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GAO INTRODUCES ELECTRONIC PROTEST SYSTEM, ASSESSES $350 FILING FEE

The Government Accountability Office (GAO) has announced that it is introducing a secure web-based electronic system for bid protests. The new electronic bid protest docketing system (EPDS) is designed "to provide a more seamless and efficient process for all participants, providing real-time notice to federal agencies of new protest filings as well as notice to all parties to a protest of subsequent protest filings."

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Effective May 1, all new protests of government contract awards (excluding those including classified material) must be submitted and managed through EPDS (**https://epds.gao.gov/login**). There will be a $350 filing fee, which will be used to pay for the operation and maintenance of the system. When filing a protest, the protester will be automatically redirected to **http://www.pay.gov**.

The EPDS implements Section 1501 of the Consolidated Appropriations Act for 2014 (Public Law 113-76), which requires the Comptroller General of the GAO to "establish and operate an electronic filing and document dissemination system under which, in accordance with procedures prescribed by the Comptroller General: (A) a person filing a protest…may file the protest through electronic means; and (B) all documents and information required with respect to the protest may be disseminated and made available to the parties to the protest through electronic means." Also, Section 1501 authorizes the Comptroller General to "require each person who files a protest…to pay a fee to support the establishment and operation of the electronic system…"

In addition to announcing the establishment of the EPDS, GAO amended its regulations in Title 4 of the Code of Federal Regulations (CFR), Part 21, Bid Protest Regulations (4 CFR Part 21), to recognize the EPDS, to reflect the mandatory nature of the EPDS, to make certain administrative changes to reflect current practice, and to streamline the bid protest process.

The following are some of the significant changes GAO is making to its bid protest regulations:

- Paragraph (f) of 4 CFR 21.0, Definitions, is redesignated as paragraph (g), and new paragraph (f) states "Electronic Protest Docketing System (EPDS) is GAO's web-based electronic docketing system. GAO's website [**https://epds.gao.gov/login**] includes instructions and guidance on the use of EPDS."

- Redesignated 4 CFR 21.0(g), which addresses how a protest is filed with GAO, is revised to state "A document is filed on a particular day when it is received in EPDS by 5:30 p.m., Eastern Time. Delivery of a protest or other document by means other than those set forth in the online EPDS instructions does not constitute a filing. Filing a document in EPDS constitutes notice to all parties of that filing."

- To specify that EPDS will be the sole means for filing a bid protest at GAO, paragraph (b) of 4 CFR 21.1, Filing a Protest, is revised to "Protests must be filed through the EPDS."

- 4 CFR 21.1(h), which addresses the filing of classified documents, has the following added as the first sentence of the paragraph: "Protests and other documents containing classified information shall not be filed through the EPDS."

- Paragraphs (a) and (e) of 4 CFR 21.3, Notice of Protest, Communications Among Parties, Submission of Agency Report, and Time for Filing of Comments on Report, are revised to reflect the requirement that documents must be filed through EPDS.

- To paragraph (a) of 4 CFR 21.4, Protective Orders, is added the following sentence: "GAO generally does not issue a protective order where an intervenor retains counsel, but the protester does not." This revision reflects GAO's longstanding practice of generally permitting the protester's decision whether to retain counsel to dictate whether GAO will issue a protective order.

- 4 CFR 21.4(b) through (d) are redesignated as paragraphs (c) through (e), and a new paragraph (b) is added, which provides that when parties file documents that are covered by a protective order, the parties must provide copies of proposed redacted versions of the document to the other parties within two days after the protected version is filed. The introduction to the rule states, "Proposed redacted versions of documents should not be filed through EPDS; rather, the party responsible for preparing the proposed redacted version of the document should provide the document to the other parties by email or facsimile… [However,] there is no reason to limit the non-EPDS exchanges between the parties to email or facsimile."

- To 4 CFR 21.5, Protest Issues Not for Consideration, is added paragraph (l), to state that, under the provisions of paragraph (e) of Title 10 of the United States Code, Section 2304, Contracts: Competition Requirements (10 USC 2304(e)) (which applies to the Department of Defense [DOD], the National Aeronautics and Space Administration [NASA], and the Coast Guard), and paragraph (f)(1) of 41 USC 4106, Orders (which applies to all other civilian agencies), GAO does not have jurisdiction to review protests of orders issued under task or

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delivery order contracts where the order is valued at less than $10,000,000 ($25,000,000 for DOD, NASA, and the Coast Guard) unless it is alleged that the order increases the scope, period, or maximum value of the contract under which the order was issued.

- 4 CFR 21.5(m) is added to clarify that GAO has the authority to review protests that an agency is improperly using a non-procurement instrument to procure goods or services.

- 4 CFR 21.6, Withholding of Award and Suspension of Contract Performance, is revised to require agencies to "file a notification in instances where it overrides a requirement to withhold award or suspend contract performance, and it shall file either a copy of any issued determination and finding, or a statement by the individual who approved the determination and finding that explains the statutory basis for the override."

- Paragraph (e) of 4 CFR 21.7, Hearings, is revised to state, "GAO does not provide for hearing transcripts. If the parties wish to have a hearing transcribed, they may do so at their own expense, so long as a copy of the transcript is provided to GAO at the parties' expense."

- 4 CFR 21.7(f) has "Recommendation on the Amount of Costs" added as its heading.

  – Paragraph (f)(3) is added, which states "If the protester and the agency cannot reach agreement regarding the amount of costs within a reasonable time, the protester may file a request that GAO recommend the amount of costs to be paid, but such request shall be filed within 10 days of when the agency advises the protester that the agency will not participate in further discussions regarding the amount of costs." (Current paragraph (f)(3) is redesignated as paragraph (f)(6)).

  – Paragraph (f)(5) is added, which states "GAO may recommend the amount of costs the agency should pay. In such cases, GAO may also recommend that the agency pay the protester the costs of pursuing the claim for costs before GAO."

GAO has established a webpage, **https://www.gao.gov/legal/bid-protests/file-a-bid-protest**, that provides how-to videos on registering as a new EPDS user, logging into and navigating EPDS, filing a new protest, and submitting a request to intervene. In addition, this webpage includes frequently asked questions (FAQs) and user manuals.

DOD CRANKS IT UP FOR SPRING!

After a relatively quiet winter, the Department of Defense (DOD) changes to the DOD Federal Acquisition Regulation Supplement (DFARS) are in full bloom, with the issuance of six final rules, two class deviations, and one notice!

■ **Definition of "Information Technology":** This final rule relocates the definition of "information technology" from DFARS 202.101, Definitions, to DFARS 239.7301, Definitions [for DFARS subpart 239.73, Requirements for Information Relating to Supply Chain Risk].

This specific definition of "information technology" was established by the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2011 (Public Law 111-383), Section 806, Requirements for Information Relating to Supply Chain Risk. To implement Section 806, DOD published an interim rule that added DFARS subpart 239.73 and DFARS 252.239-7018, Supply Chain Risk, which included a definition for "information technology" that applied when managing supply chain risk. That definition supersedes the definition of "information technology" in Federal Acquisition Regulation (FAR) 2.101, Definitions. (For more on the interim rule, see the December 2013 ***Federal Contracts Perspective*** article "DFARS Amended to Address Supply Chain Risk.")

The final version of the rule added the DFARS 252.239-7018 "information technology" definition to DFARS 202.101 (see the November 2015 ***Federal Contracts Perspective*** article "DOD Maintains Slow and Steady Pace for DFARS Revisions"). However, this particular definition of "information technology" applies only to supply chain risk, so it does not belong in DFARS 202.101, the definitions of which apply to the entire DFARS, but in DFARS 239.7301, the definitions of which apply only to DFARS subpart 239.73. Therefore, this rule moves the "information technology" definition from DFARS 202.101 to DFARS 239.7301 as originally intended by Public Law 111-383.

■ **Consolidation of Contract Requirements:** This final rule amends DFARS part 207, Acquisition Planning, to remove DFARS 207.170, Consolidation of Contract Requirements, which contains outdated coverage of consolidation of contract requirements. DFARS 207.170 implemented 10 USC 2382, Consolidation of Contract Requirements: Policy and Restrictions, which was repealed by Section 1671 of the NDAA for FY 2013 (Public Law 112-239). As a result, DOD is required to comply with 15 USC 657q, Consolidation of Contract Requirements, which is implemented by FAR 7.107, Additional Requirements for Acquisitions Involving Consolidation, Bundling, or Substantial Bundling. Therefore, this rule deletes DFARS 207.170 in its entirety. In addition, paragraphs (a)(i)(A) and (a)(ii)(A) of DFARS 210.001, Policy [on market research], are deleted to remove the reference to DFARS 207.170; and in paragraph (c)(11)(A) of the DFARS 219.201, General Policy [for small business programs], the reference to DFARS 207.170 is replaced by a reference to FAR 7.107.

■ **Extension of Test Program for Comprehensive Small Business Subcontracting Plans:** This finalizes, with changes, the rule that proposed to amend DFARS subpart 219.7, The Small Business Subcontracting Program, and DFARS 252.219-7004, Small Business Subcontracting Plan (Test Program), to implement Section 821 of the NDAA for FY 2015 (Public Law 113-291) and Section 872 of the NDAA for FY 2016 (Public Law 114-92), both of which revise the test

program for negotiation of comprehensive small business subcontracting plans on a corporate, division, or plant-wide basis rather than on an individual contract basis.

Section 821 of the NDAA for FY 2015 requires contractors participating in the test program to semiannually report specific information related to their comprehensive subcontracting plans. This information is expected to assist in determining if test program participants have achieved cost savings while enhancing opportunities for small businesses.

In addition, Section 821:

- Repeals Section 402 of the Small Business Administration Reauthorization and Amendments Act of 1990 (Public Law 101-574), which suspended liquidated damages under comprehensive small business subcontracting plans;

- Requires consideration, as part of the past performance evaluation of an offeror, of any failure to make a good faith effort to comply with its comprehensive subcontracting plan;

- Extended the test program expiration date from December 14, 2014, to December 31, 2017;

- Increases the threshold for participation in the test program from $5,000,000 to $100,000,000; and

- Prohibits negotiation of comprehensive subcontracting plans with contractors who failed to meet the subcontracting goals of their comprehensive subcontracting plan for the prior fiscal year. However, Section 872 of the NDAA for FY 2016 removes this prohibition.

To implement Section 821 and Section 872, DOD proposed revising DFARS 219.702-70, Statutory Requirements for the Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans, and DFARS 252.219-7004 (see the October 2016 ***Federal Contracts Perspective*** article "DOD Proposes Changes to Its Mentor-Protégé Program"). One respondent submitted comments on the proposed rule, but no changes were made to the final rule in response to the respondent's comments. However, this final rule implements Section 826 of the NDAA for FY 2017 (Public Law 114-328), which further extends the test program expiration date to December 31, 2027, by revising DFARS 219.702-70(f) accordingly.

This final rule replaces Class Deviation 2018-O0010, Temporary Extension of the Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans, which extended the program's expiration date to December 31, 2027 (see the February 2018 ***Federal Contracts Perspective*** article "DOD Provides Guidance on Commercial Item Procurement").

■ **Competition for Religious-Related Services Contracts:** This finalizes, without changes, the rule that proposed to add DFARS 219.270, Religious-Related Services – Inclusion of Nonprofit Organizations, DFARS subpart 237.77, Competition for Religious-Related Services, and DFARS 252.219-7012, Competition for Religious-Related Services, to implement Section 898 of the NDAA for FY 2016 (Public Law 114-92), which states that DOD "may not preclude a nonprofit organization from competing for a contract for religious related services on a United States military installation."

The proposed revisions would establish policy and procedures that allow nonprofit organizations to participate in small business set-asides, and directed contracting officers not to use the sole source authorities at (b)(4) through (7) of FAR 6.302-5, Authorized or Required by Statute, may be used for such procurements when acquiring religious-related services on a United States military installation (the following are the exceptions: (4) sole source awards under the 8(a) program; (5) sole source awards under the HUBZone Act of 1997; (6) sole source awards under the Veterans Benefits Act of 2003; and (7) sole source awards under the Women-Owned Small Business Program). In addition, the proposed rule contained new provision DFARS 252.219-7012 which would ensure that potential offerors are aware that a nonprofit organization will not be precluded from competing for a contract for religious-related services under a small business set-aside, notwithstanding that it is not one of the small business types identified in paragraph (a)(3) of FAR 19.000, Scope of Part [19, Small Business Programs]: "small business, 8(a) participants, HUBZone small business concerns, service-disabled veteran-owned small business concerns, and economically disadvantaged women-owned small business (EDWOSB) concerns and women-owned small business (WOSB) concerns eligible under the WOSB Program."

No comments were submitted in response to the proposed rule, so it is finalized without changes. For more on the proposed rule, see the January 2017 ***Federal Contracts Perspective*** article "DOD Cleans House for New Administration."

■ **Safe Access to Projects in Afghanistan:** This final rule adds DFARS 225.7705, Prohibition on Use of Funds for Contracts of Certain Programs and Projects in Afghanistan That Cannot Be Safely Accessed, to implement Section 1216 of the NDAA for FY 2017 (Public Law 114-328), which requires that funding available to DOD "may not be obligated or expended for a construction or other infrastructure program or project of the department in Afghanistan if military or civilian personnel of the United States government or their representatives with authority to conduct oversight of such program or project cannot safely access such program or project." This prohibition is in DFARS 225.7005-1, Prohibition. However, this prohibition may be waived under the circumstances specified in DFARS 225.7705-2, Waiver of Prohibition:

(1) The program or project clearly contributes to United States national interests or strategic objectives;

(2) The government of Afghanistan has requested or expressed a need for the program or project;

(3) The program or project has been coordinated with the government of Afghanistan, and with any other implementing agencies or international donors;

(4) Security conditions permit effective implementation and oversight of the program or project;

(5) Safeguards to detect, deter, and mitigate corruption and waste, fraud, and abuse of funds are in place;

(6) Adequate arrangements have been made for the sustainment of the program or project following its completion, including arrangements with respect to funding and technical capacity for sustainment; and

(7) Meaningful metrics have been established to measure the progress and effectiveness of the program or project in meeting its objectives.

The following officials are authorized to approve such waivers:

(1) In the case of a program or project with an estimated lifecycle cost of less than $1 million, by the contracting officer.

(2) In the case of a program or project with an estimated lifecycle cost of $1 million or more, but less than $20 million, by the senior U.S. officer in the Combined Security Transition Command – Afghanistan.

(3) In the case of a program or project with an estimated lifecycle cost of $20 million or more, but less than $40 million, by the Commander of United States Force – Afghanistan.

(4) In the case of a program or project with an estimated lifecycle cost of $40 million or more, by the Secretary of Defense. In addition, for waivers at this level, Congressional notification must be provided within 15 days of the issuance of the waiver.

DFARS 225.7705-3, Procedures, provides instructions to the contracting officer on complying with this prohibition or preparing a prohibition waiver.

■ **Educational Service Agreements:** This final rule removes paragraph (a) of DFARS 237.7202, Limitations [on educational service agreements], which will permit DOD to make agreements that permit payment for Masters of Laws degrees and other legal training programs.

DFARS subpart 237.72, Educational Service Agreements, prescribes policies and procedures for acquiring educational services from schools, colleges, universities, or other educational institutions. An educational service agreement is an ordering agreement under which the government may acquire educational services. DFARS 237.7202(a) states, "Make no agreement under this subpart which will result in payment of government funds for tuition or other expenses for training in any legal profession, except in connection with the detailing of commissioned officers to law schools under 10 USC 2004 [Detail of Commission Officers as Students at Law Schools]."

The limitation in DFARS 237.7202(a) was established in 1991, when legal training was acquired only for the purpose of obtaining doctorate degrees for military judge advocates. DOD's need for legal training has evolved since the addition of DFARS 237.7202(a). Because 10 USC 2004 contains no prohibition against acquiring other training in the legal profession, this rule deletes DFARS 237.7202(a). Removal of this limitation will allow DOD to make agreements that permit payment for masters of laws degrees and other legal training needs, in accordance with applicable law, regulation, and policy.

This rule replaces Class Deviation 2018-O0005, Educational Service Agreements for Training in the Legal Profession, which removed the prohibition against contracting officers

entering into educational service agreements for training in any legal profession except for commissioned officers in law school.

■ **Class Deviation Increasing the Threshold for Obtaining Certified Cost or Pricing Data:** This deviation increases the threshold for obtaining certified cost or pricing data to $2,000,000 from the $750,000 threshold in paragraph (a)(1) of FAR 15.403-4, Requiring Certified Cost or Pricing Data (10 USC 2306a and 41 USC Chapter 35).

Section 811 of the NDAA for FY 2018 (Public Law 115-91) increases the threshold for obtaining certified cost or pricing under 10 USC 2306a, , Cost or Pricing Data: Truth in Negotiations (commonly called the "Truth in Negotiations Act") and 41 USC 3502, Required Cost or Pricing Data and Certification, from $750,000 to $2,000,000 for contracts entered into after June 30, 2018. Since paragraph (b)(1)(B) of 41 USC 1502, Cost Accounting Standards, ties the cost accounting standards threshold to the certified cost or pricing threshold in 10 USC 2306a, this deviation increases the threshold for the applicability of cost accounting standards to $2,000,000 as well. Therefore, contracting officers are to use the provision and clauses in Attachment 1 of the deviation in lieu of the cost accounting standards provision and clauses FAR 52.230-1 through FAR 52.230-5.

This deviation will remain in effect until it is incorporated into the FAR or rescinded.

■ **Class Deviation Increasing the Micro-Purchase Threshold, the Simplified Acquisition Threshold, and Use of Special Emergency Procurement Authority:** This deviation increases the micro-purchase threshold to **$5,000**; the simplified acquisition threshold to **$250,000**; and continues to implement Class Deviation 2017-O0007, Special Emergency Procurement Authorities, as supplemented by Class Deviation 2018-O0001, Additional Special Emergency Procurement Authority – Delegation to Head of the Contracting Activity (both these class deviations are rescinded and superseded by this class deviation).

This class deviation provides the following exceptions to the micro-purchase threshold:

- **$10,000** for DOD basic research programs and activities of the DOD science and technology reinvention laboratories;

- **$10,000**, or a higher amount as determined appropriate by the head of the agency, for acquisitions of supplies or services from institutions of higher education or related or affiliated nonprofit entities, or from nonprofit research organizations or independent research institutes; and

- For acquisitions in support of a contingency operation; to facilitate defense against or recovery from cyber, nuclear, biological, chemical or radiological attack; to support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant to 22 USC 2292 et seq.; or to support response to an emergency or major disaster (42 USC 5122):

    - **$20,000** for any contract to be awarded and performed, or purchase to be made, inside the United States; and

- **$30,000** for any contract to be awarded and performed, or purchase to be made, outside the United States.

This class deviation provides the following exceptions to the simplified acquisition threshold:

– For acquisitions in support of a contingency operation; to facilitate defense against or recovery fromcyber, nuclear, biological, chemical or radiological attack; to support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant to 22 USC 2292 *et seq*. [International Disaster Assistance]; or to support response to an emergency or major disaster (42 USC 5122 [Definitions]):

  - **$750,000** for any contract to be awarded and performed, or purchase to be made, inside the United States; and

  - **$1,500,000** for any contract to be awarded and performed, or purchase to be made, outside the United States.

– **$500,000** for acquisitions to be used to support a humanitarian or peacekeeping operation and to be awarded and performed, or purchased, outside the United States.

The following are additional changes made by this class deviation:

– Supplies or services that are to be used to facilitate recovery from a cyber attack are to be treated as commercial items;

– The thresholds for the various small business set-asides in the Small Business Act (see FAR part 19, Small Business Programs) are changed from specific dollar amounts to the terms “micro-purchase threshold” and “simplified acquisition threshold”;

– It delegates from the “head of the agency” to the “head of the contracting activity” the authority to determine whether an acquisition supports a humanitarian or peacekeeping operation; supports a contingency operation; facilitates defense against or recovery from cyber, nuclear, biological, chemical or radiological attack; facilitates the provision of international disaster assistance; or supports response to an emergency or major disaster; and

– It exempts acquisitions in support of a contingency operation or humanitarian or peacekeeping operation; to facilitate defense against or recovery from cyber, nuclear, biological, chemical or radiological attack; to facilitate the provision of international disaster assistance; or support response to an emergency or major disaster from:

  - DOD item unique identification requirements in paragraph (b) of DFARS 211.274-2, Policy for Item Unique Identification;

- The policies related to receipt of only one offer in DFARS 215.371-2, Promote Competition; and

- The approval requirements for use of time-and-materials contracts in DFARS 215.371-4, Exceptions [to the competition promotion requirements in DFARS 215.371-2].

This deviation implements the following provisions of the FY 2018 and 2017 NDAAs:

– NDAA for FY 2018 (Public Law 115-91):

- Section 805, Increased Simplified Acquisition Threshold; and

- Section 1702, Uniformity in Procurement Terminology (convert specific dollar amounts to "micro-purchase threshold" and "simplified acquisition threshold").

– NDAA for FY 2017 (Public Law 114-328):

- Section 217, Increased Micro-Purchase Threshold for Research Programs and Entities;

- Section 816, Amendments to Special Emergency Procurement Authority;

- Section 821, Increased Micro-Purchase Threshold Applicable to Department of Defense Procurements; and

- – Section 1641, Special Emergency Procurement Authority to Facilitate the Defense Against or Recovery from a Cyber Attack.

Class Deviation 2017-O0001 implemented Section 816 and Section 1641 of Public Law 114-328, and Class Deviation 2018-O0001 expanded nonstatutory emergency acquisition flexibilities relating to item unique identification, receipt of only one offer, and limitations on time-and-materials contracts to include contracts that facilitate defense against or recovery from cyber attack, facilitate the provision of international disaster relief, or support response to an emergency or major disaster.

EDITOR'S NOTE: Public Law 115-91, Section 806, Requirements Related to the Micro-Purchase Threshold, states, "Section 1902(a)(1) of Title 41, United States Code, is amended by striking '$3,000' and inserting '$10,000'." However, Public Law 114-328, Section 821, 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." Though the intention of Section 806 was for the $10,000 threshold to apply throughout the government, it did not repeal Section 821, therefore the DOD is stuck with a $5,000 micro-purchase threshold while the rest of the government enjoys a $10,000 micro-purchase threshold! For more on this situation, see the March 2018 ***Federal Contracts Perspective*** article "CAAC Authorizes Deviation Increasing Simplified Acquisition and Micro-Purchase Thresholds."

■ **Guidance for Reviewing System Security Plans and the NIST SP 800-171 Security Requirements Not Yet Implemented:** This notice states "DOD has drafted guidance for procurements requiring implementation of National Institute of Standards and Technology (NIST) Special Publication (SP) 800-171, Protecting Controlled Unclassified Information in Nonfederal Systems and Organizations, and is making the draft guidance available to the public." DOD is asking for comments from the public on the draft guidance.

Section 941 of the NDAA for FY 2013 (Public Law 112-239) and Section 1632 of the NDAA for FY 2015 (Public Law 113-291) both require contractors to report network penetrations. NIST SP 800-171 is specifically tailored for use in protecting sensitive information residing in contractor information systems, so an interim rule was issued that modified DFARS 252.204-7012, Safeguarding Covered Defense Information Reporting, to implement both Section 941 and Section 1632, including the requirement to implement NIST SP 800-171 (for more on this interim rule, see the September 2015 ***Federal Contracts Perspective*** article "DOD Issues Regulations on Network Penetration Reporting and Contracting for Cloud Services"). A second interim rule amended DFARS 252.204-7012 to require that the security requirements specified by NIST SP 800-171 be in place no later than December 31, 2017 (for more on this second interim rule, see the January 2016 ***Federal Contracts Perspective*** article "DOD Addresses Acquisition Policies Outside the U.S."). These two interim rules were finalized with several amendments to DFARS 252.204-7012 (for more on this final rule, see the November 2016 ***Federal Contracts Perspective*** article "DOD Finalizes Network Penetration Reporting Rule").

NIST SP 800-171 states that nonfederal organizations should prepare a System Security Plan to describe how the specified security requirements are met, or how it plans to meet the requirements, and should develop a Plan of Action that describes how any unimplemented security requirements will be met and how any planned mitigations will be implemented.

DOD has developed "DOD Guidance for Reviewing System Security Plans and the NIST SP 800-171 Security Requirements Not Yet Implemented" to facilitate the consistent review and understanding of System Security Plans and Plans of Action. DOD is requesting comments on this document by May 31, 2018, identified as "DARS-2018-023," by either of the following methods: (1) the Federal eRulemaking Portal**: http://www.regulations.gov**; or (2) mail: Defense Procurement and Acquisition Policy, Attn: Mary Thomas, OUSD(A&S) DPAP/PDI, Room 3C958, 3060 Defense Pentagon, Washington, DC 20301-3060.

To access "DOD Guidance for Reviewing System Security Plans and the NIST SP 800-171 Security Requirements Not Yet Implemented" and related documents, go to the Federal eRulemaking Portal at **http://www.regulations.gov**, search for the docket "DARS-2018-0023," click "Open Docket," and view "Supporting Documents."

PHASE II OF VAAR UPDATE FINALIZED

The Department of Veterans Affairs (VA) is issuing the second of several 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.

In addition, VA is proposing three more revisions to the VAAR that would 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.

The second final rule, which addresses VAAR part 803, Improper Business Practices and Personal Conflicts of Interest, VAAR part 814, Sealed Bidding, and VAAR part 822, Application of Labor Laws to Government Acquisitions, incorporated several technical non-substantive changes to the second of the proposed rules (see the June 2017 ***Federal Contracts Perspective*** article "Phase Two of VAAR Revision Proposed"). Besides conducting clean-up and maintenance, the final rule makes the following significant changes:

- Two definitions are added to VAAR 802.101, Definitions: "Suspending and Debarring Official" and "Suspension and Debarment Committee."

- VAAR subpart 803.1, Safeguards, VAAR subpart 803.3, Reports of Suspected Antitrust Violations, VAAR subpart 803.4, Contingent Fees, VAAR subpart 803.6, Contracts with Government Employees or Organizations Owned or Controlled by Them, VAAR subpart 803.7, Voiding and Rescinding Contracts, VAAR subpart 803.8, Limitation on the Payment of Funds to Influence Federal Transactions, and VAAR subpart 803.70, Contractor Responsibility to Avoid Improper Business Practices, are removed because they are internal VA guidance.

- VAAR subpart 803.11, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, is added. This implements FAR 52.203-16, Preventing Personal Conflicts of Interest, by requiring the signing of a non-disclosure agreement by certain contractor covered employees performing acquisition functions closely associated with inherently governmental functions to prohibit disclosure of non-public information accessed through performance on a Government contract. This subpart also requires each contractor and subcontractor at any tier whose employees perform acquisition functions closely associated with inherently governmental functions to obtain the signed non-disclosure forms from each covered employee.

- VAAR 814.201-2, Part I – The Schedule, is added to explain how award is made on summary bids and bids on groups of items.

- VAAR 814.202-4, Bid Samples, is added to require that bid samples be produced by the manufacturer that would provide the supplies or services under the contract.

- VAAR subpart 814.4, Opening of Bids and Award of Contract, is deleted because the information it contains is either redundant to the FAR or is comprised of agency internal procedures.

- VAAR subpart 822.3, Contract Work Hours and Safety Standards Act, is revised to use plain language.

- VAAR subpart 822.4, Labor Standards for Contracts Involving Construction, is removed because it consists of internal agency guidance.

- VAAR 852.203-71, Display of Department of Veterans Affairs Hotline Poster, is deleted because it duplicates FAR 52.203-14, Display of Hotline Poster(s).

- VAAR 852.214-70, Caution to Bidders – Bid Envelopes, is deleted because VA no longer issues bid envelopes.

In addition to this final rule, VA issued three more proposed increments to the VAAR overhaul (the fifth through seventh increments overall). Each of the three proposed increments would amend and update VAAR parts that address related topics. Each increment would revise or remove any policy superseded by changes in the FAR, remove procedural guidance internal to VA, and 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.

The first of these increments would add VAAR part 844, Subcontracting Policies and Procedures, and add VAAR part 845, Government Property, to supplement the FAR by adding (and making public) unique VA requirements on these topics. Comments on this proposed rule must be submitted by June 5, 2018, identified as "RIN 2900-AQ05–Revise and Streamline VA Acquisition Regulation Parts 844 and 845," 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 Avenue NW, Room 1063B, Washington, DC 20420; or (3) fax: 202-273-9026.

The second of these increments would amend VAAR part 831, Contract Cost Principles and Procedures, VAAR part 833, Protests, Disputes, and Appeals, and VAAR Part 871, Loan Guaranty and Vocational Rehabilitation and Employment Programs. Comments on this proposed rule must be submitted by June 5, 2018, identified as "RIN 2900-AQ02–Revise and Streamline VA Acquisition Regulation (Parts 831 and 833," 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 Avenue NW, Room 1063B, Washington, DC 20420; or (3) fax: 202-273-9026.

The third of these increments would amend VAAR part 829, Taxes, VAAR part 846, Quality Assurance, VAAR part 847, Transportation, and VAAR part 870, Special Procurement Controls. Comments on this proposed rule must be submitted by June 25, 2018, identified as "RIN 2900-AQ04–Revise and Streamline VA Acquisition Regulation – Parts 829, 846, and 847," 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 Avenue NW, Room 1063B, Washington, DC 20420; or (3) fax: 202-273-9026.

TREASURY FINALIZES TAX CHECK REQUIREMENT RULE

The Department of the Treasury finalizes, without changes, the interim rule that added Department of the Treasury Acquisition Regulation (DTAR) subpart 1009.70, Tax Check

Requirements, which directs Internal Revenue Service (IRS) contracting officers to perform a tax check on the apparent successful offeror to determine eligibility to receive an award. If the tax check shows the offeror has a delinquent federal tax liability, the offeror is ineligible for award unless "the offeror provides the contracting officer with documentation…that demonstrates the offeror's tax status as being paid-in-full or that an approved payment agreement is in place...If the tax check demonstrates the offeror as tax compliant then the offeror is eligible for award, assuming all other standards of responsibility have been met." (DTAR 1009.7001, Definitions, defines a a "tax check" as "an IRS process that accesses and uses taxpayer return information to support the government's determination of an offeror's eligibility to receive an award, including but not limited to implementation of the statutory prohibition of making an award to corporations that have a delinquent federal tax liability...")

Twenty-seven comments were submitted on the interim rule, but twenty-six of those comments were outside the scope of the interim rule, and the other comment supported the interim rule. Therefore, Treasury is finalizing the interim rule without changes. For more on the interim rule, see the December 2017 ***Federal Contracts Perspective*** article "IRS to Assess Contractors' Tax Compliance."

HUDAR REVISIONS PROPOSED

The Department of Housing and Urban Development (HUD) is proposing to amend the HUD Acquisition Regulation (HUDAR) to implement miscellaneous changes. The most significant change would be changing throughout the HUDAR the unique-HUD term "government technical representative" (GTR) to "contracting officer representative" (COR), and the term "government technical monitor" would be removed.

In addition, the following are the most significant changes that are being proposed:

■ HUDAR 2442.1107, Contract Clause, would be revised to codify a class deviation previously approved by the Chief Procurement Officer (CPO) to: (1) revise the procurement instruments, types of contracts, and types of services applicable to HUDAR 2452.242-71, Contract Management Systems; and (2) adjust the threshold at which the clause becomes applicable (from $500,000 to $1,000,000).

■ Add HUDAR 2452.216-81, Level of Effort and Fee Payment, and HUDAR 2452.216-82, Labor Categories, Requirements, and Estimated Level of Effort, which are HUD-specific clauses that HUD now wishes to codify. HUDAR 2452.216-81 provides contractors with the total level of effort to be provided and the method for calculating the fee, and HUDAR 2452.216-82 provides estimated hours and labor categories to assist vendors in developing proposals for immediate requirements.

■ Revise paragraph (b)(2) of HUDAR 2452.232-71, Voucher Submission (Cost-Reimbursement, Time-and-Materials, and Labor Hour), to codify a class deviation approved by the CPO that requires contractors to provide supporting documentation with vouchers that adequately prove the legitimacy and compliance of costs claimed, and the ability to appropriately allocate costs claimed.

■ Add provision HUDAR 2452.237-82, Access to Controlled Unclassified Information (CUI), and clause HUDAR 2452.237-83, Access to Controlled Unclassified Information (CUI), to codify a class deviation previously approved by the CPO relating to CUI.

■ Amend HUDAR 2452.237-75, Access to HUD Facilities, and HUDAR 2452.239-70, Access to HUD Systems, to codify a class deviation approved by the CPO that requires contractors to report the status of personal identify verification (PIV) cards to the government on a quarterly basis.

■ Amend HUDAR subpart 2452.3, Provision and Clause Matrix, to reflect the addition of provisions and clauses by this rule.

Comments on this proposed rule must be submitted by June 8, 2018, by either of the following methods: (1) the Federal eRulemaking Portal**: http://www.regulations.gov**; or (2) mail: Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500.

SBA PROPOSES REVISED SIZE STANDARDS METHODOLOGY

The Small Business Administration (SBA) has revised its white paper "SBA's Size Standards Methodology," which explains how it establishes, reviews, and modifies small business size standards. The white paper, which SBA intends to apply to the forthcoming five-year comprehensive review of size standards, is available at **https://www.sba.gov/document/support--size-standards-methodology-white-paper**, and SBA is inviting comments on it.

The white paper provides a brief review of the following:

■ Legal authority, early legislative history, and regulatory history of small business size standards;

■ Detailed description of evaluation of industry structure, federal market conditions, data sources, and calculation of size standards; and

■ Adjustments of size standards for inflation (see the February 2016 ***Federal Contracts Perspective*** article "Small Business Size Standards Raised, Increasing Number of Eligible Businesses by Thousands"), and adoption of North American Industry Classification System (NAICS) revisions for size standards (see the October 2017 ***Federal Contracts Perspective*** article "SBA Adopts NAICS 2017 For Size Standards").

The most significant proposed change in methodology is the conversion from the "anchor" approach to the "percentile" approach.

With the "anchor" size standards approach, SBA evaluates the characteristics of individual industries relative to the average characteristics of industries with the anchor size standard to other industries to determine whether they should have a higher or a lower size standard than the anchor. SBA adopted 500 emp1oyees as the size standard for manufacturing industries at its 1953 inception, and 500 employees has remained the standard for many industries and has long

been considered the "anchor" size standard for employee based size standards. For nonmanufacturing industries, SBA has used annual receipts as the measure of size standards for nonmanufacturing industries since 1954 when it established $1,000,000 in average annual receipts as the "anchor" size standard for nonmanufacturing industries. Over the years the receipts based size standards for various industries were adjusted to reflect their different natures: retail trade and service industries had size standards lower than the $1,000,000 anchor; wholesale trade industries had size standards that were higher than the $1,000,000 anchor; and construction industries had size standards that were higher yet. SBA has periodically increased all receipts based size standards for inflation. With the inflation adjustment, the most common receipts based size standard of $1,000,000 has increased to $7,500,000, which is considered today's "anchor" size standard for nonmanufacturing industries.

With the "percentile" approach, SBA will rank each industry among all industries with the same measure of size standards using each of five industry factors: average firm size; average assets size; industry competition; distribution of firms by size; and small business share of federal contracts relative to their share of the industry's receipts. Specifically, the size standard for an industry will be derived based on where the specific factors of that industry fall relative to other industries sharing the same measure of size standards. If an industry ranks high for a specific factor relative to most other industries, and all other factors are the same as the other industries, a size standard assigned to that industry will be higher than that for most industries. Conversely, if an industry ranks low for a specific factor relative to most industries in the group, a lower size standard will be assigned to that industry. The size standards for each factor are then averaged to obtain the overall size standard for a specific industry.

Currently, the most prevalent size standards are $7,500,000 in annual receipts for retail trade and services; $35,500,00 general construction; $15,000,000 for special trade construction; 100 employees for wholesale trade for all federal programs except for federal procurement where it is 500 employees under the nonmanufacturer rule; and 500 employees for manufacturing industries. Monetary based size standards range from $750,000 in annual receipts for most agricultural enterprises (which were set by statute until the enactment of NDAA for FY 2017) to $38,500,000 in annual receipts for facility support services. Similarly, employee based standards range from 100 employees for heating oil dealers to 1,500 employees for some manufacturing and telecommunications industries. With a very few exceptions, uniform size standards are now in place for all SBA's programs. (The table of size standards is available at **https://www.sba.gov/document/support--table-size-standards**.)

Comments are being solicited on issues such as:

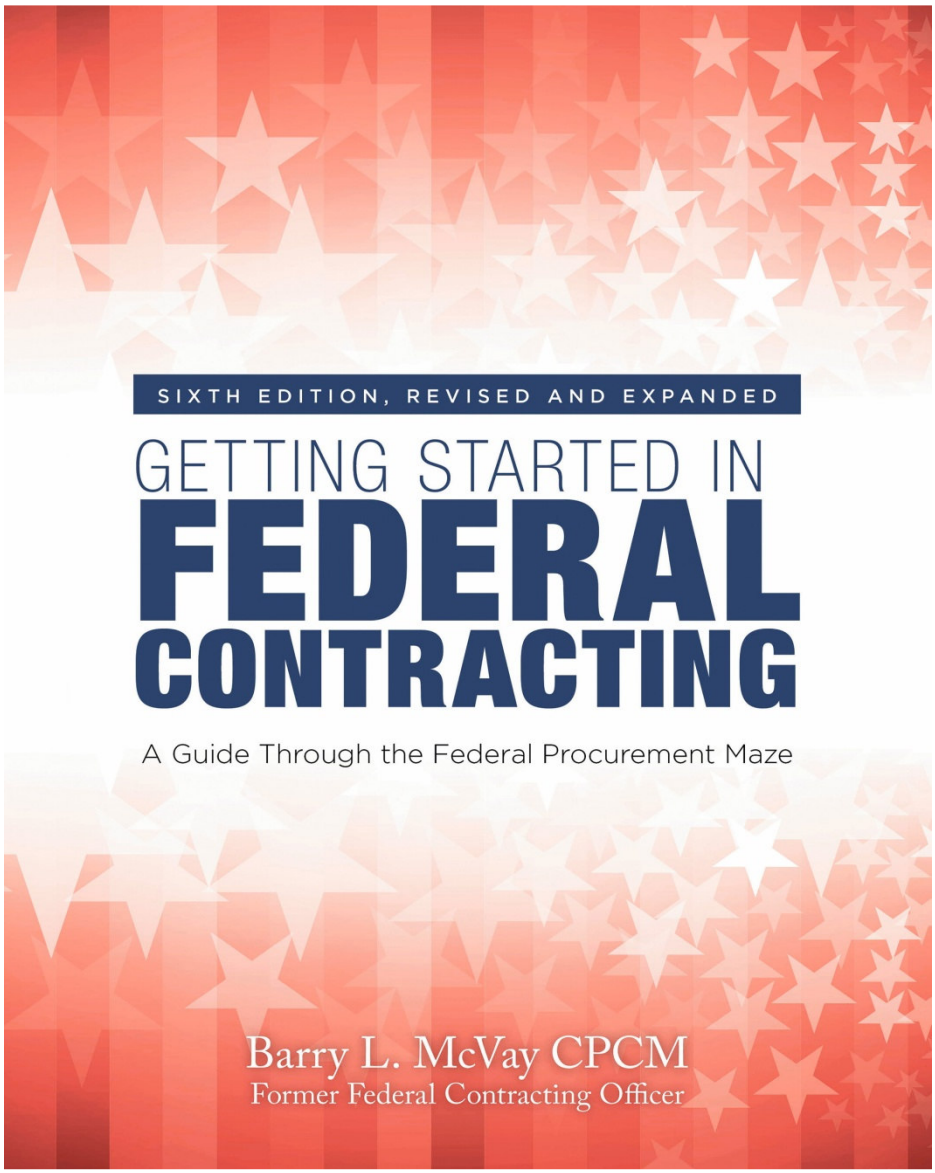
- Does the SBA's new percentile approach to size standards analysis make sense? In the current economic environment?
- Should size standards vary from program to program? For example, should SBA establish one set of size standards for federal procurement and another for its loan programs? In the 1980s, SBA had different size standards for different programs, and this resulted in some firms being small for some programs and large for others. This was very confusing to users and caused unnecessary and unwanted complexity in their application.
- Should size standards apply nationally or should they vary geographically? If the size standards should vary geographically, how would a contracting officer set the size standard on a contracting opportunity? Would it depend on the contracting officer's location? On the

location of the agency's headquarters? On the place of delivery of the product or service? What about multiple delivery locations? On the location of the prospective contractor? On the location of the prospective contractor's headquarters? What if the location was not in the U.S.? What about subcontractors, since size standards apply to their contracts as well?

- Should SBA use the same measure of size (that is, employees, receipts, or some other measure) for all industries? In 2004, SBA proposed to establish all size standards based on number of employees (see the April 2004 ***Federal Contracts Perspective*** article "SBA Proposes to Restructure Size Standards, Would Reduce Number of Categories from 37 to 10"). This proposal received over 3,700 mixed comments from the public, and SBA withdrew it (see the August 2004 ***Federal Contracts Perspective*** article "SBA Withdraws Proposed Size Standards Revision, 'Needs a Little More Work'").
- Should there be a ceiling beyond which a firm cannot be considered small? In other words, should there be a maximum size standard? SBA has not increased its employee based standards beyond the 1,500-employee level. However, receipts based size standards have gradually increased over time and the highest standard stands at $38,500,000 today.
- Should SBA consider adjusting employee-based size standards for labor productivity as it adjusts receipts based size standards for inflation?
- Should SBA consider lowering its size standards? SBA receives comments from the public that its standards are too high in certain industries. The comments generally concern the competitive edge that large small businesses have over "truly small businesses." SBA has found that its size standards appear large to the smallest of small businesses while larger small businesses often request even higher size standards.
- Should SBA size standards be specific, that is, to the precise dollar calculated based on the data and information it evaluates? Or should SBA recognize that there are other factors that go into establishing size standards, such as the fact that industries are not static?
- Should SBA round off its calculated size standards for the various industries? If so, should SBA always round up? To what level? If not, what about those industries that do not get increases in size standards when others are? What should be the cut-off point for rounding either one way or the other?
- How does SBA's size standards affect competition in general and within the specific industry?
- Alternative or additional factors that SBA should consider.
- If there are gaps in SBA's methodology because of the lack of comprehensive data.
- Alternative data sets SBA should consider for a specific sector.

Comments on this white paper must be submitted by June 26, 2018, identified as "SBA-2018-0004," by any of the following methods: (1) the Federal eRulemaking Portal**: http://www.regulations.gov**; or (2) mail or hand delivery: U.S. Small Business Administration, Khem R. Sharma, Chief, Office of Size Standards, 409 Third Street SW, Mail Code 6530, Washington, DC 20416; or (3) email: **sizestandards@sba.gov**.

REVISED AND EXPANDED!



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