

# FEDERAL CONTRACTS PERSPECTIVE

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## ACQUISITION 360 PROPOSED AS STANDARD SURVEY ALLOWING OFFERORS TO CRITIQUE SOLICITATIONS

To allow offerors, whether or not in line to receive the contract award, to provide voluntary and anonymous feedback by rating the contracting agency's pre-award and debriefing processes for solicitations, public comments are being sought on an amendment to the Federal Acquisition Regulation (FAR) that would give those offerors the opportunity to complete a four-part survey called

*Acquisition 360*, available at <https://www.acquisition.gov/360>.

The four parts of *Acquisition 360* would ask how satisfied the offeror was with: (1) the requirements development process (for example, how satisfied was the offeror: "with the agency's understanding of your firm's marketplace?"; "with the clarity of the final requirements?"); (2) the solicitation phase ("that the government chose an appropriate contract type?"; "with the clarity of the solicitation's evaluation criteria?"; "with the amount of time the agency gave to submit a proposal?"); (3) award execution and debriefings ("with the agency's resolution of issues/concerns related to the contracting process?"; "with the robustness of the agency's debriefing (*i.e.*, it allowed you to understand how to improve on similar efforts in the future)?"); and (4) overall satisfaction ("with your overall experience on this acquisition?"). In addition, the *Acquisition 360* would permit the respondent to submit any additional comments and to identify whether it is a small business.

Submissions are intended to be anonymous and for internal government improvements only. Voluntary participation would not bestow any direct benefits or protections on respondents in the acquisition process or any subsequent protests.

To implement *Acquisition 360*, the following would be added:

■ FAR 5.407, Feedback on the Pre-Award Process and Debriefings. Paragraph (a) would state, "Agencies are encouraged to seek regular voluntary feedback from interested sources that participate in an agency's acquisitions to understand strengths and weaknesses in how information is communicated, how acquisition techniques and methodologies were executed, and consider this feedback, as appropriate, to improve the effectiveness and efficiency of the acquisition process." Paragraph (b) would state, "The contracting officer should insert the provision [FAR] 52.XXX-XX, *Acquisition 360: Voluntary Survey*, in accordance with agency procedures."

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■ FAR 52.XXX-XX would state, “(a) All actual or prospective offerors are encouraged to provide feedback on the pre-award process, including debriefings. Feedback may be made anonymously by going to <https://www.acquisition.gov/360>. (b) None of the information provided will be reviewed until after contract award and will not be considered in nor impact source selection in any way.”

In addition, to encourage acquisition officials to elicit feedback from their contractors on the agency’s performance of its contract administration responsibilities, FAR 42.1401, Policy, would be added. It would state:

“(a) Agencies are encouraged to seek regular and voluntary feedback from their contractors on the agency’s performance of its contract administration responsibilities.

“(b) Feedback might be sought on matters such as the contractor’s evaluation of the agency in terms of:

“(1) adherence to contract terms, including the administrative aspects of performance;

“(2) reasonable and cooperative behavior in responding to contractor communications and addressing contractor requests; and

“(3) business-like concern for the interest of the contractor.

“(c) Agencies should consider this feedback, as appropriate, to better understand strengths and weaknesses and improve the effectiveness and efficiency of their contract administration activities.”

Comments on this proposed rule must be submitted no later than September 21, 2018, identified as “FAR Case 2017-014,” 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.

Respondents are encouraged to offer their feedback on the proposed language in the survey and the implementing amendments to the FAR, in addition to the following questions:

(1) What are the benefits to industry in providing actual and potential offerors with increased opportunity to submit feedback on how well the government is performing its pre- and post-award activities? What are the benefits to the government?

Vivina McVay, Editor-in Chief

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(2) Is the approach discussed in this proposed rulemaking the most effective way to elicit feedback about the government's pre-award activities? If not, how might effectiveness be improved? What is the best way the government can obtain honest and open feedback on the contract administration process?

(3) Approximately how long would you estimate it will take to complete the survey at <https://www.acquisition.gov/360>? What is a reasonable estimate of an organization's costs to complete the survey and what are the elements of this cost (for example, personnel involved and time to complete)?

(4) How would you quantify or otherwise describe the benefits or burdens of this type of feedback mechanism to actual and potential offerors?

(5) Should any of the information provided by industry be available for industry review? How should the government work proactively with industry to consider changes based on any data submitted?

(6) Is there different information which should be collected on the survey based on the type of company or the type of acquisition?

(7) Would you view the voluntary opportunity to provide input as burden? If so, are there modifications which would decrease the burden associated with the government collecting this information?

(8) Would you be more likely to complete the survey if it were available as a hyperlinked button within each solicitation page of <https://www.fedbizopps.gov>?

(9) What measures would help assure you that answers would remain anonymous? For example: Should the solicitation number itself and/or the specific Product Service Code (PSC) be stripped from the data agencies review? Should there be a time delay in agencies receiving survey responses? Should the government discard survey submissions when two or fewer responses are received for a solicitation or would you prefer that the government reviews data from all responses?

(10) What recommendations would you advise to ensure data quality? Similar to the example above, should the government discard survey submissions when a minimal number are received for a particular solicitation or contracting office or would you view this effort more as a forum to provide comments?

## TWELVE MORE BIOBASED PRODUCTS DESIGNATED

The United States Department of Agriculture (USDA) is adding twelve sections to Title 7 of the Code of Federal Regulations (CFR), Part 3201, Guidelines for Designating Biobased Products for Federal Procurement (7 CFR Part 3201), to add twelve more biobased products to be given preference in federal procurements as provided under Section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA) (Public Law 107-171), and to specify the minimum level of biobased content to be contained in the procured products.

The following are the new designated items and their Title 7 section numbers:

- 3201.108, Intermediates – Plastic Resins
- 3201.109, Intermediates – Chemicals
- 3201.110, Intermediates – Paint and Coating Components
- 3201.111, Intermediates – Textile Processing Materials
- 3201.112, Intermediates – Foams
- 3201.113, Intermediates – Fibers and Fabrics
- 3201.114, Intermediates – Lubricant Components
- 3201.115, Intermediates – Binders
- 3201.116, Intermediates – Cleaner Components
- 3201.117, Intermediates – Personal Care Product Components
- 3201.118, Intermediates – Oils, Fats, and Waxes
- 3201.119, Intermediates – Rubber Materials

Eight respondents submitted comments on the proposed rule. As a result of those comments, the following changes to definitions are made in the final rule:

- The definition for the intermediates – plastic resins category in 7 CFR 3201.108 is revised to include the term “polymers.”
- The definition for the intermediates – chemicals category in 7 CFR 3201.109 is revised to list additional materials, such as viscosity reducers, rheology modifiers, adhesion agents, polyols, and polymers.
- The definition for the intermediates – paint and coating components category in 7 CFR 3201.110 is revised to add more examples of paint and coating components, such as humectants, open time additives, and polymers.
- The definition for the intermediates – binders category in 7 CFR 3201.115 is revised to expand on the types of chemicals that typically make up binders with the addition of the following sentence: “Binders are generally polymers or polymer precursors (such as epoxies) and include the polymeric materials used to formulate coatings, adhesives, sealants and elastomers.”

For more on the proposed designation of these twelve product categories, see the February 2017 *Federal Contracts Perspective* article “USDA Proposes 12 New Biobased Products.”

**EDITOR’S NOTE:** The term “intermediate ingredient and feedstock” is defined in FSRIA as “a material or compound made in whole or in significant part from biological products, including renewable agricultural materials (including plant, animal, and marine materials) or forestry materials, that are subsequently used to make a more complex compound or product.” The term “intermediates” is used in the titles of these product categories to distinguish them from the finished, consumer products previously designated by USDA.

As a general rule, procuring agencies must purchase biobased products within these designated items where the purchase price of the procurement item exceeds \$10,000 or where the quantity of such items or functionally equivalent items purchased over the preceding fiscal year equaled \$10,000 or more, unless products within a designated item: (1) are not reasonably available within a reasonable period of time; (2) fail to meet the reasonable performance standards of the procuring agencies; or (3) are available only at an unreasonable price. The \$10,000 threshold applies to federal agencies as a whole and not to agency subgroups such as regional offices or subagencies of the larger federal department or agency.

For more information on the biobased program and all the products in the program, go to <http://www.biopreferred.gov/>.

## **COMMERCIAL ITEMS EXEMPTION FROM CAS CLARIFIED**

The Cost Accounting Standards (CAS) Board is finalizing, with a change, the rule that proposed to clarify the exemption from CAS requirements for contracts or subcontracts for commercial items so that the regulatory text is more consistent with the statutory text. This clarification is in paragraph (b)(6) of Title 48 of the Code of Federal Regulations (CFR), 9903.201-1, CAS Applicability (48 CFR 9903.201-1(b)(6)), which is revised to state that “contracts and subcontracts authorized in 48 CFR 12.207 [FAR 12.207, Contract Type] for the acquisition of commercial items” are exempt from CAS.

In 1996, the enactment of the Federal Acquisition Reform Act (FARA) of 1996 (Division D of Public Law 104-106) provided a CAS exemption for “contracts or subcontracts for the acquisition of commercial items.” However, over the years this exemption had evolved into the following as subsequent statutes and rules have “clarified” the commercial item exemption: “[b) The following categories of contracts and subcontracts are exempt from all CAS requirements:] (6) Firm fixed-priced, fixed-priced with economic price adjustment (provided that price adjustment is not based on actual costs incurred), time-and-materials, and labor-hour contracts and subcontracts for the acquisition of commercial items.”

Since enactment of the Federal Acquisition Streamlining Act in 1994 (Public Law 103-355), which was intended to “revise and streamline the acquisition laws of the federal government” and “facilitate the acquisition of commercial products,” FAR 12.207 has contained a list of contract types authorized for use in acquiring commercial items. Just as the CAS has been amended several times to reflect statutory changes, so has FAR 12.207. However, inconsistencies have developed between the list of contract types authorized for use in acquiring commercial items in CAS 9903.201-1(b)(6) and FAR 12.207. For example, FAR 12.207(d) allows the use of firm-fixed-price contracts “in conjunction with an award fee and performance or delivery incentives when the award fee or incentive is based solely on factors other than cost.” These types of contracts are known as “fixed-price incentive” (FPI) contracts. However, FPI contracts are not listed in CAS 9903.201-1(b)(6). The CAS Board decided that this and other discrepancies needed to be clarified.

The CAS Board proposed to address the inconsistencies between the lists by removing references to specific contract types in the (b)(6) exemption and returning to the “contracts or subcontracts for the acquisition of commercial items” language in the FARA. Four respondents submitted comments on the proposed change. One respondent stated that the change to the proposed language “may be confusing to the inexperienced, including both contractors and government representatives” who may not immediately understand how to interpret the phrase “contracts and subcontracts for the acquisition of commercial items” without further explanation. This respondent suggested that the exemption include a specific cross-reference to statute or regulation so that the reader could more easily determine the exempt contract types. In response to this comment, the CAS Board has decided to add a cross-reference to FAR 12.207 so that 48 CFR 9903.201-1(b)(6) now exempts from CAS “contracts and subcontracts authorized in 48 CFR 12.207 for the acquisition of commercial items.”

For more on the proposed rule, see the December 2012 *Federal Contracts Perspective* article “Revision to CAS Exemption for Commercial Items Proposed.”

## NEW SAM LOGIN PROCEDURES ESTABLISHED

The General Services Administration (GSA) recently announced it has made changes to the System for Award Management (SAM – <https://www.sam.gov>) login process to strengthen controls for the System for Award Management (SAM). This is in response to the discovery of fraudulent activities taking place in SAM (see the April 2018 *Federal Contracts Perspective* article “GSA Detects Fraudulent Activities in the System for Award Management”).

All SAM users are now required to access SAM through **login.gov** (<https://login.gov>). “**Login.gov** is a service that offers secure and private online access to government programs, such as federal benefits, services, and applications. With a **login.gov** account, you can sign into multiple government websites (including **SAM.gov**) with the same username and password.” Current **SAM.gov** usernames and passwords will not work with **login.gov**. Each SAM user will need to establish a **login.gov** account and use that **login.gov** username and password every time he or she logs into SAM.

- Those who have a **login.gov** account should check the email address. The associated email address must match the email address associated with the **SAM.gov** account. If the email addresses don’t match, the user will need to create a new **login.gov** account.
- Those who don’t have a **login.gov** account for their **SAM.gov** account should use the same email address used for **SAM.gov**. It is important to ensure that the email address is associated with the SAM account because the account creation process for **login.gov** will require a confirmation email that will be sent to the email address. The email address will also be used to automatically migrate the user roles in the current SAM account to the new **login.gov** SAM account. If a different email address is provided when establishing a new **login.gov** account, the user roles in SAM will need to be reassigned and this will delay access to SAM.
- Those who don’t have a **SAM.gov** account (for example, someone who is a brand new user) may use any email address to which they have access when establishing their

**login.gov** account. Then the new SAM user will be able to create a SAM profile once the **login.gov** account has been authenticated.

- Create a new password for **login.gov**.
- Because **login.gov** provides dual-factor authentication, the user will have to decide how he or she to receive security codes. The user will need a working phone number (mobile or landline) or an authentication app (installed on the user’s mobile telephone or computer). **Login.gov** will use the user’s phone or authentication app to send a one-time security code for authentication. Once authenticated, **login.gov** will remember the browser that stores the security code for 30 days.

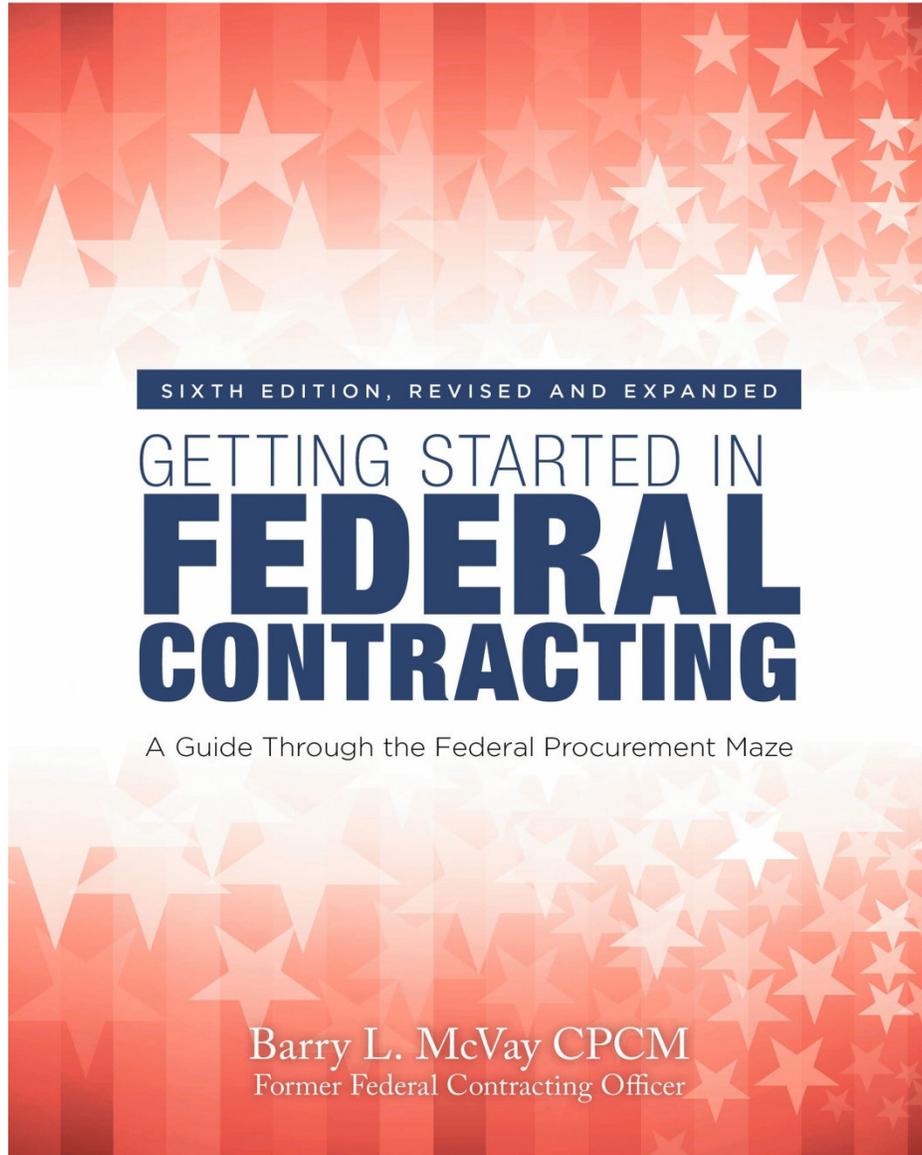
More information on the new **login.gov** process for SAM is available under “Login.gov FAQs” at <https://login.gov>. Additional assistance is available by contacting GSA’s supporting Federal Service Desk at <http://www.fsd.gov>, or by telephone at 866-606-8220 (toll free) or 334-206-7828 (internationally).

**EDITOR’S NOTE:** SAM is the federal database where vendors register to do business with the government. It consolidates several federal databases into one: the Federal Agency Registration (FedReg); the Online Representations and Certifications Application (ORCA); and the Excluded Parties List System (EPLS). There are plans to consolidate even more federal databases, such as the Wage Determinations On-Line (WDOL), the Federal Procurement Data System (FPDS), and several others. The purpose of the SAM is to: (1) allow users to employ a single login to access all the capabilities found in the old systems; (2) eliminate data overlap by sharing the data among the systems; and (3) provide a standardized format across all webpages to make it easier to navigate and find information.

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