*Panoptic Enterprises'*

# *FEDERAL CONTRACTS PERSPECTIVE*

Federal Acquisition Developments, Guidance, and Opinions

**Vol. XIX, No. 6** **June 2018**

## DOD UNLEASHES A TORRENT OF RULES, REMOVES UNNECESSARY DFARS CLAUSES AND PROVISIONS

**The Department of Defense (DOD) continues issuing rules that amend or revise the Defense Federal Acquisition Regulation Supplement (DFARS) at a frantic pace, issuing six final rules to implement various provisions of National Defense Authorization Acts. In addition, DOD issued five rules removing clauses and provisions that are no longer necessary or are redundant to similar ones in the Federal Acquisition Regulation (FAR). Finally, DOD published two proposed rules and is requesting comments on them. One of the proposed rules consists of the text of a class deviation that was issued three weeks before.**

CONTENTS



■ **Micro-Purchase Threshold:** This final rule amends the definition of "micro-purchase threshold in DFARS 202.101, Definitions, to implement Section 217 and Section 821 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Public Law 114-328). Section 821, Increased Micro-Purchase Threshold Applicable to Department of Defense Procurements, increases the micro-purchase threshold for Department of Defense (DOD) procurements from $3,500 to $5,000. Section 217, Increased Micro-Purchase Threshold for Research Programs and Entities, further increases the micro-purchase threshold to $10,000 for DOD basic research programs and for DOD science and technology reinvention laboratories (see the January 2017 ***Federal Contracts Perspective*** article "2017 Defense Authorization Act Increases Micro-Purchase Threshold, Extends SBIR/STTR").

**EDITOR'S NOTE:** The NDAA for FY 2018 (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'." The intention of Section 806 was to set $10,000 as the micro-purchase threshold throughout the federal government. However, 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." Because Section 806 of NDAA for FY 2018 did not repeal Section 821 of the NDAA for FY 2017, DOD is stuck with the $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" and the May 2018 ***Federal Contracts Perspective*** article "DOD Cranks It Up For Spring!."

■ **Delegation of Special Emergency Procurement Authority:** This final rule delegates authority to the head of the contracting activity the decision authorities provided to the head of the agency by the NDAA for FY 2017 (Public Law 114-328), Section 816, Amendments to Special Emergency Procurement Authority, and Section 1641, Special Emergency Procurement Authority to Facilitate the Defense Against or Recovery from a Cyber Attack. Section 816 adds "international disaster assistance" and "in support of an emergency or major disaster" to the list of special emergencies eligible for assistance; and Section 1641 adds "cyber" to "cyber, nuclear, biological, chemical, or radiological attack."

Besides further delegating decision authorities to the head of the contracting activity, this final rule makes the following changes (added and changed language is in *italics*):

- Paragraph (b)(1) of DFARS 211.274-2, Policy for Item Unique Identification, is amended to exempt from DOD item unique identification requirements "items, as determined by the *head of the contracting activity*, are to be used to support a contingency or humanitarian or peacekeeping operation; to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack; *to facilitate the provision of international disaster assistance; or to support response to an emergency or major disaster.*" (Note that "cyber" is not added to this authority. One of the reasons for use of item-unique identification is to ensure item-level traceability throughout the lifecycle to enhance cyber security [see paragraph (e) of DFARS 211.274-1, General (Item identification and valuation requirements)]. Therefore, to facilitate defense against or recovery from a cyber attack, item unique identification is particularly required for high-risk items identified by the requiring activity as a target of cyber threats, regardless of dollar value (see DFARS 211.274-2(a)(3)(v)).

- Paragraph (a)(2) of DFARS 215.371-4, Exceptions [to competition requirements in DFARS 215.371-2, Promote Competition, when only one response is received in response to a competitive solicitation], is amended to add the indicated wording: "Acquisitions, *as determined by the head of the contracting activity*, in support of contingency or humanitarian or peacekeeping operations; to facilitate defense against or recovery from *cyber*, nuclear, biological, chemical, or radiological attack; *to facilitate the provision of international disaster assistance; or to support response to an emergency or major disaster.*"

- Paragraph (d)(i)(A)(*3*) of DFARS 216.601, Time-and-Materials Contracts, is amended to exempt from the requirement for determination and findings approval of time-and-materials and labor-hour contracts: "The approval requirements in paragraphs (d)(i)(A)(*1*) and (*2*) of this section do not apply to contracts that, *as determined by the head of the contracting activity* – (*i*) support contingency or humanitarian or peacekeeping operations; (*ii*) facilitate defense against or recovery from conventional,

Vivina McVay, Editor-in Chief



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

*cyber*, nuclear, biological, chemical or radiological attack; (*iii*) *facilitate the provision of international disaster assistance; or (iv) support response to an emergency or major disaster.*"

– DFARS 218.201, Contingency Operation, is amended as follows:

  - Paragraph (2), Policy of Item Unique Identification, is revised to read as follows: "Contractors will not be required to provide DOD item unique identification if the items, as determined by the head of the *contracting activity*, are to be used to support a contingency operation. See [DFARS] 211.274-2(b)."

  - Paragraphs (7) through (10) are redesignated as paragraphs (9) through (12).

  - New paragraph (7) states: "*Only one offer. The requirements at [DFARS] 215.371-2 do not apply to acquisitions, as determined by the head of the contracting activity, in support of a contingency operation. See [DFARS] 215.371-4(a)(2).*"

  - New paragraph (9) states: "*Approval of determination and findings for time-and-materials or labor-hour contracts. The approval requirements in paragraphs (d)(i)(A)(1) and (2) of this section do not apply to contracts that, as determined by the head of the contracting activity, support contingency. See [DFARS] 216.601(d)(3).*"

– DFARS 218.202, Defense or Recovery from Certain Events, is revised to read as follows: "For acquisitions that, as determined by the head of the *contracting activity*, are to facilitate defense against or recovery from *cyber*, nuclear, biological, chemical, or radiological attack; *to facilitate provision of international disaster assistance; or to support response to an emergency or major disaster*, the following requirements do not apply: (1) Policy for unique item identification at [DFARS] 211.274-2(a). Contractors are not required to provide DOD unique item identification if the items are to be used to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. *However, contractors are not exempt from this requirement if the items are to be used to facilitate defense against or recovery from cyber attack. See [DFARS] 211.274-2(b). (2) Only one offer requirements at [DFARS] 215.371-2. See [DFARS] 215.371-4(a)(2). (3) Approval of determination and findings for time-and-materials or labor-hour contracts at [DFARS] 216.601(d)(i)(A)(1) and (2). See [DFARS] 216.601(d)(3).*"

– DFARS 218.204, Humanitarian or Peacekeeping Operation, is added. It states: "*The following requirements do not apply to acquisitions that, as determined by the head of the contracting activity, are in support of humanitarian or peacekeeping operations: (1) Policy for item unique identification at [DFARS] 211.274-2(a). See [DFARS] 211.274-2(b). (2) Only one offer requirements at sections [DFARS] 215.371-2. See [DFARS] 215.371-4(a)(2). (3) Approval of determination and findings for time-and-materials or labor-hour contracts at [DFARS] 216.601(d)(i)(A)(1) and (2). See [DFARS] 216.601(d)(3).*"

– DFARS 218.270, Humanitarian or Peacekeeping Operation, is removed.

– DFARS 218.271, Head of the Contracting Activity Determinations, is redesignated as DFARS 218.270, and the introductory text is revised so only the following text remains: "The term 'head of the agency' is replaced with 'head of the contracting activity,' as defined in FAR 2.101 [Definitions], in the following locations…" In addition, "Definition of micro-purchase threshold, paragraph (3)" is removed from the list of locations where this applies.

**EDITOR'S NOTE:** The final rule refers to Section 816 and Section 1641 of the NDAA for FY 2018 (Public Law 115-91). This is incorrect. The Section 816 and Section 1641 being implemented by this rule are in the NDAA for FY 2017 (Public Law 114-328).

■ **Riding Gang Member Requirements:** This final rule amends DFARS 252.247-7027, Riding Gang Member Requirements, which is required to be included in solicitations and contracts for the charter of, or contract for carriage of cargo by, a U.S.-flag vessel. The clause ensures that riding gang members are qualified to serve on board the vessel, and that both riding gang members and DOD-exempted individuals onboard will not pose a security risk based on criminal or other records. DFARS 252.247-7027(c)(2)(i)(B) required the contractor to immediately remove any individual from the vessel that is deemed unsuitable for any reasonn by Military Sealift Command (MSC) Force Protection. However, this requirement imposes duties on MSC that exceed the scope of their personnel screening agreement: MSC has authorization to screen persons who have access to MSC chartered vessels, but they do not screen persons who have access to non-MSC chartered or contracted vessels. To correct this situation, paragraph (c)(2)(i)(B) is modified to state that "the government agency conducting the background checks" is the authority responsible for deeming the individual unsuitable, not MSC.

■ **Sources of Electronic Parts:** This final rule adopts, with changes, the rule that proposed to amend DFARS 246.870-2, Policy [on contractor counterfeit electronic part detection and avoidance], and DFARS 252.246-7008, Sources of Electronic Parts, to implement the NDAA for FY 2016 (Public Law 114-92), paragraph (b) of Section 885, Amendments Concerning Detection and Avoidance of Counterfeit Electronic Parts, which provides that contractors and subcontractors are subject to approval by appropriate DOD officials when identifying a contractor-approved supplier of electronic parts. Contractors and subcontractors were already subject to review and audit by appropriate DOD officials.

DFARS 246.870-2(a) required contractors and subcontractors to "obtain electronic parts that are not in production by the original manufacturer or an authorized aftermarket manufacturer… from suppliers identified by the contractor as contractor-approved suppliers, provided that…the selection of such contractor-approved suppliers is subject to review and audit by the contracting officer." Section 885(b) revised "review and audit" to "review, audit, and approval". Therefore, the rule proposed to revise DFARS 246.870-2(a)(i)(ii)(C) and DFARS 252.246-7008(b)(2)(iii) to read "The contractor's selection of such contractor-approved suppliers is subject to review, audit, and approval by the contracting officer. The contractor may proceed with the acquisition of electronic parts from a contractor-approved supplier unless otherwise notified by DOD."

Four respondents submitted comments on the proposed rule. In response to a concern about when this review, audit, and approval would take place, the final rule amends DFARS 246.870-2(a)(i)(ii)(C) and DFARS 252.246-7008(b)(2)(iii) to state that this review, audit, and approval will be conducted by the government "generally in conjunction with a contractor purchasing

system review or other surveillance of purchasing practices by the contract administration office, or if the government obtains credible evidence that a contractor-approved supplier has provided counterfeit parts."

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

■ **Promoting Voluntary Post-Award Disclosure of Defective Pricing:** This finalizes, with changes, the rule that proposed to add DFARS 215.407, Special Cost or Pricing Areas (consisting of DFARS 215.407-1, Defective Certified Cost or Pricing Data), to encourage contractors to voluntarily disclose defective pricing identified by the contractor after contract award as a defense against defective pricing claims.

The proposed DFARS 215.407-1 would:

- Require, when a contractor voluntarily discloses defective pricing after contract award, that the contracting officer "request a limited-scope audit (*e.g.*, limited to the affected cost elements of the defective pricing disclosure) unless a full-scope audit is appropriate for the circumstances (*e.g.*, nature or dollar amount of the defective pricing disclosure)";

- Recommend that the contracting officer consult with the Defense Contract Audit Agency (DCAA) to determine the appropriate scope of the audit; and

- Clarify that a contractor's voluntary disclosure of defective pricing does not waive government entitlement to the recovery of any overpayment plus interest on the overpayments, or to the government's rights to pursue defective pricing claims.

One respondent submitted comments on the proposed rule, and in response the mandatory requirement to conduct an audit in all cases of a contractor's voluntary disclosure of defective pricing is removed.

For more on the proposed rule, see the December 2015 ***Federal Contracts Perspective*** article "DOD Picks Up Pace of Revisions to DFARS."

■ **Statement of Purpose for Department of Defense Acquisition:** This final rule adds DFARS 201.101, Purpose [of the DFARS], to implement the NDAA for FY 2018 (Public Law 115-91), Section 801, Statements of Purpose for Department of Defense Acquisition, which directs the insertion of a statement of purpose for DOD acquisition in the DFARS.

The text of DFARS 201.101 is taken verbatim from Section 801:

"(1) The defense acquisition system, as defined in 10 USC 2545, exists to manage the investments of the United States in technologies, programs, and product support necessary to achieve the national security strategy prescribed by the president pursuant to section 108 of the National Security Act of 1947 (50 USC 3043) and to support the United States Armed Forces.

"(2) The investment strategy of DOD shall be postured to support not only the current United States armed forces, but also future armed forces of the United States.

"(3) The primary objective of DOD acquisition is to acquire quality supplies and services that satisfy user needs with measurable improvements to mission capability and operational support at a fair and reasonable price."

■ **Right of First Refusal of Employment – Closure of Military Installations:** This final rule removes DFARS 252.222-7001, Right of First Refusal of Employment – Closure of Military Installations, along with DFARS subpart 222.71, Right of First Refusal of Employment, which states that it is DOD policy to "give employees adversely affected by closure of a military installation the right of first refusal for jobs created by award of contracts arising from the closure effort that the employee is qualified to fill" (DFARS 222.7101, Policy, which, as part of DFARS subpart 222.71, is removed along with the clause prescription at DFARS 222.7102, Contract Clause).

FAR 52.207-3, Right of First Refusal of Employment, is required in solicitations and contracts that will result in a conversion of work currently being performed by the government to work being performed under contract. Since FAR 52.207-3 applies to the situations covered by DFARS 252.222-7001, DFARS 252.222-7001 and DFARS subpart 222.71 are removed because they are redundant.

■ **Alternate A, System for Award Management:** This final rule removes DFARS 252.204-7004, Alternate A, System for Award Management, and its prescription in DFARS 204.1105, Solicitation Provision and Contract Clauses, because it duplicates FAR 52.204-7, System for Award Management, which requires the offeror to enter its Commercial and Government Entity (CAGE) code information into the System for Award Management (SAM) database prior to award of any contract or agreement.

DFARS 252.204-7004 was created for use in DOD solicitations to ensure that offerors responding to DOD solicitations understood that they needed to enter a CAGE code in SAM to be considered by DOD to be registered in the system and, thus, eligible for award. However, Federal Acquisition Circular (FAC) 2005-91, Item V, Unique Identification of Entities Receiving Federal Awards, revised the definition of "Registered in the System for Award Management (SAM) database" in FAR 52.204-7(a) to state that the offeror must have "entered all mandatory information, including the unique entity identifier and the EFT [electronic funds transfer] indicator, if applicable, *the Commercial and Government Entity (CAGE) code*, as well as data required by the Federal Funding Accountability and Transparency Act of 2006 [Public Law 109-282] (see [FAR] subpart 4.14 [Reporting Executive Compensation and First-Tier Subcontract Awards]) into the SAM database" (*emphasis added*). Therefore, this DFARS alternate provision is redundant and is removed. For more on FAC 2005-91, see the October 2016 ***Federal Contracts Perspective*** article "FAC 2005-91 Finalizes Rule on Women-Owned Small Business Sole Source Contracts."

■ **Restrictions on Chemical Weapons Antidote:** This final rule implements the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Public Law 115-91), Section 813, Sunset of Certain Provisions Relating to the Procurement of Goods Other Than United States Goods, which establishes a sunset date of October 1, 2018, for the limitation on the procurement of chemical weapons antidote contained in automatic injectors (and components for such injectors) that are not manufactured in the United States or Canada. This limitation is in

DFARS 225.7005, Restriction on Certain Chemical Weapons Antidote, so this rule removes DFARS 225.7005 effective October 1, 2018.

■ **Alternative Line Item Structure:** This final rule removes DFARS 252.204-7011, Alternative Line Item Structure, and its prescription in DFARS 204.7109, Solicitation Provision and Contract Clause, because it duplicates information in FAR 52.204-22, Alternative Line Item Proposal.

When DFARS 252.204-7011 was implemented, there was no standardized guidance on line item structure for the government or contractors. DFARS 252.204-7011 advised offerors that they could propose an alternative to the contract line item structure included in the solicitation. The purpose of this was to ensure that the resulting contract structure was economically and administratively advantageous to both the government and the contractor.

FAC 2005-95, Item I, Uniform Use of Line Items, added FAR subpart 4.10, Uniform Use of Line Items, to establish a uniform line item structure for the federal government. FAR 4.1008, Solicitation Provision, requires that FAR 52.204-22, Alternative Line Item Proposal, be included in all solicitations. FAR 52.204-22 covers the information in DFARS 252.204-7011, so DFARS 252.204-7011 is removed because it is redundant. For more on FAC 2005-95, see the February 2017 ***Federal Contracts Perspective*** article "FAC 2005-95 is Obama Administration's Last Hurrah."

■ **Combating Trafficking in Persons:** This final rule removes DFARS 252.222-7007, Representation Regarding Combating Trafficking in Persons, and its prescription in DFARS 222.1771, Solicitation Provision, because it is unnecessary.

The purpose of DFARS 252.222-7007 was to require the offeror to affirm that it "(a) will not engage in trafficking in persons…in performance of the contract; (b) has hiring and subcontracting policies to protect the rights of its employees…, and (c) has notified employees and subcontractors of the responsibility to report trafficking in persons violations by the contractor, contractor employees, or subcontractor employees…" It contains no guidance or policies unique to DOD.

FAR 52.222-50, Combating Trafficking in Persons, provides comprehensive guidance to contractors to ensure their compliance with the government's laws and policies on trafficking in persons when performing under a federal contract. Therefore, DFARS 252.222-7007 is unnecessary, so it is removed.

■ **Class Deviation on Contract Closeout Authority:** This class deviation allows contracting officers to close out contracts through the issuance of contract modifications without completing a reconciliation audit or other corrective action if each contract:

- Was entered into on a date that is at least 17 fiscal years before the current fiscal year;
- Has no further supplies or services due under the terms of the contract; and
- Has been determined by an individual, at least one level above the contracting officer, to be not otherwise reconcilable, because (1) the contract or related payment records have been destroyed or lost; or (2) although contract or related payment records are available,

the time or effort required to establish the exact amount owed to the U.S. government or amount owed to the contractor is disproportionate to the amount at issue.

When using this authority, contracting officers may close out these contracts through a negotiated settlement with the contractor. Remaining contract balances may be offset with balances in other contract line items within the same contract or with balances on other contracts.

This deviation implements the NDAA for FY 2017 (Public Law 114-328), Section 836, Contract Closeout Authority, as modified by NDAA for FY 2018 (Public Law 115-91), Section 824, Contract Closeout Authority. It permits DOD to close out certain older contracts that no longer contain the requisite documentation needed under current closeout procedures.

This deviation is effective immediately and stays in effect until incorporated into the DFARS. To incorporate this deviation into the DFARS, DOD has published a proposed rule that would incorporate the provisions of the deviation verbatim into DFARS 204.804, Closeout of Contract Files, as paragraph (3). Comments on the proposed rule must be submitted no later than July 30, 2018, identified as "DFARS Case 2018-D012," by any of the following methods: (1) the Federal eRulemaking Portal**: http://www.regulations.gov**; (2) email: **osd.dfars@mail.mil**; (3) fax: 571-372-6094; or (4) mail: Defense Acquisition Regulations System, Attn: Carrie Moore, OUSD (AT&L) DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Mentor-Protégé Program Modifications:** This rule proposes to amend DFARS Appendix I, Policy and Procedures for the DOD Pilot Mentor Protégé Program, to implement the NDAA for FY 2017 (Public Law 114-328), paragraph (b) of Section 1813, Improving Contractor Compliance, and Section 1823, Amendments to the Mentor-Protégé Program of the Department of Defense, which revise the definition and requirements associated with affiliation between mentor firms and their protégé firms, and add new types of assistance for mentor firms to provide to their protégé firms.

The proposed rule would make the following changes to DFARS Appendix I:

- Section I–101, Definitions, would be amended to add the definition of "affiliation" that is in Section 1823 ("With respect to a relationship between a mentor firm and a protégé firm, a relationship described under 13 CFR [Code of Federal Regulations] 121.103 [How does SBA (Small Business Administration) determine affiliation?]").

- Section I–102, Participant eligibility, would be amended to add new paragraph (e) to specify that a mentor firm may not enter into an agreement with a protégé firm if the SBA has made a determination of affiliation. Paragraph (e) would also address the conditions under which DOD will request a determination from SBA regarding affiliation.

- Section I–106, Development of Mentor-Protégé Agreements, would be amended to add women's business centers as a form of assistance that a mentor firm can obtain for a protégé firm.

- Section I–107, Elements of a Mentor-Protégé Agreement, would be amended to add new paragraph (h) to implement the requirement in Section 1813 for mentor-protégé

agreements to include the assistance the mentor firm will provide to the protégé firm in understanding federal contract regulations, including the FAR and DFARS.

Comments on the proposed rule must be submitted no later than July 3, 2018, identified as "DFARS Case 2017-D016," by any of the following methods: (1) the Federal eRulemaking Portal**: http://www.regulations.gov**; (2) email: **osd.dfars@mail.mil**; (3) fax: 571-372-6094; or (4) mail: Defense Acquisition Regulations System, Attn: Jennifer Johnson, OUSD (AT&L) DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

## FAC 2005-98 CONDUCTS SPRING HOUSEKEEPING

Federal Acquisition Circular (FAC) 2005-98 conducts spring cleaning on the Federal Acquisition Regulation (FAR), primarily adjusting various thresholds and implementing mandated additions to the acquisition-related duties of the Office of Small and Disadvantaged Business Utilization.

■ **Task- and Delivery-Order Protests:** This final rule implements the NDAA for FY 2017 (Public Law 114-328), Section 835, Protection of Task Order Competition, by (1) raising the threshold at which a protest against the placement of a DOD, National Aeronautics and Space Administration (NASA), or Coast Guard task-and delivery-order may be filed with the Government Accounting Office (GAO) from $10,000,000 to $25,000,000; and (2) repealing the sunset date (September 30, 2016) for the authority to protest the placement of an order applicable to all other civilian agencies.

Paragraph (a)(10)(i) of FAR 16.505, Ordering [under indefinite-delivery contracts], prohibited any protest in connection with the issuance of an order under a task-order contract or delivery-order contract, except: (1) for a protest on the grounds that the order increases the scope, period, or maximum value of the contract; or (2) if the order was valued in excess of $10,000,000. Paragraph (a)(10)(ii) established September 30, 2016, as the expiration date for this authority for all other agencies (the authority was permanent for DOD, NASA and the Coast Guard).

Section 835 raises the threshold from $10,000,000 to $25,000,000 for DOD, NASA, and the Coast Guard only, and removes the sunset date for all other agencies. Therefore, FAR 16.505(a)(10)(1) is amended to prohibit protests against the issuance of an order under a task-order or delivery-order contract except for: (1) a protest on the grounds that the order increases the scope, period, or maximum value of the contract; or (2) a protest of an order valued in excess of $10,000,000 for agencies other than DOD, NASA, and the Coast Guard; or (3) a protest of an order valued in excess of $25,000,000 for DOD, NASA, or the Coast Guard. FAR 16.505(a)(10)(2) requires that these protests must be filed with the GAO.

• **Duties of Office of Small and Disadvantaged Business Utilization:** This final rule amends paragraph (c) of FAR 19.201, General Policy, which provides details on the operation, responsibilities, and duties of agency Offices of Small and Disadvantaged Business Utilization (OSDBU) (in the DOD this office is called the Office of Small Business Programs [OSBP]), to provide additional duties as required by the NDAA for FY 2017 (Public Law 114-328), Section 1812, Duties of the Office of Small and Disadvantaged Business Utilization; paragraph (a) of

Section 1813, Improving Contractor Compliance; and paragraph (b) of Section 1821, Good Faith in Subcontracting.

Section 1812 requires that OSDBUs and OSBPs "review summary data provided by purchase card issuers of purchases made by the agency greater than the micro-purchase threshold…and less than the simplified acquisition threshold to ensure that the purchases have been made in compliance with the provisions of this [Small Business] Act [Public Law 85-536] and have been properly recorded in the Federal Procurement Data System, if the method of payment is a purchase card issued by the Department of Defense…or by the head of an executive agency…"

Paragraph (a) of Section 1813 requires that OSDBUs and OSBPs "provide assistance to a small business concern awarded a contract or subcontract under this [Small Business] Act or under Title 10 or Title 41, United States Code, in finding resources for education and training on compliance with contracting regulations (including the Federal Acquisition Regulation) after award of such a contract or subcontract…"

Paragraph (b) of Section 1821 requires that OSDBUs and OSBPs "review all subcontracting plans…to ensure that the plan provides maximum practicable opportunity for small business concerns to participate in the performance of the contract to which the plan applies."

To implement these sections, FAR 19.201(c) is revised by adding the following subparagraphs to reflect the required acquisition-related duties:

> "(15) Ensures agency purchases using the governmentwide purchase card that are greater than the micro-purchase threshold and less than the simplified acquisition threshold were made in compliance with the Small Business Act and were properly recorded in accordance with [FAR] subpart 4.6 in the Federal Procurement Data System;
> "(16) Assists small business contractors and subcontractors in finding resources for education and training on compliance with contracting regulations; [and]
> "(17) Reviews all subcontracting plans required by [FAR] 19.702(a) [Statutory Requirements (for the small business subcontracting program)] to ensure the plan provides maximum practicable opportunity for small business concerns to participate in the performance of the contract…"

■ **Liquidated Damages Rate Adjustment:** This final rule amends FAR 22.302, Liquidated Damages and Overtime Pay, and FAR 52.222-4, Contract Work Hours and Safety Standards – Overtime Compensation, to automatically adjust for inflation the liquidated damages rate that is assessed for violations of the overtime provisions of the Contract Work Hours and Safety Standards Act (CWHSSA) (Public Law 107-217).

FAR 22.302(a) and FAR 52.222-4(b) both state, "The contracting officer must assess liquidated damages at the rate of $10 per affected employee for each calendar day on which the employer required or permitted the employee to work in excess of the standard workweek of 40 hours without paying overtime wages required by the statute [CWHSSA]."

The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Section 701 of Public Law 114-74, The Bipartisan Budget Act of 2015) requires that all civil penalties be adjusted for inflation with an initial "catch up" and then adjusted annually thereafter.

The Department of Labor (DOL) issued a rule in July 2016 that amended its regulations in Title 29 of the Code of Federal Regulations (CFR), Labor; Part 5, Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work

Hours and Safety Standards Act); Section 5.5, Contract Provisions and Related Matters; paragraph (b), *Contract Work Hours and Safety Standards Act*; second sentence of subparagraph (b)(2), *Violation; Liability for Unpaid Wages; Liquidated Damages* (29 CFR 5.5(b)(2)), to state, "Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause [FAR 52.222-4]…in the sum of $25 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by [FAR 52.222-4]…"

The DOL rule set the new rate of liquidated damages for CWHSSA violations at $25 per individual per calendar day. Since the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 requires that this rate be adjusted annually to reflect inflation, FAR 22.302(a) and FAR 52.222-4(b) are revised to reference the DOL regulations at 29 CFR 5.5(b)(2) in lieu of a dollar amount: "The contracting officer must assess liquidated damages at the rate specified at 29 CFR 5.5(b)(2) per affected employee for each calendar day on which the employer required or permitted the employee to work in excess of the standard workweek of 40 hours without paying overtime wages required by the statute. In accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 USC 2461 Note) [Public Law 101-410], the Department of Labor adjusts this civil monetary penalty for inflation no later than January 15 each year."

■ **Audit of Settlement Proposals:** This rule finalizes, without changes, the proposal to amend FAR 49.107, Audit of Prime Contract Settlement Proposals and Subcontract Settlements, to raise the dollar threshold requirement for the audit of prime contract settlement proposals and subcontract settlements submitted in the event of contract termination from $100,000 to the threshold for obtaining certified cost or pricing data in paragraph (a)(1) of FAR 15.403-4, Requiring Certified Cost or Pricing Data (10 USC 2306a and 41 USC Chapter 35) (currently $750,000). The purpose of this rule is to alleviate contract close-out backlogs and enable contracting officers to deobligate excess funds from terminated contracts more quickly.

FAR 49.107(a) stated "The TCO [termination contracting officer] shall refer each prime contractor settlement proposal of $100,000 or more to the appropriate audit agency for review and recommendations. The TCO may submit settlement proposals of less than $100,000 to the audit agency…When a formal examination of settlement proposals under $100,000 is not warranted, the TCO will perform or have performed a desk review and include a written summary of the review in the termination case file." The rule proposed to change it to "The TCO shall refer each prime contractor settlement proposal valued at or above the threshold for obtaining certified cost or pricing data set forth in FAR 15.403-4(a)(1) to the appropriate audit agency for review and recommendations. The TCO may submit settlement proposals of less than the threshold for obtaining certified cost or pricing data to the audit agency… When a formal examination of settlement proposals valued under the threshold for obtaining certified cost or pricing data is not warranted, the TCO will perform or have performed a desk review and include a written summary of the review in the termination case file." In addition, the rule proposed to change paragraph (b), which addresses subcontract settlements, similarly.

No comments were submitted in response to the proposed rule, so it is finalized without changes. For more on the proposed rule, see the October 2016 ***Federal Contracts Perspective*** article "Increase Proposed to Settlement Audit Threshold."

## CAAC ISSUES DEVIATION RAISING COST OR PRICING THRESHOLD

The Civilian Agency Acquisition Council (CAAC) has issued a letter to all civilian agencies (except the National Aeronautics and Space Administration [NASA] and the Coast Guard, which belong to the Defense Acquisition Regulations Council [DARC]) authorizing them to issue a class deviation to increase the threshold for requiring certified cost or pricing data. This implements the NDAA for FY 2018 (Public Law 115-91), Section 811, Modifications to Cost or Reporting Data and Reporting Requirements, which raises the threshold from $750,000 to $2,000,000.

Because of this CAAC letter, civilian agencies (except NASA and the Coast Guard) are authorized to substitute "$2,000,000" for "$750,000" in the following portions of the FAR:

- Paragraphs (a)(1) and (a)(1)(iii) of FAR 15.403-4, Requiring Certified Cost or Pricing Data (10 USC 2306a and 41 USC Chapter 35).

- Paragraph (b)(1) of FAR 30.201-4, Contract Clauses.

- Paragraph (b) of FAR 42.709-0, Scope [of indirect cost rates].

- FAR 42.709-6, Contract Clause.

- Paragraph (a) of the Disclosure Statement in FAR 52.230-1, Cost Accounting Standards Notices and Certification.

- Paragraph (d) of FAR 52.230-2, Cost Accounting Standards.

- Paragraph (d)(2) of FAR 52.230-3, Disclosure and Consistency of Cost Accounting Practices.

- Paragraph (d)(2) of FAR 52.230-4, Disclosure and Consistency of Cost Accounting Practices – Foreign Concerns.

- Paragraph (d)(2) of FAR 52.230-5, Cost Accounting Standards – Educational Institution.

## SBA WAIVES NONMANUFACTURING RULE FOR AIRWAY DEVICES

The Small Business Administration (SBA) is waiving the nonmanufacturer rule for Positive Airway Pressure Devices and Supplies Manufacturing, Product Service Code (PSC) 6515, Medical and Surgical Instruments, Equipment, and Supplies, under the North American Industry Classification System (NAICS) codes 333912, Surgical and Medical Instrument Manufacturing, and NAICS code 339113, Surgical Appliance and Supplies Manufacturing. SBA invited the public to comment on the proposed waiver or to provide information on potential small business sources for these products. Two comments were received supporting the waiver, and the SBA conducted research that did not reveal any small business manufacturers that participated in the federal market during the previous 24 months. Therefore, SBA has determined that there are no

small business manufacturers of this class of products, and it is granting the nonmanufacturing rule waiver. This waiver will allow qualified regular dealers to supply the product of any manufacturer on a federal contract set aside for small businesses, service-disabled veteran-owned small businesses (SDVOSB), women-owned small businesses (WOSB), economically disadvantaged women-owned small businesses (EDWOSB), businesses in historically underutilized business zones (HUBZones), or participants in the SBA's 8(a) Business Development program.

For more on the proposed nonmanufacturing rule waiver, see the October 2017 ***Federal Contracts Perspective*** article "SBA Proposes Nonmanufacturer Rule Waiver."

The SBA regulation on the nonmanufacturer rule is in Title 13 of the Code of Federal Regulations (CFR), Business and Credit Administration; part 121, Small Business Size Standards; under paragraph (b) of 121.406, How Does a Small Business Concern Qualify to Provide Manufactured Products or Other Supply Items Under a Small Business Set-Aside, Service-Disabled Veteran-Owned Small Business Set-Aside, WOSB [women-owned small business] or EDWOSB [economically disadvantaged women-owned small business] Set-Aside, or 8(a) Contract? (13 CFR 121.406(b)) The SBA regulation on the waiver of the nonmanufacturer rule is 13 CFR 121.1202, When Will a Waiver of the Nonmanufacturer Rule Be Granted for a Class of Products? A complete list of products for which the nonmanufacturer rule has been waived is available at **https://www.sba.gov/contracting/contracting-officials/non-manufacturer-rule/class-waivers**.

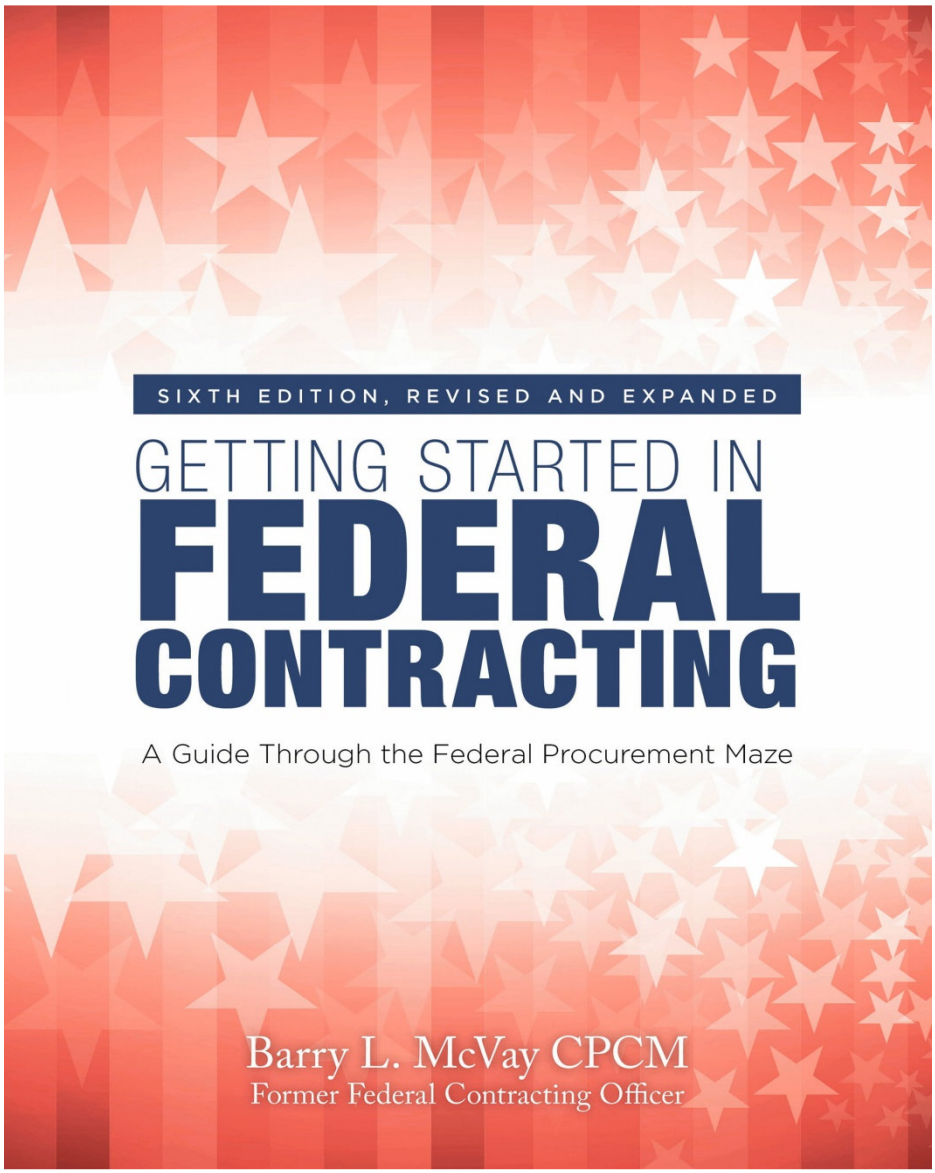
## GAO ISSUES NEW BID PROTEST GUIDE

To assist those confronting the Government Accountability Office's (GAO) new regulations that were issued in conjunction with the establishment of the mandatory electronic bid protest docketing system (EPDS) (**https://epds.gao.gov/login**), the GAO has issued the tenth edition of "***Bid Protests at GAO: A Descriptive Guide***." It is available online at **https://www.gao.gov/assets/700/691596.pdf**.

The introduction states: "Over the years, GAO has developed a substantial body of law and standard procedures for considering bid protests. This is the tenth edition of ***Bid Protests at GAO: A Descriptive Guide***, prepared by the Office of the General Counsel, to aid those interested in GAO's bid protest process. We issued the first edition of this booklet in 1975 to facilitate greater public familiarity with the bid protest process at GAO and we have revised it over the years to reflect changes in our bid protest procedures. This edition incorporates changes made to our Bid Protest Regulations, effective May 1, 2018, to conform the regulations to reflect administrative changes in our procedures enacted by Section 1501 of the Consolidated Appropriations Act, 2014, Pub. L. No. 113-76…Section 1501 required GAO to establish an electronic filing and document dissemination system for the filing of bid protests at GAO. The statute also provided for GAO to receive a fee from filers to support the establishment and operation of the electronic system. This edition also incorporates changes to our protective order process."

GAO has established $350 as the filing fee for all new protests of government contract awards. For more on the GAO's new protest regulations and filing fee, see the May 2018 ***Federal Contracts Perspective*** article "GAO Introduces Electronic Protest System, Assesses $350 Filing Fee."

## *REVISED AND EXPANDED!*




**468 pages, 2017, ISBN: 978-0-912481-27-2, $39.95**
**from Panoptic Enterprises (http://www.FedGovContracts.com) and from Amazon.com**

**To see: Table of Contents, go to http://www.FedGovContracts.com/Contents.pdf**
**Index, go to http://www.FedGovContracts.com/Index.pdf**

**Sample Chapters:**
**Chapter 11, Small Business Programs, go to http://www.FedGovContracts.com/Chap11.pdf**
**Chapter 13, Federal Supply Schedules, go to http://www.FedGovContracts.com/Chap13.pdf**