Panoptic Enterprises'

FEDERAL CONTRACTS PERSPECTIVE

Federal Acquisition Developments, Guidance, and Opinions

Vol. XX, No. 3 **March 2019**

DFARS AMENDED TO COMPLY WITH NDAA STATUTORY CHANGES, DIRECTIVES

The Department of Defense (DOD) conducted a little tidying up of the Defense Federal Acquisition Regulation Supplement (DFARS) during February by issuing seven final rules, primarily to implement provisions of various National Defense Authorization Acts (NDAAs). In addition, DOD proposed a rule to implement another NDAA provision, and issued a memorandum to comply with yet another NDAA provision.

CONTENTS

DFARS Amended Comply with NDAA Directives 1
Navy Acquisition Regulations Trimmed Down 10
Two Agencies Address Their Mentor-Protégé Programs 11
Michael Wooten Nominated to be OFPP Administrator . 12
Prompt Payment Interest Rate Set at 3 5/8%..... 12

■ **Exemption from Design-Build Selection Procedures:** This finalizes, with an editorial correction, the rule that proposed to add Defense Federal Acquisition Regulation Supplement (DFARS) subpart 236.3, Two-Phase Design-Build Selection Procedures, to implement Section 823 of the NDAA for Fiscal Year (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 Federal Acquisition Regulation (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…"

A rule was proposed that would add DFARS subpart 236.3, consisting of paragraph (a)(4) of DFARS 236.303-1, Phase One, to be used in place of the procedures in FAR 36.303-1(a)(4). This paragraph included the new authority: "(i) If the contract value exceeds $4 million, the maximum number of offerors specified in the solicitation that are to be selected to submit phase-two proposals shall not exceed five, unless…the solicitation is issued for an indefinite-delivery indefinite-quantity contract for design-build construction…" (along with the other provisions of FAR 36.303-1(a)(4)).

Three respondents submitted comments on the proposed rule, but none of the comments were adopted, so the proposed rule is finalized without changes. For more on the proposed rule, see the September 2018 ***Federal Contracts Perspective*** article "DOD Returns from Summer Vacation with Lots of Rules."

■ **Modification of "Transportation of Supplies by Sea" Clause:** This finalizes, without changes, the rule that proposed to modify DFARS 252.247-7023, Transportation of Supplies by Sea, to include the instructions in DFARS 252.247-7024, Notification of Supplies by Sea, to streamline instructions to contractors regarding notifications of transportation of supplies by sea.

DFARS 252.247-7023 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 was required to be included in contracts when the contractor indicated in DFARS 252.247-7022, Representation of Extent of Transportation by Sea, that it did not anticipate transporting supplies by sea. However, if the contractor learned that supplies would be transported by sea, DFARS 252.247-7024 required 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 was associated with the requirements of DFARS 252.247-7023, it was proposed that the text of the two clauses be combined to minimize the number of clauses contained in the contract. Therefore, a rule was proposed to include the pertinent text of DFARS 252.247-7024 as paragraph (h) of DFARS 252.247-7023, and the rest of DFARS 252.247-7024 would be removed.

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

■ **Extension of Supply Chain Risk Management Authority:** This final rule amends DFARS subpart 239.73, Requirements for Information Relating to Supply Chain Risk, to implement the NDAA for FY 2019 (Public Law 115-232), Section 881, Permanent Supply Chain Risk Management Authority, which codifies the authority for information relating to supply chain risk at Title 10 of the U.S. Code, Section 2339a (10 USC 2339a), and repeals the September 30, 2018, sunset date specified in the NDAA for FY 2011 (Public Law 111-383), paragraph (g) of Section 806, Requirements for Information Relating to Supply Chain Risk.

Vivina McVay, Editor-in Chief

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

Section 806 of the NDAA for FY 2011 authorizes the DOD to establish a pilot program to consider the impact of supply chain risk in specified types of procurements related to national security systems. It defined supply chain risk as "the risk that an adversary may sabotage, maliciously introduce unwanted function, or otherwise subvert the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of a covered system so as to surveil, deny, disrupt, or otherwise degrade the function, use, or operation of such system." Section 806 established September 30, 2018, as the expiration date for this pilot program.

DFARS subpart 239.73 implements Section 806. It authorize the secretaries of Defense, Army, Navy, and Air Force to exclude certain sources when conducting procurements of national security systems (that is, one that involves intelligence activities; involves cryptologic activities related to national security; involves command and control of military forces; involves equipment that is an integral part of a weapon or weapons system; or is critical to the direct fulfillment of military or intelligence missions) or an item of information technology that is to be included in a national security system. These secretaries are authorized to "(a) exclude a source that fails to meet qualification standards established...for the purpose of reducing supply chain risk in the acquisition of covered systems; (b) exclude a source that fails to achieve an acceptable rating with regard to an evaluation factor providing for the consideration of supply chain risk in the evaluation of proposals for the award of a contract or the issuance of a task or delivery order; [and] (c) withhold consent for a contractor to subcontract with a particular source or direct a contractor for a covered system to exclude a particular source from consideration for a subcontract under the contract..."

Section 881 of the NDAA for FY 2019 made this authority permanent by codifying it at 10 USC 2339a and by removing the September 30, 2018, expiration date. To implement Section 881, this final rule removes the expiration date from DFARS 239.7300, Scope of Subpart, and changes numerous statutory citations from "Section 806 of Public Law 111-383" to "10 USC 2339a" throughout DFARS subpart 239.73, the provision at DFARS 252.239-7017, Notice of Supply Chain Risk, the clause at DFARS 252.239-7018, Supply Chain Risk, and elsewhere in the DFARS.

■ **Use of Commercial or Non-Government Standards:** This finalizes, with editorial changes, the rule that proposed to implement the NDAA for FY 2017 (Public Law 114-328), Section 875, Use of Commercial or Non-Government Standards in Lieu of Military Specifications and Standards, which requires DOD to "revise the Defense Federal Acquisition Regulation Supplement to encourage contractors to propose commercial or non-government standards and industry-wide practices that meet the intent of the military specifications and standards."

Paragraph (b) of DFARS 211.107, Solicitation Provision [for selecting and developing requirements documents], stated that "DOD uses the categorical method of reporting. Do not use the provision at FAR 52.211-7, Alternatives to Government-Unique Standards, in DOD solicitations." FAR 52.211-7 states that "the offeror may propose voluntary consensus standards that meet the government's requirements as alternatives to the government-unique standards. The government will accept use of the voluntary consensus standard instead of the government-unique standard if it meets the government's requirements unless inconsistent with law or otherwise impractical."

DFARS 211.107(b) contradicted Section 875. Therefore, DOD proposed to amend DFARS 211.107(b) to direct contracting officers to "use the provision at FAR 52.211-7, Alternatives to

Government-Unique Standards, in DOD solicitations that include military or government-unique specifications and standards."

Four respondents submitted comments on the proposed rule, but none of the comments were adopted. However, the final rule makes a couple of minor editorial changes to the proposed rule. For more on the proposed rule, see the July 2018 ***Federal Contracts Perspective*** article "DOD Continues Deluge of Rules, Deviations."

■ **Amendments Related to General Solicitations:** This finalizes, with an editorial change, the rule that proposed to amend DFARS part 234, Major System Acquisition, and DFARS part 235, Research and Development Contracting, to implement two sections of the NDAA for FY 2018 (Public Law 115-91): Section 221, Expansion of Definition of Competitive Procedures to Include Competitive Selection for Award of Science And Technology Proposals, and Section 861, Contract Authority for Advanced Development of Initial or Additional Prototype Units.

Paragraph (2) of Title 10 of the U.S. Code, Section 2302, Definitions (10 USC 2302), consists of a definition of "competitive procedures." Paragraph (2)(B) stated that "the term 'competitive procedures' means procedures under which the head of an agency enters into a contract pursuant to full and open competition. Such term also includes...(B) the competitive selection for award of *basic research* proposals resulting from a general solicitation and the peer review or scientific review (as appropriate) of such proposals…" (*emphasis* added).

Section 221 of the NDAA for FY 2018 amended 10 USC 2302(2)(B) by replacing "basic research" with "science and technology". Changing the words "basic research" to "science and technology" expanded the authority to use other competitive procedures for other types of research proposals, such as applied research, advanced technology development, and advanced component development and prototypes research.

One of the solicitation methods for research and development proposals is a "broad agency announcement" (BAA), which is defined in FAR 2.101, Definitions, as "a general announcement of an agency's research interest including criteria for selecting proposals and soliciting the participation of all offerors capable of satisfying the government's needs." In addition, paragraph (d)(2) of FAR 6.102, Use of Competitive Procedures, states, "competitive selection of basic and applied research and that part of development not related to the development of a specific system or hardware procurement is a competitive procedure if award results from: (i) a broad agency announcement that is general in nature identifying areas of research interest, including criteria for selecting proposals, and soliciting the participation of all offerors capable of satisfying the government's needs; and (ii) a peer or scientific review." Since Section 221 parallels FAR 2.101 and FAR 6.102, Section 221 now permits the use of BAAs for competitive selection of science and technology proposals.

Section 861 of the NDAA for FY 2018 adds 10 USC 2302e, Contract Authority for Advanced Development of Initial or Additional Prototype Units, which authorizes "a contract initially awarded from the competitive selection of a proposal resulting from a general solicitation referred to in section 2302(2)(B) of this title [10 USC 2302(2)(B)] may contain a contract line item or contract option for: (1) the provision of advanced component development, prototype, or initial production of technology developed under the contract; or (2) the delivery of initial or additional items if the item or a prototype thereof is created as the result of work performed under the contract." The term of such contract line item or option cannot exceed two years, nor can its value exceed $100,000,000 in FY 2017 constant dollars (meaning the $100,000,000 limit will be adjusted to reflect inflation since FY 2017).

To implement Section 221 and Section 861, the following changes were proposed:

- Amend DFARS 234.005-1, Competition [for major system acquisitions], as follows:
  - In paragraph (1), replace "general solicitation" with "broad agency announcement" in the text: "A contract that is initially awarded from the competitive selection of a proposal resulting from a *general solicitation* [change to "*broad agency announcement*"] may contain a contract line item or contract option for the provision of advanced component development, prototype, or initial production of technology developed under the contract or the delivery of initial or additional items if the item or a prototype thereof is created as the result of work performed under the contract only when it adheres to the following limitations…" (*emphasis* added).
  - Among the limitations listed in paragraph (1):
    - Amend paragraph (1)(ii), which states, "The term of the contract line item or contract option shall be for not more than <I>12 months</I>", to state, "The term of the contract line item or contract option shall be for not more than *2 years*" (*emphasis* added).
    - Amend paragraph (1)(iii), which states, "The dollar value of the work to be performed pursuant to the contract line item or contract option shall not exceed the lesser of: (A) the amount that is three times the dollar value of the work previously performed under the contract; or (B) $20 million", to "The dollar value of the work to be performed pursuant to the contract line item or contract option shall not exceed $100 million in fiscal year 2017 constant dollars. (10 USC 2302e)."
  - Remove paragraph (2), which states, "A contract line item or contract option may not be exercised under this authority after September 30, 2019." Section 861 repealed the deadline by making the authority permanent.
- Amend DFARS 235.006-71, Competition [for research and development contracts], to add a new paragraph (a), which would state, "Use of a broad agency announcement with peer or scientific review for the award of science and technology proposals in accordance with [DFARS] 235.016(a) fulfills the requirement for full and open competition (see [DFARS] 206.102(d)(2))." [New DFARS 206.102, Use of Competitive Procedures, which would consist of paragraph (d)(2), would state: "(d) Other Competitive Procedures. (2) In lieu of FAR 6.102(d)(2), competitive selection of science and technology proposals resulting from a broad agency announcement with peer or scientific review, as described in [DFARS] 235.016(a) (10 USC 2302(2)(B))."]
- Add DFARS 235.016, Broad Agency Announcement, which would state: "(a) *General.* A broad agency announcement with peer or scientific review may be used for the award of science and technology proposals. Science and technology proposals include proposals for the following: (i) basic research (budget activity 6.1); (ii) applied research (budget

activity 6.2); (iii) advanced technology development (budget activity 6.3); [and] (iv) advanced component development and prototypes (budget activity 6.4)."

One respondent submitted a comment on the proposed rule but it was not adopted, so the proposed rule is finalized without change except for the correction of a typographical error. For more on the proposed rule, see the November 2018 ***Federal Contracts Perspective*** article "DOD Keeps DFARS Cleanup Rolling Along."

■ **Antiterrorism Training Requirements for Contractors:** This finalizes, with minor editorial changes, the rule that proposed to add DFARS subpart 204.72, Antiterrorism Awareness Training, and corresponding clause DFARS 252.204-7004, 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 (available at **http://www.esd.whs.mil/Directives/issuances/dodi/**, but a DOD PKI [public key infrastructure] certificate is required to access this document).

The proposed DFARS subpart 204.72 would include DFARS 204.7202, Policy, which 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 subpart 204.72 would include DFARS 204.7203, Contract Clause, which would prescribe DFARS 252.204-7004 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 252.204-7004 would advise contractors of the training requirements, provide a reference to additional information and guidance available on the internet (**http://jko.jten.mil/**), and instruct contractors to include the substance of the clause in all subcontracts that require routine physical access to a federally-controlled facility or military installation.

No comments were submitted on the proposed rule, so it is finalized with several minor editorial changes, including to update the website address cited in DFARS 252.204-7004 for additional information and guidance on the training requirements. For more on the proposed rule, see the September 2018 ***Federal Contracts Perspective*** article "DOD Returns from Summer Vacation with Lots of Rules."

■ **Updated Charter of the Armed Services Board of Contract Appeals:** This final rule publishes the updated Charter of the Armed Services Board of Contract Appeals (ASBCA), dated April 9, 2018, in Appendix A of the DFARS. The previous version of the charter was issued May 14, 2007.

The ASBCA is chartered to serve as the authorized representative of the Secretary of Defense and the Secretaries of the Army, Navy, and Air Force in hearing, considering, and determining appeals by contractors from decisions of contracting officers or their authorized representatives or other authorities regarding claims on contracts under the Contract Disputes Act of 1978 or

other remedy-granting provisions. The ASBCA Charter is Part 1 of DFARS Appendix A; the ASBCA rules are Part 2 of DFARS Appendix A.

The updated Charter implements changes to ASBCA internal administration to better support the Board's mission of hearing, considering, and determining appeals by contractors from decisions of contracting officers or their authorized representatives or other authorities on disputed questions. In addition to minor administrative changes and a rearranging of paragraphs to improve the logical flow of the document and add clarity, the following changes were made to the Charter:

- References to "Under Secretary of Defense for Acquisition, Technology and Logistics" are changed to "Under Secretary of Defense responsible for acquisition."

- Former paragraph 4 (new paragraph 3) is shortened to clearly state the Board Chairman's broad powers and responsibilities and to remove detailed processes deemed not appropriate for this type of document.

- The requirement for the Board to forward quarterly reports of the Board's proceedings to various DOD officials is removed, but the requirement for annual reports is retained.

■ **Undefinitized Contract Actions:** This proposed rule would amend DFARS subpart 215.4, Contract Pricing, and DFARS subpart 217.74, Undefinitized Contract Actions, to implement the NDAA for FY 2017 (Public Law 114-328), Section 811, Modified Restrictions on Undefinitized Contractual Actions, and the NDAA for FY 2018 (Public Law 115-91), Section 815, Limitation on Unilateral Definitization. Section 811 modifies requirements on undefinitized contractual actions (UCA) regarding calculations of risk-based profit objectives, timing for definitizations, foreign military sales (FMS). Section 815 establishes limitations on unilateral definitizations of UCAs over $50,000,000.

To implement Section 811 of the NDAA for FY 2017, the following changes to the DFARS are proposed:

- DFARS 215.404-71-3, Contract Type Risk and Working Capital Adjustment, explains how the contracting officer is to determine contract type risk when using the weighted guidelines method to develop a prenegotiation profit or fee objective. DFARS 215.404-71-3(d) addresses evaluation criteria, and subparagraph (d)(2) addresses mandatory evaluation criteria. Subparagraph (d)(2)(i) states, "The contracting officer shall assess the extent to which costs have been incurred prior to definitization of the contract action…When costs have been incurred prior to definitization, generally regard the contract type risk to be in the low end of the designated range. If a substantial portion of the costs have been incurred prior to definitization, the contracting officer may assign a value as low as 0 percent, regardless of contract type." This proposed rule would amend subparagraph (d)(2)(i) by adding the following language from Section 811 immediately following the existing text: "[However,] if a contractor submits a qualifying proposal to definitize an undefinitized contract action and the contracting officer for such action definitizes the contract after the end of the 180-day period beginning on the date on which the contractor submitted the qualifying proposal (as defined in [DFARS] 217.7401(c) [Definitions]), the profit allowed on the contract shall accurately reflect the

cost risk of the contractor as such risk existed on the date the contractor submitted the qualifying proposal."

- Paragraph (c) of DFARS 217.7401, Definitions, provides the following definition for "qualifying proposal": "a proposal containing sufficient data for the DOD to do *complete and meaningful* analyses and audits of the (1) data in the proposal; and (2) any other data that the contracting officer has determined DOD needs to review in connection with the contract" (*emphasis* added) However, paragraph (j)(2) of 10 USC 2326, Undefinitized Contractual Actions: Restrictions, states that "the term 'qualifying proposal' means a proposal that contains sufficient information to enable the Department of Defense to conduct a *meaningful* audit of the information contained in the proposal." Therefore, to align DFARS 217.7401(c) with 10 USC 2326(j)(2), the proposed rule would remove "complete and" from DFARS 217.7401(c).

- Paragraph (a) of DFARS 217.7402, Exceptions, lists the different kinds of UCAs that are not subject to the provisions of DFARS subpart 217.74. Subparagraph (a)(1) lists "UCAs for foreign military sales" as one of the exceptions. The proposed rule would remove subparagraph (a)(1) because the Section 811 provisions on UCAs for foreign military sales would be added to DFARS 217.7404 (see next).

- DFARS 217.7404, Limitations, would be amended by adding paragraph (a) to address UCAs for an FMS. It would consist of language taken from Section 811: "(1) A contracting officer may not enter into a UCA for a foreign military sale unless (i) the contract action provides for agreement upon contractual terms, specifications, and price by the end of the 180-day period beginning on the date on which the contractor submits a qualifying proposal…" and cross-reference existing approval procedures: "and (ii) the contracting officer obtains approval from the head of the contracting activity to enter into a UCA in accordance with [DFARS] 217.7404-1 [Authorization]." In addition, paragraph (a)(2) would consist of language taken almost verbatim from 10 USC 2326(b)(4): "The head of an agency may waive the requirements of paragraph (a)(1) of this section, if a waiver is necessary in order to support any of the following operations: (i) a contingency operation [and] (ii) a humanitarian or peacekeeping operation."

- Paragraph (a)(1) of DFARS 217.7404-3, Definitization Schedule, would be amended to include language taken almost verbatim from Section 811. Currently, DFARS 217.7404-3(a)(1) states, "(a) UCAs shall contain definitization schedules that provide for definitization by the earlier of (1) the date that is 180 days after issuance of the action (this date may be extended but may not exceed the date that is 180 days after the contractor submits a qualifying proposal)…" The proposed rule would amend paragraph (a)(1) to reflect Section 811: "(a) UCAs shall contain definitization schedules that provide for definitization by the earlier of (1) the date that is 180 days after the contractor submits a qualifying proposal. *This date may not be extended beyond an additional 90 days without a written determination by the Secretary of the military department concerned, the head of the defense agency concerned, the commander of the combatant command concerned, or the Under Secretary of Defense for Acquisition and Sustainment that it is in the best interests of the military department, the defense agency, the combatant command, or the Department of Defense, respectively, to continue the action…*" (*emphasis* added).

- Paragraph (a) of DFARS 217.7404-6, Allowable Profit, would be amended. The introductory text and paragraph (a) currently state: "When the final price of a UCA is negotiated after a substantial portion of the required performance has been completed, the head of the contracting activity shall ensure the profit allowed reflects (a) any reduced cost risk to the contractor for costs incurred during contract performance before negotiation of the final price…" This proposed rule would amend paragraph (a) by adding the following language from Section 811 immediately following the existing text: "However, if a contractor submits a qualifying proposal to definitize an undefinitized contract action and the contracting officer for such action definitizes the contract after the end of the 180-day period beginning on the date on which the contractor submitted the qualifying proposal, the profit allowed on the contract shall accurately reflect the cost risk of the contractor as such risk existed on the date the contractor submitted the qualifying proposal." This proposed addition is almost identical to the proposed addition to DFARS 215.404-71-3(d)(2)(i) (see above).

To implement Section 815 NDAA for FY 2018, paragraph (b) would be added to DFARS 217.7404. The title of the paragraph would be "Unilateral Definitization by the Contracting Officer" and would incorporate the provisions of Section 815: "Any UCA with a value greater than $50 million may not be unilaterally definitized until (1) the earlier of (i) the end of the 180-day period, beginning on the date on which the contractor submits a qualifying proposal to definitize the contractual terms, specifications, and price; or (ii) the date on which the amount of funds expended under the contractual action is equal to more than 50 percent of the negotiated overall not-to-exceed price for the contractual action; (2) the service acquisition executive for the military department that awarded the contract or the Under Secretary of Defense for Acquisition and Sustainment if the contract was awarded by a defense agency or other component of the Department of Defense, approves the definitization in writing; (3) the contracting officer provides a copy of the written approval to the contractor; and (4) a period of 30 calendar days has elapsed after the written approval is provided to the contractor."

Comments on this proposed rule must be submitted no later than April 16, 2019, identified as DFARS Case 2018-D008, 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.

■ **Updated List of Supplies to be Competed When Purchasing from Federal Prison Industries (FPI):** Section 827 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181) requires the DOD to publish a list of product categories for which the FPI's share of the DOD market is greater than 5%. Products on the list must be procured using competitive (or fair opportunity) procedures (see DFARS 208.602-70, Acquisition of Items for Which FPI Has a Significant Market Share). In conducting such a competition, DOD contracting officers must consider a timely offer from FPI for any of the products on the list. In addition, FPI must be included in the process even if the procurement otherwise would have been set aside in accordance with FAR part 19, Small Business Programs. When the FPI item is determined to provide the best value as a result of FPI's response to a competitive solicitation, contracting officers are to follow the ordering procedures at **http://www.unicor.gov**.

Kim Herrington, the Acting Principal Director of Defense Pricing and Contracting, has forwarded a memorandum to each service's deputy assistant secretary for procurement that contains a list of such product categories, by Federal Supply Classification (FSC) codes. The following is the list of products:

FSC	Description
7125	Cabinets, Lockers, Bins, and Shelving
7210	Household Furnishings
7540	Standard Forms
7810	Athletic and Sporting Equipment
8420	Underwear and Nightwear, Men's
8470	Armor, Personal

FSC 7210, FSC 7540, FSC 7810, and FSC 8470 are added to the list. FSC 7230, Draperies, Awnings, and Shades, and FSC 8405, Outerwear, Men's, are removed from the list.

For more on the changes made to the list last year, see the April 2018 ***Federal Contracts Perspective*** article "DOD Amends Mentor-Protégé Program."

NAVY ACQUISITION REGULATIONS TRIMMED DOWN

The Department of the Navy has decided to trim down the Department of the Navy Acquisition Regulations because the coverage is duplicative of that in the Federal Acquisition Regulation (FAR) and the Defense FAR Supplement (DFARS).

■ **Removal of Part 5215, Contracting by Negotiation:** This final rule removes Part 5215 of the Department of the Navy Acquisition Regulations because the content is duplicative of FAR part 15 and DFARS part 215 and is obsolete. Clause 5252.215-9000, Submission of Cost or Pricing Data, which is referenced in Section 5215.407, Solicitation Provisions, has been subsumed into FAR 15.403-5, Instructions for Submission of Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.

■ **Removal of Part 5242, Contract Administration and Audit Services:** This final rule removes Part 5242, which consists of Subpart 5242.90, Refunds Requirements (Spares and Support Equipment), because the content is duplicative of DFARS subpart 242.71, Voluntary Refunds, and DFARS Procedures, Guidance and Instruction (PGI) 242.71, Voluntary Refunds, both of which contain guidance on Department of Defense policy on voluntary refunds for spares and other items. Additional guidance related to the acquisition of spare parts is contained in DFARS subpart 217.75, Acquisition of Replenishment Parts, and DFARS PGI 217.7503, Spares Acquisition Integrated with Production.

■ **Removal of Part 5252, Solicitation Provisions and Contract Clauses:** This final rule removes Part 5252, which consists of clause 5252.215-9000, Submission of Cost or Pricing Data, and clause 5252.242-9000, Refunds, because both Part 5215 and Part 5242 are removed as duplicative and obsolete. See the previous two final rules.

TWO AGENCIES ADDRESS THEIR MENTOR-PROTÉGÉ PROGRAMS

The General Services Administration (GSA) and the Department of Energy (DOE) took action on their respective mentor-protégé programs by going in two different directions.

Title 13 of the Code of Federal Regulations (CFR), Business Credit and Assistance, Section 125.9 (13 CFR 125.9), What are the rules governing SBA's small business mentor-protégé program?, provides the following explanation of the mentor-protégé program: "The small business mentor-protégé program is designed to enhance the capabilities of protégé firms by requiring approved mentors to provide business development assistance to protégé firms and to improve the protégé firms' ability to successfully compete for federal contracts. This assistance may include technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts (either from the mentor to the protégé or from the protégé to the mentor); trade education; and/or assistance in performing prime contracts with the government through joint venture arrangements. Mentors are encouraged to provide assistance relating to the performance of contracts set aside or reserved for small business so that protégé firms may more fully develop their capabilities." By mentoring a protégé, the mentor: (1) establishes a long-term business relationship with the protégé, thus improving the performance of subcontracts; (2) is permitted to acquire a minority interest in the protégé, and (3) can enter into joint-venture arrangements with its protégé to compete for, and perform on, federal government contracts.

Several agencies developed their own mentor-protégé programs. All the programs had different requirements, different rules, different procedures, etc. Congress recognized that the various mentor-protégé programs helped small businesses develop into viable and important government contractors, but that the agencies' disparate programs were needlessly confusing and burdensome. Therefore, Congress passed the NDAA for FY 2013 (Public Law 112-239), which included Section 1641, Mentor-Protégé Programs, which authorizes the Small Business Administration (SBA) to "establish a mentor-protégé program for ***all*** small business concerns (***emphasis*** added)." In addition, Section 1641 prohibits agencies from conducting their own mentor-protégé programs unless the head of the agency submits a plan to SBA for approval. (**EDITOR'S NOTE:** This does not apply to DOD because it has the necessary statutory and regulatory framework for its own separate mentor-protégé program).

In 2016 the SBA published a final rule establishing a governmentwide mentor-protégé program applicable to civilian agencies in which all small businesses are eligible (see the August 2016 ***Federal Contracts Perspective*** article "Governmentwide Mentor-Protégé Program Established"). Agencies were given one year to decide whether to adopt the SBA's mentor-protégé program or submit to SBA for approval a plan for continuing a previously existing mentor-protégé program.

GSA has decided not to continue its mentor-protégé program, so it published a direct final rule in February repealing the regulations implementing its mentor-protégé program in GSA Acquisition Regulation (GSAR) subpart 519.70, GSA Mentor-Protégé Program, and associated clauses GSAR 552.219–75, GSA Mentor-Protégé Program, and GSAR 552.219–76, Mentor Requirements and Evaluation.

DOE has taken the other approach. DOE decided to continue administering its mentor-protégé program, so it developed a plan, submitted it to the SBA, and SBA approved the DOE mentor-protégé program on February 20, 2018. The DOE mentor-protégé program required the protégé to be either: (1) a business certified by the SBA in the 8(a) Program; (2) a small

disadvantaged business (SDB); (3) a women-owned small business (WOSB); (4) a Historically Black College and University or other minority institution of higher learning (HBCU/Ml); or (5) a small business concern owned and controlled by service-disabled veterans.

However, on July 10, 2018, SBA gave DOE approval to amend the language in the DOE Acquisition Regulation (DEAR) to expand the eligibility for its mentor-protégé program to all small businesses, including HUBZone [Historically Underutilized Business Zone] small businesses. Therefore, DOE issued a class deviation revising DEAR subpart 919.70, The Department of Energy Mentor-Protégé Program, and DEAR 952.219-70, DOE Mentor-Protégé Program, to open participation to *all* small businesses. This is consistent with SBA's "All Small Business Mentor-Protege Program" and will enable more small businesses to receive business development assistance from DOE prime contractors.

MICHAEL WOOTEN NOMINATED TO BE OFPP ADMINISTRATOR

President Trump has nominated Dr. Michael Eric Wooten to be the next administrator of the Office of Federal Procurement Policy (OFPP). Dr. Wooten is a senior advisor for acquisitions at the Department of Education's Federal Student Aid office.

He recently served in the Trump Administration as the Department of Education's acting Assistant Secretary and Deputy Assistant Secretary for Career, Technical, and Adult Education. Prior to this appointment, Dr. Wooten served as Deputy Chief Procurement Officer for the District of Columbia government.

Between 2005 and 2015, he served as a professor of contract management and in senior staff and acquisition workforce positions at Defense Acquisition University.

Dr. Wooten holds a doctorate in Higher Education Management from the University of Pennsylvania, an M.S. in contract management from the Naval Postgraduate School, master's degrees from George Washington University and Norwich University, and a B.A. in psychology from Chapman University.

He is a retired Marine Corps major and previously served in Afghanistan.

PROMPT PAYMENT INTEREST RATE SET AT 3 5/8%

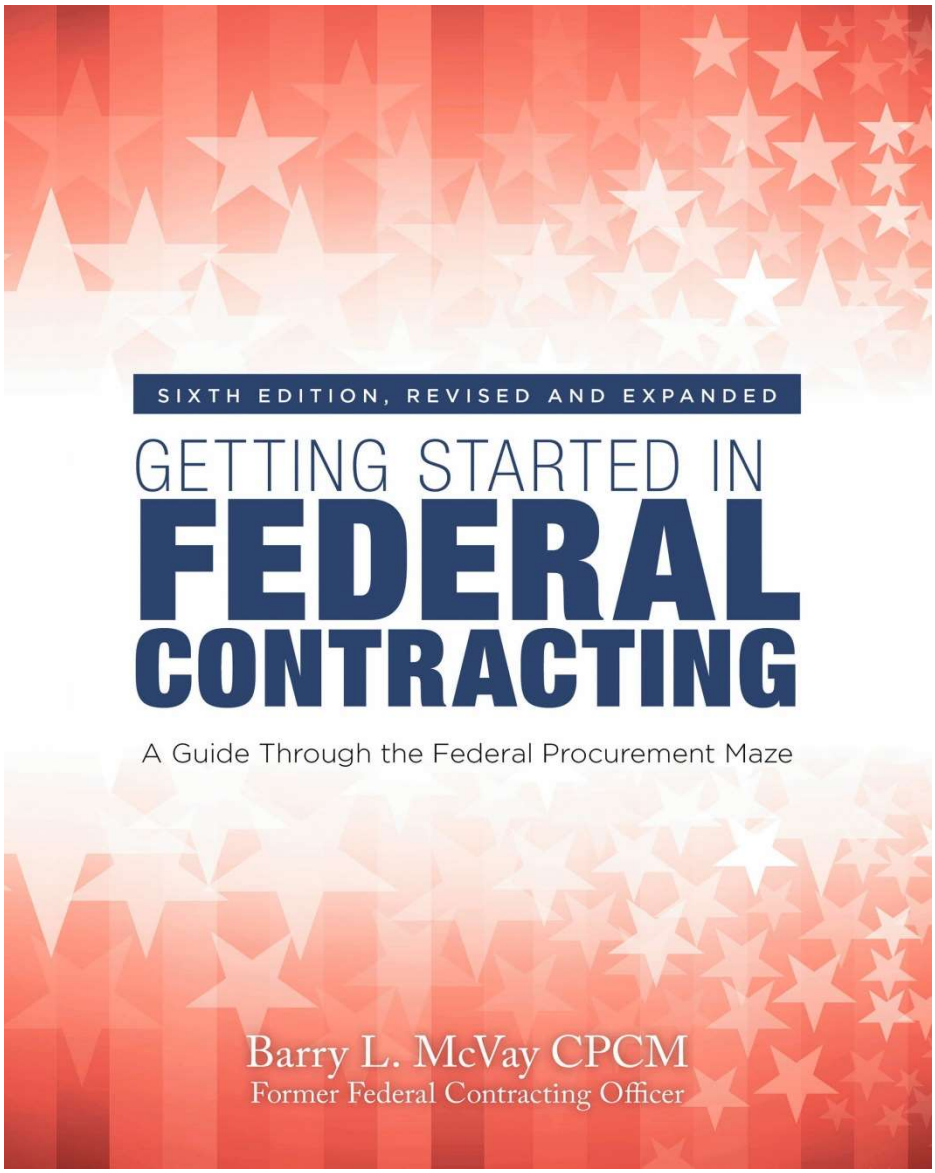
The Treasury Department has established 3 5/8% (3.625%) as the interest rate for the computation of payments made between January 1, 2019, and June 30, 2019, under the Prompt Payment Act and the Contracts Disputes Act. This rate is also used in facilities capital cost of money calculations.

The interest rate for the prior six-month period (July 1, 2018, through December 31, 2018) was 3 1/2% (3.5%). The interest rate for January 1, 2018, through June 30, 2018, was 2 5/8% (2.625%).

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

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.

REVISED AND EXPANDED!



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

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

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