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$717 BILLION DEFENSE AUTHORIZATION ACT ADDRESSES DOD MICRO-PURCHASE THRESHOLD, COMMERCIAL ITEMS

On August 13 President Trump signed into law the $717 billion John S. McCain National Defense Authorization Act for Fiscal Year 2019 (NDAA for FY 2019 – Public Law 115-232), named after the late senator from Arizona. While the primary concern of Public Law 115-232 is to authorize an increase in defense funding by 3% over that authorized by the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Public Law 115-91), there are some provisions that address issues involving acquisition. Most of those provisions are in Title VIII, Acquisition Policy, Acquisition Management, and Related Matters (Sections 800-890), though there are a few other acquisition-related provisions scattered elsewhere in the statute. The most significant of the acquisition-related provisions are the increase in the micro-purchase threshold for the Department of Defense (DOD) from $5,000 to $10,000, and the revision of the definition of "commercial item."

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First of all, Sections 800 through 809 direct that Title 10 of the U.S. Code, Armed Forces (10 USC), Subtitle A, General Military Law, be realigned to include a new Part V, Acquisition, to logically organize all acquisition-related statutes applicable to DOD in one part of the U.S. Code. This is an acknowledgement that the structure for acquisition-related statutes in Title 10 has become unwieldy and inadequate. In addition, this restructuring will enable additional growth and potential future reorganization of Title 10 statutes in other subject areas outside of the acquisition code.

Section 800 requires that the new Part V be established by February 1, 2019; Section 801 establishes the framework for Part V; Section 806 redesignates sections and chapters in Subtitle D, Air Force, to create numerical space for Part V at the end of Subtitle A; Section 807 redesignates sections and chapters in Subtitle C, Navy and Marine Corps, to create numerical space for Part V at the end of Subtitle A; Section 808 redesignates sections and chapters in Subtitle B, Army, to create numerical space for Part V at the end of Subtitle A; and Section 809 requires that each provision of Title 10 that contains a reference to a section or chapter that has been redesignated be amended so that the reference refers to the number of the section or chapter as redesignated.

The following are some of the other important acquisition-related provisions in Title VIII:

■ **Section 812, Repeal of Certain Defense Acquisition Laws:** This section repeals a number of outdated provisions of law related to defense acquisition: 10 USC 167a, Unified Combatant Command for Joint Warfighting Experimentation: Acquisition Authority; 10 USC 2323, Contract Goal for Small Disadvantaged Businesses and Certain Institutions of Higher Education; 10 USC 2332, Share-in-Savings Contracts; and 60 provisions of various NDAAs, appropriations acts, and miscellaneous public laws (from 1991 onward).

■ **Section 821, Increase in Micro-Purchase Threshold Applicable to Department of Defense:** This section increases the micro-purchase threshold for DOD from $5,000 to $10,000. Section 806 of the NDAA for FY 2018 (Public Law 115-91) increased the federal micro-purchase threshold in paragraph (a)(1) of Title 41 of the U.S. Code, Section 1902, Procedures Applicable to Purchases Below Micro-Purchase Threshold (41 USC 1902) by striking "$3,000" and inserting "$10,000". However, Section 806 did not repeal 10 USC 2338, Micro-Purchase Threshold, which 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 of this oversight, DOD was stuck with the $5,000 micro-purchase threshold while the rest of the government enjoyed the $10,000 micro-purchase threshold! Section 821 corrects that oversight by replacing the language in 10 USC 2338 with "The micro-purchase threshold for the Department of Defense is $10,000." (**EDITOR'S NOTE:** For more on this situation, see the February 2018 ***Federal Contracts Perspective*** article "DOD Provides Guidance on Commercial Item Procurement.")

■ **Section 836, Revision of Definition of Commercial Item for Purposes of Federal Acquisition Statutes:** Both 41 USC, Public Contracts (which applies to civilian agencies except the National Aeronautics and Space Administration [NASA] and the Coast Guard), and 10 USC (which applies to DOD, NASA, and the Coast Guard) are amended to separate the definition of "commercial item" into definitions of "commercial product" and "commercial service" to enable differentiation between products and services, thus simplifying and streamlining acquisitions. This change will become effective January 1, 2020.

■ **Section 838, Modifications to Procurement Through Commercial E-Commerce Portals:** This section amends Section 846 of the NDAA for FY 2018 (Public Law 115-91), which directed the General Services Administration (GSA) to "establish a program to procure commercial products through commercial e-commerce portals," to provide that "a procurement of a product made through a commercial e-commerce portal…is deemed to satisfy requirements for full and open competition…if there are offers from two or more suppliers of such a product or similar product with substantially the same physical, functional, or performance characteristics on the online marketlplace…" Also, this section requires GSA to develop procedures to implement this and submit them to Congress at least 30 days before implementing such procedures.

Vivina McVay, Editor-in Chief

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■ **Section 852, Prompt Payments of Small Business Contractors:** This section directs DOD to establish an accelerated prompt payment date of 15 days after receipt of a proper invoice for small business prime contractors. In addition, it extends the 15-day accelerated payment objective to prime contractors that subcontract with small businesses if "the prime contractor agrees to make payments to the subcontractor in accordance with the accelerated payment date without any further consideration from or fees charged to the subcontractor."

■ **Section 880, Use of Lowest Price Technically Acceptable Source Selection Process:** This section requires that the Federal Acquisition Regulation (FAR) be amended to require that lowest price technically acceptable source selection criteria are used only in situations in which "(1) an executive agency is able to comprehensively and clearly describe the minimum requirements expressed in terms of performance objectives, measures, and standards that will be used to determine acceptability of offers; (2) the executive agency would realize no, or minimal, value from a contract proposal exceeding the minimum technical or performance requirements set forth in the request for proposal; (3) the proposed technical approaches will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror's proposal versus a competing proposal; (4) the executive agency has a high degree of confidence that a review of technical proposals of offerors other than the lowest bidder would not result in the identification of factors that could provide value or benefit to the executive agency; (5) the contracting officer has included a justification for the use of a lowest price technically acceptable evaluation methodology in the contract file; and (6) the executive agency has determined that the lowest price reflects full life-cycle costs, including for operations and support."

In addition, this section states that "the use of lowest price technically acceptable source selection criteria shall be avoided in the case of a procurement that is predominately for the acquisition of: (1) information technology services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, audit or audit readiness services, health care services and records, telecommunications devices and services, or other knowledge-based professional services; (2) personal protective equipment; or (3) knowledge-based training or logistics services in contingency operations or other operations outside the United States, including in Afghanistan or Iraq."

The following miscellaneous sections of Public Law 115-232 involving acquisition are outside of Title VIII:

■ **Section 1101, Direct Hire Authority for the Department of Defense for Certain Competitive Service Positions:** This section authorizes DOD to expedite hiring of civilian personnel into positions involving maintenance; depot maintenance; cybersecurity; acquisition; and science, technology, and engineering. The acquisition personnel authorized for direct hire are "any individual in the acquisition workforce that manages any services contracts necessary to the operation and maintenance of programs of the Department [of Defense]." This authority will expire September 30, 2025.

■ **Section 2804, Small Business Set-Aside for Contracts for Architectural and Engineering Services and Construction Design:** This section increases the threshold for small business set-asides for architectural and engineering services and construction design contracts from $300,000 to $1,000,000.

■ **Section 3523, Contract Termination:** This section requires the Coast Guard, before terminating a contract with a total value of more than $1,000,000, to notify each vendor under the contract and require each vendor to maintain all work product related to the contract for at least one year.

DOD has announced that it is providing the public an opportunity to provide "early inputs" on implementation of the provisions in NDAA for FY19 that address acquisition. "The public is invited to submit early inputs on sections of the NDAA for FY 2019 via the DARS [Defense Acquisition Regulations System] website at **http://www.acq.osd.mil/dpap/dars/index.html**. The website will be updated when early inputs will no longer be accepted. Please note, this venue does not replace or circumvent the rulemaking process; DARS will engage in formal rulemaking…when it has been determined that rulemaking is required to implement a section of the NDAA for FY 2019 within the acquisition regulations."

FAC 2005-100 FINALIZES PAID SICK LEAVE RULE

Federal Acquisition Circular (FAC) 2005-100 finalizes two interim rules that were issued to amend the FAR to comply with two labor-related Executive Orders (EO) issued by President Obama and the Department of Labor (DOL) rules implementing those EOs. In addition, FAC 2005-100 contains technical amendments throughout the FAR that make editorial changes and update the addresses of links to websites.

■ **Paid Sick Leave for Federal Contractors:** This finalizes, without changes, the interim rule in FAC 2005-93 that added FAR subpart 22.21, Establishing Paid Sick Leave for Federal Contractors, and FAR 52.222-62, Paid Sick Leave Under Executive Order 13706, to conform to the Department of Labor (DOL) rule implementing Executive Order (EO) 13706, Establishing Paid Sick Leave for Federal Contractors, which requires federal contractors and subcontractors to provide their employees with up to seven days of paid sick leave annually, including paid leave allowing for family care.

EO 13706, the DOL rule, and the interim rule provide the following:

- Contractors are required to permit an employee to accrue not less than one hour of paid sick leave for every 30 hours worked.

- Contractors may limit the amount of paid sick leave employees are permitted to accrue to not less than 56 hours in each accrual year.

- Contractors are not required pay an employee for accrued paid sick leave that has not been used upon a separation from employment.

- Contractors are required to permit an employee to use any or all of his or her available paid sick leave upon the request of the employee.

- If the employee is absent for three or more consecutive work days, the contractor may require certification issued by a health care provider verifying the need for paid sick leave

for physical or mental illness, injury, or medical condition of the employee; obtaining diagnosis, care, or preventive care from a health care provider by the employee; caring for the employee's child, parent, spouse, domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship who has any of the conditions or needs for diagnosis, care, or preventive care; or domestic violence, sexual assault, or stalking, if the time absent from work is to obtain counseling, seek relocation, seek assistance from a victim services organization, take related legal action, or assist an individual related to the employee in engaging in any of these activities.

Seven respondents submitted comments on the interim rule, but no recommended changes were adopted, so the interim rule is finalized without changes.

For more on the interim rule, see the January 2017 ***Federal Contracts Perspective*** article "FAC 2005-93 Puts FAC 2005-90 Fair Pay Rule on Hold." For more on EO 13706, see the October 2015 ***Federal Contracts Perspective*** article "President Orders Paid Sick Leave for Employees of Federal Contractors." For more on the DOL implementation of EO 13706, see the October 2016 ***Federal Contracts Perspective*** article "Labor Finalizes Rule on Contractors' Paid Sick Leave").

■ **Non-Retaliation for Disclosure of Compensation Information:** This finalizes, without changes, the interim rule in FAC 2005-91 that amended FAR 22.802, General [regarding equal employment opportunity], and FAR 52.222-26, Equal Opportunity, to require agencies "to prohibit contractors from discharging, or in any other manner discriminating against, any employee or applicant for employment because the employee or applicant inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This prohibition against discrimination does not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information."

This interim rule implemented: (1) Executive Order 13665, Non-Retaliation for Disclosure of Compensation Information, which prohibits contractors from "discharg[ing] or in any other manner discriminat[ing] against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant"; and (2) the Department of Labor's (DOL) implementing regulations (issued by its Office of Federal Contract Compliance Programs [OFCCP]).

Two respondents submitted comments on the interim rule, but since both strongly supported the interim rule, the interim rule is finalized without changes.

For more on the interim rule, see the October 2016 ***Federal Contracts Perspective*** article "FAC 2005-91 Finalizes Rule on Women-Owned Small Business Sole Source Contracts." For more on Executive Order 13665, see the May 2014 ***Federal Contracts Perspective*** article "President Requires Collection of Compensation Data from Contractors and Subcontractors."

For more on DOL's regulations implementing Executive Order 13665, see the October 2015 ***Federal Contracts Perspective*** article "OFCCP Finalizes Regulations Prohibiting Pay Secrecy."

■ **Technical Amendments:** The primary purpose of these technical amendments is to update various website addresses throughout the FAR. The most significant website address being changed is that of the Federal Business Opportunities website from "https://www.fedbizopps.gov" to "**https://www.fbo.gov**." (**EDITOR'S NOTE:** The Federal Business Opportunities website is the "government point-of-entry" (GPE) for notices of upcoming solicitations over $25,000 and contract awards over $25,000 likely to result in the award of any subcontracts.)

DOD RETURNS FROM SUMMER VACATION WITH LOTS OF RULES

The Department of Defense (DOD) returned from its summer break full of vim and vigor, finalizing two interim rules, proposing six rules, issuing a class deviation, and issuing two memoranda.

■ **Repeal of "Removal of Contractor's Employees" Clause:** This final rule removes DFARS 252.247-7006, Removal of Contractor's Employees [from stevedoring contracts], and its prescription at DFARS 247.270-4, Contract Clauses [for stevedoring contracts] because the clause is no longer necessary.

DFARS 252.247-7006 served as an agreement "to use only experienced, responsible, and capable people to perform the work" under the stevedoring contract. Also, the clause advised the contractor that "the contracting officer may require that the contractor remove from the job, employees who endanger persons or property, or whose continued employment under this contract is inconsistent with the interest of military security."

A definition of what the government considers an experienced, responsible, and capable employee is more appropriate in a performance work statement, not a contract clause, because those requirements may change depending on various factors of the work being performed. As such, DFARS 252.247-7006 is unnecessary and can be removed along with its prescription at DFARS 247.270-4(f).

■ **Repeal of Independent Research and Development Technical Interchange:** This final rule removes paragraph (c)(iii)(*C*)(*4*) of DFARS 231.205-18, Independent Research and Development and Bid and Proposal Costs, which requires major contractors to engage in and document a technical interchange with the government prior to generating independent research and development (IR&D) costs for IR&D projects initiated in FY 2017 and later for those costs to be allowable.

In November 2016, DFARS 231.205-18(c)(iii)(*C*) was revised to require that proposed IR&D efforts be communicated to appropriate DOD personnel prior to the initiation of these investments, and that results from those investments be shared with appropriate DOD personnel. The objective of this requirement was to ensure that both IR&D performers and their potential DOD customers had sufficient awareness of each other's efforts and to provide industry with some feedback on the relevance of proposed and completed IR&D work.

However, the final rule states that "this requirement causes the contractor to expend time preparing for a discussion, contacting appropriate government personnel, and discussing the

IR&D project. Since contractors commonly pool all of their IR&D project costs to develop a single billing rate, this requirement would necessitate contractors having to discuss all of the IR&D projects contained in their billing rate. While some contractors may have a single project, many have close to 100 or more, which could be significantly burdensome." In response to this problem, Shay Assad, Director of Defense Pricing, issued a class deviation that prohibited contracting officers from requiring major contractors to engage or document a technical interchange described in DFARS 231.205-18(c)(iii)(*C*)(*4*) as part of the criteria for determining whether a contractor's annual IR&D costs are allowable. The deviation went on to state that "this class deviation is effective until it is incorporated into the DFARS or until this class deviation is otherwise rescinded." This final rule incorporates the class deviation into the DFARS by removing DFARS 231.205-18(c)(iii)(*C*)(*4*).

For more on the November 2016 revision to DFARS 231.205-18(c)(iii)(*C*)(*4*), see the December 2016 ***Federal Contracts Perspective*** article "DOD Issues Three Final Rules in November." For more on the class deviation that prohibited compliance with DFARS 231.205-18(c)(iii)(*C*)(*4*), see the October 2017 ***Federal Contracts Perspective*** article "DOD Issues Four Additional Class Deviations."

■ **Exemption from Design-Build Selection Procedures:** This proposed rule would add DFARS 236.303-1, Phase One [of two-phase design-build selection procedures], to implement Section 823 of the NDAA for FY 2018 (Public Law 115-91), which amends paragraph (d) of Title 10 of the U.S. Code (USC), Section 2305a (10 USC 2305a), Design-Build Selection Procedures, to allow for more than five offerors on solicitations issued using two-phase design-build selection procedures for indefinite-delivery, indefinite-quantity (IDIQ) contracts that exceed $4,000,000.

10 USC 2305a required the head of the contracting activity to approve the contracting officer's justification that it is in the best interest of the government to exceed the maximum number of five offerors that may be selected to submit phase-two proposals under certain conditions. Section 823 eliminates the requirement for such a justification when the solicitation is for an IDIQ contract that exceeds $4,000,000. Paragraph (d) of 10 USC 2305a now provides "if the contract value exceeds $4,000,000, the maximum number specified in the solicitation shall not exceed 5 unless…the solicitation is issued pursuant to an indefinite delivery-indefinite quantity contract for design-build construction."

The two-phase design-build selection procedures authorized by 10 USC 2305a are implemented by FAR subpart 36.3, Two-Phase Design-Build Selection Procedures. Paragraph (a)(4) of FAR 36.303-1, Phase-One, contains the requirement for a contracting officer to justify exceeding the maximum number of five offerors: "The maximum number specified in the solicitation shall not exceed five unless the contracting officer determines, for that particular solicitation, that a number greater than five is in the government's interest…For acquisitions greater than $4 million, the determination shall be approved by the head of the contracting activity…"

This proposed rule would implement Section 823 by adding DFARS subpart 236.3, consisting of DFARS 236.303-1(a)(4), to be used in place of the procedures in FAR 36.303-1(a)(4). This paragraph would include the new authority to exceed the five offeror maximum when the solicitation is for an IDIQ contract that exceeds $4,000,000 in addition to the current provisions of FAR 36.303-1(a)(4).

Comments on this proposed rule must be submitted no later than October 23, 2018, identified as "DFARS Case 2018-D011," 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: Heather Kitchens, OUSD(A&S)DPC/ DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Restrictions on Acquisitions from Foreign Sources:** This proposed rule would implement two sections of the NDAA for FY 2017 (Public Law 114-328) that address restrictions on acquisitions from foreign sources: Section 817, Compliance with Domestic Source Requirements for Footwear Furnished to Enlisted Members of the Armed Forces Upon Their Initial Entry into the Armed Forces; and paragraph (b) of Section 881, Greater Integration of the National Technology and Industrial Base.

- Section 817 extends the domestic source requirements of 10 USC 2533a, Requirement to Buy Certain Articles from American Sources; Exceptions (referred to as the "Berry Amendment"), to purchases of athletic footwear at or below the simplified acquisition threshold (currently $250,000) that are to be furnished to the members of the Army, Navy, Air Force, or Marine Corps upon their initial entry into the Armed Forces. To implement Section 817, this rule proposes to amend paragraph (a) of DFARS 225.7002-2, Exceptions [to restrictions on food, clothing, fabrics, hand or measuring tools, and flags], which currently exempts "acquisitions at or below the simplified acquisition threshold" from the restrictions of the Berry Amendment, to "acquisitions at or below the simplified acquisition threshold, except for athletic footwear purchased by DOD for use by members of the Army, Navy, Air Force, or Marine Corps upon their initial entry into the Armed Forces (Section 817 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328))."

  In addition, a conforming amendment would be made to the prescription for DFARS 252.225-7012, Preference for Certain Domestic Commodities, in paragraph (a) of DFARS 225.7002-3, Contract Clauses, removing the condition that the clause be included in solicitations and contracts "that exceed the simplified acquisition threshold" since the introductory text of DFARS 225.7002-3 states that the clauses prescribed in DFARS 225.7002-3 are to be included "unless an exception at [DFARS] 225.7002-2 applies."

- Section 881(b) amends paragraph (1) of 10 USC 2500, Definitions, which defines "national technology and industrial base," by adding Australia and the United Kingdom of Great Britain and Northern Ireland to the United States and Canada as the countries in the "national technology and industrial base." Now the "national technology and industrial base" is defined as "the persons and organizations that are engaged in research, development, production, integration, services, or information technology activities conducted within the United States, the United Kingdom of Great Britain and Northern Ireland, Australia, and Canada." Since 10 USC 2534, Miscellaneous Limitations on the Procurement of Goods Other Than United States Goods, requires that DOD only procure certain items if the manufacturer is part of the national technology and industrial base, this rule proposes to amend the following DFARS sections, provision, and clause that

implement the restrictions of 10 USC 2534 to allow acquisition of certain items from Australia and the United Kingdom:

- DFARS 225.7004, Restriction on Acquisition of Foreign Buses
- DFARS 225.7005, Restriction on Certain Chemical Weapons Antidote
- DFARS 225.7006, Restriction on Air Circuit Breakers for Naval Vessels
- DFARS 252.225-7037, Evaluation of Offers for Air Circuit Breakers
- DFARS 252.225-7038, Restriction on Acquisition of Air Circuit Breakers

EDITOR'S NOTE: Purchases from the United Kingdom are already authorized by DFARS 252.225-7037 and DFARS 252.225-7038.

Comments on this proposed rule must be submitted no later than October 23, 2018, identified as "DFARS Case 2017-D011," 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)DPC/ DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Transportation of Supplies by Sea:** This proposed rule would modify DFARS 252.247-7023, Transportation of Supplies by Sea, to include the instructions currently in DFARS 252.247-7024, Notification of Supplies by Sea, to streamline instructions to contractors regarding notifications of transportation of supplies by sea.

DFARS 252.247-7022, Representation of Extent of Transportation by Sea, is required to be included in all solicitations exceeding the simplified acquisition threshold (currently $250,000) other than those for direct purchase of ocean transportation services, and it requires the offeror to represent with its offer whether it anticipates that supplies will be transported by sea in the performance of the contract or not.

DFARS 252.247-7023 is required to be included in all contracts other than those for direct purchase of ocean transportation services, and it provides contractors with terms and conditions that apply when transporting supplies by sea under the contract.

DFARS 252.247-7024 is required to be included in contracts when the contractor indicated in DFARS 252.247-7022 that it did not anticipate transporting supplies by sea. However, if the contractor learns that supplies will be transported by sea, DFARS 252.247-7024 requires the contractor to notify the contracting officer and to comply with the terms and conditions in DFARS 252.247-7023.

Since DFARS 252.247-7023 is included in all contracts, and DFARS 252.247-7024 is associated with the requirements of DFARS 252.247-7023, it is proposed that the text of the two clauses be combined to minimize the number of clauses contained in the contract while still maintaining the intent of both clauses. Therefore, this rule proposes to include the pertinent text of DFARS 252.247-7024 as paragraph (h) of DFARS 252.247-7023 (the current paragraph (h) would be redesignated as paragraph (i)), and DFARS 252.247-7024 would be removed. In addition, the prescription for DFARS 252.247-7024 in paragraph (c) of DFARS 247.574,

Solicitation Provisions and Contract Clauses [for ocean transportation by U.S.-flag vessels] would be removed.

Comments on this proposed rule must be submitted no later than October 23, 2018, identified as "DFARS Case 2018-D028," 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)DPC/ DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Source of Photovoltaic Devices:** This proposed rule would amend DFARS 252.225-7017, Photovoltaic Devices, and DFARS 252.225-7018, Photovoltaic Devices – Certificate, to implement NDAA for FY 2018 (Public Law 115-91), paragraph (b) of Section 813, Sunset of Certain Provisions Relating to the Procurement of Goods Other Than United States Goods, which repeals NDAA for FY 2015 (Public Law 113-291), Section 858, Requirement to Provide Photovoltaic Devices from United States Sources.

In the NDAA for FY 2011 (Public Law 111-383), Section 846, Procurement of Photovoltaic Devices, established a requirement that "energy savings performance contracts, utility service contracts, land leases, and private housing contracts…[that] result in ownership of photovoltaic devices by the Department of Defense" must comply with the Buy American Act, subject to the exceptions in the Trade Agreement Act. Section 846 continues to specify that "the Department of Defense is deemed to own a photovoltaic device if the device is (1) installed on Department of Defense property or in a facility owned by the Department of Defense; ***and*** (2) reserved for the exclusive use of the Department of Defense for the full economic life of the device" (***emphasis*** added). These requirements were implemented in DFARS 225.7017, Utilization of Domestic Photovoltaic Devices.

Paragraph (b) of Section 858 of the NDAA for FY 2015 changed the "and" between the two conditions to "or," making the two conditions independent of each other: "The term 'covered contract' means a contract awarded by the Department of Defense that provides for a photovoltaic device to be (A) installed inside the United States on Department of Defense property or in a facility owned by the Department of Defense; ***or*** (B) reserved for the exclusive use of the Department of Defense in the United States for the full economic life of the device" (***emphasis*** added). DFARS 225.7017 was amended accordingly.

Paragraph (b) of Section 813 of the NDAA for FY 2018 repeals Section 858 effective October 1, 2018. In effect, Section 813 reinstates Section 846, and essentially reinstates the original DFARS 225.7017.

Comments on this proposed rule must be submitted no later than October 23, 2018, identified as "DFARS Case 2018-D007," 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)DPC/ DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Antiterrorism Training Requirements for Contractors:** This proposed rule would add DFARS 204.7X, Antiterrorism Awareness Training, and corresponding clause DFARS 252.204-7XXX, Antiterrorism Awareness Training for Contractors, to implement the requirement that contractor personnel who require routine physical access to a federally-controlled facility or military installation complete Level I antiterrorism awareness training in accordance with

Department of Defense Instruction (DODI) O-2000.16, Volume 1, DOD Antiterrorism (AT) Program Implementation: DOD AT Standards.

The new DFARS 204.7X02, Policy, would advise covered contractors and contracting officers of the training requirement; the authorized sources of training ("(1) through a DOD-sponsored and certified computer or web-based distance learning instruction for Level I antiterrorism awareness; or (2) under the instruction of a qualified Level I antiterrorism awareness instructor"); and when training must be completed by contractors ("within 30 days of requiring access and annually thereafter"). Also, DFARS 204.7X03, Contract Clause, prescribes DFARS 252.204-7XXX for use in all solicitations and contracts, including those for the acquisition of commercial items, when contractor personnel will require routine physical access to a federally-controlled facility or military installation.

DFARS 252.204-7XXX advises contractors of the training requirements, provides a reference to additional information and guidance available on the internet (**http://jko.jfcom.mil/**), and instructs contractors to include the substance of the clause in all subcontracts that require routine physical access to a federally-controlled facility or military installation.

Comments on this proposed rule must be submitted no later than October 23, 2018, identified as "DFARS Case 2017-D034," 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: Kimberly Bass, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Performance-Based Payments and Progress Payments:** This proposed rule would implement Section 831 of the NDAA for FY 2017 (Public Law 114-328), which establishes a preference for performance-based payments (see FAR subpart 32.10, Performance-Based Payments, and DFARS subpart 232.10). In addition, this proposed rule would revise progress payments and performance-based payments policies for DOD contracts, which have not been updated since 2001 (see FAR subpart 32.5, Progress Payments Based on Costs, and DFARS subpart 232.5).

Currently, paragraph (a)(1) of FAR 52.232-16, Progress Payments, sets a customary progress payment rate of 80% (85% small businesses (Alternate I)). Paragraph (a) of DFARS 232.501-1, Customary Progress Payment Rates, and DFARS 252.232-7004, DOD Progress Payment Rates, increase the FAR customary progress payment rate for small businesses to 90%.

Regarding performance-based payments, paragraph (c)(2)(iii) of FAR 52.232-28, Invitation to Propose Performance-Based Payments, sets a maximum performance-based rate of 90% of the contract price if on a whole contract basis, or 90% of the delivery item price if on a delivery item basis. Paragraph (b)(ii) of DFARS 232.1004, Procedure, provides procedures for analysis of proposed performance-based payments using the performance-based payments analysis tool at **https://www.acq.osd.mil/dpap/cpic/cp/Performance_based_payments.html**, and also requires that the contractor provide consideration to the government if the performance-based payments payment schedule will be more favorable to the contractor than customary progress payments (paragraph (b)(iii)). Paragraph (a) of DFARS 232.1005-70, Contract Clauses, prescribes the use of the provision at DFARS 252.232-7012, Performance-Based Payments – Whole Contract Basis, or DFARS 252.232-7013, Performance-Based Payments – Deliverable Item Basis (paragraph (b)).

This proposed rule would make the following changes:

- The customary progress payment rate specified in DFARS 232.501-1(a) and DFARS 252.232-7004 would be reduced from 80% to 50% (the 90% rate for small businesses would be retained). However, criteria would be provided by which contractors would be able to achieve a customary progress payment rate of up to 95%. The following are the proposed criteria for "other than small businesses":

Additional Percentage	**Criteria**
10	Met the contract delivery dates for contract end items and contract data requirements lists or performance milestone schedule at least 95% of the time during the preceding government fiscal year (October 1 through September 30).
10	Does not have open level III or IV corrective action requests. (**EDITOR'S NOTE:** The four levels of corrective action will be added to DFARS 242.302, Contract Administrative Functions – see below).
10	All applicable contractor business systems are acceptable, without significant deficiencies.
7.5	At least 95% of the time during the preceding government fiscal year, when responding to solicitations that required submission of certified cost or pricing data, met the due date in the request for proposal and complied with the Proposal Adequacy Checklist (DFARS 252.215-7009).
5	Has met its small business subcontracting goals during the preceding government fiscal year.
2.5	Has provided subcontracting opportunities for AbilityOne [details to be determined].

The following are the proposed criteria for small businesses:

Additional percentage	**Criteria**
2	Met the contract delivery dates for contract end items and contract data requirements lists or performance milestone schedule at least 95% of the time during the preceding government fiscal year.
2	Does not have open level III or IV corrective action requests.
1	All applicable contractor business systems are acceptable, without significant deficiencies.

However, if within the preceding government fiscal year, "a contractor or any of its principals been convicted of or had a civil judgment rendered against the contractor or any of its principals for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state, or local) contract or subcontract; violation of federal or state antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property, then the contractor will not be eligible for any incentives and the customary progress payment rate will be 25% percent for that contractor."

- The performance-based payment rates specified in DFARS 232.1004(b)(2) and new provision DFARS 252.232-70YY, DOD Maximum Performance-Based Payment Rates (which is to be included in solicitations that include FAR 52.232-28, Invitation to Propose Performance-Based Payments), and the procedures for determining the appropriate level of performance-based payments would be comparable to those for determining the customary progress payment rate.

  In addition, the DFARS 232.1004 would be amended to remove the procedures for using the performance-based payments analysis tool (paragraph (b)(ii)) and the requirement that the contractor provide consideration to the government if the performance-based payments payment schedule will be more favorable to the contractor than customary progress payments (paragraph (b)(iii)). With this amendment, DFARS 252.232-7012, Performance-Based Payments – Whole-Contract Basis, and DFARS 252.232-7013, Performance-Based Payments – Deliverable-Item Basis, would be removed because they are no longer required.

- To implement Section 831 of NDAA for FY 2017 (Public Law 114-328), paragraph S-70, Eligibility for Performance-Based Payments, would be added to DFARS 232.1004. It would provide that "nontraditional defense contractors and other private sector companies shall be eligible for performance-based payments, consistent with best commercial practices."

- The following four levels of corrective action would be added to DFARS 242.302, Contract Administration Functions, for use by government personnel performing administrative duties:

  – Level I is issued for noncompliances that are minor in nature, are promptly corrected by the contractor, and present no need for root cause determination or further preventive action.

  – Level II is issued for noncompliances that are not promptly correctable and warrant root cause analysis and preventive action, or need action by the contractor to determine if other product/services are affected.

  – Level III is issued to the contractor's management responsible for the company or business segment to call attention to a serious noncompliance, a significant deficiency

pursuant to paragraph (b) of DFARS 252.242–7005, Contractor Business Systems ("in the case of a contractor business system, a shortcoming in the system that materially affects the ability of officials of the Department of Defense to rely upon information produced by the system that is needed for management purposes"), a failure to respond to a lower level corrective action request, or to remedy recurring noncompliance.

– Level IV is issued to the contractor's segment or corporate management and when the contractual noncompliance(s) is of a serious nature or when a Level III corrective action request has been ineffective.

Comments on this proposed rule must be submitted no later than October 23, 2018, identified as "DFARS Case 2017-D019," 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)DPC/ DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

In addition to written comments on the proposed rule, DOD will hold a public meeting to hear the views of experts and interested parties. The public meeting will be held on September 14, 2018, from 9:00 am to 12:00 pm EST, at the Mark Center Auditorium, 4800 Mark Center Drive, Alexandria, VA 22350-3603. The Mark Center Auditorium is located on level B-1 of the building. Individuals desiring to attend the meeting must register by September 6, 2018, at **https://www.acq.osd.mil/ dpap/dars/performance-based_payments_and_progress_ payments.html**. One valid government-issued photo identification card (that is, a driver's license or passport) will be required to enter the building. Attendees are encouraged to arrive at least 45 minutes early to accommodate security procedures. Public parking is not available at the Mark Center. Those wishing to make a presentation must submit an electronic copy of the presentation to **osd.dfars@mail.mil** no later than September 10, 2018.

■ **Class Deviation on Contractor Personnel Performing in Japan:** This class deviation requires that DFARS 252.225-7976, Contractor Personnel Performing in Japan (DEVIATION 2018-O0019) be included in all solicitations, contracts, and subcontracts that require contractor personnel to perform in Japan, including solicitations and contracts using the procedures in FAR part 12, Acquisition of Commercial Items. The deviation clause requires DOD contractors to account for contractor personnel and dependents in the Synchronized Predeployment and Operational Tracker (SPOT) (**https://www.acq.osd.mil/log/PS/spot.html**) for the contractor personnel and dependents to be eligible for coverage under the Status of United States Armed Forces in Japan (SOFA), dated January 19, 1960.

This class deviation implements changes made on January 16, 2017, to the "Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between Japan and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan."

■ **Governmentwide Commercial Purchase Card Prohibited Purchases:** This memorandum from Shay D. Assad, Director of Defense Pricing and Contracting, reminds the DOD acquisition community that DFARS subpart 213.3, Simplified Acquisition Procedures (in particular, DFARS 213.301, Governmentwide Commercial Purchase Card), provides direction for authorizing,

establishing, and operating governmentwide commercial purchase card (GPC) programs, and directs personnel to follow the guidance in the *Department of Defense Government Charge Card Guidebook for Establishing and Managing Purchase, Travel, and Fuel Card Programs* (**https://www.acq.osd.mil/dpap/pdi/pc/docs/DoD_Govt_Charge_Card_Guide_10_1_2017%20-%20Jan_24_Rev.pdf**).

The *Guidebook*'s Section A.1.2.4, Prohibited Purchases, lists items prohibited from purchasing using the GPC. Among the prohibited items are appliances acquired for personal use in a work environment; bail and bond payments; construction services over $2,000; fines; food and meals; gift certificates and cards; services greater than $2,500; telecommunication services; and weapons, ammunition, and explosives. The memorandum adds to this prohibited list the following items: video surveillance cameras, and commercial unmanned aerial systems.

■ **Award of SmartPay®3 Government Purchase Card Tailored Task Orders:** This memorandum from LeAntha Sumpter, Deputy Director for Contracting eBusiness, announces the award of two SmartPay®3 (SP3) tailored task orders (TTO) to U.S. Bank: one for the Army, Air Force, and DOD agencies; and the other for the Navy. "The terms of the subject TTOs and applicable GSA [General Service Administration] SP®3 Master Contract require that the transition from SP®2 to SP®3 include the closing of all SP®2 accounts, creation of new accounts, and issuance of new purchase cards to DOD. Accordingly, new accounts and cards will be established for all purchase cardholders. Existing SP®2 accounts will expire at 11:59 pm Eastern Standard Time (EST) on 29 November 2018. Charges made prior to that time will be processed through the regular/billing/payment cycle of the old accounts. New SP®3 accounts will commence at midnight CST on November 30, 2018."

CBCA REVISES PROCEDURES TO PREFER ELECTRONIC FILING

The Civilian Board of Contract Appeals (CBCA), which hears disputes involving contract with civilian agencies, is finalizing, with minor changes, the rule that proposed to revise its procedures in Title 48 of the Code of Federal Regulations (CFR), Part 6101, Rules of Procedure of the Civilian Board of Contract Appeals, to simplify and modernize access to the CBCA by establishing a preference for electronic filing, increasing conformity between its rules and the Federal Rules of Civil Procedure, streamlining the wording of the its rules, and clarifying current rules and practices.

The CBCA rules of procedure for Contract Disputes Act cases were adopted in May 2008 (see the June 2008 ***Federal Contracts Perspective*** article "CBCA Revises Rules of Procedure") and last amended in August 2011 to permit "filings submitted by electronic mail (e-mail)." Paragraph (b)(1) of revised section 6101.4, Appeal File [Rule 4], now states, "Unless otherwise ordered, parties shall file the appeal file and supplements thereto in an electronic storage medium (*e.g.*, hard disk or solid state drive, compact disc (CD), or digital versatile disc (DVD)), labeled with the docket number, case name, and range of exhibit numbers."

Two respondents submitted comments on the proposed rule, but no changes were made in response to their comments. However, several administrative changes to correct spelling, grammatical, and similar errors have been made to the final rule.

For more on the proposed rule, see the April 2018 ***Federal Contracts Perspective*** article "CBCA Proposes Preference for Electronic Filing."

THRESHOLD FOR FSS OLMs CLARIFIED

The General Services Administration (GSA) has amended paragraph (d)(4) of GSA Acquisition Regulation (GSAR) 552.238-82, Special Ordering Procedures for the Acquisition of Order-Level Materials, to clarify the application of the threshold for order-level materials (OLMs) when placing an order against a Federal Supply Schedule (FSS) contract or FSS blanket purchase agreement (FSS BPA).

GSAR 552.238-82(d) prescribes procedures for including OLMs when placing an individual task or delivery order against an FSS contract or FSS BPA. The procedures in paragraph (d)(4) required that "the cumulative value of order-level materials in an individual task or delivery order awarded under a FSS contract or FSS BPA shall not exceed 33.33 percent of the total value of the individual task or delivery order."

GSA is amending GSAR 552.238-82(d)(4) to clarify the applicability of the 33.33 percent threshold as follows: "The value of order-level materials in a task or delivery order, or the cumulative value of order-level materials in orders against an FSS BPA awarded under a FSS contract shall not exceed 33.33 percent."

For more on the addition of GSAR 552.238-82 to the GSAR, see the February 2018 ***Federal Contracts Perspective*** article "GSA Authorizes Order-Level Materials on Federal Supply Schedule Orders."

PROMPT PAYMENT INTEREST RATE SET AT 3 1/2%

The Treasury Department has established 3 1/2% (3.5%) as the interest rate for the computation of payments made between July 1, 2018, and December 31, 2018, under the Prompt Payment Act and the Contracts Disputes Act. This rate is also used in facilities capital cost of money calculations.

The interest rate for the prior six-month period (January 1, 2018, through June 30, 2018) was 2 5/8% (2.625%). The interest rate for July 1, 2017, through December 31, 2017, was 2 3/8% (2.375%).

All prompt payment interest rates since 1980 (in six-month increments) are available at **https://www.fiscal.treasury.gov/fsservices/gov/pmt/promptPayment/rates.htm**.

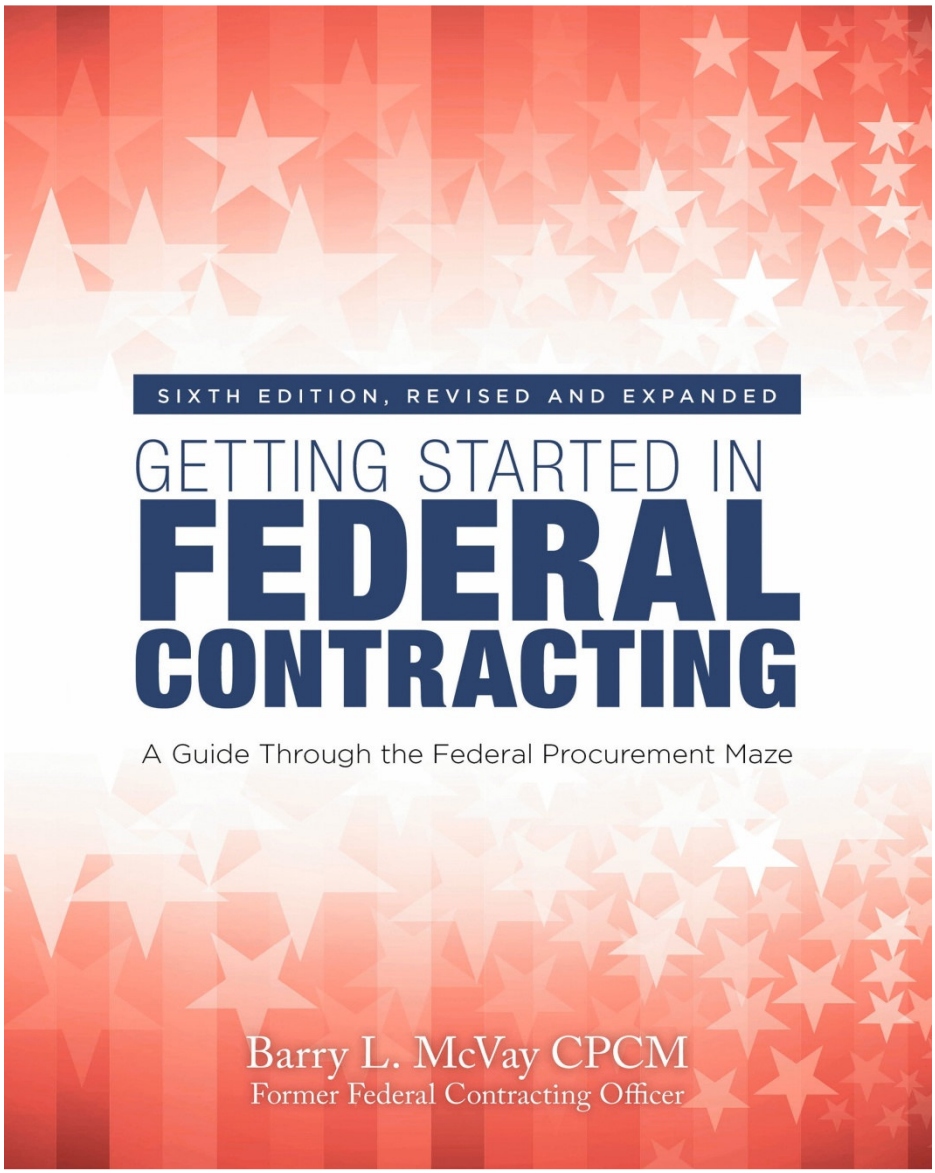
FAR subpart 32.9, Prompt Payment; FAR subpart 33.2, Disputes and Appeals; FAR 31.205-10, Cost of Money; and Cost Accounting Standard (CAS) 9904.414, Cost of Money as an Element of the Cost of Facilities Capital, are affected by this interest rate.

GSA RELEASES FY2019 PER DIEM RATES

The General Services Administration (GSA) has released the FY 2019 maximum travel per diem rates for the Continental United States (CONUS), which will take effect on October 1, 2018. GSA sets these rates annually based on local market costs of mid-priced hotels. Per diem rates provide maximum amounts that can be reimbursed to federal employees for lodging and meals while on official travel.

The FY 2019 travel per diem rates are available at **https://www.gsa.gov/travel/plan-book/per-diem-rates**.

REVISED AND EXPANDED!



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