting Standards] and the regulations implementing such section, for at least the one-year period preceding the solicitation of sources by DOD for the procurement (10 U.S.C. 2302(9)).")

The sections being implemented are:

– FY 2013 NDAA section 831, Guidance and Training Related to Evaluating Reasonableness of Price: This section directs DOD to issue guidance on the use of the DOD authority to require the submission of other than cost or pricing data to evaluate the price reasonableness of commercial items.

– FY 2016 NDAA

  - Section 851, Procurement of Commercial Items: This requires DOD to: (1) establish and maintain a centralized capability to oversee the making of commercial item determinations for DOD procurements, and (2) provide public access to the determinations. In addition, it permits a contracting officer to presume that a prior commercial item determination made by a DOD component may serve as a determination for subsequent procurements of the items.

  - Section 852, Modification to Information Required to be Submitted by Offeror in Procurement of Major Weapon Systems as Commercial Items: This modifies the information that a contractor is required to submit to DOD to support a price reasonableness determination.

  - Section 853, Use of Recent Prices Paid by the Government in the Determination of Price Reasonableness: This requires a contracting officer to consider evidence provided by an offeror of recent purchase prices paid by the government for the same or similar commercial items in establishing price reasonableness if the contracting officer is satisfied the prices previously paid remain a valid reference for comparison after considering the totality of other relevant factors such as time elapsed since prior purchase and any difference in quantities purchased or applicable terms and conditions.

  - Section 855, Market Research and Preference for Commercial Items: Concerned that the market research being conducted to determine the existence of suitable commercial items is perfunctory and that the preference for the use of commercial items is being ignored throughout DOD, this requires DOD to issue guidance that will ensure commercial information technology products and services are determined to be unsuitable to the government's needs before a non-commercial item is purchased and that market research be conducted and used to inform price reasonableness determinations.

  - Section 856, Limitation on Conversion of Procurements from Commercial Acquisition Procedures: Prior to converting a procurement of commercial items or services valued at more than $1,000,000 from commercial acquisition procedures

under FAR part 12, Acquisition of Commercial Items, to noncommercial acquisition procedures under FAR part 15, Contracting by Negotiation, this requires the contracting officer to determine that either: (1) the earlier use of FAR part 12 procedures was in error or was based on inadequate information; and (2) the DOD will realize a cost savings compared to the cost of procuring a similar quantity or level of such item or service using commercial acquisition procedures.

- Section 857, Treatment of Goods and Services Provided by Nontraditional Defense Contractors as Commercial Items: This allows items and services provided by nontraditional defense contractors to be treated as commercial items.

– FY 2018 NDAA section 848, Commercial Item Determinations: This states that a contract for an item acquired using commercial item acquisition procedures of FAR part 12 shall serve as a prior commercial item determination for that item unless the senior procurement executive of the military department or DOD determines it is no longer appropriate to acquire the item using commercial item acquisition procedures.

To implement Section 831, a proposed rule was issued (see the September 2015 ***Federal Contracts Perspective*** article "DOD Issues Regulations on Network Penetration Reporting and Contracting for Cloud Services"). Besides amending various sections of DFARS subpart 215.4, Contract Pricing, to provide guidelines for obtaining data other than certified cost or pricing data, it proposed adding the following provisions: DFARS 252.215-7010, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data; DFARS 252.215-7011; Requirements for Submission of Proposals to the Administrative Contracting Officer and Contract Auditor; and DFARS 252.215-7012, Requirements for Submission of Proposals via Electronic Media. However, to implement the subsequently enacted sections of the FY 2016 NDAA that address commercial items, that proposed rule was withdrawn and another rule was proposed that incorporated the first proposed rule and would amend various sections of DFARS part 212, Acquisition of Commercial Items, and add DFARS subpart 212.70, Limitation on Conversion of Procurement from Commercial Acquisition Procedures.

Twelve respondents submitted comments on the second proposed rule. Other than changes made for clarity and to correct grammar, the most significant change made to the final rule is the addition of DFARS 252.215-7013, Supplies and Services Provided by Nontraditional Defense Contractors, which is added to advise offerors that in accordance with 10 U.S.C. 2380a, Treatment of Certain Items as Commercial Items, supplies and services provided by a nontraditional defense contractor may be treated as commercial items.

For more on the second proposed rule, see the September 2016 ***Federal Contracts Perspective*** article "DOD Issues Rules on Counterfeit Electronic Parts."

■ **State Sponsor of Terrorism – North Korea:** This final rule implements the November 20, 2017, Department of State designation of North Korea as a "state sponsor of terrorism." A "state sponsor of terrorism" is a country that has repeatedly provided support for acts of international terrorism. The Department of State previously designated North Korea as a state sponsor of terrorism in January 1988, but rescinded the designation in October 2008 (see the February 2009 ***Federal Contracts Perspective*** article "Fifteen DFARS Rules for the New Year").

This final rule adds North Korea to the list of countries that are state sponsors of terrorism in the definition of "state sponsor of terrorism" in paragraph (a) of DFARS 252.225-7049, Prohibition on Acquisition of Commercial Satellite Services from Certain Foreign Entities – Representation, and paragraph (a) of DFARS 252.225-7050, Disclosure of Ownership or Control by the Government of a Country that is a State Sponsor of Terrorism. In doing so, DOD is now prohibited from: (1) entering into a contract with a firm that is owned or controlled by the government of North Korea (DFARS 252.225-7050); and (2) acquiring commercial satellite services from any entity owned by the government of North Korea, or any entity planning or expected to provide or use launch or other satellite services from North Korea (DFARS 252.225-7049).

■ **Class Deviation on the Pilot Program for Streamlining Awards for Innovative Technology Projects:** This deviation expands the list of exceptions to certified cost or pricing data requirements in paragraph (b) of FAR 15.403-1, Prohibition on Obtaining Certified Cost or Pricing Data (10 U.S.C. 2306a and 41 U.S.C. Chapter 35), to include contracts, subcontracts, or modifications of contracts or subcontracts valued at less than $7,500,000 that are awarded to a small business or nontraditional defense contractor through: (1) a technical, merit-based selection procedure, such as a broad agency announcement (see FAR 35.016); (2) the Small Business Innovative Research (SBIR) program; or (3) the Small Business Technology Transfer (STTR) program.

In addition, covered contracts, subcontracts, and modifications awarded through a technical, merit-based selection procedure or the SBIR program are exempt from the requirements of FAR 52.215-2, Audit and Records – Negotiations. This exemption does *not* apply to covered contracts, subcontracts, and modifications awarded through the STTR program.

The head of the contracting activity (HCA) may decide that the requirements for the submission of cost and pricing data or audit and records examination should be required based on past performance of the specific small business or nontraditional defense contractor, or based on analysis of other information specific to the award.

This deviation implements Section 873 of the FY 2016 NDAA (Public Law 114-92), as modified by Section 896 of the FY 2017 NDAA (Public Law 114-328). Section 873 provided the exception for technical, merit-based selection procedures and the SBIR program, and Section 896 added the STTR program.

This deviation remains in effect until October 1, 2020 (as specified in Section 873), or is rescinded. (DOD published a proposed rule to implement Section 873; see the September 2016 ***Federal Contracts Perspective*** article "DOD Issues Rules on Counterfeit Electronic Parts.")

■ **Class Deviation Temporarily Extending the Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans:** This deviation requires contracting officers to continue to follow the requirements of DFARS subpart 219.7, The Small Business Subcontracting Plan, which requires "DOD to establish a test program to determine whether comprehensive subcontracting plans on a corporate, division, or plant-wide basis will reduce administrative burdens while enhancing subcontracting opportunities for small and small disadvantaged business concerns," through December 31, 2027.

Section 834 of the NDAA for FYs 1990 and 1991 (Public Law 101-189) established this test program and set an expiration date of December 31, 2014 (see paragraph (3) of DFARS 219.702, Statutory Requirements). Section 821 of the FY 2015 NDAA (Public Law 113-291) extended the

expiration date to December 31, 2017, and a class deviation was issued authorizing an extension to the expiration date specified in DFARS 219.702(3) (see the January 2015 ***Federal Contracts Perspective*** article "Authority to Use Simplified Procedures for Commercial Items Up to $6,500,000 Made Permanent"). Section 826 of the FY 2017 NDAA (Public Law 114-328) extended the expiration date to December 31, 2027, and this deviation reflects that date.

■ **DOD Micro-Purchase Threshold:** This memorandum alerts the DOD acquisition community that DOD's micro-purchase threshold remains $5,000 ($10,000 for basic research programs and for the activities of DOD science and technology reinvention laboratories, institutions of higher education, related or affiliated nonprofit entities, nonprofit research organizations, and independent research institutes) despite the enactment of the FY 2018 NDAA (Public Law 115-91), which increased the federal micro-purchase threshold from $3,000 to $10,000 (Section 806, Requirements Related to the Micro-Purchase Threshold – see the January 2018 ***Federal Contracts Perspective*** article "2018 Defense Authorization Act Increases Simplified Acquisition, Micro-Purchase Thresholds").

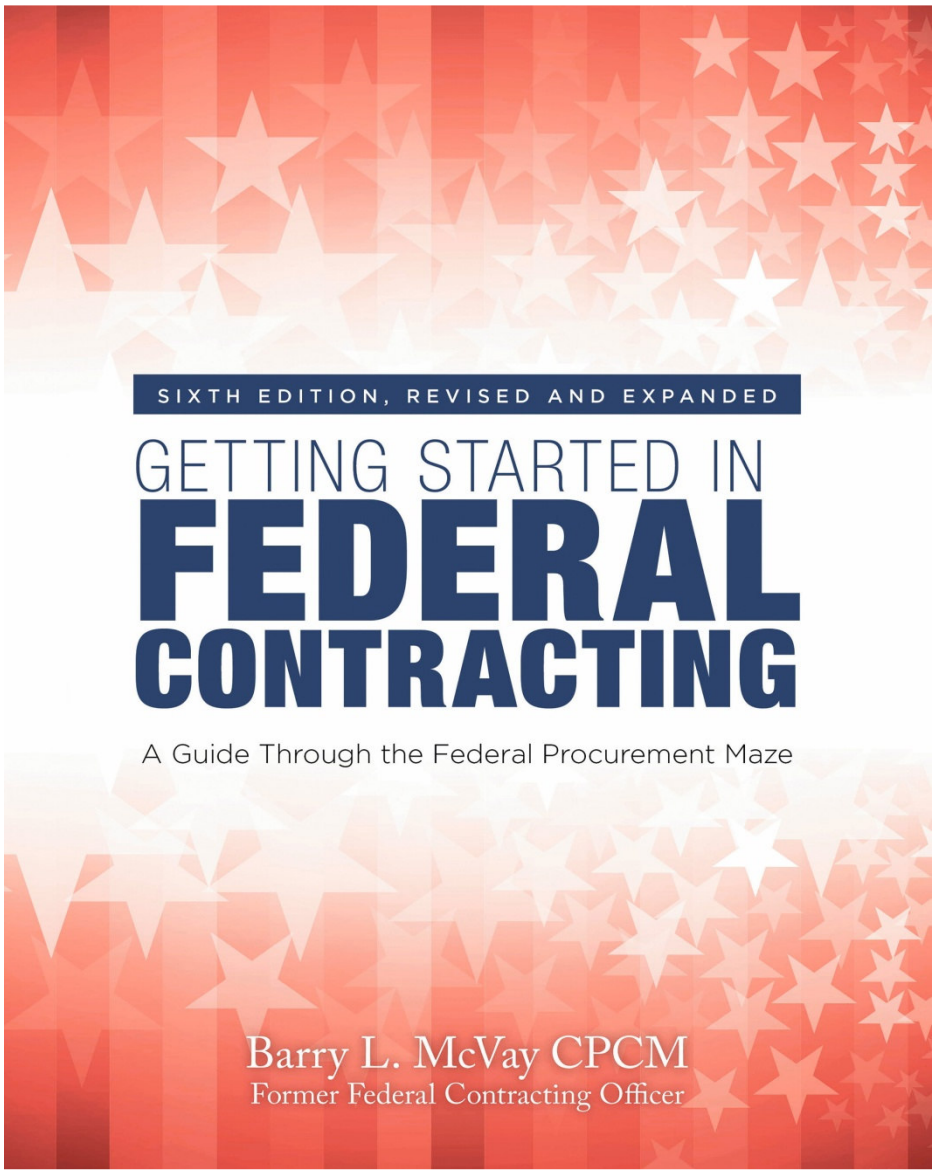
The reason is that Section 806 **did not repeal** 10 U.S.C. 2338, Micro-Purchase Threshold, which states: "Notwithstanding subsection (a) of section 1902 of title 41 [41 U.S.C. 1902, Procedures Applicable to Purchases Below Micro-Purchase Threshold], the micro-purchase threshold for the Department of Defense for purposes of such section is $5,000" [**emphasis** in memorandum].

"As a result," states Shay Assad, Director of Defense Pricing/Defense Procurement and Acquisition Policy, "the department's MPT [micro-purchase threshold] remains at $5,000 as established in Section 821 of the NDAA for FY 2017 (Public Law 114-328), and $10,000 for purposes of basic research programs and for the activities of the DOD science and laboratories, as established in Section 217 of the NDAA for FY 2017." (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." For more on the class deviation implementing Section 821, see the August 2017 ***Federal Contracts Perspective*** article "DOD Increases Micro-Purchase Threshold.").

MILEAGE REIMBURSEMENT SET AT 54.5¢ PER MILE FOR AUTOS

The General Services Administration (GSA) is increasing the mileage reimbursement rate for use of a privately owned automobile on official travel from 53.5¢ per mile to **54.5¢** per mile, and the rate for use of a motorcycle on official travel from 50.5¢ per mile to **51.5¢** per mile. The rate for use of a privately owned aircraft is reduced from $1.15 per mile to **$1.21** per mile. These revised rates are effective for travel performed on or after January 1, 2018, through December 31, 2018. The increased reimbursement rates reflect slightly higher fuel prices.

REVISED AND EXPANDED!



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Sample Chapters:
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