

FEDERAL CONTRACTS PERSPECTIVE

Federal Acquisition Developments, Guidance, and Opinions

SBA ISSUES COMBINED SBIR PROGRAM AND STTR PROGRAM POLICY DIRECTIVE

The Small Business Administration (SBA) has combined the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) program policy directives into a single document because the general structure of both programs is the same. Both programs use a phased process to solicit proposals and award funding agreements for research and research and development (R/R&D) to meet stated agency needs or missions: Phase I, Experimental or Theoretical Research; Phase II, Development of the Research Conducted in Phase I; and Phase III, Commercial Application of the Research Developed in Phase II. This single document clarifies the data rights and Phase III preference afforded to SBIR and STTR small business awardees, adds definitions relating to data rights, and clarifies the benchmarks for progress toward commercialization.

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The SBIR requires all agencies with R&D budgets of more than \$100,000,000 to set aside 3.2% of their R&D budgets for small businesses. Approximately \$1.7 billion is awarded to small businesses through the SBIR program each year.

The following 11 agencies take part in the SBIR program:

- Department of Agriculture
- Department of Commerce
- Department of Defense
- Department of Education
- Department of Energy
- Department of Health and Human Services
- Department of Homeland Security
- Department of Transportation
- Environmental Protection Agency
- National Aeronautics and Space Administration
- National Science Foundation

The STTR program requires all agencies with R&D budgets of more than \$1 billion to set aside 0.45% of their R&D budgets for small businesses. Approximately \$200,000,000 is awarded to small businesses through the STTR program each year.

The following five agencies participate in the STTR program:

- Department of Defense
- Department of Energy
- Department of Health and Human Services
- National Aeronautics and Space Administration
- National Science Foundation

Under both the SBIR and STTR programs, a small business is defined as a concern with no more than 500 employees (regardless of the applicable small business size standard) and is more than 50% owned and controlled by U.S. citizens.

The primary difference between the SBIR and the STTR programs is that small businesses must have a single nonprofit research institution as a partner to participate in the STTR program. The nonprofit research institution must be located in the U.S. and must be either: (1) a nonprofit college or university; (2) a domestic nonprofit research organization; or (3) a federally funded research and development center (FFRDC).

Both the SBIR and STTR programs expire on September 30, 2022.

The Small Business Act requires the SBA to issue a policy directive providing guidance to the federal agencies participating in the SBIR and STTR programs. Because of the similarity of the two programs, SBA decided to combine the two policy directives into one policy directive that covers both programs.

In April 2016, SBA issued a proposed rule to merge the two policy directives and to clarify the important issues relating to both programs, particularly concerning data rights, Phase III awards, and benchmarks toward commercialization achievement. SBA specifically requested comments on its clarification of the federal government's data rights in SBIR/STTR data during an SBIR/STTR protection period of not less than 12 years (increased from four years). In addition, SBA asked for comments on the federal government's unlimited rights in SBIR/STTR data after the protection period; the elimination of the extension of the protection period when a subsequent, related SBIR/STTR award is made; the language regarding prototypes; and the proposed establishment of a time limit of six months for SBIR/STTR awardees to correct or add omitted markings on SBIR/STTR data it has delivered. (For more on the proposed rule, see the May 2016 *Federal Contracts Perspective* article "SBA Proposes Joining SBIR and STTR Policies.")

Forty-two comments were submitted on the proposed rule. The comments supported combining the SBIR and STTR policy directives, the proposed clarifications of SBIR/STTR data rights during the protection period, and the clarifications of the Phase III preference

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

requirement and process (along with the majority of other proposed changes). However, several commenters, primarily small businesses, objected to the proposed removal of the ability to extend data rights through subsequent awards, the proposed 12-year protection period, and to the proposal that the government receive unlimited rights in SBIR/STTR data after the protection period expires. Commenters pointed out that these changes would reduce the incentive for small businesses to participate in the program and are antithetical to the small business commercialization goals of the programs.

The executive summary of the notice states, “SBA recognizes that to be efficient and effective at stimulating small business innovation, the SBIR/STTR programs must maintain the features of the programs that create strong incentives for small businesses to participate, and SBA must scrutinize whether changes to the SBIR/STTR policy directive are consistent with the goals of the programs. As a result, SBA is removing these specific proposed changes from this amendment and will work closely with the participating agencies to identify ways to address the related administrative concerns discussed in the proposed policy directive in a way that does not weaken the data rights protection of appropriately marked SBIR/STTR data.”

VA INCREASES CONTRACTING GOALS FOR VETERAN BUSINESSES

The Department of Veterans Affairs (VA) has announced that it is increasing its goals for contracting with veteran-owned small businesses (VOSBs) and service-disabled veteran-owned small businesses (SDVOSBs) by 5% of its total contract dollars, from 10% to **15% for SDVOSBs**, and from 12% to **17% for VOSBs** (SDVOSBs are a subset of VOSBs). The previous goals were established by VA in 2010.

These goals are established in compliance with paragraph (a) of Title 38 of the U.S. Code, Section 8127 (38 USC 8127), Small Business Concerns Owned and Controlled by Veterans: Contracting Goals and Preferences, which states, “In order to increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns owned and controlled by veterans with service-connected disabilities, the Secretary [of VA] shall (A) establish a goal for each fiscal year for participation in [VA] contracts (including subcontracts) by small business concerns owned and controlled by veterans who are not veterans with service-connected disabilities ...and (B) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans with service-connected disabilities...”

This increase is in response to the Supreme Court’s 2016 unanimous decision in *Kingdomware Technologies, Inc. v. United States* (No. 14-916). In 2012, the VA procured emergency notification services through the Federal Supply Schedule (FSS) from a non-VOSB veteran-owned business. Kingdomware Technologies protested to Government Accountability Office (GAO) that the VA procured multiple contracts through the FSS without employing the “rule of two,” which is specified in paragraph (d) of 38 USC 8127: “a contracting officer of the [VA] shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that *two or more* small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States” (*emphasis added*). The VA argued that the “rule of two” did not apply in this particular situation because the VA had already achieved its annual minimum goal for awards to veteran-owned

small businesses. Though the GAO determined that the VA's actions were unlawful, the VA declined to follow the GAO's.

Kingdomware Technologies filed suit but the various courts upheld VA's actions. However, upon appeal to the Supreme Court, the Supreme Court overturned the lower courts' decisions and ruled in favor of Kingdomware. "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement...Accordingly, the [VA] shall (or must) prefer veteran-owned small businesses when the rule of two is satisfied."

In his announcement of the new goals, VA Secretary Robert Wilkie said, "Three years ago, the U.S. Supreme Court underscored our mandate to do business with service-disabled and other veteran entrepreneurs. We have increased the dollars awarded each year, but now it's time to update the goals to reflect this new commitment. We need to lock in the gains we have made and continue to build for the future."

In FY 2017 (the last year for which official data is available), VA awarded \$5.1 billion in contracts to SDVOSBs and \$5.4 billion to VOSBs. These figures represent 19.5% and 20.6%, respectively, of VA's total procurement of \$26.1 billion.

Paragraph (i) of 38 USC 8127 directs VA to consider SDVOSBs first and VOSBs second, before considering other small business program preferences. Other federal agencies are covered by an SDVOSB program administered by the Small Business Administration (SBA), which has a goal of only 3% for awards to SDVOSBs (no goal for VOSBs). At these agencies, the governmentwide SDVOSB program has equal priority with other small business socioeconomic programs.

For more on *Kingdomware Technologies, Inc. v. United States*, see the July 2016 *Federal Contracts Perspective* article "Supreme Court Issues Two Acquisition-Related Decisions."

DOD SHAKES UP THE DFARS

After taking it easy in March, the Department of Defense went on a tear in April, issuing eight final rules, one interim rule, seven proposed rules, and one deviation. A majority of the final rules clean up the Defense Federal Acquisition Regulation Supplement (DFARS), deleting obsolete and duplicate clauses and making editorial changes (such as adding telephone numbers and website addresses for offices cited in the DFARS). While some of the proposed rules also clean up the DFARS, most of the proposed rules, the interim rule, and the deviation implement provisions of various National Defense Authorization Acts (NDAA).

■ **Repeal of Certain Defense Acquisition Laws:** This final rule amends Defense Federal Acquisition Regulation Supplement (DFARS) 202.101, Definitions, to implement the NDAA for Fiscal Year (FY) 2019 (Public Law 115-232), Section 812, Repeal of Certain Defense Acquisition Laws, which repeals more than 60 obsolete Defense acquisition laws, most of which have been completed, have expired, or do not affect procurement regulations.

Of the obsolete laws listed in Section 812, only one was implemented in the DFARS: the NDAA for FY 2008 (Public Law 110-181), Section 815, Clarification of Rules Regarding the Procurement of Commercial Items, paragraph (b). Section 815(b) requires the Secretary of Defense to modify the DFARS to clarify that "on the procurement of commercial items...the terms 'general public' and 'nongovernmental entities'...do not include the federal government or a state, local, or foreign government." DFARS 202.101 was amended by an interim rule on July

15, 2009, to add the following: “General public and non-governmental entities, as used in the definition of commercial item at FAR 2.101 [Definitions], do not include the federal government or a state, local, or foreign government (Pub. L. 110-181, Section 815(b)).”

Since Section 812 of the NDAA for FY 2019 repealed Section 815(b) of the NDAA for FY 2008, this final rule removes the clarification of the terms “general public” and “non-governmental entities” in DFARS 202.101. No other changes are required to implement Section 812 of the NDAA for FY 2019.

For more on Section 812 of the NDAA for FY 2019 (Public Law 115-232) and other acquisition-related sections in the law, see the September 2018 *Federal Contracts Perspective* article “\$717 Billion Defense Authorization Act Addresses DOD Micro-Purchase Threshold, Commercial Items.”

For more on the implementation of Section 815 of the NDAA for FY 2008, see the *Federal Contracts Perspective* article “Tidal Wave of DFARS Changes in July.”

■ **Repeal of “Oral Attestation of Security Responsibilities” Clause:** This final rule removes DFARS 252.204-7005, Oral Attestation of Security Responsibilities, and the associated prescription at DFARS 204.404-70, Additional Contract Clauses. DFARS 252.204-7005 was required to be included in contracts that include Federal Acquisition Regulation (FAR) 52.204-2, Security Requirements, which must be included in solicitations and contracts that may require access to classified information. DFARS 252.204-7005 required that “contractor employees cleared for access to Top Secret (TS), Special Access Program (SAP), or Sensitive Compartmented Information (SCI) shall attest orally that they will conform to the conditions and responsibilities imposed by law or regulation on those granted access. Reading aloud the first paragraph of Standard Form 312, Classified Information Nondisclosure Agreement, in the presence of a person designated by the Contractor for this purpose, and a witness, will satisfy this requirement.”

The purpose of DFARS 252.204-7005 was to make individuals more aware of the significance of the access being granted to them. Upon further review, DOD subject matter experts determined that the clause is not necessary to safeguard classified information in industry. In addition, the Industrial Security Regulation and National Industrial Security Program Operating Manual (Department of Defense [DOD] 5220.22-M) contain the requisite policies and procedures to safeguard government classified information released to contractors, licensees, and grantees of the government. Neither of these documents require contractor employees to attest orally to their security responsibilities, as required by the clause. Therefore, DFARS 252.204-7005 is no longer necessary and is removed (along with its prescription in DFARS 204.404-70).

■ **Repeal of Congressional Notification for Certain Task- and Delivery-Order Contracts:** This final rule amends DFARS 216.504, Indefinite-Quantity Contracts, to make clarifications and updates associated with determinations to award task- or delivery-order contracts estimated to exceed \$112 million to a single source.

Paragraph (c)(1)(ii)(D)(2) of FAR 16.504, Indefinite-Quantity Contracts, requires the head of the agency to notify Congress within 30 days after determining that it is in the public interest to award a task- or delivery-order contract in an amount exceeding \$112 million to a single source due to exceptional circumstances (paragraph (c)(1)(ii)(D)(1)(iv)). This notification requirement is codified in paragraph (d)(3)(B) of Title 41 of the U.S. Code, Section 4103 (41 USC 4103), General Authority. However, 41 USC 4103 does not apply to DOD but to civilian agencies

(except the National Aeronautics and Space Administration and the Coast Guard). Therefore, DFARS 216.504 is being amended to add paragraph (c)(2), which states, “The congressional notification requirement at FAR 16.504(c)(1)(ii)(D)(2) does not apply to DOD.”

In addition, DFARS 216.504(c)(1)(ii)(D) requires that a copy of the written public interest determination specified in FAR 16.504(c)(1)(ii)(D)(I)(iv) be submitted to the Director, Defense Pricing and Contracting (DPC). DFARS 216.504(c)(1)(ii)(D)(I) prohibits these determinations from being made by an individual below the level of the senior procurement executive. However, the statutory requirement for DOD to report or provide notifications on these determinations has been rescinded, so there is no longer a need for a copy of these determinations to be submitted to DPC or to restrict delegation of this authority. Therefore, DFARS 216.504(c)(1)(ii)(D) is removed, and DFARS 216.504(c)(1)(ii)(D)(I) is modified to remove the restriction on the delegation of authority to make the determination.

■ **Consent to Subcontract:** This final rule amends DFARS 244.201-1, Consent Requirements, to implement the NDAA for FY 2019 (Public Law 115-232), Section 824, Subcontracting Price and Approved Purchasing System, to require, for DOD contracts with contractors that have approved purchasing systems, that a contracting officer have written approval from the program manager prior to withholding a consent to subcontract.

The NDAA for FY 2011 (Public Law 111-383), Section 893, Contractor Business Systems, requires that DOD “develop and initiate a program for the improvement of contractor business systems to ensure that such systems provide timely, reliable information for the management of Department of Defense programs by the contractor and by the department.” Section 824 of the NDAA for FY 2019 amends Section 893 to add the following: “If the contractor on a Department of Defense contract requiring a contracting officer's written consent prior to the contractor entering into a subcontract has an approved purchasing system, the contracting officer may not withhold such consent without the written approval of the program manager.”

To implement Section 824, DFARS 244.201-1 is amended to add the following as paragraph (a): “In accordance with Section 824 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232), notwithstanding the requirements in FAR 44.201-1(a) [Consent Requirements], the contracting officer shall not withhold consent to subcontract without the written approval of the program manager, or comparable requiring activity official exercising program management responsibilities, if the contractor has an approved purchasing system, as defined in FAR 44.101 [Definitions].”

■ **Modification of “Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns” Clause:** This final rule adds phone numbers and websites addresses of department offices to DFARS 252.226-7001, Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns. The clause is included in solicitations and contracts that are for supplies and services exceeding \$500,000, and it encourages contractors to give Indian organizations, Indian-owned economic enterprises, and Native Hawaiian small business concerns the maximum practicable opportunity to participate in subcontracts. The clause provides the names and addresses of the departmental offices that address representation matters for these organizations, enterprises, and concerns.

To streamline the procurement process and make information more accessible to contractors, this final rule adds phone numbers and websites for both of the departmental offices listed in the

clause that determine the eligibility of a subcontractor when the subcontractor's representation is challenged: (1) for matters relating to Indian organizations or Indian-owned economic enterprises: U.S. Department of the Interior, Bureau of Indian Affairs, phone: 703-390-6433, website: <https://www.bia.gov/>; and (2) for matters relating to Native Hawaiian small business concerns: Department of Hawaiian Home Lands, phone: 808-620-9500, website: <http://dhhl.hawaii.gov/>.

■ **Contract Closeout Authority:** This final rule amends DFARS 204.804, Closeout of Contract Files, to implement the NDAA for FY 2017 (Public Law 114-328), Section 836, Contract Closeout Authority, as modified by the NDAA for FY 2018 (Public Law 115-91), Section 824, Contract Closeout Authority, to permit expedited closeout of contracts that: (1) were entered into on a date that is at least 17 fiscal years before the current fiscal year; (2) have no further supplies or services due; and (3) for which a determination has been made that the contract records are not otherwise reconcilable, because either (i) the contract or related payment records have been destroyed or lost; or (ii) the time or effort required to establish the exact amount owed to the U.S. government or amount owed to the contractor is disproportionate to the amount at issue.

To accomplish the closeout of such contracts, Section 836 further authorizes (1) a covered contract or groups of contracts to be closed out through a negotiated settlement with the contractor; and (2) the remaining contract balances to be offset with balances within the contract or on other contracts regardless of the year or type of appropriation obligated to fund each contract or contract line item, and regardless of whether the appropriation has closed.

This final rule amends DFARS 204.804 to add paragraph (3) to reflect the provisions of Section 836 and Section 824. In addition, the paragraph (3) closeout procedures require the contracting officer to issue a modification of the affected contract, which must be signed by both the contractor and the government. When closing out a group of contracts, the contracting officer must issue a modification of at least one of the affected contracts that reflects the negotiated settlement for the group of contracts, and this modification must be signed by both the contractor and the government. The remaining contracts in the group may be modified without obtaining the contractor's signature.

The DOD issued a class deviation implementing Section 836 and Section 824 while the DFARS change worked its way through the system. For more on the class deviation, see the June 2018 *Federal Contracts Perspective* article "DOD Unleashes a Torrent of Rules, Removes Unnecessary DFARS Clauses and Provisions."

■ **Small Business Set-Asides for Architect-Engineer and Construction Design Contracts:** This finalizes, without changes, the rule that proposed to 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 the 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, the 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.

No comments were received on the proposed rule, so the proposed rule is finalized with a minor editorial change. For more on the proposed rule, see the January 2019 *Federal Contracts Perspective* article “DOD Holds Year-End Regulations Clearance.”

■ **Use of the Government Property Clause:** This finalizes, without changes, the rule that proposed to amend DFARS 245.107, Contract Clauses [on government property], to strengthen the management and accountability of government-furnished property (GFP).

Paragraph (d) of FAR 45.107, Contract Clauses [for government property], provides that “purchase orders for property repair need not include a government property clause when the unit acquisition cost of government property to be repaired does not exceed the simplified acquisition threshold, unless other government property (not for repair) is provided.” However, the acquisition value of property is not an indicator of its criticality or sensitivity. For example, the acquisition cost of individual items of firearms, body armor, night-vision equipment, computers, or cryptologic devices may be below the simplified acquisition threshold (currently \$250,000), but the accountability requirements for these items are fairly stringent. To address this gap, DOD proposing to amend DFARS 245.107 to add paragraph (1)(i) to require the use of FAR 52.245-1, Government Property, in all purchase orders for repair, maintenance, overhaul, or modification of government property regardless of the unit acquisition cost of the items to be repaired: “In lieu of the prescription at FAR 45.107(d), use the clause at [FAR] 52.245-1, Government Property, in all purchase orders for repair, maintenance, overhaul, or modification of government property regardless of the unit acquisition cost of the items to be repaired.”

One respondent submitted comments on the proposed rule but none were adopted, so the proposed rule is finalized without changes. For more on the proposed rule, see the November 2016 *Federal Contracts Perspective* article “DOD Finalizes Network Penetration Reporting Rule.”

■ **Restriction on the Acquisition of Certain Magnets and Tungsten:** This interim rule adds DFARS 225.7018, Restriction on Acquisition of Certain Magnets and Tungsten, and DFARS 252.225-7052, Restriction on the Acquisition of Certain Magnets and Tungsten, to implement the NDAA for FY 2019 (Public Law 115-232), Section 871, Prohibition on Acquisition of Sensitive Materials from Non-Allied Foreign Nations, which prohibits the acquisition of samarium-cobalt magnets, neodymium-iron-boron magnets, tungsten metal powder, and tungsten heavy alloy or any finished or semi-finished component containing tungsten heavy alloy melted or produced in North Korea, China, Russia, and Iran, because these materials play an essential role in national defense.

This interim rule adds DFARS 225.7018, which consists of five subsections:

- DFARS 225.7018-1, Definitions, provides definitions for “covered material” and “covered country.”
- DFARS 225.7018-2, Restriction, prohibits the acquisition of any covered material from a covered country unless an exception applies or the covered material is nonavailable.
- DFARS 225.7018-3, Exceptions, lists the following exceptions to the restriction: (1) acquisitions at or below the simplified acquisition threshold (currently \$250,000); (2) acquisition outside the U.S. of an item for use outside the U.S.; (3) an end item that is (i) a commercially available off-the-shelf item other than (A) a commercially available off-the-shelf item that is 50% or more tungsten by weight, or (B) a tungsten heavy alloy mill product, such as bar, billet, slab, wire, cube, sphere, block, blank, plate, or sheet, that had not been incorporated into an end item, subsystem, assembly, or component; (ii) an electronic device, unless the Secretary of Defense determines that the domestic availability of a particular electronic device is critical to national security; or (iii) a neodymium-iron-boron magnet manufactured from recycled material if the milling of the recycled material and sintering of the final magnet takes place in the United States. DFARS 225.7018-3 goes on to provide that an acquisition may be exempt from the restriction “if the authorized agency official concerned, without power of redelegation, determines that covered materials of satisfactory quality and quantity, in the required form, cannot be procured as and when needed at a reasonable price from a source other than a covered country...”
- DFARS 225.7018-4, Nonavailability Determination, provides details on what the authorized agency officials (that is, the Under Secretary of Defense (Acquisition and Sustainment), the secretaries of the Army, Navy, and Air Force, and the Director of the Defense Logistics Agency) must consider and do to execute a nonavailability determination.
- DFARS 225.7018-5, Contract Clause, requires the inclusion of DFARS 252.225-7052, in solicitations and contracts that exceed the simplified acquisition threshold, including solicitations and contracts using the procedures in FAR part 12, Acquisition of Commercial Items, unless the acquisition is for items outside the United States for use outside the United States or a nonavailability determination has been executed in accordance with DFARS 225.7018-4.

DFARS 252.225-7052 consists of the definitions for “covered material” and “covered country”; the restrictions in DFARS 225.7018-2; and the exceptions in DFARS 225.7018-3, including when a nonavailability determination is executed.

This interim rule incorporates the class deviation issued in January 2019 into the DFARS, so the class deviation is no longer in effect. For more on the class deviation, see the February 2019 *Federal Contracts Perspective* article “Restrictions Placed on Certain Magnets and Tungsten.”

Comments on this interim rule must be submitted no later than July 1, 2019, identified as “DFARS Case 2018-D054,” 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.

■ **Modification of “Cancellation or Termination of Orders” Clause:** This rule proposes to amend DFARS 252.239-7007, Cancellation or Termination of Orders, to clarify the limitations on the government’s obligation to reimburse a contractor for nonrecoverable costs when the government cancels an order for telecommunications services, and incorporate the information currently in DFARS 252.239-7008, Reuse Arrangements.

Both DFARS 252.239-7007 and 252.239-7008 are included in solicitations, contracts, and basic agreements for telecommunications services. DFARS 252.239-7007 provides contractors with terms and conditions that apply in the event the government cancels any of the services ordered under the agreement or contract, while DFARS 252.239-7008 provides contractors with terms and conditions for the reuse of equipment and facilities purchased under a telecommunications order that is cancelled or terminated by the government. Since both clauses are included in the same contracts and both clauses establish terms and conditions for the cancellation or termination of telecommunications orders, the text of the two clauses can be combined, without changing the intent. This rule proposes to add the text of DFARS 252.239-7008 as paragraphs (c), (d), and (e) of DFARS 252.239.7007, and remove DFARS 252.239-7008.

In addition, DFARS 252.239-7007 would be amended to make various clarifications:

- Paragraph (a), Definitions, would be added. It would include definitions of “actual nonrecoverable costs” (“actual nonrecoverable costs means the installed costs of the facilities and equipment, less cost of reusable materials, and less net salvage value”); “basic cancellation liability” (“the actual nonrecoverable cost, which the government shall reimburse the contractor at the time services are cancelled”); “basic termination liability” (“the nonrecoverable cost amortized in equal monthly increments throughout the liability period”); “installed costs” (“the actual cost of equipment and materials specifically provided or used, plus the actual cost of installing...less any costs the government may have directly reimbursed the contractor under the Special Construction and Equipment Charges clause of this agreement/contract [DFARS 252.239-7011]”); and “net salvage value” (“the salvage value less the cost of removal”).
- To make way for proposed paragraph (a), the current paragraph (a) would be redesignated as paragraph (b), and the following sentence would be added to the end of the paragraph: “The government will not reimburse the contractor for any actual nonrecoverable costs incurred after notice of award, but prior to execution of the order.” This is intended to prevent the contractor from incurring costs in anticipation of, but prior to, the establishment of a formal agreement/contract for services and the award of an order for such services.
- To make way for proposed paragraphs (c), (d), and (e), paragraph (b) would be redesignated as paragraph (f), and all the other paragraphs in DFARS 252.239-7011 would be redesignated accordingly.

Redesignated paragraph (h)(5) (current paragraph (d)(5)) is amended by moving the definitions of “basic cancellation liability” and “basic termination liability” to proposed

paragraph (a), and by adding the following two sentences: “In the case of either a cancellation or a termination, the government’s presumed maximum liability will be capped by the unpaid nonrecurring charges and the monthly recurring charges (MRCs) set out in the contract/agreement. The presumed maximum liability for MRCs will be capped at MRCs for the minimum service period and any required notice period.” The purpose of this clarification is to create an upfront mutual understanding of the maximum amount of reimbursement due to the contractor in the event of cancellation or termination.

Comments on this proposed rule must be submitted no later than July 1, 2019, identified as “DFARS Case 2018-D035,” 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.

■ **Modification of “Orders for Facilities and Services” Clause:** This rule proposes to incorporate the information in DFARS 252.239-7005, Rates, Charges, and Services, into DFARS 252.239-7004, Orders for Facilities and Services.

Both DFARS 252.239-7004 and DFARS 252.239-7005 are included in all solicitations, contracts, and basic agreements for telecommunications services. DFARS 252.239-7004 specifies how contractors shall acknowledge the receipt orders under the contract or agreement; DFARS 252.239-7005 provides contractors with terms and conditions regarding charges for facilities and services being provided in accordance with the contract or agreement. The text of the two clauses can be combined without changing the intent of either one of the clauses. Therefore, the contents of DFARS 252.239-7004 (“The Contractor shall acknowledge a communication service authorization or other type order for supplies and facilities by commencing performance; or written acceptance by a duly authorized representative”) would be incorporated as paragraph (b) of DFARS 252.239-7005, and DFARS 252.239-7004 would be removed.

Comments on this proposed rule must be submitted no later than July 1, 2019, identified as “DFARS Case 2018-D045,” 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.

■ **Performance-Based Payments:** This rule proposes to amend DFARS subpart 232.10, Performance-Based Payments; amend DFARS 252.232-7012, Performance-Based Payments – Whole Contract Basis, and DFARS 252.232-7013, Performance-Based Payments –Deliverable Item Basis; and add DFARS 252.232-70XX, Performance-Based Payments –Representation, to implement the NDAA for FY 2017 (Public Law 114-328), Section 831, Preference for Performance-Based Contract Payments, which amends Title 10 of the U.S. Code, Section 2307, (10 USC 2307), Contract Financing, to address the use of performance-based payments.

Performance-based payments are a method of contract financing that may be available under fixed-price contracts (except those awarded through sealed bidding procedures in FAR part 14). Performance-based payments are made on the basis of the contractor’s achievement of objective,

quantifiably measurable events, results, or accomplishments that are defined and valued in the contract prior to performance.

Section 831 amended paragraph (b) of 10 USC 2307 to make performance-based payments the preferred method of contract financing. This parallels paragraph (a) of FAR 32.1001, Policy [for performance-based payments], which since 2000 has stated “performance-based payments are the preferred government financing method when the contracting officer finds them practical, and the contractor agrees to their use” (see the April 2000 *Federal Contracts Perspective* article “FAC 97-16 Revises Contract Financing Rules, Small Business Competitiveness Demo Program”).

Section 831 amended 10 USC 2307 by adding three subparagraphs to paragraph (b):

- First of all, Section 831 changed the title of paragraph (b) from “Performance-Based Payments” to “Preference for Performance-Based Payments,” and converted the existing text into paragraph (b)(1).
- Section 831 added paragraph (b)(2), which provides that “performance-based payments shall not be conditioned upon costs incurred in contract performance but only on the achievement of negotiated performance outcomes...” Therefore, this rule proposes to remove the restrictions in paragraph (a) of DFARS 232.1001, Policy [for performance-based payments] (“performance-based payments should never exceed total cost incurred at any point during the contract”) and paragraph (b)(i) of both DFARS 252.232-7012 and 252.232-7013 (“at no time shall cumulative performance-based payments exceed cumulative contract cost incurred under this contract”). However, the requirement in paragraph (b)(1) of the clauses for contractors to report costs incurred when requesting performance-based payments would be retained as the clauses’ paragraph (c)(1) so the data necessary for negotiation of performance-based payments on future contracts would be available.
- Section 831 added paragraph (b)(3), which states “The Secretary of Defense shall ensure that nontraditional defense contractors and other private sector companies are eligible for performance-based payments, consistent with best commercial practices. Therefore, paragraph (a) of DFARS 232.1001 would be amended to add “Private sector companies, including nontraditional defense contractors, are eligible for performance-based payments, consistent with best commercial practices.”
- Section 831 added paragraph (b)(4) to mandate that “in order to receive performance-based payments, a contractor’s accounting system shall be in compliance with Generally Accepted Accounting Principles, and there shall be no requirement for a contractor to develop government-unique accounting systems or practices as a prerequisite for agreeing to receive performance-based payments.” To implement this, the following would replace the existing text in DFARS 232.103-70, Criteria for Use, and paragraph (b) of both DFARS 252.232-7012 and DFARS 252.232-7013: “In accordance with 10 USC 2307(b), the output of a contractor’s accounting system shall be in compliance with Generally Accepted Accounting Principles, as evidenced by audited financial statements, in order to receive performance-based payments.” In addition, DFARS 232.203-70 would include the following sentence: “10 USC 2307 does not grant the Defense Contract Audit

Agency the authority to audit compliance with Generally Accepted Accounting Principles.” Finally, proposed DFARS 252.232-70XX, Performance-Based Payments – Representation, would require each offeror to represent whether the output of its accounting system is in compliance with Generally Accepted Accounting Principles, as evidenced by audited financial statements.

Comments on this proposed rule must be submitted no later than July 1, 2019, identified as “DFARS Case 2018-D045,” 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.

EDITOR’S NOTE: A proposed rule was published in August 2018 that proposed to implement Section 831 and also revise progress payments and performance-based payments policies and procedures for DOD contracts, which have not been updated since 2001. That proposed rule was withdrawn in October 2018 “so DOD can conduct additional outreach with industry regarding contract financing methods.” This proposed rule addresses only the amendments to the DFARS required to implement Section 831. For more on the August 2018 proposed rule, see the September 2018 *Federal Contracts Perspective* article ““DOD Returns from Summer Vacation with Lots of Rules.” For more on the withdrawal of the August 2018 proposed rule, see the November 2018 *Federal Contracts Perspective* article “DOD Keeps DFARS Cleanup Rolling Along.”

■ **Deviation Authorizing Section 890 Pilot Program to Accelerate Contracting and Pricing Processes:** This deviation implements the NDAA for FY 2019 (Public Law 115-232), Section 890, Pilot Program to Accelerate Contracting and Pricing Processes, which authorizes the Secretary of Defense to conduct a pilot program with no more than 10 contracts that exceed \$50,000,000 (excluding those that are part of a major defense acquisition program), by “basing price reasonableness determinations on actual cost and (sic) pricing data for purchases of the same or similar items for the Department of Defense, and reducing the cost and (sic) pricing data to be submitted...”

This deviation delegates to the Principal Director, Defense Pricing and Contracting, that authority to approve the 10 contracts participating in the pilot program. The deviation goes on to permit contracting officers of those 10 contracts to deviate from the requirement in paragraph (c)(4)(A) of DFARS 215.403-1, Prohibition on Obtaining Certified Cost or Pricing Data (10 USC 2306a and 41 USC chapter 35), for the exceptional circumstances waiver of submission of certified cost or pricing data: “(1) the property or services cannot reasonably be obtained under the contract, subcontract, or modification, without the granting of the waiver; (2) the price can be determined to be fair and reasonable without the submission of certified cost or pricing data; and (3) there are demonstrated benefits to granting the waiver...” The deviation states, “The head of the contracting activity is not required to determine that the property or services cannot reasonably be obtained under the contract, subcontract, or modification, without granting the waiver, or that there are demonstrated benefits to granting the waiver. However, the exceptional circumstances waiver shall be only executed if the price can be determined by the contracting officer to be fair and reasonable without the submission of certified cost or pricing data.”

DFARS 252.215-7998, Pilot Program to Accelerate Contracting and Pricing Processes (DEVIATION 2019-O0008), is to be included in solicitations and the resulting contracts that

have been approved by the Principle Director, Defense Pricing and Contracting, to participate in the pilot program. The clause describes the pilot program, the purpose of the program, and requires the contractor, as a condition of participating in the pilot program, to “submit verifiable data documenting any savings (time and money) achieved as a result of this pilot program within 3 months after award or modification of this contract.”

The pilot program and this deviation remain in effect until January 2, 2021.

■ **Use of Fixed-Price Contracts:** This rule proposes to amend various DFARS parts to implement two sections of the NDAA for FY 2017 (Public Law 114-328): Section 829, Preference for Fixed-Price Contracts; and Section 830, Requirement to Use Firm-Fixed-Price Contracts for Foreign Military Sales.

Section 829 requires contracting officers to first consider fixed-price contracts, including fixed-price incentive contracts, when determining contract type, and to obtain approval from the head of the contracting activity for (1) cost-reimbursement contracts in excess of \$50 million to be awarded after October 1, 2018, and before October 1, 2019; and (2) cost-reimbursement contracts in excess of \$25 million to be awarded on or after October 1, 2019.

Section 830 provides requirements, exceptions, and waiver authority for the use of firm-fixed-price contracts for foreign military sales (FMS). It requires contracting officers to use firm fixed-price contracts unless the FMS customer has established, in writing, a preference for a different contract type or has requested in writing that a different contract type be used for a specific FMS. The waiver, which is exercised on a case-by-case basis by the Secretary of Defense or designee, authorizes contracting officers to use a contract type other than firm-fixed-price when it is in the best interest of the United States and American taxpayers.

The following changes to the DFARS are proposed to implement Sections 829 and 830 of the NDAA for FY 2017:

- To DFARS 202.101, Definitions, would be added the following definition of “milestone decision authority” because the definition is used throughout the DFARS: “Milestone decision authority, with respect to a major defense acquisition program, major automated information system, or major system, means the official within the Department of Defense designated with the overall responsibility and authority for acquisition decisions for the program or system, including authority to approve entry of the program or system into the next phase of the acquisition process...”
- To DFARS 216.102, Policies [for selecting contract types], would be added two paragraphs. Paragraph (1) would reference Section 829 to inform contracting officers of the new requirements when selecting contract types, and would reference the new paragraph (2) of DFARS 216.301-3, Limitations [on cost-reimbursement contracts], for the approval requirements on the use of cost-reimbursement contracts; and paragraph (3) would reference new DFARS 225.7301-1, Requirement to Use Firm-Fixed-Price Contracts, for the requirements on the use of fixed-price contracts for FMS sales that are specified in Section 830 of the NDAA for FY 2017.
- To DFARS 216.104-70, Research and Development, would be added a reference to the new paragraph (b) of DFARS 235.006, Contracting Methods and Contract Type, for the new research and development (R&D) contract type approval requirements.

- To DFARS 216.301-3, Limitations, would be added a new paragraph (2), which would incorporate the exception on the use of cost-reimbursement contracts for R&D as provided in DFARS 235.006(b). In addition, paragraph (2) would provide the statutory requirements of Section 829 on the use of cost-reimbursement contracts over the established thresholds and timelines, and would establish the head of the contracting activity as the approval level on the use of cost-reimbursement contracts.
- Paragraph (1) of DFARS 217.202, Use of Options, would be amended to incorporate Procedures, Guidance, and Information (PGI) references that provide guidance (i) on the use of options for (i) FMS requirements; and (ii) for sole source major systems for U.S. and U.S./FMS combined procurements.
- New DFARS 225.7301-1, Requirement to Use Firm-Fixed-Price Contracts, would be added to implement Section 830. Paragraph (a) would incorporate the requirement to use firm-fixed-price contracts for FMS requirements unless the foreign customer expresses a preference for a different contract type in writing or requests in writing that a different contract type be used for a specific FMS. Also, it would provide a reference to guidance in the PGI on the use of priced options for FMS requirements. Paragraph (b) would establish a waiver process for the use of firm-fixed-price contract requirements if the chief of the contracting office determines, on a case-by-case basis, a different contract type is in the best interest of the government.
- DFARS 225.7301-2, Solicitation Approval for Sole Source Contracts, would require contracting officers to coordinate with the Office of Defense Pricing and Contracting, prior to issuing a solicitation for a sole source contract for U.S./FMS combined requirements for a major system that has an estimated contract value that exceeds \$500 million. Also, it would include a reference to the PGI for procedures on the use of fixed-price incentive (firm target) (FPIF) contracts.
- To DFARS 234.004, Acquisition Strategy [for major systems], would be added a reference to DFARS 216.301-3 for the additional approval requirements on cost-reimbursement contracts for major system acquisitions, and a reference to the PGI for procedures on the use of FPIF contracts.
- To DFARS 235.006, Contracting Methods and Contract Type [for R&D], would be added paragraph (b)(i), which would state that the Under Secretary of Defense for Acquisition and Sustainment has approved the use of cost-reimbursement contracts for R&D in excess of \$25 million if the contracting officer executes a written determination and findings that the risk level does not permit realistic pricing and it is not possible to allocate that risk equitably between the government and the contractor.

Comments on this proposed rule must be submitted no later than May 31, 2019, identified as “DFARS Case 2017-D024,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) email: osd.dfars@mail.mil; (3) fax: 571-372-6094; or (4) mail: Defense Acquisition Regulations System, Attn: Kimberly Bass,

OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Demonstration Project for Contractors Employing Persons with Disabilities:** This rule proposes to amend DFARS part 226, Other Socioeconomic Programs, to add DFARS Subpart 226.7X, Demonstration Project for Contractors Employing Persons with Disabilities, and DFARS 252.226-7XXX, Representation for Demonstration Project for Contractors Employing Persons with Disabilities, to implement the NDAA for FY 2019 (Public Law 115-232), Section 888, Instruction on Pilot Program Regarding Employment of Persons with Disabilities. Section 888 requires that the DFARS be updated to include an instruction on the demonstration project authorized by the NDAA for FY 2004 (Public Law 108-136), Section 853, Demonstration Project for Contractors Employing Persons with Disabilities, which authorized the secretary of defense to establish a demonstration project for contractors employing disabled people to provide defense contracting opportunities for entities employing individuals who are severely disabled.

The proposed rule would amend the DFARS as follows:

- DFARS subpart 226.7X would be added.
 - DFARS 226.7X01, Scope of Subpart, would reference Section 853 of the NDAA for FY 2004.
 - DFARS 226.7X02, Definitions, would provide definitions for the terms “eligible contractor” (“a business entity...that (1) employs severely disabled individuals at a rate that averages not less than 33% of its total workforce over the 12-month period prior to issuance of the solicitation; (2) pays not less than the minimum wage...; and (3) provides for its employees’ health insurance and a retirement plan...”) and “severely disabled individual” (“an individual with a disability...who has a severe physical or mental impairment that seriously limits one or more functional capacities”). These definitions are based on those in Section 853.
 - DFARS 226.7X03, Policy and Procedures, would (1) provide the purpose of the demonstration program (“Contracting officers may use this demonstration project to award one or more contracts to an eligible contractor for the purpose of providing defense contracting opportunities for entities that employ severely disabled individuals”); (2) explains the mandatory evaluation factor (“when using this demonstration project, one of the evaluation factors shall be the percentage of the offeror’s total workforce that consists of severely disabled individuals employed by the offeror. Contracting officers may use a rating method in which a higher percentage of the offeror’s total workforce consisting of severely disabled individuals would result in a higher rating for this evaluation factor”); and (3) provide that “contracts awarded to eligible contractors under this demonstration project may be counted toward DOD’s small disadvantaged business goal”).
 - DFARS 226.7X04, Solicitation Provision, would prescribe the use of solicitation provision DFARS 252.226-7XXX, Representation for Demonstration Project for Contractors Employing Persons with Disabilities, for use in solicitations using the demonstration program.

- DFARS 252.226-7XXX would provide the definitions of the terms “eligible contractor” and “severely disabled individual” that are in DFARS 226.7X02; announce that “this solicitation is issued pursuant to the Demonstration Project for Contractors Employing Persons with Disabilities...To be eligible for award, an offeror must be an eligible contractor...”; and require the offeror to represent whether it is or is not an eligible contractor.

Because some contractors may be required by FAR 19.702, Statutory Requirements [for the small business subcontracting program, to submit small business subcontracting plans, DFARS 252.219-7003, Small Business Subcontracting Plan (DOD Contracts), would be amended to include the definition for “eligible contractor” and to specify that subcontracts awarded to subcontractors that meet the definition of “eligible contractor” under the Demonstration Project may be counted toward the prime contractor’s small disadvantaged business subcontracting goal.

Comments on this proposed rule must be submitted no later than May 31, 2019, identified as “DFARS Case 2018-D058,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) email: osd.dfars@mail.mil; (3) fax: 571-372-6094; or (4) mail: Defense Acquisition Regulations System, Attn: Jennifer Johnson, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Nonmanufacturer Rule for 8(a) Participants:** This rule proposes to amend paragraph (d) of DFARS 252.219-7010, Notification of Competition Limited to Eligible 8(a) Concerns – Partnership Agreement, to implement changes 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 revised and standardized the limitations on subcontracting, including the nonmanufacturer rule, that apply to small business concerns, including 8(a) Program participants, under procurements conducted under FAR part 19, Small Business Programs.

Small business concerns must meet certain requirements when they offer to the government an end item they did not manufacture, process, or produce. These requirements are known as the “nonmanufacturer rule.” For example, a small business nonmanufacturer must offer an end item that a small business manufactured, processed, or produced in the United States or its outlying areas.

DFARS 252.219-7010(d) provides an exemption from the nonmanufacturer rule for 8(a) contracts valued at or below \$25,000 that are awarded under the simplified acquisition procedures in FAR part 13. For these contracts, an 8(a) participant may offer end items manufactured or produced by any domestic firm.

The SBA, in implementing Section 1610, revised its regulations to apply the nonmanufacturer rule to 8(a) contracts at any dollar value by removing the exemption for 8(a) contracts valued at or below \$25,000 and awarded under the simplified acquisition procedures. In addition, the SBA regulation changes require that the 8(a) 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...”

This rule proposes to amend DFARS 252.219-7010(d) to replace the outdated text regarding the nonmanufacturer rule with updated text that implements section 1651 and SBA's final rule.

The proposed, updated text is consistent with the proposed FAR rule that would bring the FAR into conformance with the revised SBA regulations (see the January 2019 *Federal Contracts Perspective* article “Amendments Proposed to Limitations on Subcontracting”). The proposed DFARS 252.219-7010(d) would require a small business concern that provides an end item it did not manufacture, process, or produce to “(i) provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas...; (ii) be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied; and (iii) take ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice; for example, providing storage, transportation, or delivery.” In addition, the revised clause would provide that “when the end item being acquired is a kit of supplies, at least 50 percent of the total cost of the components of the kit shall be manufactured, processed, or produced by small businesses in the United States or its outlying areas.” Finally, it would exempt construction or service contracts from the provisions of DFARS 252.219-7010.

Comments on this proposed rule must be submitted no later than May 31, 2019, identified as “DFARS Case 2019-D004,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) email: osd.dfars@mail.mil; (3) fax: 571-372-6094; or (4) mail: Defense Acquisition Regulations System, Attn: Jennifer Johnson, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

USTR WAIVES RESTRICTIONS FOR AUSTRALIA

The Office of the U.S. Trade Representative (USTR) has agreed to waive discriminatory purchasing requirements for eligible products and suppliers of the Republic of Australia beginning on May 5, 2019, because on that date Australia will become a party to the World Trade Organization Government Procurement Agreement (WTO GPA), and it has agreed to provide reciprocal competitive government procurement opportunities to U.S. products and services and to suppliers of such products and services.

Because of this waiver, the FAR will be amended to add Australia to the list of WTO GPA “designated countries” wherever the list appears in the FAR: FAR 22.1503, Procedures for Acquiring End Products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor; FAR 25.003, Definitions; FAR 25.407, Agreement on Trade in Civil Aircraft; FAR 52.222-19, Child Labor – Cooperation with Authorities and Remedies; FAR 52.225-5, Trade Agreements; FAR 52.225-11, Buy American Act – Construction Materials under Trade Agreements; and FAR 52.225-23, Required Use of American Iron, Steel, and Manufactured Goods – Buy American Act – Construction Materials Under Trade Agreements.

PROPOSED DEAR RULE ON INTELLECTUAL PROPERTY WITHDRAWN

The Department of Energy (DOE) is withdrawing the proposed rule that would have amended the DOE Acquisition Regulation (DEAR) intellectual property and technology transfer clauses to conform to the FAR changes made to the FAR by Federal Acquisition Circular (FAC) 2005-21. However, DOE has determined that it will not proceed with this rulemaking and is

withdrawing the proposed rule. The changes that were proposed will be incorporated into a larger rulemaking that will update the entire DEAR.

For more on the proposed rule, see the December 2013 *Federal Contracts Perspective* article “Energy to Address Patents, Data, and Copyrights.” For more on FAC 2005-21, see the December 2007 *Federal Contracts Perspective* article “FAC 2005-21 Rewrites FAR Part 27 in Plain English.”

GSA FINALIZES LOCAL AUTHORITY TO BUY OFF SCHEDULE 84

The General Services Administration (GSA) is finalizing, without changes, the interim rule that amended GSA Acquisition Regulation (GSAR) part 538, Federal Supply Schedule Contracting, to permit state and local governments to purchase from Federal Supply Schedule (FSS) 84, Total Solutions for Law Enforcement, Security, Facility Management Systems, Fire, Rescue, Special Purpose Clothing, Marine Craft, and Emergency/Disaster Response. The interim rule implemented the Local Preparedness Acquisition Act (Public Law 110-248).

In the final rule notification, GSA states, “No public comments were submitted in response to the interim rule. The program has been operating under the interim rule since 2008 without concern and with no statutory changes. Therefore, there are no changes from the interim rule made in the final rule. This action represents administrative clean-up...”

For more on the interim rule, see the October 2008 *Federal Contracts Perspective* article “State and Local Governments Can Buy Off Schedule 84.”

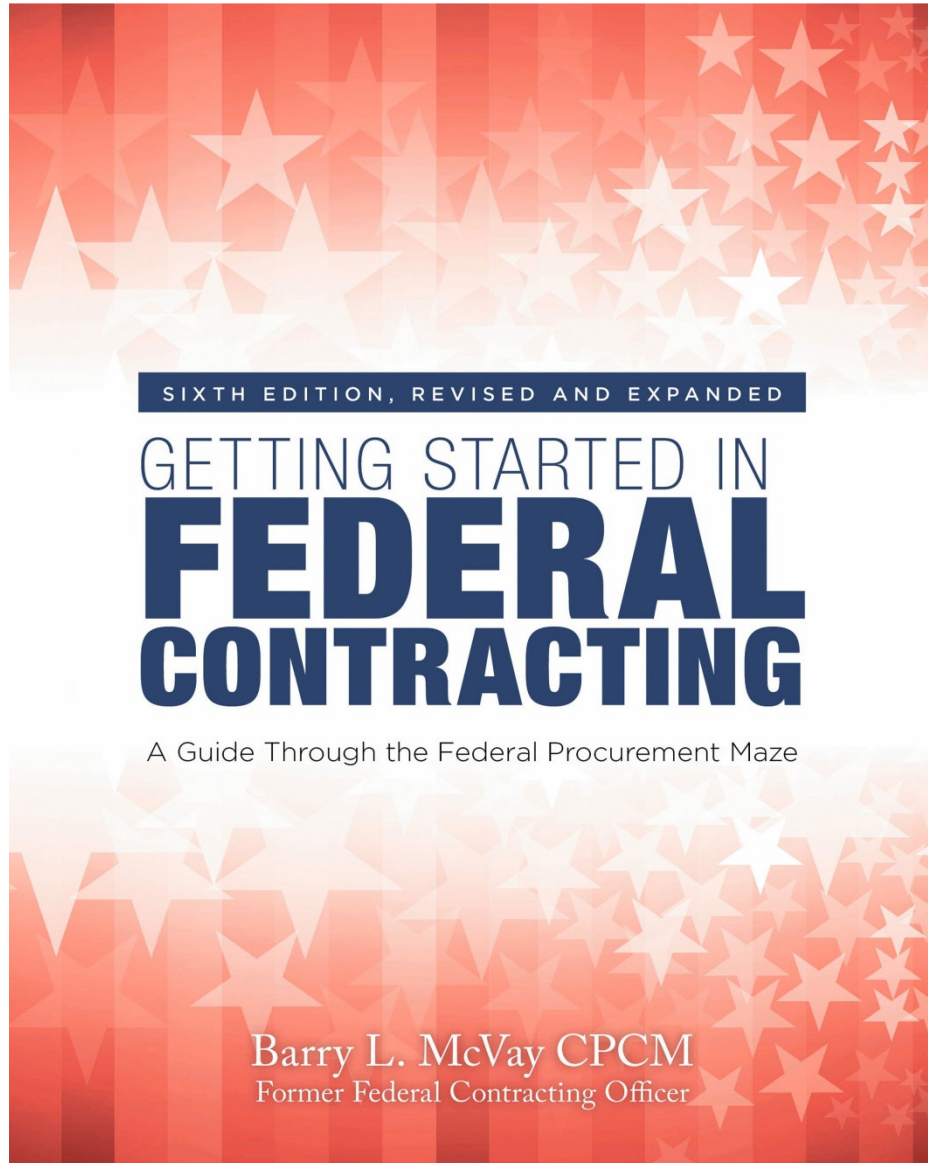
CAAC ISSUES DEVIATION ON SUBCONTRACTING LIMITATIONS

The Civilian Agency Acquisition Council (CAAC), which represents the civilian agencies in maintaining the FAR (except for the National Aeronautics and Space Administration and the Coast Guard, which are members of the Defense Acquisition Regulations Council [DARC]), has followed the lead of the DOD and issued a class deviation from the FAR regarding limitations on subcontracting for small business concerns.

The members of the CAAC and the DARC have worked with the FAR Council (which administers the FAR) on a proposed rule 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. DOD decided not to wait for a final rule to be issued, so it issued a class deviation directing DOD contracting officers to use alternate clauses to those in the FAR that address limitations on subcontracting. The alternate clauses in the class deviation are practically identical to those in the proposed rule. Now the CAAC has issued an identical class deviation allowing civilian agencies to direct their contracting officers to use the same alternate clauses that are in the proposed rule and the DOD class deviation.

For more on the proposed FAR rule and the DOD class deviation, see the January 2019 *Federal Contracts Perspective* article “Amendments Proposed to Limitations on Subcontracting.”

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468 pages, 2017, ISBN: 978-0-912481-27-2, \$39.95
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Sample Chapters:

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Chapter 13, Federal Supply Schedules, go to
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