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FAC 2019-01 PROVIDES DEFINITION OF "RECRUITMENT FEES" ON COMBATING TRAFFICKING IN PERSONS

Federal Acquisition Circular (FAC) 2019-01 is amending Federal Acquisition Regulation (FAR) subpart 22.17, Combating Trafficking in Persons, and the clause FAR 52.222-50, Combating Trafficking in Persons, to provide a definition of "recruitment fees" to further implement the FAR policy on combating trafficking in persons, one element of which is to prohibit contractors from charging employees recruitment fees.

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Paragragh (a)(6) of FAR 22.1703, Policy, states that "government solicitations and contracts shall…(a) prohibit contractors, contractor employees, subcontractors, subcontractor employees, and their agents from…(6) charging employees recruitment fees…" However, the Government Accountability Office (GAO) issued report GAO-15-102, Oversight of Contractors' Use of Foreign Workers in High-Risk Environments Needs to Be Strengthened, which recommended that agencies "develop a more precise definition of recruitment fees." The GAO explained that without a clear definition, agencies would face challenges enforcing the prohibition.

To address the GAO recommendation, FAC 2019-01 is adding the following definition to FAR 22.1702, Definitions, and FAR 52.222-50(a):

> "Recruitment fees means fees of any type, including charges, costs, assessments, or other financial obligations, that are associated with the recruiting process, regardless of the time, manner, or location of imposition or collection of the fee."

In addition, the following examples of prohibited recruitment fees associated with the recruiting process are included:

> (i) Soliciting, identifying, considering, interviewing, referring, retaining, transferring, selecting, training, providing orientation to, skills testing, recommending, or placing employees or potential employees;
>
> (ii) Advertising;
>
> (iii) Obtaining permanent or temporary labor certification, including any associated fees;
>
> (iv) Processing applications and petitions;

(v) Acquiring visas, including any associated fees;

(vi) Acquiring photographs and identity or immigration documents, such as passports, including any associated fees;

(vii) Accessing the job opportunity, including required medical examinations and immunizations; background, reference, and security clearance checks and examinations; and additional certifications;

(viii) An employer's recruiters, agents or attorneys, or other notary or legal fees;

(ix) Language interpretation or translation, arranging for or accompanying on travel, or providing other advice to employees or potential employees;

(x) Government-mandated fees, such as border crossing fees, levies, or worker welfare funds;

(xi) Transportation and subsistence costs: (A) while in transit, including, but not limited to, airfare or costs of other modes of transportation, terminal fees, and travel taxes associated with travel from the country of origin to the country of performance and the return journey upon the end of employment; and (B) from the airport or disembarkation point to the worksite;

(xii) Security deposits, bonds, and insurance; and

(xiii) Equipment charges.

The definition clarifies that a payment "is a recruitment fee, regardless of whether the payment is:

(i) Paid in property or money;

(ii) Deducted from wages;

(iii) Paid back in wage or benefit concessions;

(iv) Paid back as a kickback, bribe, in-kind payment, free labor, tip, or tribute; or

(v) Collected by an employer or a third party, whether licensed or unlicensed, including, but not limited to: (A) agents; (B) labor brokers; (C) recruiters; (D) staffing firms (including private employment and placement firms); (E) subsidiaries/affiliates of the employer; (F) any agent or employee of such entities; and (G) subcontractors at all tiers."

Twenty-eight respondents submitted comments on the proposed rule. In response to the comments, the following changes were made in the final rule:

- In the definition, the phrase "regardless of the manner of their imposition or collection" is expanded to "regardless of the *time*, manner, *or location* of imposition or collection of the fee" (*emphasis* indicates added text).

- Several more illustrative examples of prohibited recruitment fees have been added: processing of applications (iv); immigration documents such as passports (vi); worker

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welfare funds (x); transportation and subsistence costs (xi); security deposits, bonds, and insurance (xii); or equipment charges (xiii).

- In the paragraph that explains the nature of a recruitment fee, "labor brokers" is added to the list of licensed or unlicensed third parties collecting recruitment fees.

The final rule goes into effect January 22, 2019.

For more on the proposed rule, see the June 2016 ***Federal Contracts Perspective*** article "Four More FAR Rules Proposed."

AMENDMENTS PROPOSED TO LIMITATIONS ON SUBCONTRACTING

To bring the FAR into conformance with revisions made by the Small Business Administration (SBA) to its regulations to implement the NDAA for FY 2013 (Public Law 112-239), Section 1651, Limitations on Subcontracting, which changed and standardized the limitations on subcontracting and the nonmanufacturer rule, a rule is being proposed that would amend FAR part 19, Small Business Programs, and corresponding clauses.

FAR 52.219-14, Limitations on Subcontracting, applies to each contract exceeding $150,000 that is awarded as a set-aside or awarded under the SBA's 8(a) program. The clause establishes that, as a condition for award of the contract, the small business agrees that for:

- Services (except construction), at least 50% of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

- Supplies (other than procurement from a nonmanufacturer of such supplies), the concern shall perform work for at least 50% of the cost of manufacturing the supplies, not including the cost of materials.

- General construction, the concern will perform at least 15% of the cost of the contract, not including the cost of materials, with its own employees.

- Construction by special trade contractors, the concern will perform at least 25% of the cost of the contract, not including the cost of materials, with its own employees.

Section 1651 turned this around to limit the percentage of the award amount received by the small business contractor that may be spent on subcontractors. For example, instead of requiring the small business contractor to perform at least 15% of the general construction contract, Section 1651 limits the small business contractor from expending more than 85% of the general construction contract cost on subcontractors. However, Section 1651 created a new category of exempt subcontractors: "similarly situated entities." If a contractor receives an award under a service-disabled veteran-owned small business set-aside, any subcontracts awarded to "similarly situated entities" – in this case, other service-disabled veteran-owned small businesses – *do not count as subcontracted work* when determining compliance with the limitation on subcontracting requirements. This means the service-disabled veteran-owned small business contractor can subcontract as much of the contract to service-disabled veteran-owned small businesses without

violating the limitation on subcontracting. This gives small businesses greater flexibility in complying with the limitations on subcontracting.

In addition, SBA decided to clarify that the nonmanufacturer rule, which is an exception to the limitations on subcontracting, does not apply to small business set-aside contracts between $3,500 and $150,000. Under the nonmanufacturer rule in paragraph (f) of FAR 19.102, Size Standards, a small business may submit a bid or offer under a set-aside for supplies as a nonmanufacturer if it has no more than 500 employees and furnishes the product of a small business manufacturer or producer. However, the SBA regulations at Title 13 of the Code of Federal Regulations (CFR), Section 121.406 (13 CFR 121.406), How does a small business concern qualify to provide manufactured products or other supply items under a small business set-aside, service-disabled veteran-owned small business, HUBZone, WOSB or EDWOSB, or 8(a) contract?, also require that the small business nonmanufacturer must be "primarily engaged in the retail or wholesale trade and normally sells the type of item being supplied…[and] takes ownership or possession of the item(s) with its personnel, equipment or facilities in a manner consistent with industry practice…"

To conform to SBA's final rule dated May 31, 2016, the following are the significant changes that would be made to FAR part 19 and corresponding clauses:

- A definition of "similarly situated entity" would be added to DFARS 19.001, Definitions ("a first-tier subcontractor, including an independent contractor, that has the same small business program status as that which qualified the prime contractor for the award; and is considered small for the NAICS [North American Industry Classification System] code the prime contractor assigned to the subcontract the subcontractor will perform. An example of a similarly situated entity is a first-tier subcontractor that is a HUBZone [Historically Under-utilized Business Zone] small business concern for a HUBZone set-aside or sole-source award under the HUBZone program").

  Also, the definition of "nonmanufacturer rule" would be deleted from FAR 19.001.

- FAR 19.102(f) would be deleted and replaced by FAR 19.103, Nonmanufacturer Rule. New FAR 19.103 would provide full and updated guidance on the application of the nonmanufacturer rule, including the requirements associated with the nonmanufacturer rule, and the circumstances and procedures related to waivers of the nonmanufacturer rule. FAR 19.103 would clarify that the nonmanufacturer rule does not apply to small business set-asides at or below $150,000 (see FAR subpart 19.5, Set-Asides for Small Businesses), but that it ***does*** apply to set-asides and sole-source acquisitions under the SBA's 8(a) program (see FAR subpart 19.8, Contracting with the Small Business Administration (The 8(a) Program)), the HUBZone program (see FAR subpart 19.13, Historically Underutilized Business Zone (HUBZone) Program), the Service-Disabled Veteran-Owned Small Business (SDVOSB) Procurement Program (see FAR subpart 19.14, Service-Disabled Veteran-Owned Small Business Procurement Program), and to economically disadvantaged women-owned small businesses (EDWOSB) and women-owned small businesses (WOSB) eligible for set-asides and sole-source acquisitions under FAR subpart 19.15, Women-Owned Small Business Program, ***regardless of dollar value***.

- FAR 52.219-XX, Nonmanufacturer Rule, would be added to implement the requirements in solicitations and contracts. In addition, the outdated nonmanufacturer rule would be removed from FAR 52.219-3, Notice of HUBZone Set-Aside or Sole Source Award; FAR 52.219-6, Notice of Total Small Business Set-Aside, and its Alternate I; FAR 52.219-7, Notice of Partial Small Business Set-Aside, and its Alternate I; FAR 52.219-18, Notification of Competition Limited to Eligible 8(a) Participants, and its Alternate II; FAR 52.219-27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside; FAR 52.219-29, Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns; and FAR 52.219-30, Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program.

  In addition, the following provisions and clause would be updated to clarify when the 500 employee size standard for nonmanufacturers applies: FAR 52.204-8, Annual Representations and Certifications; FAR 52.212-1, Instructions to Offerors – Commercial Items; FAR 52.219-1, Small Business Program Representations; and FAR 52.219-28, Post-Award Small Business Program Rerepresentation.

- FAR 52.219-14, Limitations on Subcontracting, would be revised to implement the updated limitations on subcontracting requirements in solicitations and contracts. The outdated limitations on subcontracting guidance would be removed from FAR 52.219-3, FAR 52.219-27, FAR 52.219-29, and FAR 52.219-30.

Comments on this proposed rule must be submitted no later than February 4, 2019, identified as FAR Case 2016-011, by either of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; or (2) mail: General Services Administration, Regulatory-Secretariat Division (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd floor, Washington, DC 20405.

In a parallel effort, the DOD decided it couldn't wait for a final rule to be issued amending the FAR to reflect SBA's revised regulations on limitations on subcontracting and the nonmanufacturer rule, so Kim Herrington, the acting director of defense pricing and contracting, issued a class deviation directing DOD contracting officers to use the following alternate clauses (which are very similar to those in the proposed FAR rule):

- In solicitations, contracts, and task or delivery orders that are set aside for small businesses under FAR subpart 19.5, use: (1) FAR 52.219-6, Notice of Total Small Business Set-Aside (DEVIATION 2019-O0003), in place of FAR 52.219-6; (2) FAR 52.219-7, Notice of Partial Small Business Set-Aside (DEVIATION 2019-O0003), in place of FAR 52.219-7; and (3) FAR 52.219-14, Limitations on Subcontracting (DEVIATION 2019-O0003), in place of FAR 52.219-14.

- In solicitations, contracts, and task or delivery orders for competitive 8(a) procurements and 8(a) sole source awards under FAR subpart 19.8, use: (1) FAR 52.219-14, Limitations on Subcontracting (DEVIATION 2019-O0003), in place of FAR 52.219-14; and (2) DFARS 252.219-7010, Notification of Competition Limited to Eligible 8(a) Concerns – Partnership Agreement (DEVIATION 2019-O0003), in place of DFARS 252.219-7010.

- In solicitations, contracts, and task or delivery orders that are set aside for, or awarded on a sole source basis to, HUBZone small businesses under FAR subpart 19.13, as well as procurements using the HUBZone price evaluation preference (see FAR 19.1307, Price Evaluation Preference for HUBZone Small Business Concerns), use: (1) FAR 52.219-3, Notice of HUBZone Set-Aside or Sole Source (DEVIATION 2019-O0003), in place of FAR 52.219-3; and (2) FAR 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns (DEVIATION 2019-O0003), in place of FAR 52.219-4. (**NOTE:** The deviation states, "Contracting officers shall not use Alternate I of FAR 52.219-3 or Alternate I of FAR 52.219-4. These alternates conflict with the attached deviation clauses.")

- In solicitations, contracts, and task or delivery orders that are set aside for SDVOSBs under FAR subpart 19.14, use FAR 52.219-27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside (DEVIATION 2019-O0003), in place of FAR 52.219-27.

- In solicitations, contracts, and task or delivery orders that are set aside for, or awarded on a sole source basis to, EDWOSBs under FAR subpart 19.15, use FAR 52.219-29, Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns (DEVIATION 2019-O0003), in place of FAR 52.219-29.

- In solicitations, contracts, and task or delivery orders that are set aside for, or awarded on a sole source basis to, WOSBs eligible under FAR subpart 19.15, use FAR 52.219-30, Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program (DEVIATION 2019-O0003), in place of FAR 52.219-30.

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

MILEAGE REIMBURSEMENT SET AT 58¢ PER MILE FOR AUTOS

The General Services Administration (GSA) is increasing the mileage reimbursement rate for use of a privately owned automobile on official travel from 54¢ per mile to 58¢ per mile, and the rate for use of a motorcycle on official travel from 51.5¢ per mile to 55¢ per mile. The rate for use of a privately owned aircraft is increased from $1.21 per mile to $1.26 per mile. These revised rates are effective for travel performed on or after January 1, 2019, through December 31, 2019. The increased reimbursement rates reflect higher fuel prices.

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DOD HOLDS YEAR-END REGULATIONS CLEARANCE

As the Department of Defense (DOD) has done the past several Decembers, it has prepared for the upcoming new year by cleaning house with the issuance of a multitude of final rules (7) and interim rules (1) amending the Defense FAR Supplement (DFARS), proposed rules (3) that would amend the DFARS, deviations (4, including the one on limitations on subcontracting – see preceding article) to the FAR and DFARS, and a memorandum addressing DOD acquisition policy. Most of these actions address acquisition-related provisions in various National Defense Authorization Acts (NDAA).

■ **Modification of the Limitations on Single-Source Task or Delivery Order Contracts:** This final rule adds DFARS 216.504, Indefinite-Quantity Contracts, to implement the NDAA for Fiscal Year (FY) 2019 (Public Law 115-232), Section 816, Modification of Limitations on Single Source Task or Delivery Order Contracts.

Paragraph (c)(1)(ii)(D)(*1*)(*i*) of FAR 16.504, Indefinite-Quantity Contracts, prohibits the award of a task or delivery order contract in an amount exceeding $112,000,000 to a single source unless the head of the agency determines that "the task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work."

Section 816 amends this limitation (which is in Title 10 of the U.S. Code, Section 2304a (10 USC 2304a), Task and Delivery Order Contracts: General Authority, paragraph (d)(3)(A)), by replacing "reasonably perform the work" with "efficiently perform the work". Therefore, to implement Section 816, this final rule adds DFARS 216.504(c)(1)(ii)(D)(*1*)(*i*) which states: "In accordance with Section 816 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232), when making the determination at FAR 16.504(c)(1)(ii)(D)(*1*)(*i*), the agency head shall determine that the task or delivery orders expected under the contract are so integrally related that only a single source can 'efficiently perform the work,' instead of 'reasonably perform the work' as required by the FAR." In addition, DFARS 216.504(c)(1)(ii)(D) is amended to state that the authority to make this determination shall not be delegated below the level of the senior procurement executive, and that the determination must be submitted to the Director, Defense Procurement and Acquisition Policy by email to **osd.pentagon.ousd-atl.mbx.cpic@mail.mil**.

■ **Electronic Submission and Processing of Payment Requests and Receiving Reports:** This finalizes, with minor changes, the rule that proposed 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 contract 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, particularly paragraph (a)(1)(ii), which 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..." These have been mistakenly 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. To clarify this, the rule proposed to delete this list of exceptions and replace it with 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)..."

In addition, the rule proposed to add definitions of "electronic form" and "payment request" to DFARS 232.7001, Definitions. Also, the rule proposed to revise DFARS 252.232-7003, DFARS 252.232-7006, and DFARS Appendix F, Part 3, to reflect the change and make various clarifications. Finally, the rule proposed to delete DFARS 252.246-7000, Material Inspection and Receiving Reports, because its procedures predate the WAWF automated procedures and processes and are now obsolete.

One respondent submitted comments on the proposed rule, but no changes were made in response to those comments. However, the final rule adds the full text of the definitions of "contract financing payment" and "invoice payment" to DFARS 252.232-7003 in place of a reference to the definitions at FAR 32.001, Definitions, and DFARS 252.232-7006 is revised to add a reference to DFARS 252.232-7003 for the definitions of "payment request" and "receiving report."

For more on the proposed rule, see the July 2018 ***Federal Contracts Perspective*** article "DOD Continues Deluge of Rules, Deviations."

In a related action, Kim Herrington, the acting principal director of defense pricing and contracting, issued class deviation 2019-O0002 to extend from December 31, 2018, to March 31, 2020, the requirement that contracting officers allow the submission of payment requests by nonelectronic means for contracts for packing, crating, and storage of household goods belonging to DOD employees and service members. Instead of including DFARS 252.232-7003, Electronic Submission of Payment Requests and Receiving Reports, contracting officers are to ensure that the contract or order specifies that invoices shall be submitted to the ordering office, and that the contract administration data section provide the ordering office's mailing address, email address, and fax number.

The NDAA for FY 2001 (Public Law 106-398, Section 1008, Electronic Submission and Processing of Claims for Contract Payments," imposed the requirement that contractors provide payment requests in electronic form (with several exceptions). However, Section 1008 also provides that "if the secretary of defense determines that the requirement for using electronic means for submitting claims…is unduly burdensome in any category of cases, the secretary may exempt the cases in that category from the application of the requirement." This deviation

utilizes the secretary's authority to exempt the covered contracts from this requirement, and it rescinds and supersedes class deviation 2018-O0004, which had extended the requirement through December 31, 2018. For more on class deviation 2018-O0004, see the January 2018 ***Federal Contracts Perspective*** article "DOD Finishes 2017 with a Flourish."

■ **Restrictions on Acquisitions from Foreign Sources:** This finalizes, with changes, the rule that proposed to 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 (commonly referred to as the "Berry Amendment"), to purchases of athletic footwear at or below the simplified acquisition threshold (which is $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, the rule proposed to amend paragraph (a) of DFARS 225.7002-2, Exceptions [to restrictions on food, clothing, fabrics, hand or measuring tools, and flags], which 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))."

- 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 proposed 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 225.7006, Restriction on Air Circuit Breakers for Naval Vessels; DFARS 252.225-7037, Evaluation of Offers for Air Circuit Breakers; and DFARS 252.225-7038, Restriction on Acquisition of Air Circuit Breakers (only Australia would be added to DFARS 252.225-7037 and DFARS 252.225-7038 because the United Kingdom was already authorized to provide air circuit breakers).

One respondent submitted comments on the proposed rule, but none were adopted, so the proposed rule is adopted as final except for the proposed additiion Australia and the United Kingdom to DFARS 225.7005, Restrictions on Certain Chemical Weapons Antidote, because DFARS 225.7005 was removed by an earlier rule (see the June 2018 ***Federal Contracts Perspective*** article "DOD Unleashes a Torrent of Rules, Removes Unnecessary DFARS Clauses and Provisions").

For more on the proposed rule, see the September 2018 ***Federal Contracts Perspective*** article "DOD Returns from Summer Vacation with Lots of Rules."

■ **Sunset of Provision Relating to the Procurement of Certain Photovoltaic Devices:** This finalizes, without changes, the rule that proposed to amend DFARS 225.7017, Utilization of Domestic Photovoltaic Devices, 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 continued 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 the definition of "covered contract" in DFARS 225.7017.

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.

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

The proposed rule, besides changing "and" to "or" in DFARS 225.7017, would amend DFARS 252.225-7017, Photovoltaic Devices, and DFARS 252.225-7018, Photovoltaic Devices – Certificate, to reflect increased trade agreement thresholds (see the February 2018 ***Federal Contracts Perspective*** article "FAC 2005-97 Revises Trade Agreements Thresholds"). In addition, the rule proposed to use the "micro-purchase threshold" rather than a specific dollar value, to provide more flexibility when the micro-purchase threshold increases.

No comments were submitted in response to the proposed rule, so the rule is finalized without any changes. For more on the proposed rule, see the September 2018 ***Federal Contracts Perspective*** article "DOD Returns from Summer Vacation with Lots of Rules."

■ **Submission of Summary Subcontract Reports:** This finalizes, without changes, the rule that proposed 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 its Alternate I required 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." The rule proposed to amend DFARS 252.219-7003 to require contractors to submit a consolidated SSR to the SSR coordinator "at the Department of Defense level [who] 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.

No comments were submitted in response to the proposed rule, so it is finalized without changes. For more on the proposed rule, see the July 2018 ***Federal Contracts Perspective*** article "DOD Continues Deluge of Rules, Deviations."

Because this final rule amends DFARS 252.219-7003, DOD has issued a class deviation that rescinds and supersedes class deviation 2018-O0007, which required that FAR 52.219-9, Small Business Subcontracting Plans, be supplemented by DFARS 252.219-7003, Small Business Subcontracting Plan (DOD Contracts) – Basic (DEVIATION 2018-O0007) and its various alternates.

Class deviation 2018-O0007 addressed two topics:

- It directed that FAR 52.219-9, Small Business Subcontracting Plans – Alternate IV (DEVIATION 2018-O0007), be used in place of FAR 52.219-9, Alternate IV, when incorporating a subcontracting plan due to a modification to an order under a basic ordering agreement (BOA) or blanket purchase agreements (BPA); and

- It provided instructions for including various DFARS 252.219-7003 deviations for use in (1) solicitations and contracts that include FAR 52.219-9 or its Alternate I or II; (2) in orders or calls against BOAs or BPAs; and (3) when incorporating a subcontracting plan due to a modification to an order under a BOA or BPA. The various DFARS 252.219-7003 deviations required contractors to submit a consolidated SSR to the SSR coordinator at the DOD.

Since the amendment of DFARS 252.219-7003 requires contractors to submit a consolidated SSR to the SSR coordinator at the DOD, the DFARS 252.219-7003 deviations are no longer needed. Therefore, this class deviation 2019-O0005 rescinds class deviation 2018-O0007 but retains FAR 52.219-9, Small Business Subcontracting Plans – Alternate IV (DEVIATION 2019-O0005) and directs that it be used in place of FAR 52.219-9, Small Business Subcontracting

Plans – Alternate IV when incorporating a subcontracting plan due to a modification to an order under a BOA or BPA.

For more on class deviation 2018-O0007, see the January 2018 ***Federal Contracts Perspective*** article "DOD Finishes 2017 with a Flourish."

Finally, in a somewhat related action, the Department of Homeland Security (DHS) is amending its Homeland Security Acquisition Regulation (HSAR) to remove HSAR 3052.219-70, Small Business Subcontracting Reporting Plan. HSAR 3052.219-70 required contractors to enter required subcontracting reports into the eSRS and include HSAR 3052.219.70 in all subcontracts that include FAR 52.219-9. However, FAC 2005-42 contained a final rule that amended FAR 52.219-9 to require that small business subcontract reports be submitted using the eSRS (see the July 2010 ***Federal Contracts Perspective*** article "FAC 2005-42 Addresses Disclosure of Noncompetitive Contract Justifications, Recovery Act"), so HSAR 3052.219-70 is no longer needed to provide guidance to contractors on the eSRS requirements and is deleted.

■ **Modification of "Surge Option" Clause:** This finalizes, without changes, the rule that proposed 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 instructed 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 advised that the Production Surge Plan (DI-MGMT-80969) is no longer an up-to-date reference, and that the Capabilities Analysis Plan (CAP) is the current terminology used in industrial planning efforts. Therefore, the rule proposed to update paragraphs (a) and (b) of the clause to reflect the current industry terminology.

In addition, paragraph (a)(1) of the clause stated 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, the rule proposed to 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]..."

One respondent submitted a comment on the proposed rule, but it was not adopted, so the proposed rule is adopted as final. For more on the proposed rule, see the July 2018 ***Federal Contracts Perspective*** article "DOD Continues Deluge of Rules, Deviations."

■ **Documentation for Interagency Contracts:** This final rule removes paragraph (a) of DFARS 217.502-1, General [procedures for interagency agreements], to implement the NDAA for FY 2019 (Public Law 115-232), Section 875, Promotion of the Use of Government-Wide and Other Interagency Contracts, which amends the NDAA for FY 2009 (Public Law 110-417),

Section 865, Preventing Abuse of Interagency Contracts, by removing the requirement for agencies, prior to requesting another agency to conduct an acquisition on its behalf, to make "a determination that an interagency acquisition is the best procurement alternative…"

The requirement for a best procurement approach determination is implemented at FAR 17.502-1(a). This rule removes the supplemental text in DFARS 217.502-1(a), which advises contracting officers, when providing acquisition assistance to deployed DOD units or personnel from another DOD component, to obtain the determination from the requiring DOD unit or personnel.

This rule parallels the memorandum issued by the Civilian Agency Acquisition Council (CAAC) authorizing all civilian agencies (except the National Aeronautics and Space Administration and the Coast Guard, which are on the Defense Acquisition Regulations Council [DARC]) to remove the best procurement approach determination requirement in FAR 17.502-1(a) (see the November 2018 ***Federal Contracts Perspective*** article "CAAC Deviation Removes Determination Requirement").

■ **Foreign Commercial Satellite Services and Certain Items on the Commerce Control List:** This interim rule revises DFARS subpart 225.7, Prohibited Sources, and corresponding provisions and clauses to implement two NDAA sections: (1) the NDAA for FY 2018 (Public Law 115-91), Section 1603, Foreign Commercial Satellite Services: Cybersecurity Threats and Launches, which imposes additional prohibitions on the acquisition of certain foreign commercial satellite services; and (2) the NDAA for FY 2017 (Public Law 114-328), Section 1296, Maintenance of Prohibition on Procurement by Department of Defense of People's Republic of China-Origin Items that Meet the Definition of Goods and Services Controlled as Munitions Items When Moved to the "600 series" of the Commerce Control List, which prohibits purchases from any Communist Chinese military company, through a contract or subcontract (at any tier), of goods and services controlled as munitions items on the 600 series of the Commerce Control List (CCL) of the Export Administration Regulations (EAR) of the Department of Commerce.

- ***Section 1603 of the NDAA for FY 2018***

  Section 1603 amends paragraph (f) of 10 USC 2279, Foreign Commercial Satellite Services and Foreign Launches, to add "the Russian Federation" to the definition of "covered foreign country." Russia joins countries described in the NDAA for FY 2013 (Public Law 112-239), paragraph (c)(2) of Section 1261, Removal of Satellites and Related Items from the United States Munitions List: the People's Republic of China, North Korea, and any country that is a state sponsor of terrorism (currently Iran, North Korea, Sudan, and Syria). DOD is not permitted to contract with a covered foreign country for satellite services, to use satellites designed or manufactured in a covered foreign country, or to have a satellite launched using a launch vehicle designed or manufactured in a covered foreign country (the prohibition pertaining to satellites does not go into effect until December 31, 2022). In addition, Section 1603 adds to 10 USC 2279 that "the Secretary of Defense may not enter into a contract for satellite services with a foreign entity if the Secretary reasonably believes that…entering into such contract would create an unacceptable cybersecurity risk for the Department of Defense."

To implement Section 1603, the following changes are made to the DFARS:

- The definition of "covered foreign country" in DFARS 225.772-1, Definitions [pertaining to prohibition on acquisition of certain foreign commercial satellite services], is expanded to include Russia. In addition, the definitions specified in Section 1603 of "cybersecurity risk" ("threats to and vulnerabilities of information or information systems and any related consequences caused by or resulting from unauthorized access, use, disclosure, degradation, disruption, modification, or destruction of such information or information systems, including such related consequences caused by an act of terrorism") and "launch vehicle" ("a fully integrated space launch vehicle") are added to DFARS 225.772-1.

- DFARS 225.772-2, Prohibitions, is amended to expand the prohibitions to include (1) award of a contract for commercial satellite services to a foreign entity if entering into such contract would create an unacceptable cybersecurity risk for the DOD; and (2) "for a launch that occurs on or after December 31, 2022…satellite services that will be provided using satellites that will be designed or manufactured in a covered foreign country, or by an entity controlled in whole or in part by, or acting on behalf of, the government of a covered foreign country; or launched outside the United States using a launch vehicle that is designed or manufactured in a covered foreign country; or provided by the government of a covered foreign country, or an entity controlled in whole or in part by, or acting on behalf of, the government of a covered foreign country."

- Provision DFARS 252.225-7049, Prohibition on Acquisition of Certain Foreign Commercial Satellite Services – Representations, is revised to add the definition of "cybersecurity risk" that is in DFARS 225.772-1, the prohibitions specified in DFARS 225.772-2, and five representations to cover the new restrictions on satellites and launch vehicles, but these new restrictions will only be applicable with regard to commercial satellite services that will use satellites launched or after December 31, 2022. The restriction on launch vehicles does not apply to launches within the United States.

  The definitions of "covered foreign country," "foreign entity," "government of a covered foreign country," "satellite services," and "state sponsor of terrorism" are moved from DFARS 252.225-7049 to DFARS 252.225-7051, and replaced with a reference to DFARS 252.225-7051.

- A new contract clause DFARS 252.225-7051. Prohibition on Acquisition of Certain Foreign Commercial Satellite Services, includes the definitions of the terms removed from DFARS 252.225-7049 (as revised in DFARS 225.772-1), the new definition of "launch vehicle" in DFARS 225.772-1, and the prohibitions specified in DFARS 225.772-2.

- ***Section 1296 of the NDAA for FY 2017***

The NDAA for FY 2006 (Public Law 109-163), Section 1211, Prohibition on Procurements from Communist Chinese Military Companies, prohibits DOD from purchasing items on the United States Munitions List (USML) from a Communist Chinese military company.

Subsequent to the enactment of Public Law 109-163, the Export Administration Regulations (EAR) were amended to move some munitions and munitions-related items from the USML to a series of new export control classification numbers (the 600 series) on the EAR's Commerce Control List (CCL), because these items do not warrant USML controls – they provide less than a critical military capability but are not in normal commercial use. The 600 series is so identified when the third character in the 5-character export control classification number is the number "6" – xy6zz.

However, an unintended consequence of this transfer was that the 600 series items were no longer covered by the Section 1211 prohibition of DOD purchases of USML items from Communist Chinese military companies. Therefore, Section 1296 extends the Section 1211 prohibition to cover items listed "in the 600 series of the control list of the Export Administration Regulations…"

To implement Section 1296, the following changes are made to the DFARS:

- □ DFARS 225.003, Definitions, is amended to add a definition of "600 series of the Commerce Control List." In addition, the definitions of "Communist Chinese military company" and "United States Munitions List" in DFARS 252.225-7007, Prohibition on Acquisition of Certain Items From Communist Chinese Military Companies, are repeated in DFARS 225.003 for ease in reading and comprehension.

- □ DFARS 225.770-1, Definitions, is amended to remove the definitions of "Communist Chinese military company" and "United States Munitions List," which merely provided a cross-reference to DFARS 252.225-7007. In addition, a definition of "item" is added, which includes USML defense articles, USML defense services, and 600 series items.

- □ DFARS 225.770-2, Prohibition, is expanded to include items covered by "the USML *or the 600 series of the CCL*" (*emphasis* added).

- □ The title of DFARS 225.770-4 is changed from "Identifying USML Items" to "Identifying Items Covered by the USML or the 600 Series of the CCL," and the contents are expanded to cover the items in the 600 series.

- □ The title of DFARS 252.225-7007 is changed from "Prohibition on Acquisition of United States Munitions List Items from Communist Chinese Military Companies" to "Prohibition on Acquisition of Certain Items from Communist Chinese Military Companies"; adds the definition of "600 series of the Commerce Control List" from DFARS 225.003; adds the definition of "item" from DFARS 225.770-1; and expands the prohibition to cover the items in the 600 series.

This interim rule went into effect December 21, 2018.

Comments on this interim rule must be submitted no later than February 19, 2019, identified as DFARS Case 2018-D020, 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 G. Williams, OUSD (A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Restrictions on Use of Lowest Priced Technically Acceptable Source Selection Process:** This proposed rule would amend the DFARS to implement sections of the NDAA for FY 2017 (Public Law 114-328) and NDAA for FY 2018 (Public Law 115-91) that establish limitations and prohibitions on the use of the lowest price technically acceptable (LPTA) source selection process.

FAR 15.101-2, Lowest Price Technically Acceptable Source Selection Process, states, "The lowest price technically acceptable source selection process is appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price." LPTA requires contracting officers to select the lowest price proposal regardless of the benefits of cost and technical tradeoffs that would be realized by the acceptance of other proposals.

The NDAA for FY 2017, Section 813, Use of Lowest Price Technically Acceptable Source Selection Process, establishes that the LPTA source selection process shall only be used when:

- Minimum requirements can be described clearly and comprehensively and expressed in terms of performance objectives, measures, and standards that will be used to determine the acceptability of offers;

- No, or minimal, value will be realized from a proposal that exceeds the minimum technical or performance requirements;

- 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;

- The source selection authority has a high degree of confidence that reviewing the technical proposals of all offerors would not result in the identification of characteristics that could provide value or benefit; and

- The contract file contains a determination that the lowest price reflects full life-cycle costs of the product(s) or service(s) being acquired.

The NDAA for FY 2018, Section 822, Use of Lowest Price Technically Acceptable Source Selection Process, added the following two restrictions to those specified in Section 813:

- No, or minimal, additional innovation or future technological advantage will be realized by using a different source selection process; and

- Goods to be procured are predominantly expendable in nature, are nontechnical, or have a short life expectancy or short shelf life.

In addition, Section 813 mandates that the use of the LPTA process is to be avoided, to the maximum extent practicable, when acquiring information technology, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, other knowledge-based professional services, personal protective equipment, or knowledge-based training or logistics services in contingency operations or other operations outside the United States.

Continuing, the NDAA for FY 2017, Section 814, Procurement of Personal Protective Equipment, prohibits the use of reverse auctions or the LPTA source selection process when purchasing personal protective equipment if the level of quality or failure of the item could result in combat casualties. The NDAA for FY 2018, Section 882, Procurement of Aviation Critical Safety Items, amends Section 814 to further prohibit the use of reverse auctions (in which sellers compete against one another to provide the buyer the lowest price) or the LPTA source selection process for aviation critical safety items.

Furthermore, the NDAA for FY 2018, Section 832, Prohibition on Use of Lowest Price Technically Acceptable Source Selection Process for Major Defense Acquisition Programs, prohibits the use of the LPTA source selection process for engineering and manufacturing development (EMD) of a major defense acquisition program (MDAP) for which budgetary authority is requested beginning in FY 2019.

Finally, the NDAA for FY 2017, Section 892, Selection of Service Providers for Auditing Services And Audit Readiness Services, prohibits the use of the LPTA source selection process when acquiring auditing services, and requires selection of service providers based on the best value to DOD.

To address these LPTA limitations and prohibitions, the following changes would be made to the DFARS:

- A new section, DFARS 215.101-2-70, Limitations and Prohibitions, would be added to supplement FAR 15.101-2. It would address the various limitations and prohibitions on the use of the LPTA source selection process. This new DFARS section would consist of two paragraphs: paragraph (a) would address the limitations in Section 813 of the NDAA for FY 2017, as amended by Section 822 of the NDAA for FY 2018; and paragraph (b) would address the prohibitions in Sections 814, 832, and 892 of the NDAA for FY 2017, as amended by Section 882 of the NDAA for FY 2018.

- The new statutory limitations and prohibitions on the use of the LPTA source selection process and reverse auctions are not restricted to acquisitions conducted using the procedures in FAR part 15, Contracting by Negotiation, but also apply to orders placed against Federal Supply Schedules using the procedures in FAR subpart 8.4, Federal Supply Schedules; acquisitions for commercial items using the procedures in FAR part 12, Acquisition of Commercial Items; acquisitions conducted using the procedures in FAR part 13, Simplified Acquisition Procedures; and orders placed using the fair opportunity procedures against multiple-award indefinite-delivery contracts using the procedures in paragraph (b) of FAR 16.505, Ordering. To notify contracting officers of the new limitations and prohibitions when using these procedures, a cross-reference to

DFARS 215.101-2-70 would be added to DFARS 208.405, Ordering Procedures for Federal Supply Schedules; new DFARS 212.203, Procedures for Solicitation, Evaluation, and Award [of acquisitions for commercial items], which would also contain a cross-reference to DFARS 217.7XXX (see next); DFARS 213.106-1, Soliciting Competition [in simplified acquisitions]; and DFARS 216.505, Ordering [under indefinite-delivery contracts].

- Since reverse auctions are not addressed in either the FAR or the DFARS, a new DFARS subpart 217.7X, Reverse Auctions, would be added (under DFARS part 217, Special Contracting Methods). This new subpart would consist of DFARS 217.7XXX, Prohibitions, which would state "contracting officers shall not use reverse auctions when procuring items designated by the requiring activity as personal protective equipment or an aviation critical safety item, when the requiring activity advises the contracting officer that the level of quality or failure of the equipment or item could result in combat casualties."

  To notify contracting officers of the new prohibition against the use of reverse auctions for personal protective equipment or aviation critical safety items, procedures, a cross-reference to DFARS 217.7XXX would be added to DFARS 208.405, Ordering Procedures for Federal Supply Schedules; the new DFARS 212.203, Procedures for Solicitation, Evaluation, and Award [of acquisitions for commercial items]; DFARS 213.106-1, Soliciting Competition [in simplified acquisitions]; and DFARS 216.505.

- DFARS 215.101-2-70(b) includes the prohibitions on use of the LPTA source selection process for the acquisition of EMD for a MDAP and for audit services. Since special requirements associated with major system acquisitions are addressed in DFARS part 234, Major System Acquisition, and special requirements for the acquisition of audit services are addressed in DFARS 237.270, Acquisition of Audit Services, a cross-reference to DFARS 215.101-2-70(b) would be added as DFARS 234.005-2, Mission-Oriented Solicitation, and to DFARS 237.270.

Comments on this proposed rule must be submitted no later than February 4, 2019, identified as DFARS Case 2018-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: Carrie Moore, OUSD (A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Small Business Set-Asides for Architect-Engineer and Construction Design Contracts:** This proposed rule would amend DFARS 219.502-1, Requirements for Setting Aside Acquisitions, and DFARS 219.502-2, Total Set-Asides, to implement the NDAA for FY 2019, Section 2804, Small Business Set-Aside for Contracts for Architectural and Engineering Services and Construction Design, which amends the threshold for small business set-asides of acquisitions of architect-engineer services, including construction design, in connection with military construction projects or military family housing projects, from $400,000 to $1,000,000. Acquisitions of these architect-engineer services that are valued at less than that specified threshold are required to be set aside for small businesses. In addition, Section 2804 removes the

prohibition on setting aside acquisitions over the specified threshold; therefore, these acquisitions that are $1,000,000 or more may now be set aside for small businesses.

To implement Section 2804, this proposed rule would delete paragraph (2) of DFARS 219.502-1, which states, "Do not set aside acquisitions for…architect-engineer services for military construction or family housing projects of $400,000 or more…" In addition, the dollar value in paragraph (a)(iii) of DFARS 219.502-2, which states, "…set aside for small business concerns acquisitions for…architect-engineer services for military construction or family housing projects of under $400,000," would be changed from $400,000 to $1,000,000.

Comments on this proposed rule must be submitted no later than February 4, 2019, identified as DFARS Case 2018-D057, 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 D. Johnson, OUSD (A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Applicability of Inflation Adjustment of Acquisition Related Thresholds:** This proposed rule would amend the FAR to implement NDAA for FY 2018, Section 821, Amendment Relating to Applicability of Inflation Adjustments, which amends paragraph (d) of 41 USC 1908, Inflation Adjustment of Acquisition-Related Dollar Thresholds, to require that the inflation adjustments of statutory acquisition-related thresholds under 41 USC 1908 apply to existing contracts and subcontracts in effect on the date of the adjustment.

41 USC 1908 requires that statutory acquisition-related thresholds be adjusted every five years of for inflation (except for thresholds under the Construction Wage Rate Requirements statute [formerly known as the Davis-Bacon Act], the Service Contract Labor Standards statute [formerly known as the Service Contract Act], and trade agreements thresholds). The last time thresholds in the DFARS were adjusted was in 2015 (see the July 2015 ***Federal Contracts Persepctive*** article "DOD Adjusts Acquisition Thresholds to Reflect Changes in Consumer Price Index Since 2010"). The next adjustments will take place in 2020.

41 USC 1908(d) had stated "The [Federal Acquisition Regulatory] Council shall publish a notice of the adjusted dollar thresholds under this section in the ***Federal Register***. The thresholds take effect on the date of publication." Section 821 added "and shall apply, in the case of the procurement of property or services by contract, to a contract, and any subcontract at any tier under the contract, in effect on that date without regard to the date of award of the contract or subcontract" to the end of 41 USC 1908(d), so that it now states "The Council shall publish a notice of the adjusted dollar thresholds under this section in the ***Federal Register***. The thresholds take effect on the date of publication and shall apply, in the case of the procurement of property or services by contract, to a contract, and any subcontract at any tier under the contract, in effect on that date without regard to the date of award of the contract or subcontract." Therefore, if acquisition-related thresholds are adjusted under 41 USC 1908 during the life of a contract, then that contract and all of its subcontracts are subject to the adjusted thresholds.

FAR 1.109, Statutory Acquisition–Related Dollar Thresholds – Adjustment for Inflation, implements 41 USC 1908, and DFARS 201.109 provides supplemental information applicable to DOD. This proposed rule would amend DFARS 201.109 to add the following as paragraph (a)(1): "41 USC 1908(d) requires the adjustment for inflation of all statutory acquisition-related dollar thresholds in the DFARS be applied to contracts and subcontracts without regard to the date of award of the contract or subcontract, except thresholds based on the Wage Rate Requirements statute, the Service Contract Labor Standards statute, or established by the United

States Trade Representative pursuant to the Trade Agreement Act, which are not escalated by the statute."

In addition, several DFARS clauses that contain thresholds subject to inflation adjustment provide the specific dollar amount of the threshold. To implement the new requirements under 41 USC 1908(d), the proposed rule would replace the dollar amounts of the thresholds in each clause with a reference to the FAR or DFARS section that provides the overarching policy and the acquisition-related threshold. If the DFARS policy section does not currently include the acquisition-related threshold, this rule proposes to amend those sections to add the thresholds. Finally, additional text would be added within the affected DFARS clauses to clarify that the threshold with which a contractor or subcontractor must comply is the threshold in effect at the time of contract or subcontract award or issuance of the notice, as appropriate. For example, paragraph (d) of DFARS 252.203-7004, Display of Hotline Posters, states, "The contractor shall include this clause, including this paragraph (d), in all subcontracts that exceed $5.5 million except when the subcontract is for the acquisition of a commercial item." The proposed rule would revise DFARS 252.203-7004(d) to state "The contractor shall include the substance of this clause, including this paragraph (d), in all subcontracts that exceed the threshold specified in Defense Federal Acquisition Regulation Supplement 203.1004(b)(2)(ii) on the date of subcontract award except when the subcontract is for the acquisition of a commercial item." Paragraph (b)(2)(ii) of DFARS 203.1004, Contract Clauses [for contractor code of business ethics and conduct], specifies that DFARS 252.203-7004 must be included in solicitations and contracts expected to exceed $5.5 million (except for acquisitions of commercial items).

The following are the other clauses that would be similarly amended:

- Paragraph (a) of DFARS 252.209-7004, Subcontracting with Firms That Are Owned or Controlled by the Government of a Country that is a State Sponsor of Terrorism (paragraph (b) of FAR 9.405-2, Restrictions on Subcontracting, specifies $35,000 as the threshold).

- Paragraph (a)(2) of DFARS 252.209-7009, Organizational Conflict of Interest – Major Defense Acquisition Program (the definition of "major subcontractor" in DFARS 209.571-1, Definitions [for organizational conflicts of interest in major defense acquisition programs] would be amended to add "$55 million" as the threshold).

- Paragraph (g) of DFARS 252.219-7003, Small Business Subcontracting Plan (DOD Contracts), and paragraph (g) of Alternate I (paragraph (a) of FAR 19.702, Statutory Requirements [for small business subcontracting program], specifies $700,000 as the threshold [$1.5 million for construction]).

- Paragraph (g) of DFARS 252.219-7004, Small Business Subcontracting Plan (Test Program) (paragraph (a) of FAR 19.702 specifies $700,000 as the threshold [$1.5 million for construction]).

- DFARS 252.225-7004, Report of Intended Performance Outside the United States and Canada – Submission After Award (paragraph (c)(2)(i)(A)(*1*) of DFARS 225.870-4, Contracting Procedures [with Canadian contractors], specifies $700,000 as the threshold).

- Paragraphs (d)(1), (d)(2)(i), and (d)(2)(ii) of DFARS 252.249-7002, Notification of Anticipated Contract Termination or Reduction (DFARS 225.870-4(c)(2)(i)(A)(*1*) specifies $700,000 as the threshold for subcontracts subject to paragraph (d)(1); and DFARS 225.870-4(c)(2)(i)(C) specifies $150,000 as the threshold for subcontracts subject to paragraphs (d)(2)(i) and (d)(2)(i)).

Comments on this proposed rule must be submitted no later than February 19, 2019, identified as DFARS Case 2018-D023, 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.

■ **Class Deviation Authorizing Products and Services Produced in Countries Along a Major Supply Route to Afghanistan:** Class deviation 2019-O0004 implements the NDAA for FY 2018 (Public Law 115-91), Section 1214, Extension of Authority to Acquire Products and Services Produced in Countries Along a Major Route of Supply to Afghanistan, by extending from December 31, 2018, to December 31, 2019, the authority for contracting officers to provide a preference for products (other than small arms) or services (including construction) from Afghanistan, a Central Asian state (defined as "the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan, or the Republic of Uzbekistan"); or (2) limiting competition to products or services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus. This class deviation rescinds and supersedes class deviation 2017-O0003, which extended this authority from December 31, 2016, to December 31, 2018 (see the October 2017 ***Federal Contracts Perspective*** article "DOD Issues Four Additional Class Deviations").

This authority is in DFARS 225.7799, Authority to Acquire Products and Services (Including Construction) from Afghanistan or from Countries Along a Major Route of Supply to Afghanistan (DEVIATION 2019-O0004), and it may be invoked when the product or service is to be: "(i) used or performed in the country that is the source of the product or service; (ii) used in the course of efforts by the United States and the North Atlantic Treaty Organization Forces to ship goods to or from Afghanistan in support of military or stability operations in Afghanistan; (iii) used by the military forces, police, or other security personnel of Afghanistan; or (iv) used by the United States or coalition forces in Afghanistan" (several other conditions apply) (paragraph (a)(1) of DFARS 225.7799-2, Determination Requirements (DEVIATION 2019-O0004)).

In addition, the deviation prescribes the use of DFARS 252.225-7996, Acquisition Restricted to Products or Services from Afghanistan, a Central Asian State, Pakistan, or the South Caucasus (DEVIATION 2019-O0004); DFARS 252.225-7998, Preference for Products or Services from Afghanistan, a Central Asian State, Pakistan, or the South Caucasus (DEVIATION 2019-O0004); and DFARS 252.225-7999, Requirement for Products or Services from Afghanistan, a Central Asian State, Pakistan, or the South Caucasus (DEVIATION 2019-O0004).

■ **Defense Contract Management Agency (DCMA) Commercial Item Determination Authority:** This memorandum alerts the DOD acquisition community that "DCMA CIG [Commercial Item Group] contracting officers will serve as determining officials for commercial item review requests submitted to DCMA. DFARS Procedures, Guidance, and Instructions (PGI) 212.102 [Applicabilty, paragraph (a)(i), Commercial Item Determination] advise contracting

officers how to request assistance from the DOD cadre of experts in DCMA CIG… Determinations by the CIG will relieve buying activity procuring contracting officers (PCO) from duplicating effort expended reviewing the CIG recommendations to determine whether an item meets the FAR 2.101 definition of "commercial item" as well as provide consistency in the commerciality review process. Determinations made by the DCMA CIG will be contained in the commercial item database available to all DOD contracting officers to rely upon for future purchases of the same item or service."

AMENDMENT PROPOSED FOR CONTRACTOR WHISTLEBLOWERS

To implement the provisions of Public Law 114-261, An Act to Enhance Whistleblower Protection for Contractor and Grantee Employees, a rule is proposed that would make permanent the provisions in FAR 3.908, Pilot Program for Enhancement of Contractor Employee Whistleblower Protections, and to clarify that the prohibition on the reimbursement of certain legal costs applies to subcontractors as well as to contractors.

The NDAA for FY 2013 (Public Law 112-239), Section 828, Pilot Program for Enhancement of Contractor Employee Whistleblower Protections, added Section 4712, Pilot Program for Enhancement of Contractor Protection from Reprisal for Disclosure of Certain Information, to Title 41 of the U.S. Code (41 USC 4712), to enact a four-year pilot program (through January 1, 2017) that enhanced the existing whistleblower protections for contractor employees. A rule in FAC 2005-70 implemented Section 828 by adding FAR 3.908. (**EDITOR'S NOTE:** The pilot program in FAR 3.908 does not apply to the DOD, the National Aeronautics and Space Administration (NASA), and the Coast Guard, or to the intelligence community. DOD, NASA, and the Coast Guard are covered by 10 USC 2409, Contractor Employees: Protection from Reprisal for Disclosure of Certain Information. NDAA for FY 2013, Section 827, Enhancement of Whistleblower Protections For Contractor Employees, and those whistleblower protections provisions are permanent, not limited to a four-year period like the protections in the Section 828 civilian agency contractor pilot program. DOD issued a rule amending DFARS subpart 203.9, Whistleblower Protections for Contractor Employees, on the same day as FAC 2005-70.)

On December 16, 2016, Public Law 114-261 was enacted into law. It amended 41 USC 4712 to make the whistleblower protections permanent, just before the scheduled January 1, 2017, expiration of the pilot program.

To implement Public Law 114-261 and make the Section 828 pilot program permanent, this rule proposes the make the following changes to FAR subpart 3.9, Whistleblower Protections for Contractor Employees, and its clause, FAR 52.203-17, Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights:

■ FAR 3.900, Scope of Subpart, would be amended to delete the discussion of 41 USC 4705, Protection of Contractor Employees from Reprisal for Disclosure of Certain Information, because its successor statute, 41 USC 4712, has been made permanent. 41 USC 4705 was the prior whistleblower statute; it was implemented by FAR 3.901 through 3.906 but suspended for the duration of the 41 USC 4712 pilot program. This proposed rule would remove FAR 3.901 through FAR 3.906 and replace them with FAR 3.908 and its subsections (see next).

■ FAR 3.908 and its subsections would be relocated to FAR 3.900 through 3.906 as follows:

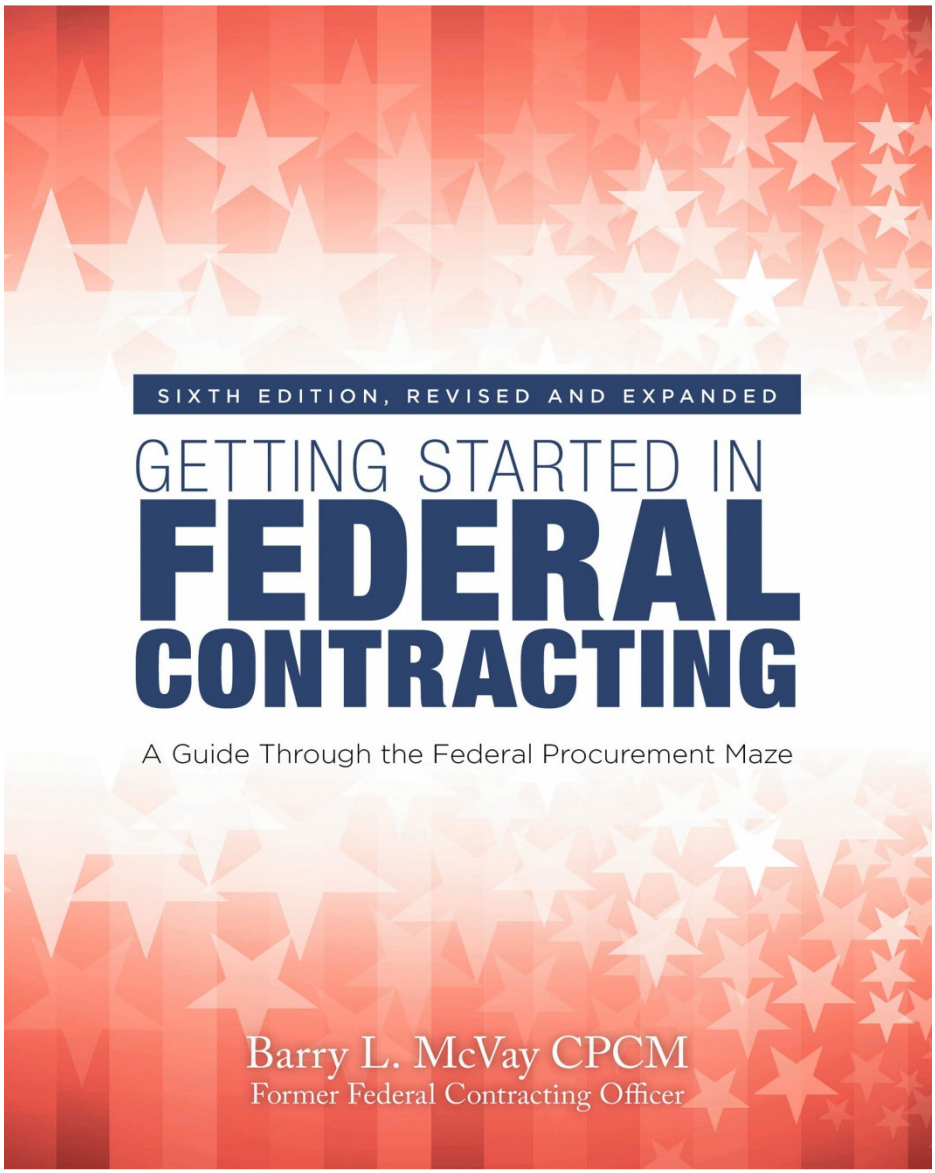
- FAR 3.908-1, Scope of Section, would be relocated as paragraph (a) of FAR 3.900, Scope of Subpart.
- FAR 3.908-2, Definitions, would be relocated as FAR 3.901, Definitions.
- FAR 3.908-3, Policy, would be relocated as FAR 3.903, Policy.
- FAR 3.908-4, Filing Complaints, would be relocated as FAR 3.904-1, Procedures for Filing Complaints.
- FAR 3.908-5, Procedures for Investigating Complaints, would be relocated as FAR 3.904-2, Procedures for Investigating Complaints, and amended to state that the complainant, contractor, and/or subcontractor shall submit responses to the written report to both the head of the agency and the Office of Inspector General.
- FAR 3.908-6, Remedies, would be relocated as FAR 3.905-1, Remedies.
- FAR 3.908-7, Enforcement of Orders, would be relocated as FAR 3.905-2, Enforcement of Orders.
- FAR 3.908-8, Classified Information, would be relocated as FAR 3.902, Classified Information.
- FAR 3.908-9, Contract Clause, would be relocated as FAR 3.906, Contract Clause.

■ FAR 52.203-17, Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights, would be retitled "Contractor Employee Whistleblower Rights" and amended to remove the reference to Section 828, which is no longer necessary since 41 USC 4712 has been made permanent.

In addition, Public Law 114-261 also clarifies that the cost principles at paragraph (k) of 10 USC 2324, Allowable Costs Under Defense Contracts, 41 USC 4304, Specific Costs Not Allowable, and 41 USC 4310, Proceeding Costs Not Allowable, that prohibit reimbursement of certain legal costs (including costs incurred responding to complaints under 10 USC 2409 and 41 USC 4712) apply to costs incurred by a contractor, subcontractor, or personal services contractor. To implement this provision of Public Law 114-261, this proposed rule would amend FAR 31.205-47, Costs Related to Legal and Other Proceedings, and FAR 31.603, Requirements [for contracts with state, local, and federally recognized Indian tribal governments], to add "or subcontract" after "contract" wherever it occurs, and to add "or subcontractor" after "contractor" wherever it occurs. There is one exception: "or subcontract" is not added to FAR 31.205-47(b)(3)(ii) and (iii), which address a final decision by an appropriate official to rescind, void, or terminate a contract for default, because the government does not have the authority to rescind, void, or terminate a subcontract. Also, the terms "personal services contract" and "personal services contractor" are not added to the FAR because they are covered by the terms "contract" and "contractor."

Comments on this proposed rule must be submitted no later than February 25 2019, identified as FAR Case 2017-005, by either of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; or (2) mail: General Services Administration, Regulatory-Secretariat Division (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd floor, Washington, DC 20405.

REVISED AND EXPANDED!



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