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FAC 2005-99 PROHIBITS CONTRACTS WITH KASPERSKY LAB, ENTITIES VIOLATING ARMS CONTROL TREATIES

Federal Acquisition Circular (FAC) 2005-99 consists of two interim rules that amend the Federal Acquisition Regulation (FAR) to implement prohibitions contained in two different National Defense Authorization Acts (NDAA). One prohibits the use of products and services of Kaspersky Labs, a Russian firm that is suspected of being under Kremlin control; the other prohibits contracting with an entity involved in activities that violate arms control treaties or agreements with the United States.

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■ **Use of Products and Services of Kaspersky Lab:** This interim rule implements the NDAA for Fiscal Year (FY) 2018 (Public Law 115-91), Section 1634, Prohibition on Use of Products and Services Developed or Provided by Kaspersky Lab, which prohibits the use of hardware, software, and services of Kaspersky Lab and its related entities by the federal government on or after October 1, 2018.

Kaspersky Lab is a cybersecurity firm based in Moscow. There have been widespread suspicions that Kaspersky executives are closely linked to the Russian government, especially the Federal Security Service (abbreviated FSB in Russian; it is the equivalent of the Federal Bureau of Investigation [FBI]), and that its products have been used to gain access to ("hack") state election databases and utilities. Congress has held hearings on the matter, and included Section 1634 in the NDAA for FY 2018 to order the removal of all Kaspersky products from federal computers.

To implement Section 1634, this interim rule adds FAR subpart 4.20, Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab, and a corresponding new contract clause, FAR 52.204-23, Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab and Other Covered Entities. FAR 52.204-23, which applies to all solicitations and contracts, including micro-purchases and purchases of commercial-off-the-shelf (COTS) items, prohibits contractors from providing any hardware, software, or services developed or provided by Kaspersky Lab or its related entities, or from using any such hardware, software, or services in the development of data or deliverables first produced in the performance of the contract. The contractor must also report any such hardware, software, or services discovered during contract performance. This clause is required to be included in all subcontracts as well.

As additional actions are under consideration to implement Section 1634, comments are sought on steps the government could take to better identify and reduce the burden on contractors related to identifying covered articles. Some areas in which comments are sought are:

– Is the prohibition scoped appropriately to protect the government by including situations in which covered articles may be used in the development of data or deliverables first produced during contract performance, for example, under a systems development contract?

– If the government were to consider establishing a list to publicly share information regarding products identified as meeting the definition of a covered article (that is, excluded products), including those offered by third parties:

  - What protocols should the government apply prior to placing a product on the excluded list (for example, who should be reaching out, and to whom)?

  - Should different protocols apply depending on whether the product is made by the original equipment manufacturer, sold by a reseller, or customized by a firm?

  - When is it appropriate to leave a product on the excluded list indefinitely (for example, to provide notice for those who have previously acquired the product)?

  - Are there steps the government can take to avoid inappropriately affecting the producer's interests (for example, allowing the firm to demonstrate that there is a new version of the product that is free from concern and annotating the list accordingly)?

Comments on this interim rule must be submitted no later than August 14, 2018, identified as "FAC 2005-99, FAR Case 2018-010," by either of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; or (2) mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd Floor, Washington, DC 20405-0001.

The rule becomes effective July 16, 2018. Contracting officers shall include FAR 52.204-23 in solicitations issued on or after July 16, 2018, and resultant contracts; and in solicitations issued before July 16, 2018, provided award of the resulting contract occurs on or after July 16, 2018.

In addition, contracting officers shall modify existing indefinite-delivery contracts to include FAR 52.204-23 for future orders, prior to placing any further orders on or after July 16, 2018.

Finally, if modifying an existing contract to extend the period of performance by more than six months, contracting officers should include FAR 52.204-23.

Vivina McVay, Editor-in Chief

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■ **Violations of Arms Control Treaties or Agreements With the United States:** This interim rule implements the NDAA for FY 2017 (Public Law 114-328), Section 1290, Measures Against Persons Involved in Activities that Violate Arms Control Treaties or Agreements with the United States, by adding FAR 9.109, Prohibition on Contracting with an Entity Involved in Activities that Violate Arms Control Treaties or Agreements with the United States, and FAR 52.209-13, Violation of Arms Control Treaties or Agreements – Certification, to prohibit award to offerors that violate arms control treaties or agreements with the United States, or own or control entities that do so; and terminate contractors, and suspend or debar offerors and contractors that have provided false certifications regarding such violations.

FAR 9.109 includes the following:

- FAR 9.109-1, Authority, which references Title 22 of the U.S. Code, Section 2593e (22 USC 2593e), which is the codification of Section 1290.

- FAR 9.109-2, Prohibition, which states: "Contracting officers shall not award, renew, or extend a contract for the procurement of products or services with an entity identified as excluded in the System for Award Management database [**https://www.sam.gov**], specifically for this subpart [FAR subpart 9.1, Responsible Prospective Contractors], on the basis of involvement in activities that violate arms control treaties or agreements with the United States."

- FAR 9.109-3, Exception, which specifies the statutory exception from this prohibition for the procurement of products or services "along a major route of supply to a zone of active combat or a major contingency operation." "As of May 10, 2018, countries along the major route of supply to support operations in Afghanistan are Afghanistan, Georgia, the Kyrgyz Republic, Pakistan, the Republic of Armenia, the Republic of Azerbaijan, the Republic of Kazakhstan, the Republic of Tajikistan, the Republic of Uzbekistan, and Turkmenistan."

- FAR 9.109-4, Certification by the Offeror, which describes the offeror certification and the remedies for submission of a false certification – "an offeror that falsely certifies under [FAR] 52.209-13 will be subject to such remedies as suspension or debarment for a period of not less than 2 years…or termination of any contract resulting from the false certification."

- FAR 9.109-5, Solicitation Provision, which prescribes the use of FAR 52.209-13 in each solicitation for the acquisition of products or services (including construction) that exceeds the simplified acquisition threshold (currently $250,000), other than solicitations for the acquisition of commercial items.

FAR 52.209-13 requires that each offeror certify that it, and any entity owned or controlled by it, has not engaged in any activity that contributed to or is a significant factor in the president's or the secretary of state's determination that such country is not in full compliance with its obligations undertaken in all arms control, nonproliferation, and disarmament agreements or commitments to which the United States is a participating state. FAR 52.209-13 also provides procedures to assist offerors in using the secretary of state report to complete the certification ("The Department of State's most recent unclassified report submitted in April 2018 to Congress

is available at **https://www.state.gov/t/avc/rls/rpt/**"). The certification is not required for acquisitions under the simplified acquisition threshold or for acquisitions of commercial items, but if a contractor's activities related to violations of arms control treaties results in the contractor being added to the SAM Exclusions list (that is, a debarred contractor), the contractor may not be awarded contracts, including those under the simplified acquisition threshold or for commercial items. The government will not consider the offer of an offeror that has not provided a certification unless the offeror provides with its offer information that the president of the United States has waived the prohibition or determined that the entity has ceased all activities for which measures were imposed.

Comments on this interim rule must be submitted no later than August 14, 2018, identified as "FAC 2005-99, FAR Case 2018-018," by either of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; or (2) mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd Floor, Washington, DC 20405-0001.

DOD CONTINUES DELUGE OF RULES, DEVIATIONS

The Department of Defense (DOD) continues it onslaught on the Defense FAR Supplement (DFARS), issuing four final rules, six proposed rules, three deviations, and four policy memoranda.

■ **Offset Costs:** This finalizes, with changes, the rule that proposed to amend DFARS subpart 225.73, Acquisitions for Foreign Military Sales, and add DFARS 252.215-7014, Exception from Certified Cost or Pricing Data for Foreign Military Sales Indirect Offset, to implement section 812 of the NDAA for FY 2016 (Public Law 114-92), which exempts from certified cost or pricing data submission requirements any contracts, subcontracts, or modifications of a contract or subcontract "to the extent such data (i) relates to an offset agreement in connection with a contract for the sale of a weapon system or defense-related item to a foreign country or foreign firm; and (ii) does not relate to a contract or subcontract under the offset agreement for work performed in such foreign country or by such foreign firm that is directly related to the weapon system or defense-related item being purchased under the contract."

The proposed rule suggested making the following changes:

– Add two definitions to DFARS 202.101, Definitions:

  - "Offset": "A benefit or obligation agreed to by a contractor and a foreign government or international organization as an inducement or condition to purchase supplies or services pursuant to a foreign military sale (FMS). There are two types of offsets: direct offsets and indirect offsets. (1) A direct offset involves benefits or obligations, including supplies or services, that are related to the item being purchased. For example, as a condition of a foreign military sale, the contractor may require or agree to permit the customer to produce in its country certain components or subsystems of the item being sold. Generally, direct offsets must be performed within a specified period, because they are integral to the deliverable of the FMS contract. (2) An indirect offset involves benefits, including supplies or services, that are unrelated to

the item being purchased. For example, as a condition of a foreign military sale, the contractor may agree to purchase certain manufactured products, agricultural commodities, raw materials, or services required by the FMS customer, or may agree to build a school or road. Indirect offsets may be accomplished without a clearly defined period of performance."

- "Offset costs": "The costs to the contractor of providing any direct or indirect offsets required (explicitly or implicitly) as a condition of a foreign military sale".

– Add subparagraph (b)(ii) to DFARS 215.403-1, Prohibition on Obtaining Certified Cost or Pricing Data (10 USC 2306a and 41 USC chapter 35): "Submission of certified cost or pricing data shall not be required in the case of a contract, subcontract, or modification of a contract or subcontract to the extent such data relates to an indirect offset."

– Add paragraph (a)(3)(i) to DFARS 225.7303-2, Cost of Doing Business with a Foreign Government or an International Organization: "An offset agreement is the contractual arrangement between the FMS customer and the U.S. defense contractor that identifies the offset obligation imposed by the FMS customer that has been accepted by the U.S. defense contractor as a condition of the FMS customer's purchase."

– Add DFARS 252.215-7014, Requirements for Certified Cost or Pricing Data for Foreign Military Sales Indirect Offset Agreements, to provide the definitions of "offset" and "offset costs" (from DFARS 202.101) and incorporate the provisions of section 812.

One respondent submitted comments on the proposed rule. In response to the comments, the following changes are made in the final rule:

– The first sentence of the "direct offset" portion of the "offset" definition in DFARS 202.101 is changed to read as follows (added language in *italics*): "A direct offset involves benefits or obligations, including supplies or services that are *directly* related to the item*(s)* being purchased *and are integral to the deliverable of the FMS contract*."

– The "indirect offset" portion of the "offset" definition in DFARS 202.101 is changed to read as follows (added language in *italics*): "An indirect offset involves benefits *or obligations*, including supplies or services that are *not directly related* [replaces "unrelated"] to the *specific* item*(s)* being purchased *and are not integral to the deliverable of the FMS contract*. For example, as a condition of a foreign military sale, the contractor may agree to purchase certain manufactured products, agricultural commodities, raw materials, or services*, or make an equity investment or grant of equipment* required by the FMS customer, or may agree to build a school, road *or other facility. Indirect offsets would also include projects that are related to the FMS contract but not purchased under said contract (*e.g.*, a project to develop or advance a capability, technology transfer, or know-how in a foreign company).* Indirect offsets may be accomplished without a clearly defined period of performance."

– The title of DFARS 252.215-7014 is changed from "Requirements for Certified Cost or Pricing Data for Foreign Military Sales Indirect Offset Agreements" to "Exception from Certified Cost or Pricing Data Requirements for Foreign Military Sales Indirect Offsets."

For more on the proposed rule, see the December 2016 ***Federal Contracts Perspective*** article "DOD Issues Three Final Rules in November."

■ **Repeal of "Pricing Adjustments" Clause:** This final rule removes DFARS 252.215-7000, Pricing Adjustments, because it duplicates several FAR clauses.

DFARS 252.215-7000 states: "The term 'pricing adjustment, as used in paragraph (a) of the clauses entitled 'Price Reduction for Defective Certified Cost or Pricing Data – Modifications,' 'Subcontractor Certified Cost or Pricing Data,' and 'Subcontractor Certified Cost or Pricing Data – Modifications,' means the aggregate increases and/or decreases in cost plus applicable profits." FAR 52.215-11, Price Reduction for Defective Certified Cost or Pricing Data – Modifications, FAR 52.215-12, Subcontractor Certified Cost or Pricing Data, and FAR 52.215-13, Subcontractor Certified Cost or Pricing Data – Modifications, adequately define "price adjustments," so this clause is redundant and can be removed.

In addition, the clause prescription at DFARS 215.408, Solicitation Provisions and Contract Clauses, is removed, as are all cross-references to DFARS 252.215-7000 throughout the DFARS.

■ **Repeal of "Requirements" Clause:** This final rule removes DFARS 252.216-7010, Requirements, and its prescription at DFARS 216.506, Solicitation Provisions and Contract Clauses, because it is duplicative of FAR 52.216-21, Requirements.

DFARS 252.216-7010 is included in contracts for preparation of personal property for movement or storage, or for intra-city or intra-area movement, and it advises contractors that a requirements contract has been issued; that the delivery of items or performance of work is subject to the issuance of orders; and that the government must order all requirements covered by the contract from the contractor unless the requirements are in excess of any limit on total orders under the contract.

FAR 52.216-21 advises contractors of the same information at that in DFARS 252.216-7010, so it is redundant and can be removed.

■ **Undefinitized Contract Action Definitization:** This finalizes, with changes, the rule that proposed to amend DFARS 215.404-71, Weighted Guidelines Method, to provide a more transparent means of documenting the effect of costs incurred during the undefinitized period of an undefinitized contract action on allowable profit, and to recognize when contractors demonstrate efficient management and internal cost control systems through the submittal of a timely, auditable proposal that aides in the definitization of an undefinitized contract action.

The following are the significant changes that the proposed rule suggested making:

– Add paragraph (e)(2)(iii) to DFARS 215.404-71-2, Performance Risk: "If the contractor demonstrates efficient management and cost control through the submittal of a timely, auditable proposal in furtherance of definitization of an undefinitized contract action, and the proposal demonstrates effective cost control from the time of award to the present, the

contracting officer may add 1 percentage point to the value determined for management/cost control up to the maximum of 7 percent."

– Amend paragraph (b) of DFARS 215.404-71-3, Contract Type Risk and Working Capital Adjustment, to reflect the proposed separation of Item 24, Contract Type Risk, into Item 24a, Contract Type Risk (based on costs incurred as of the date the contractor submits a qualifying proposal); Item 24b, Contract Type Risk (based on government estimated cost to complete); and Item 24c, Totals. Also, paragraph (d)(2)(ii) would be added to require contracting officers to document the reason for assigning a specific contract type risk value in determining the negotiation objective (as would paragraph (c) of DFARS 217.7404-6, Allowable Profit [on undefinitized contract actions], and paragraph (c) of DFARS 243.204-70-6, Allowable Profit [on change orders].)

Two respondents submitted comments on the proposed rule. In response to the comments, the following changes are made in the final rule:

– In DFARS 215.404-71-2, the term "auditable proposal" is revised to "qualifying proposal as defined in [DFARS] 217.7401(c) [Definitions (for undefinitized contract actions)]" for consistency with 10 USC 2326 [Undefinitized Contract Actions: Restrictions].

– In DFARS 215.404-71-3(b), the instructions for completing Items 24a and 24b have been revised for clarity.

– The language in DFARS 215.404-71-3(d)(2)(ii) is revised for clarity.

For more on the proposed rule, see the November 2016 ***Federal Contracts Perspective*** article "DOD Finalizes Network Penetration Reporting Rule."

■ **Use of Commercial or Non-Government Standards:** This rule proposes to amend paragraph (b) of DFARS 211.107, Solicitation Provision [for selecting and developing requirements documents], to implement the NDAA for FY 2017 (Public Law 114-328), Section 875, Use of Commercial or Non-Government Standards in Lieu of Military Specifications and Standards, which requires DOD to "revise the Defense Federal Acquisition Regulation Supplement to encourage contractors to propose commercial or non-government standards and industry-wide practices that meet the intent of the military specifications and standards."

To achieve this, DOD proposes to amend DFARS 211.107(b) to require the use of FAR 52.211-7, Alternatives to Government-Unique Standards, in DOD solicitations and contracts that include military or government-unique specifications and standards. FAR 52.211-7 states that "the offeror may propose voluntary consensus standards that meet the government's requirements as alternatives to the government-unique standards. The government will accept use of the voluntary consensus standard instead of the government-unique standard if it meets the government's requirements unless inconsistent with law or otherwise impractical."

DFARS 211.107(b) currently prohibits the use of FAR 52.211-7. This proposed rule would revise DFARS 211.107(b) to read as follows: "Use the provision at FAR 52.211-7, Alternatives to Government-Unique Standards, in DOD solicitations that include military or government-unique specifications and standards."

Comments on this proposed rule must be submitted no later than August 28, 2018, identified as "DFARS Case 2017-D014," 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: Mark Gomersall, OUSD(A&S)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Submission of Summary Subcontract Reports:** This rule proposes to amend DFARS 252.219-7003, Small Business Subcontracting Plan (DOD Contracts), and its Alternate I, to clarify the entity to which contractors submit Summary Subcontract Reports (SSRs) in the Electronic Subcontracting Reporting System (eSRS – **https://www.esrs.gov/**) and to clarify the entity that acknowledges receipt of, or rejects, the reports in eSRS.

DFARS 252.219-7003 and Alternate I currently require contractors to submit SSRs to the SSR coordinator "at the department or agency level who is registered in the Electronic Subcontracting Reporting System (eSRS) and is responsible for acknowledging receipt or rejecting SSRs in eSRS for the department or agency departments or agencies within DOD." This rule would amend DFARS 252.219-7003 to require contractors to submit a consolidated SSR to the SSR coordinator "at the Department of Defense level and is responsible for acknowledging receipt or rejecting SSRs submitted under an individual subcontracting plan in eSRS for the Department of Defense." This change would obviate the need for contractors to submit SSRs to each department or agency with which they have covered contracts; instead the contractors would submit a single consolidated SSR to the DOD SSR coordinator. In addition, this change would bring DFARS 252.219-7003 into compliance with the requirement for a consolidated SSR in FAR 52.219-9, Small Business Subcontracting Plan.

Comments on this proposed rule must be submitted no later than August 28, 2018, identified as "DFARS Case 2017-D005," 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(A&S)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Only One Offer:** This rule proposes to amend DFARS 215.371-3, Fair and Reasonable Price and the Requirement for Additional Cost or Pricing Data, DFARS 252.215-7008, Only One Offer, and DFARS 252.215-7010, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, to implement the NDAA for FY 2017 (Public Law 114-328), Section 822, Enhanced Competition Requirements, which requires that adequate price competition for the DOD, the National Aeronautics and Space Administration (NASA), and the Coast Guard requires a price that is based on adequate competition from at least two or more responsive and viable offers from independently competing offerors.

Paragraph (c)(1)(ii) of FAR 15.403-1, Prohibition on Obtaining Certified Cost or Pricing Data (10 USC 2306a and 41 USC Chapter 35), provides that if only one offer is received, the contracting officer may determine that there was adequate price competition if the contracting officer can reasonably conclude that the offer was submitted with the expectation of competition and this determination is approved at a level above the contracting officer.

However, DOD added DFARS 215.371, Only One Offer, to implement a more stringent policy for determining adequate price competition (see the July 2012 ***Federal Contracts Perspective*** article "DFARS Addresses Receipt of Only One Offer"). DFARS 215.371-3, Fair and Reasonable Price (a subsection of DFARS 215.371), states that adequate price competition

does not exist if only one offer is received. In addition, DOD added DFARS 252.215-7008, which requires the contracting officer to specify in the competitive solicitation what cost or pricing data may be required if only one offer is received.

Section 822 amends 10 USC 2306a, Cost or Pricing Data: Truth in Negotiations, (which applies to DOD, NASA, and the Coast Guard only) to change one of the exceptions for submission of cost or pricing data (paragraph (b)(1)(A)(1)) from "a contract [or] subcontract…for which the price agreed upon is based on price competition" to "a contract [or] subcontract…for which the price agreed upon is based on competition *that results in at least two or more responsive and viable competing bids*" (*emphasis* added). In addition, Section 822 provides that the offeror is responsible for determining whether a subcontractor qualifies for an exception from the requirement for submission of certified cost or pricing data based on adequate price competition.

To implement Section 822, it is proposed that the following changes be made:

- Because FAR 15.403-1(b)(1) no longer applies to DOD (because it states that, when only one offer is received, it can be exempted from the requirement for certified cost or pricing data based on adequate price competition), DFARS 215.371-3 and DFARS 252.215-7008 would be amended to limit the cross-references to FAR 15.403-1(b)(2) through (b)(5) (that is, prices set by law or regulation; commercial item is being required; a waiver has been granted; and modifications to contracts or subcontracts for commercial items).

- DFARS 215.371-3(a) references the FAR 15.403-1(c)(1)(ii) exception from certified cost or pricing data requirements for one offer submitted when there was a reasonable expectation for competition. Since FAR 15.403-1(c)(1)(ii) no longer applies to DOD, DFARS 215.371-3(a) would be removed.

- The provisions of DFARS 215.371-3(b) would be redesignated as paragraphs (a) through (d) with additional emphasis placed on the requirement to obtain certified cost or pricing data when only one offer is received. In addition, the introductory text would be revised to exempt contracts valued at or below the simplified acquisition threshold (now $250,000 in most circumstances), as specified in paragraph (a) of FAR 15.403-1, Prohibition on Obtaining Certified Cost or Pricing Data (10 USC 2306a and 41 USC Chapter 35) ("Certified cost or pricing data shall not be obtained for acquisitions at or below the simplified acquisition threshold").

- The prescription for DFARS 252.215-7008 in paragraph (3)(i) of DFARS 215.408, Solicitation Provisions and Contract Clauses, would be revised to exempt contracts valued at or below simplified acquisition threshold.

- DFARS 252.215-7008 covers the requirements for when only one offer is received in response to a DOD solicitation. It contains much of the same text as FAR 52.215-20, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, because it was required to be used instead of FAR 52.215-20. However, DOD subsequently added DFARS 252.215-7010, Requirement for Certified Cost or Pricing Data and Data Other than Certified Cost or Pricing Data (Basic and Alternate), to take the place of FAR 52.215-20 (see the February 2018 ***Federal Contracts Perspective***

article "DOD Provides Guidance on Commercial Item Procurement"). DFARS 252.215-7010 also contains much of the same text as FAR 52.215-20 in addition to DOD specific requirements based on statute. Since DFARS 252.215-7010 is always used when DFARS 252.215-7008 is included in a solicitation, DFARS 252.215-7008 would be revised to remove all text now covered by DFARS 252.215-7010, so that DFARS 252.215-7008 would be limited to addressing the Section 822 requirements for when only one offer is received in response to a DOD solicitation.

– A new paragraph (c)(3) would be added to both the basic and alternate DFARS 252.215-7010 to state that the offeror is responsible for determining whether a subcontractor qualifies for an exception from the requirement for submission of certified cost on the basis of adequate price competition.

Comments on this proposed rule must be submitted no later than August 28, 2018, identified as "DFARS Case 2017-D009," 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: Amy Williams, OUSD(A&S)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Besides this proposed DOD rule, a rule has been published that proposes to amend FAR 15.403-1(c)(1), to provide a separate standard for DOD, NASA, and the Coast Guard consistent with Section 822 (proposed paragraph (c)(1)(ii): "For DOD, NASA, and the Coast Guard, a price is based on adequate price competition only if two or more responsible offerors, competing independently, submit responsive and viable offers. (10 USC 2306a(b)(1)(A)(i))").

Comments on this proposed rule must be submitted no later than August 13, 2018, identified as "FAR Case 2017-006," by either of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; or (2) mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd Floor, Washington, DC 20405-0001.

■ **Modification of "Surge Option" Clause:** This rule proposes to amend DFARS 252.217-7001, Surge Option, to replace the term "Production Surge Plan (DI-MGMT-80969)" with "Capabilities Analysis Plan (CAP)" and permit the option increase of supplies or services to be expressed as a specific quantity instead of solely as a percentage of the basic quantity.

DFARS 252.217-7001 is incorporated into contracts that support industrial planning for selected essential military items in the event of a national emergency. It advises contractors that the government has the option to increase the supplies or services delivered under the contract up to a specified percentage or accelerate the rate of delivery. In addition, it instructs contractors to follow the Production Surge Plan (DI MGMT 80969) included in the contract or, if no plan is in the contract, to provide a delivery schedule to the government within 30 days of contract award.

DOD experts advise that Production Surge Plan (DI MGMT 80969) is no longer an up-to-date reference and that Capabilities Analysis Plan (CAP) is the current terminology used in industrial planning efforts. Therefore, this proposed rule would update paragraphs (a) and (b) of the clause to reflect the current industry terminology.

Paragraph (a)(1) of the clause states that "The government has the option to (1) increase the quantity of supplies or services called for under this contract by no more than ___ percent…" to

support a surge need. However, supply chains supporting surge needs more commonly express increases of supplies or services as a specific number of additional supplies or services to be provided under the contract. To reflect current supply chain practices, this proposed rule would revise paragraph (a)(1) to "The government has the option to (1) increase the quantity of supplies or services called for under this contract by no more than __ percent or __ [insert quantity and description of services or supplies to be increased]…"

Finally, this proposed rule would revise the clause prescription in paragraph (b)(1) of DFARS 217.208-70, Additional Clauses, to amended the instruction to the contracting officer to reflect that the option increase of supplies or services may also be expressed as a specific number ("Insert the percentage *or quantity* of increase the option represents…").

Comments on this proposed rule must be submitted no later than August 28, 2018, identified as "DFARS Case 2018-D025," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) email: **osd.dfars@mail.mil**; (3) fax: 571-372-6094; or (4) mail: Defense Acquisition Regulations System, Attn: Carrie Moore, OUSD(A&S)DPAP/ DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Inapplicability of Certain Laws and Regulations to Commercial Items:** This rule proposes to implement the NDAA for FY 2017 (Public Law 114-328), Section 874, Inapplicability of Certain Laws and Regulations to the Acquisition of Commercial Items and Commercially Available Off-the-Shelf Items, which requires that the DFARS be amended to include lists of defense-unique provisions of law and contract clause requirements based on governmentwide acquisition regulations, policies, or executive orders not expressly authorized in law, that are inapplicable to the acquisition of a commercial item; subcontracts for commercial items under a contract for the procurement of commercial items; or contracts for the procurement of a commercially available off-the-shelf (COTS) item. Section 874 limits the required review of the applicability of provisions of law and contract clauses to those enacted after January 1, 2015.

As the first step toward implementation of Section 874, DOD identified all new DFARS and FAR provisions and clauses published as interim or final rules after January 1, 2015, determined whether these provisions and clauses were based on statute or executive order, and reviewed their applicability to commercial items.

Since the DFARS supplements the FAR, the lists of inapplicable statutes in FAR 12.503, Applicability of Certain Laws to Executive Agency Contracts for the Acquisition of Commercial Items, FAR 12.504, Applicability of Certain Laws to Subcontracts for the Acquisition of Commercial Items, and FAR 12.505, Applicability of Certain Laws to Contracts for the Acquisition of COTS Items, are applicable to DOD. Therefore, DFARS 212.503, DFARS 212.504, and DFARS 212.505, would be amended to add language emphasizing that the DFARS lists of statutes are in addition to the FAR lists, not in place of them. For example, paragraph (a) of DFARS 212.503 would be amended from "The following laws are not applicable to contracts for the acquisition of commercial items" to "*In addition to the laws listed at FAR 12.503*, the following laws are not applicable to contracts for the acquisition of commercial items" (*emphasis* added). DFARS 212.504 and DFARS 212.505 would be amended similarly (DFARS 212.570 would be redesignated as DFARS 212.505 to comply with the FAR numbering scheme).

The following changes would be made to the DFARS to implement this requirement:

– DFARS 212.370, Inapplicability of Certain Provisions and Clauses to Contracts and Subcontracts for the Acquisition of Commercial Items, Including Commercially

Available Off-the-Shelf Items, would be added. It would identify the following as inapplicable to contracts for the acquisition of commercial items: FAR 52.204-22, Alternative Line Item Proposal; and DFARS 252.219-7010, Notification of Competition Limited to Eligible 8(a) Concerns – Partnership Agreement.

– DFARS 212.371, Inapplicability of Certain Provisions and Clauses to Contracts for the Acquisition of Commercially Available Off-the-Shelf Items, would be added. It would identify FAR 52.204-21, Basic Safeguarding of Covered Contractor Information Systems, as inapplicable to COTS items. Also, it would include the following clarifying language: "Commercially available off-the-shelf (COTS) items are a subset of commercial items. Therefore, any provisions and clauses are inapplicable to contracts or subcontracts for the acquisition of COTS items if listed in [DFARS] 212.370 of this subpart as inapplicable to contracts or subcontracts for the acquisition of commercial items."

In addition, Section 874 defines "subcontract" to includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor. The definition excludes agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the DOD and other parties, and are not identifiable to any particular contract. This definition of "subcontract" would be added to DFARS 202.001, Definitions, and the following contract clauses that require their inclusion in subcontracts ("flowdown"):

– DFARS 252.204-7009, Limitations on the Use or Disclosure of Third-Party Contractor Reported Cyber Incident Information
– DFARS 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting
– DFARS 252.204-7014, Limitations on the Use or Disclosure of Information by Litigation Support Contractors
– DFARS 252.204-7015, Notice of Authorized Disclosure of Information for Litigation Support
– DFARS 252.211-7003, Item Unique Identification and Valuation
– DFARS 252.223-7008, Prohibition of Hexavalent Chromium
– DFARS 252.225-7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals
– DFARS 252.225-7039, Defense Contractors Performing Private Security Functions Outside the United States
– DFARS 252.229-7014, Taxes – Foreign Contracts in Afghanistan
– DFARS 252.229-7015, Taxes – Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement)
– DFARS 252.237-7010, Prohibition on Interrogation of Detainees by Contractor Personnel
– DFARS 252.237-7019, Training for Contractor Personnel Interacting with Detainees
– DFARS 252.239-7010, Cloud Computing Services
– DFARS 252.244-7000, Subcontracts for Commercial Items
– DFARS 252.246-7003, Notification of Potential Safety Issues

- DFARS 252.246-7007, Contractor Counterfeit Electronic Part Detection and Avoidance System
- DFARS 252.246-7008, Sources of Electronic Parts
- DFARS 252.247-7003, Pass-Through of Motor Carrier Fuel Surcharge Adjustment to the Cost Bearer
- DFARS 252.247-7023, Transportation of Supplies by Sea

Comments on this proposed rule must be submitted no later than August 28, 2018, identified as "DFARS Case 2017-D010," 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: Amy Williams, OUSD(A&S)DPAP/ DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Electronic Submission and Processing of Payment Requests and Receiving Reports:** This rule proposes to amend DFARS subpart 232.70, Electronic Submission and Processing of Payment Requests and Receiving Reports; DFARS 252.232-7003, Electronic Submission of Payment Requests and Receiving Reports; DFARS 252.232-7006, Wide Area WorkFlow Payment Instructions; and DFARS Appendix F, Material Inspection and Receiving Report, Part 3, Preparation of the Wide Area Workflow (WAWF) Receiving Report (RR) And WAWF Energy RR, to clarify and update the policies and procedures for electronic submission of payment requests and receiving reports.

Title 10 of the United States Code, Section 2227, Electronic Submission and Processing of Claims for Contract Payments (10 USC 2227), requires that "any claim for payment under a Department of Defense shall be submitted to the Department of Defense in electronic form." If electronic submission is unduly burdensome, 10 USC 2227 allows DOD to exempt "the cases in that category." In 2012, DOD updated DFARS policies and procedures for electronic submission of payment requests and receiving reports and established WAWF (**https://wawf.eb.mil/**) as the accepted DOD system for processing invoices and receiving reports (see the July 2012 ***Federal Contracts Perspective*** article "DFARS Addresses Receipt of Only One Offer").

Some contractors have been prevented from using WAWF because of misinterpretation of the exemptions in paragraph (a)(1) of DFARS 232.7002, Policy. This proposed rule would make the following changes to clarify those exemptions and allow contractors to request permission from the contracting officer to submit payment requests and receiving reports using temporary alternative methods, other than in electronic form:

- DFARS 232.7001, Definitions, references DFARS 252.232-7003 for the definitions of "electronic form" and "payment request." This proposed rule would insert these definitions in their entirety in DFARS 232.7001 ("electronic form means any automated system that transmits information electronically from the initiating system to affected systems" and "payment request means any request for contract financing payment or invoice payment submitted by the contractor under a contract or task or delivery order"). In addition, the definition of "receiving report" would be added ("receiving report means the data prepared in the manner and to the extent required by Appendix F, Material Inspection and Receiving Report, of the DFARS").

– Paragraph (a)(1)(ii) of DFARS 232.7002, Policy, requires contractors to submit payment requests and receiving reports in electronic form, except for "contracts awarded by deployed contracting officers in the course of military operations, including, but not limited to, contingency operations…or humanitarian or peacekeeping operations…, or contracts awarded by contracting officers in the conduct of emergency operations, such as responses to natural disasters or national or civil emergencies, when access to the Wide Area WorkFlow by those contractors is not feasible…" This list of exceptions would be deleted and replaced by a more general exception: "Cases in which contractor submission of electronic payment requests and receiving reports is not feasible (*e.g.*, when contract performance is in an environment where internet connectivity is not available)…" This clarification is considered necessary because the exceptions in DFARS 232.7002(a)(1)(ii) have been interpreted as prohibitions against use or submission of payment requests in WAWF, not examples of when access to WAWF by contractors might not be feasible.

– DFARS 246.370, Material Inspection and Receiving Report, which contains the prescription for DFARS 252.246-7000, Material Inspection and Receiving Reports, would be deleted because the clause is proposed for deletion.

– Paragraph (b)(1) would be added to DFARS 246.471, Authorizing Shipment of Supplies, to prevent the use of alternative procedures for foreign military sales contracts (new paragraph (b)(1) would state "for foreign military sales (FMS) contracts, do not use alternative procedures"). Alternative procedures result in no signed receiving report with the packing list, which delay the shipment significantly and may lead to termination of the contract for convenience. (Current paragraphs (b)(1) through (b)(3) would be redesignated as paragraphs (b)(2) through (b)(4).)

– Paragraph (d)(1) to DFARS 252.232-7003 would be revised to clarify that a contractor may use methods other than WAWF to submit a payment request and receiving report when the contracting officer has authorized and provided instructions for the use of nonelectronic methods in the contract administration data section of the contract ("the contractor may submit a payment request and receiving report using methods other than WAWF only when…the contractor has requested permission in writing to do so, and the contracting officer has provided instructions for a temporary alternative method of submission of payment requests and receiving reports in the contract administration data section of this contract or task or delivery order").

  In addition, the requirement for contractors to submit a receiving report at the time of each delivery of supplies or services under a contract would be relocated from DFARS 252.246-7000 to paragraph (b) of this clause because DFARS 252.246-7000 is proposed for deletion. (Current paragraph (b) would be divided into paragraphs (b) and (c), and paragraphs (c) through (e) would be redesignated as paragraphs (d) through (f).)

– Paragraph (f)(1) of DFARS 252.232-7006 would be revised to clarify the type of payment request to be used for cost-type line items, fixed-price line items, and various contract financing payments. The use of the WAWF "combo" document type and the use of Department of Defense Activity Address Codes (DODAAC) would be clarified in

paragraph (f)(2). The requirement to ensure that a receiving report complies with DFARS Appendix F would be relocated from DFARS 252.246-7000, which is being deleted, to paragraph (g)(2) of this clause.

– DFARS 252.246-7000 would be deleted because its procedures predate the WAWF automated procedures and processes and are now obsolete. The relevant text would be relocated to DFARS 252.232-7003 as paragraph (g)(2).

– Appendix F, Material Inspection and Receiving Report, would be revised to clarify the requirement to enter unit prices on WAWF receiving reports and to include the requirement to enter estimated prices for foreign military sales shipments if actual prices are not available (DFARS F-301, Preparation Instructions). In addition, invoice submission and packing list instructions would be clarified (DFARS F-305, Invoice Instructions).

Comments on this proposed rule must be submitted no later than August 28, 2018, identified as "DFARS Case 2016-D032," 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(A&S)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Class Deviation Increasing the Threshold for Obtaining Certified Cost or Pricing Data:** This class deviation 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 for obtaining certified cost or pricing data from $750,000 (as specified in FAR 15.403-4, Requiring Certified Cost or Pricing Data (10 USC 2306a and 41 USC Chapter 35)) to $2,000,000, effective July 1, 2018.

In addition, since paragraph (b)(1)(B) of 41 USC 1502, Cost Accounting Standards, equates the cost accounting standards threshold to the threshold for obtaining certified cost or pricing data in 10 USC 2306a, this class deviation also increases the threshold for applicability of the cost accounting standards to $2,000,000.

This class deviation rescinds and supersedes Class Deviation 2018-O0012, which was issued in April 2018 to increase the threshold for obtaining certified cost or pricing data. This replacement class deviation includes two clauses that were not included in the earlier class deviation: FAR 52.215-12, Subcontractor Certified Cost or Pricing Data (Deviation 2018-O0015), and FAR 52.215-13, Subcontractor Certified Cost or Pricing Data – Modifications (Deviation 2018-O0015). For more on Class Deviation 2018-O0012, see the May 2018 ***Federal Contracts Perspective*** article "DOD Cranks It Up For Spring!"

This class deviation parallels the class deviation issued by the Civilian Agency Acquisition Council (CAAC) increasing the threshold for obtaining certified cost or pricing data for civilian agencies; see the June 2018 ***Federal Contracts Perspective*** article "CAAC Issues Deviation Raising Cost of Pricing Threshold."

■ **Class Deviation on Defense Commercial Solutions Opening Pilot Program:** This class deviation implements NDAA for FY 2017 (Public Law 114-328), Section 879, Defense Pilot

Program for Authority to Acquire Innovative Commercial Items, Technologies, and Services Using General Solicitation Competitive Procedures, which authorizes DOD to use a competitive procedure called a "Commercial Solutions Opening" (CSO) pilot program to acquire innovative commercial items, technologies, and services through a competitive selection of proposals resulting from a general solicitation and the peer review of such proposals.

Contracts or agreements executed under a CSO are limited to $100,000,000 unless authorized by the Under Secretary for Acquisition, Logistics, and Technology, and congressional defense committees are notified; must be a fixed-price type contract; and are to treat items, technologies, and services as commercial items.

Contracting officers may use a CSO only to obtain solutions or potential new capabilities that fulfill requirement, close capability gaps, or provide potential technological advancements; and when meaningful proposals with varying technical or scientific approaches can be reasonably anticipated.

Contracting officers shall ensure the CSO:

- Describes the agency's interest, either for an individual program requirement or for broadly defined areas of interest covering the full range of the agency's requirements.

- Describes the criteria for selecting proposals, their relative importance, and the method of evaluation, including the potential type of data rights that may be necessary to meet DOD's minimum needs. The primary evaluation factors for selecting proposals for award shall be technical, importance to agency programs, and funds availability. Price shall be considered to the extent appropriate, but at a minimum to determine that the price is fair and reasonable. Proposals shall be evaluated by scientific, technological, or other subject-matter expert peers.

- Specifies the period during which proposals submitted will be accepted.

- Contains instructions for the preparation and submission of proposals.

Contracting officers must publicize a notice of CSO availability through the Federal Business Opportunities (FedBizOpps) database (**https://www.fbo.gov/**) at least annually, and through paid advertisements in scientific, technical, or engineering periodicals if authorized by FAR subpart 5.5, Paid Advertisements. Synopsis under FAR subpart 5.2, Synopses of Proposed Contract Actions, of individual contract actions under the CSO is not required. The notice published in the FedBizOpps fulfills the synopsis requirements.

The authority to enter into a contract under the CSO pilot program expires on September 30, 2022. Contracts awarded under the CSO pilot program before the expiration date will remain valid.

■ **Class Deviation on Determining Contract Type for Foreign Military Sales (FMS) Contracts:** This class deviation implements the NDAA for FY 2017, Section 830, Requirement to Use Firm Fixed-Price Contracts for Foreign Military Sales, which requires that firm fixed-price contracts be used for FMS contracts unless an exception applies or a waiver has been authorized.

Section 830 permits use of a different contract type if the FMS customer has established a preference for a different contract type or has requested that a different contract type be used for a specific foreign military sale.

Also, Section 830 authorizes the waiver of this requirement on a case-by-case when a contract type other than firm fixed-price is in the best interests of the United States and the American taxpayers. This waiver may be granted by the chief of the contracting office.

Accompanying this deviation is a memorandum issued by the director of Defense Pricing/Defense Procurement and Acquisition Policy on the subject "Negotiations of Sole Source Major Systems for U.S. and U.S./FMS Combined Procurements." "With regard to the development of acquisition and contracting strategies for sole source major systems procurements for U.S. and U.S./FMS combined requirements, we encourage program managers and contracting officers to use strategies that address more than a single year's procurement requirements, whenever possible, through the use of priced options," the director wrote. "The practice of year-to-year annual procurements is both administratively costly in terms of Procurement Acquisition Lead Time (PALT) and the resources (proposal preparation and manpower) to get annual requirements under contract. Contracting officers are encouraged to establish priced options for two years beyond the instant procurement year such that negotiations of major systems would be conducted approximately every three years."

In addition, the director addresses contract types. "For economies of scale, it is in the best interests of the taxpayers to combine U.S. and FMS requirements under the same contract whenever possible. In terms of contract type for U.S. or combined U.S. and FMS requirements, most production type requirements are typically contracted for on a fixed price basis (firm fixed-price or fixed-price incentive (firm target) FPIF)). It is not in the best interest of the taxpayers to concurrently use mixed contract types for the same or similar items."

The director concludes with the following reminder: "A request for a waiver provided for in Section 830 of the National Defense Authorization Act for Fiscal Year 2017 should be processed when the U.S. portions of these contracts alone would otherwise be FPIF."

■ **Reporting "Solicitation Date" in the Federal Procurement Data System:** This memorandum from the director of Defense Pricing/Defense Procurement and Acquisition Policy announces to the DOD acquisition workforce that the General Services Administration (GSA) plans to implement an update of the Federal Procurement Data System (FPDS – **https://www.fpds.gov/**) which will now include a data element for "Solicitation Date", which is required to comply with the NDAA for FY 2018 (Public Law 115-91), Section 886, Development of Procurement Administrative Lead Time. Section 886 establishes requirements for the DOD to measure procurement administrative lead time (PALT), identified as the time between initial solicitation date and award date on contracts and orders valued above the simplified acquisition threshold (currently $250,000).

Though the determination of a solicitation date is easy for normal solicitations, the memorandum provides instructions for determining the date to be used as the solicitation date for: (1) when the action is the award of an order using existing pre-priced line items under an indefinite-delivery contract where no proposal is required; (2) when the action is the award of a contract under a Broad Agency Announcement (BAA); and (3) for awards made in response to unsolicited proposals.

■ **Reducing Acquisition Lead Time by Eliminating Inefficiencies Associated with Cost or Pricing Data Submissions:** This memorandum from the director of Defense Pricing/Defense Procurement and Acquisition Policy announces that "effective immediately, for actions subject to the Truth in Negotiations Act, contracting officers shall request offerors execute the Certificate of Current Cost or Pricing Data as soon as practicable, but not later than five business days after the date of the price agreement." This is considered necessary because the contractor's submission of additional cost or pricing data (referred to as "sweep data") concurrently with or after the submission of the Certificate of Current Cost or Pricing Data subsequent to price agreement "significantly contributes to the timeframe between price agreement and contract award." This is due to "delays associated with contractor efforts to collect and submit cost or pricing data which should have been, but were not, provided to the contracting officer in a timely manner prior to agreement on price unnecessarily increase acquisition lead time acquisition lead time, both by delaying submission of the Certificate of Current Cost or Pricing Data, and by requiring the contracting officer to review the "sweep" data, assess the impact on the negotiated price, and come to an agreement with the contractor on that price impact."

■ **Implementation of Defense-Wide Contract Clause Logic Service V4.0:** This memorandum from the director of Defense Pricing/Defense Procurement and Acquisition Policy notifies DOD acquisition personnel that access to the DOD Clause Logic Service (CLS) is available through the Wide Area Workflow (WAWF) single sign on (SSO) process. "The WAWF SSO protocol is structured to enable access to other systems such as the Electronic Document Access (EDA); the complete list can be found at **https://wawf.eb.mil**."

FAR RULE TO EXPAND EMERGENCY PROCUREMENT AUTHORITY

As the DOD did to the DFARS last month, a proposed rule has been issued that would implement 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, both of which amend 41 USC 1903, Special Emergency Procurement Authority. 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." (For more on the amendments to the DFARS to implement Section 816 and Section 1641, see the June 2018 ***Federal Contracts Perspective*** article "DOD Unleashes a Torrent of Rules, Removes Unnecessary DFARS Clauses and Provisions.")

To implement these two sections, the FAR would be amended as follows:

– FAR 2.101, Definitions, would have a definition for "emergency" added ("emergency…means any occasion or instance for which, in the determination of the president, federal assistance is needed to supplement state and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States…"). In addition, a definition for "major disaster" would be added ("major disaster…means any natural catastrophe (including any hurricane, tornado, storm, high water, wind driven water, tidal

wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or regardless of cause, any fire, flood, or explosion, in any part of the United States, which, in the determination of the president, causes damage of sufficient severity and magnitude to warrant major disaster assistance under the Stafford Act to supplement the efforts and available resources of states, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby…"). A definition for "cyber attack" will *not* be added because there is no statutory definition for the term, and it was decided not to limit the authority of the head of the agency to determine what constitutes a cyber attack that should trigger the new authorities.

Also in FAR 2.101, new language would be added to the definitions for "micro-purchase threshold" and "simplified acquisition threshold" to reflect these expanded special emergency procurement authorities.

– FAR 13.201, General (for actions at or below the micro-purchase threshold), would be amended to reflect the new circumstances that allow exercise of the special emergency procurement authorities at or below the micro-purchase threshold (currently $5,000 for DOD, NASA, and the Coast Guard; and $10,000 for all other civilian agencies).

– FAR 13.500, General (for simplified procedures applicable to certain commercial items), would be amended to reflect the new circumstances that allow exercise of the special emergency procurement authorities for the acquisition of supplies and services in amounts greater than the simplified acquisition threshold (currently $250,000) but not exceeding $7,000,000.

– FAR part 18, Emergency Acquisitions, provides a summary of emergency acquisition flexibilities throughout the FAR, so the changes in this proposed rule would be reflected in FAR part 18.

Comments on this proposed rule must be submitted no later than August 27, 2018, identified as "FAR Case 2017-009," by either of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; or (2) mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd Floor, Washington, DC 20405-0001.

NASA REMOVES CHUNKS OF THE NFS

The National Aeronautics and Space Administration (NASA) has decided to clean up the NASA FAR Supplement (NFS) by issuing direct final rules removing several portions of that regulation.

■ **Removal of Definitions:** NFS part 1802, Definition of Words and Terms, contains definitions for the following terms: administrator; contracting activity; head of the agency or agency head; head of the contracting activity (HCA); NASA Acquisition internet Service (NAIS); procurement officer; and senior procurement executive. These definitions apply to

internal NASA administrative procedures only and have no cost or administrative impact on contractors or prospective contractors. For this reason, NFS part 1802 is removed.

Comments on this direct final rule must be submitted no later than July 23, 2018, identified as "NFS Case 2018-N017," by either of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; or (2) email: **geoffrey.s.sage@nasa.gov**. If adverse comments are received, NASA will publish a timely withdrawal of the rule. Otherwise, the rule will go into effect August 21, 2018.

■ **Removal of Reference to the Supplemental Rights in Data Special Works Policy:** NFS 1852.227-17, Rights in Data – Special Works, requires that whenever the words "establish" and "establishment" are used in FAR 52.227-17, Rights in Data, they shall be construed to mean "assert" and "assertion", respectively. However, in 2007, FAC 2005-21 rewrote FAR part 27, Patents, Data, and Copyrights, and the associated clauses, including FAR 52.227-17, in plain English. As part of that rewrite, the words "establish" and "establishment" were eliminated from FAR 52.227-17. Therefore, NFS 1852.227-17 is no longer applicable and is removed, along with its prescription in paragraph (i) of NFS 1827.409, Solicitation Provisions and Contract Clauses.

Comments on this direct final rule must be submitted no later than July 23, 2018, identified as "NFS Case 2018-N016," by either of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; or (2) email: **john.brett@nasa.gov**. If adverse comments are received, NASA will publish a timely withdrawal of the rule. Otherwise, the rule will go into effect August 21, 2018.

For more on FAC 2005-21, see the December 2007 ***Federal Contracts Perspective*** article "FAC 2005-21 Rewrites FAR Part 27 in Plain English."

■ **Removal of Reference to the Shared Savings Policy:** NFS 1852.243-71, Shared Savings, was added to the NFS in 1997 to provide an incentive for contractors to identify and implement significant cost reduction programs. In return, they would be eligible for a share of the realized savings which resulted from those cost-cutting projects once they were approved by the contracting officer. However, NFS 1852.243-71 is duplicative of FAR part 48, Value Engineering, and its associated clauses, which provide the same incentives to contractors as NFS 1852.243-71. Therefore, NFS 1852.243-71 and NFS subpart 1843.71, Shared Savings Program, which consists of a description of the program and the prescription for NFS 1852.243-71, are removed.

Comments on this direct final rule must be submitted no later than July 23, 2018, identified as "NFS Case 2018-N008," by either of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; or (2) email: **marilyn.seppi-1@nasa.gov**. If adverse comments are received, NASA will publish a timely withdrawal of the rule. Otherwise, the rule will go into effect August 21, 2018.

EPA DISCONTINUES ITS MENTOR-PROTÉGÉ PROGRAM

The Environmental Protection Agency (EPA) is issuing a direct final rule that removes EPA Acquisition Regulation (EPAAR) 1519.203, Mentor-Protégé, EPAAR 1552.219-70, Mentor-Protégé Program, and EPAAR 1552.219–71, Procedures for Participation in the EPA Mentor-Protégé Program, and will utilize the governmentwide mentor-protégé program that has been established by the Small Business Administration (SBA) (see the August 2016 ***Federal Contracts Perspective*** article "Governmentwide Mentor-Protégé Program Established").

SBA was given the responsibility for civilian agencies' mentor-protégé programs (DOD is exempt from this because it has the necessary statutory and regulatory framework for its own mentor-protégé program). SBA received this responsibility from two statutes:

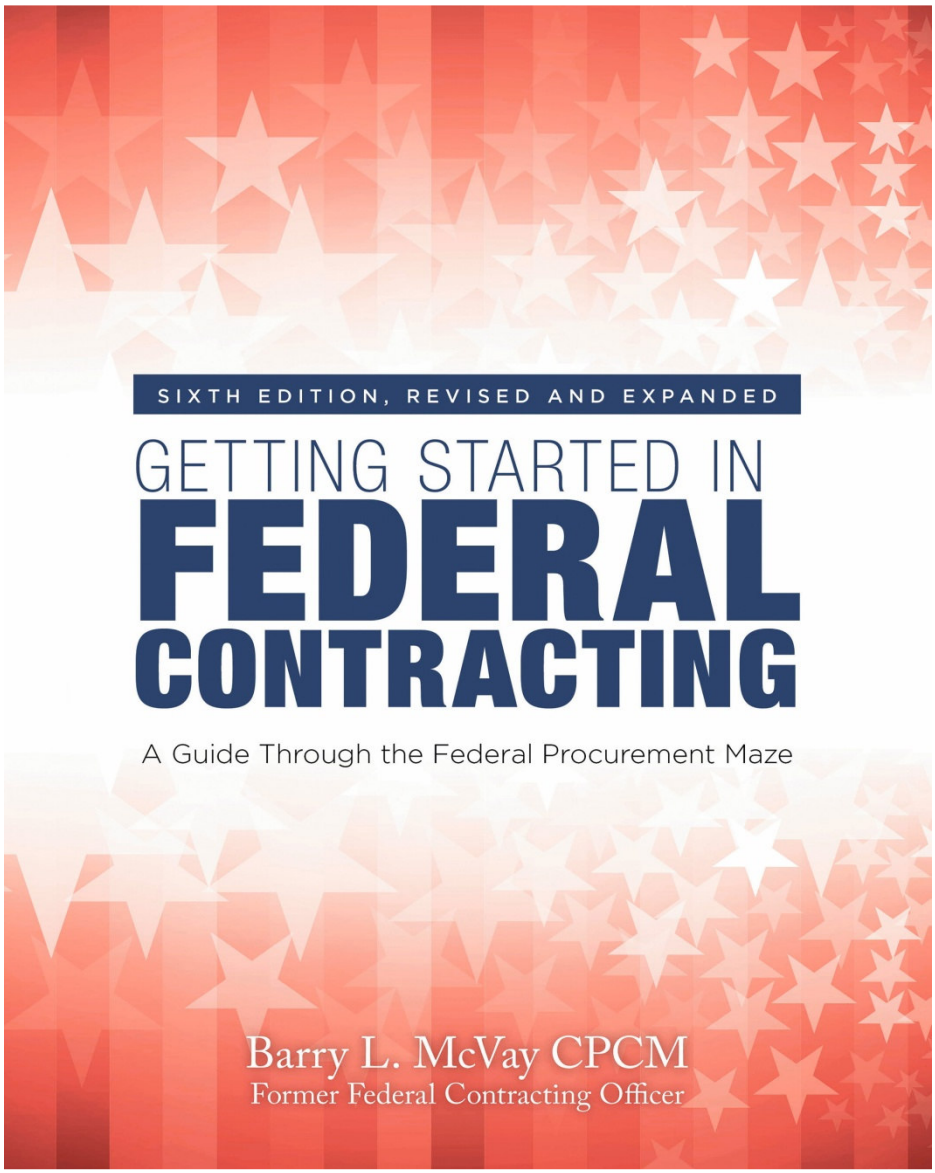
- The Small Business Jobs Act of 2010 (Public Law 111-240), Section 1347, Small Business Contracting Parity, which authorizes the Small Business administrator to "establish mentor-protégé programs for small business concerns owned and controlled by service-disabled veterans, small business concerns owned and controlled by women, and HUBZone [Historically Underutilized Business Zone] small business concerns modeled on the mentor-protégé program of the [SBA] for small business concerns participating in programs under Section 8(a) of the Small Business Act" (paragraph (b)(3) – see the October 2010 ***Federal Contracts Perspective*** article "Parity Among Small Business Programs Mandated by Statute").

- The NDAA for FY 2013 (Public Law 112-239), Section 1641, Mentor-Protégé Programs, which authorizes the SBA to "establish a mentor-protégé program for all small business concerns." It goes on to require that the mentor-protégé program "be identical to the mentor-protégé program of the [SBA] for small business concerns that participate in the program under section 8(a)...except that the [SBA] may modify the program to the extent necessary given the types of small business concerns included as protégés." Furthermore, Section 1641 prohibits agencies from conducting their own mentor-protégé programs unless the head of the agency submits a plan to SBA for approval (see the February 2013 ***Federal Contracts Perspective*** article "FY 2013 National Defense Authorization Act Extends FAR Subpart 13.5 Procedures Through 2014").

Since SBA's mentor-protégé program is governmentwide, EPA can use it instead of managing its own program. EPA has decided to use SBA's mentor-protégé program to reduce redundancy and increase efficiencies. Therefore, EPAAR 1519.203, EPAAR 1552.219-70, and EPAAR 1552.219–71 are removed because they are obsolete.

Comments on this direct final rule must be submitted no later than July 23, 2018, identified as "Docket ID No. EPA–HQ– OARM–2018–0165," by the Federal eRulemaking Portal: **http://www.regulations.gov**, If adverse comments are received, EPA will publish a timely withdrawal of the rule. Otherwise, the rule will go into effect September 19, 2018.

REVISED AND EXPANDED!



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