Panoptic Enterprises'

FEDERAL CONTRACTS PERSPECTIVE

Federal Acquisition Developments, Guidance, and Opinions

Vol. XX, No. 6 **June 2019**

FAC 2019-02 ADDRESSES SPECIAL EMERGENCY PROCUREMENT AUTHORITY, INTERAGENCY CONTRACTS

Federal Acquisition Circular (FAC) 2019-02 amends the Federal Acquisition Regulation (FAR) with two rules implementing sections in two National Defense Authorization Acts (NDAAs): one rule expands special emergency procurement authorities; the other rule removes the requirement to make a best procurement approach determination to use an interagency acquisition.

CONTENTS

■ **Special Emergency Procurement Authority:** This finalizes, without changes, the rule that proposed to implement the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Public Law 114-328), Section 816, Amendments to Special Emergency Procurement Authority, and Section 1641, Special Emergency Procurement Authority to Facilitate the Defense Against or Recovery from a Cyber Attack, both of which amend Title 41 of the U.S. Code, Section 1903 (41 USC 1903), Special Emergency Procurement Authority.

Paragraph (a) of 41 USC 1903 consists of a list of emergency circumstances for which an agency may procure property or services. Section 841 adds to paragraph (a) "the provision of international disaster assistance pursuant to…the Foreign Assistance Act of 1961 (22 USC 2292 *et seq*.), or in support of an emergency or major disaster (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 USC 5122))." Section 1641 modifies paragraph (a) to add "cyber" to "to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States" so that it now reads "to facilitate the defense against or recovery from *cyber*, nuclear, biological, chemical, or radiological attack against the United States…" (*emphasis* added).

To implement these two sections, it was proposed that the FAR be amended as follows:

– Amend FAR 2.101, Definitions, to add definitions for "emergency" and "major disaster," and amend "micro-purchase threshold" and "simplified acquisition threshold" to apply the higher thresholds for emergency procurements to the circumstances specified in Section 841 and Section 1641.

– Amend FAR 13.201, General (for actions at or below the micro-purchase threshold), to reflect the new circumstances that allow exercise of the special emergency procurement

authorities at or below the micro-purchase threshold ($20,000 for contracts awarded and performed, or purchase made, inside the United States; $30,000 for contracts awarded and performed, or purchase made, outside the United States).

– Amend FAR 13.500, General (for simplified procedures applicable to certain commercial items), to reflect the new circumstances that allow exercise of the special emergency procurement authorities for the acquisition of supplies and services in amounts greater than the simplified acquisition threshold ($750,000 for contracts awarded and performed, or purchase made, inside the United States; $1,500,000 for contracts awarded and performed, or purchase made, outside the United States) but not exceeding $13,000,000.

– Amend FAR part 18, Emergency Acquisitions, which provides a summary of emergency acquisition flexibilities throughout the FAR, so it would reflect the proposed changes.

No comments were submitted in response to the proposed rule, so it is finalized without changes. For more on the proposed rule, see the July 2018 ***Federal Contracts Perspective*** article "FAR Rule to Expand Emergency Procurement Authority."

■ **Governmentwide and Other Interagency Contracts:** This final rule removes the requirement for agencies to make a determination that the use of an interagency acquisition represents the best procurement approach. This requirement was in paragraph (a) of FAR 17.502-1, General [for interagency acquisitions].

This final rule implements the NDAA for FY 2019 (Public Law 115-232), Section 875, Promotion of the Use of Government-Wide and Other Interagency Contracts, which amends the NDAA for FY 2009 (Public Law 110-417), Section 865, Preventing Abuse of Interagency Contracts, by removing the requirement for agencies, prior to requesting another agency to conduct an acquisition on its behalf, to make "a determination that an interagency acquisition is the best procurement alternative..."

The Civilian Agency Acquisition Council (CAAC) had authorized all civilian agencies to deviate from this requirement, and the Department of Defense (DOD) amended the Defense FAR Supplement (DFARS) to remove supplemental text applicable to DOD only. For more on the CAAC deviation, see the see the November 2018 ***Federal Contracts Perspective*** article "CAAC Deviation Removes Determination Requirement." For more on the DFARS revision, see the January 2019 ***Federal Contracts Perspective*** article "DOD Holds Year-End Regulations Clearance."

Vivina McVay, Editor-in Chief

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

DOD KEEPS UP FRENZIED PACE OF DFARS CHANGES

The Department of Defense (DOD) maintained its torrid rate of DOD FAR Supplement (DFARS) changes during May with the issuance of five final rules, two proposed rules, and a deviation.

■ **Applicability of Inflation Adjustment of Acquisition-Related Thresholds:** This finalizes, with minor editorial changes, the rule that proposed to amend the FAR to implement the NDAA for FY 2018 (Public Law 115-91), Section 821, Amendment Relating to Applicability of Inflation Adjustments, which amends paragraph (d) of 41 USC 1908, Inflation Adjustment of Acquisition-Related Dollar Thresholds, to require that the inflation adjustments of statutory acquisition-related thresholds under 41 USC 1908 apply to existing contracts and subcontracts in effect on the date of the adjustment.

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

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

FAR 1.109, Statutory Acquisition-Related Dollar Thresholds – Adjustment for Inflation, implements 41 USC 1908, and DFARS 201.109 provides supplemental information applicable to DOD. A rule was proposed that would amend DFARS 201.109 to add the following as paragraph (a)(1): "41 USC 1908(d) requires the adjustment for inflation of all statutory acquisition-related dollar thresholds in the DFARS be applied to contracts and subcontracts without regard to the date of award of the contract or subcontract, except thresholds based on the Wage Rate Requirements statute, the Service Contract Labor Standards statute, or established by the United States Trade Representative pursuant to the Trade Agreement Act, which are not escalated by the statute."

In addition, several DFARS clauses that contain thresholds subject to inflation adjustment provide the specific dollar amount of the threshold. To implement the new requirements under 41 USC 1908(d), the rule proposed to replace the dollar amounts of the thresholds in each clause with a reference to the FAR or DFARS section that provides the overarching policy and the acquisition-related threshold. If the DFARS policy section does not currently include the acquisition-related threshold, the rule proposed to amend those sections to add the thresholds.

No comments were submitted in response to the proposed rule, so it is finalized with conforming changes. For more on the proposed rule, see the January 2019 ***Federal Contracts Perspective*** article "DOD Holds Year-End Regulations Clearance."

■ **Brand Name or Equal:** This finalizes, with changes, the rule that proposed to amend DFARS part 206, Competition Requirement, DFARS part 211, Describing Agency Needs, and DFARS part 213, Simplified Acquisition Procedures, to implement the NDAA for FY 2017 (Public Law 114-328), Section 888, Requirement and Review Relating to Use of Brand Names or Brand-Name or Equivalent Descriptions in Solicitations, which requires that competition on DOD solicitations not be limited through the use of brand name or equivalent descriptions, or proprietary specifications or standards, unless a justification for such specification is provided and approved. FAR 6.303, Justifications, and FAR 6.304, Approval of the Justification, address the content, format, and approval authorities for justifications for other than full and open competition.

The rule proposed to make the following amendments:

- Add to DFARS 206.302-1, Only One Responsible Source and No Other Supplies or Services Will Satisfy Agency Requirements, (1) a new paragraph (c) to advise contracting officers that a justification and approval described at FAR 6.303 is required when using brand name or equal descriptions; and (2) a new paragraph (S-70) to provide a similar instruction for proprietary specifications or standards.

- Add new DFARS 211.104, Use of Brand Name or Equal Purchase Descriptions, to direct contracting officers to the new requirements at DFARS 206.302-1 and DFARS 213.501 (see next) to complete a justification and approval prior to using brand name or equal purchase descriptions. Similar direction for use of proprietary specifications and standards would be provided in new DFARS 211.170, Use of Proprietary Specifications or Standards.

- Add to DFARS 213.501, Special Documentation Requirements, a new paragraph (a)(ii) to advise contracting officers that "the justification and approval addressed in FAR 13.501(a) [Special Documentation Requirements] is required in order to use brand name or equal descriptions or proprietary specifications and standards."

Finally, because FAR 11.104, Use of Brand Name or Equal Purchase Descriptions, addresses requirements for the use of brand name or equal purchase descriptions, this rule proposed to add DFARS 211.104 to direct contracting officers to the new requirements at DFARS 206.302-1 and DFARS 213.501 to complete a justification and approval prior to using brand name or equal purchase descriptions. Similar direction for use of proprietary specifications and standards would be provided in new DFARS 211.170, Use of Proprietary Specifications or Standards.

Six respondents submitted comments on the proposed rule and, in response, DFARS 211.104 and DFARS 211.170 have been updated to clarify that the use brand name or equal descriptions or proprietary specifications and standards shall be justified and approved when using sealed bidding procedures, negotiated procedures, or simplified procedures for certain commercial items.

For more on the proposed rule, see the November 2018 ***Federal Contracts Perspective*** article "DOD Keeps DFARS Cleanup Rolling Along."

■ **Foreign Commercial Satellite Services and Certain Items on the Commerce Control List:** This finalizes, without changes, the interim rule that revised DFARS subpart 225.7, Prohibited Sources, and corresponding provisions and clauses to implement two NDAA sections: (1) the NDAA for FY 2018 (Public Law 115-91), Section 1603, Foreign Commercial Satellite Services: Cybersecurity Threats and Launches, which imposes additional prohibitions on the acquisition of certain foreign commercial satellite services; and (2) the NDAA for FY 2017 (Public Law 114-328), Section 1296, Maintenance of Prohibition on Procurement by Department of Defense of People's Republic of China-Origin Items that Meet the Definition of Goods and Services Controlled as Munitions Items When Moved to the "600 series" of the Commerce Control List, which prohibits purchases from any Communist Chinese military company, through a contract or subcontract (at any tier), of goods and services controlled as munitions items on the 600 series of the Commerce Control List (CCL) of the Export Administration Regulations (EAR) of the Department of Commerce.

- Section 1603 of the NDAA for FY 2018 amends paragraph (f) of 10 USC 2279, Foreign Commercial Satellite Services and Foreign Launches, to add "the Russian Federation" to the definition of "covered foreign country." Russia joins the other countries identified as "covered foreign countries" in the NDAA for FY 2013 (Public Law 112-239), paragraph (c)(2) of Section 1261, Removal of Satellites and Related Items from the United States Munitions List: the People's Republic of China, North Korea, and any country that is a state sponsor of terrorism (currently Iran, North Korea, Sudan, and Syria). DOD is not permitted to contract with a covered foreign country for satellite services, to use satellites designed or manufactured in a covered foreign country, or to have a satellite launched using a launch vehicle designed or manufactured in a covered foreign country (the prohibition pertaining to satellites does not go into effect until December 31, 2022). In addition, Section 1603 adds to 10 USC 2279 that "the Secretary of Defense may not enter into a contract for satellite services with a foreign entity if the Secretary reasonably believes that...entering into such contract would create an unacceptable cybersecurity risk for the Department of Defense."

  To implement Section 1603, the interim rule amended DFARS 252.225-7049, Prohibition on Acquisition of Commercial Satellite Services from Certain Foreign Entities – Representation, and DFARS 252.225-7051, Prohibition on Acquisition of Certain Foreign Commercial Satellite Services, to enforce compliance.

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

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

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

To implement Section 1296 of the NDAA for FY 2017, the interim rule modified DFARS 252.225-7007, Prohibition on Acquisition of United States Munitions List Items from Communist Chinese Military Companies, to prohibit contractors or subcontractors from acquiring items listed on the 600 series of the CCL from any Communist Chinese military company. In addition, the clause now applies to the acquisition of commercial items, including commercially available off-the-shelf (COTS) items if the items are 600 series items on the CCL or are USML items. Although most 600 series items are not commercial items, and USML items are even less likely to be commercial items, it is possible that some of these covered items will be commercial items and must not be purchased from a Communist Chinese military company.

One comment on the interim rule was submitted by a respondent, and it was favorable to the implementation of the rule. Therefore, the interim rule is finalized without changes.. For more on the interim rule, see the January 2019 ***Federal Contracts Perspective*** article "DOD Holds Year-End Regulations Clearance."

■ **Repeal of "Ordering Limitation" Clause:** This final rule removes DFARS 252.247-7012, Ordering Limitation, and its associated prescription at paragraph (g) of DFARS 247.271-3, Solicitation Provisions, Schedule Formats, and Contract Clauses. DFARS 252.247-7012 is included in solicitations and resulting contracts when an indefinite-delivery contract for the preparation of personal property for movement or storage, or for performance of intra-city or intra-area movement, is contemplated. The clause advises a contractor of the manner in which the government will place orders for requisite supplies and services in consideration of the contractor's guaranteed maximum daily capacity.

FAR 52.216-19, Ordering Limitations, is also included in solicitations and contracts for indefinite-delivery contracts. It identifies: the minimum and maximum order quantities or values; a limitation on ordering, within a specified number of days, a total amount or quantity that exceeds the maximum order quantities or values; and the terms and conditions for placing, accepting, or refusing orders that exceed the maximum ordering limitations identified in the clause. Upon review of the DFARS and FAR clauses, and based on current transportation practices, DOD has determined that FAR 52.216-19 adequately addresses the necessary terms and conditions on minimum and maximum ordering limitations for the preparation of personal property for movement or storage, or performance of intra-city or intra-area movement. Therefore, DFARS 252.247-7012 is no longer necessary and is removed, along with its prescription in DFARS 247.271-3(g).

■ **Repeal of "Availability of Specifications, Standards, and Data Item Descriptions Not Listed in the Acquisition Streamlining and Standardization Information System (ASSIST), and Plans, Drawings, and Other Pertinent Documents" Provision:** This final rule removes DFARS 252.211-7001, Availability of Specifications, Standards, and Data Item Descriptions Not

Listed in the Acquisition Streamlining and Standardization Information System (ASSIST), and Plans, Drawings, and Other Pertinent Documents, and its associated clause prescription at paragraph (c)(i) of DFARS 211.204, Solicitation Provisions and Contract Clause [pertaining to using and maintaining requirements documents].

When solicitations identify requirements documents not listed in the General Services Administration (GSA) Index of Federal Specifications, Standards and Commercial Item Descriptions or ASSIST, paragraph (b) of FAR 11.201, Identification and Availability of Documents, requires that "such documents shall be furnished with the solicitation or specific instructions shall be furnished for obtaining or examining such documents."

DFARS 252.211-7001 is included in solicitations that require the use of specifications, standards, and data item descriptions that are not listed in the ASSIST database. It provides offerors with the name and address of the activity from which the offeror can obtain a copy of the applicable documents. It was intended for use in situations where the documents were not attached to the solicitation and an offeror could request a copy of the documents by mail.

However, DFARS 252.211-7002, Examination of Specifications, Standards, Plans, Drawings, Data Item Descriptions and Other Pertinent Documents, is also available for use in solicitations that require the use of specifications, standards, and data item descriptions not listed in the ASSIST database. The text of DFARS 252.211-7002 notifies offerors that the documents are unavailable for distribution (as an attachment to the solicitation) and includes a blank for the contracting officer to provide a physical address, email address, or name and phone number where the documents can be requested and/or obtained. It is not necessary to have two different provisions to communicate how or where an offeror can obtain or view documents associated with a solicitation. Therefore, DFARS 252.211-7001 is not necessary and is removed, along with its prescription in DFARS 211.204(c)(i).

■ **Contractor Purchasing System Review Threshold:** This proposed rule would add DFARS 244.302, Requirements [for granting, withholding, or withdrawing approvals of contractor purchasing system reviews (CSPRs)], to raise the CPSR threshold in paragraph (a) of FAR 44.302, Requirements, from $25,000,000 to $50,000,000. FAR 44.302(a) requires the administrative contracting officer (ACO) to determine whether a contractor's sales to the government are expected to exceed $25,000,000 during the next 12 months and, if so, perform a review of the contractor's past performance of the contractor and the volume, complexity, and dollar value of its subcontracts to determine if a CPSR is needed.

FAR 44.302(a) also provides that "the head of the agency responsible for contract administration may raise or lower the $25,000,000 review level if it is considered to be in the government's best interest." The $25,000,000 threshold has not been changed since 1996. Adjusting the threshold to $50,000,000 would account for inflation, reduce the burden on small contractors, and allow a more efficient and effective use of CSPR resources to review larger contractors where more taxpayer dollars are at risk. It is estimated that this change would reduce the number of contractor reviews by approximately 20% while reducing by only 2% the value of contract dollars covered by CSPRs.

To implement this change, DFARS 244.302 would be added, and it would consist of the following paragraph (a): "In lieu of the threshold at FAR 44.302(a), the ACO shall determine the need for a CPSR if a contractor's sales to the government are expected to exceed $50 million during the next 12 months."

Comments on this proposed rule must be submitted no later than July 30, 2019, identified as "DFARS Case 2017-D038," 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.

■ **Accelerated Payments for Small Business Contractors:** This proposed rule would add DFARS 232.009, Providing Accelerated Payments to Small Business Subcontractors, and DFARS 252.232-7XXX, Accelerating Payments to Small Business Subcontractors – Prohibition on Fees and Consideration, to implement the NDAA for FY 2019 (Public Law 115-232), Section 852, Prompt Payments of Small Contractors. Section 852 provides for accelerated payments to small business contractors and to small business subcontractors by accelerating payments to their prime contractors.

Specifically, Section 852 requires DOD to establish an accelerated payment date for small business contractors, with a goal of 15 days after receipt of a proper invoice, if a specific payment date is not established by contract. For contractors that subcontract with small businesses, Section 852 requires DOD to establish an accelerated payment date, with a goal of 15 days after receipt of a proper invoice, if: (1) a specific payment date is not established by contract, and (2) the contractor agrees to make accelerated payments to the subcontractor without any further consideration from, or fees charged to, the subcontractor.

The requirements of Section 852 are similar to current DOD policy and practice regarding payments to small business contractors and subcontractors (see the August 2014 ***Federal Contracts Perspective*** article "DOD Conducts DFARS Clean-Up"). DFARS 232.903, Responsibilities, states "DOD policy is to assist small business concerns by paying them as quickly as possible after invoices and all proper documentation, including acceptance, are received and before normal payment due dates established in the contract…" In practice, the Defense Financial Accounting Service (DFAS) provides accelerated payments to nearly all DOD contractors.

FAR 52.232-40, Providing Accelerated Payments to Small Business Subcontractors, already includes most of the requirements of Section 852. Therefore, DOD proposes to continue using FAR 52.232-40 to avoid unnecessary duplication. However, this rule proposes to add DFARS 252.232-7XXX, Accelerating Payments to Small Business Subcontractors – Prohibition on Fees and Consideration. Since Section 852 prohibits accelerated payments to contractors unless the contractor agrees to make accelerated payments to the subcontractor without any further consideration from, or fees charged to, the subcontractor, this new clause would include this prohibition.

To implement Section 852, this proposed rule would do the following:

– Add DFARS 232.009, which would consist of DFARS 232.009-1, Providing Accelerated Payments to Small Business Subcontractors ("Section 852 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232) requires DOD to provide accelerated payments to small business contractors and subcontractors, to the fullest extent permitted by law, with a goal of 15 days"), and DFARS 232.009-2, Contract Clause ("use the clause at [DFARS] 252.232-7XXX, Accelerating Payments to Small Business Subcontractors – Prohibition on Fees and Consideration, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of

commercial items, that include the clause at FAR 52.232-40, Providing Accelerated Payments to Small Business Subcontractors").

– Revise DFARS 232.903 to state, "In accordance with Section 852 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232), DOD shall assist small business concerns by providing payment as quickly as possible, to the fullest extent permitted by law, with a goal of 15 days after receipt of proper invoices and all required documentation, including acceptance, and before normal payment due dates established in the contract (see [DFARS] 232.906(a) [Making Payments])".

– Add DFARS 252.232-7XXX, which would state, "(a) In accordance with Section 852 of Public Law 115-232, the contractor shall not require any further consideration from or charge fees to the small business subcontractor when making accelerated payments to subcontractors under the clause at FAR 52.232-40, Providing Accelerated Payments to Small Business Subcontractors. (b) Include the substance of this clause, including this paragraph (b), in all subcontracts with small business concerns, including those for the acquisition of commercial items."

Comments on this proposed rule must be submitted no later than July 30, 2019, identified as "DFARS Case 2018-D068," 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.

■ **Deviation on Quick-Closeout Procedures:** This deviation directs contracting officers to deviate from the quick-closeout procedures in paragraph (a) of FAR 42.708, Quick-Closeout Procedure, for cost reimbursement, time and material, labor hour, fixed-price incentive, and fixed-price redeterminable contracts, task orders, and delivery orders. "Specifically, in lieu of the thresholds at FAR 42.708(a)(2)(i) and (ii) [that is, unsettled direct and indirect costs are considered "relatively insignificant" if the costs do not exceed the lesser or (i) $1,000,000; or (ii) 10% of the total contract, task order, or delivery order amount], contracting officers shall consider cost amounts to be relatively insignificant when the total unsettled direct and indirect costs to be allocated to any one contract, task order, or delivery order do not exceed $2 million."

In addition, the deviation authorizes Defense Contract Management Agency (DCMA) Administrative Contracting Officers (ACOs) are further authorized to deviate from FAR 42.708(a)(2) and negotiate the settlement of direct and indirect costs for a specific contract, task order, or delivery order to be closed in advance of the determination of final direct costs and indirect rates set forth in FAR 42.705 [Final Indirect Cost Rates] regardless of the dollar value or percent of unsettled direct or indirect costs allocable to the contract."

FSS PROVISIONS, CLAUSES UPDATED

The General Services Administration (GSA) is finalizing, with many changes, the rule that proposed to clarify, update, and incorporate existing Federal Supply Schedule (FSS) contract administration policies and procedures. In addition, substantial corrections had to be issued to the final rule.

Thirty new FSS-specific clauses and provisions that were previously implemented through internal GSA policy and were included in FSS solicitations and contracts are incorporated into GSA Acquisition Regulation (GSAR) part 538, Federal Supply Schedule Contracting, and GSAR part 552, Solicitation Provisions and Contract Clauses. Bringing these clauses and provisions into the GSAR allows for greater transparency, and consolidates all regulations into one area, while updating administrative information to ensure currency and consistency within the FSS program. The new clauses and provisions are:

- GSAR 552.238-70, Cover Page for Worldwide Federal Supply Schedules
- GSAR 552.238-71, Notice of Total Small Business Set-Aside
- GSAR 552.238-72, Information Collection Requirements
- GSAR 552.238-74, Introduction of New Supplies/Services (INSS)
- GSAR 552.238-76, Use of Non-Government Employees to Review Offers
- GSAR 552.238-87, Delivery Prices
- GSAR 552.238-88, GSA Advantage! ®.
- GSAR 552.238-89, Deliveries to the U.S. Postal Service
- GSAR 552.238-90, Characteristics of Electric Current
- GSAR 552.238-91, Marking and Documentation Requirements for Shipping
- GSAR 552.238-92, Vendor Managed Inventory (VMI) Program
- GSAR 552.238-93, Order Acknowledgement
- GSAR 552.238-94, Accelerated Delivery Requirements
- GSAR 552.238-95, Separate Charge for Performance Oriented Packaging (POP)
- GSAR 552.238-96, Separate Charge for Delivery Within Consignee's Premises
- GSAR 552.238-97, Parts and Service
- GSAR 552.238-98, Clauses for Overseas Coverage
- GSAR 552.238-99, Delivery Prices Overseas
- GSAR 552.238-100, Transshipments
- GSAR 552.238-101, Foreign Taxes and Duties
- GSAR 552.238-102, English Language and U.S. Dollar Requirements
- GSAR 552.238-103, Electronic Commerce
- GSAR 552.238-104, Dissemination of Information by Contractor
- GSAR 552.238-105, Deliveries Beyond the Contractual Period – Placing of Orders
- GSAR 552.238-106, Interpretation of Contract Requirements
- GSAR 552.238-107, Export Traffic Release (Supplies)
- GSAR 552.238-108, Spare Parts Kit
- GSAR 552.238-109, Authentication Supplies and Services
- GSAR 552.238-110, Commercial Satellite Communication (COMSATCOM) Services
- GSAR 552.238-111, Environmental Protection Agency Registration Requirement

Four FSS-specific clauses and provisions were removed from the GSAR as part of the ongoing GSAR rewrite and retained as internal GSA policy. It has been decided that these four clauses and provisions should be reinstated and given new clause numbers. These clauses and provisions are:

- GSAR 552.238-75, Evaluation – Commercial Items (Federal Supply Schedules
- GSAR 552.238-84, Discounts for Prompt Payment
- GSAR 552.238-85, Contractor's Billing Responsibilities
- GSAR 552.232-86, Delivery Schedule

Ten existing FSS-specific clauses and provisions are updated to reflect current references and practices. These clauses and provisions are:

- GSAR 552.212-71, Contract Terms and Conditions Applicable to GSA Acquisition of Commercial Items
- GSAR 552.238-73, Identification of Electronic Office Equipment Providing Accessibility for the Handicapped
- GSAR 552.238-77, Submission and Distribution of Authorized Federal Supply Schedule (FSS) Price Lists
- GSAR 552.238-78, Identification of Products That Have Environmental Attributes
- GSAR 552.238-79, Cancellation
- GSAR 552.238-80, Industrial Funding Fee and Sales Reporting
- GSAR 552.238-81, Price Reductions
- GSAR 552.238-82, Modifications (Federal Supply Schedules)
- GSAR 552.238-83, Examination of Records by GSA (Federal Supply Schedules)
- GSAR 552.238-113, Scope of Contract (Eligible Ordering Activities)

In addition, GSAR 538.273, FSS Solicitation Provisions and Contract Clauses, is restructured to be more consistent with the formation of FSS solicitations and contracts. The previous structure of GSAR 538.273 was based on whether the FSS was single-award or multiple-award. A more practical structure outlines where each provision or clause is to be located in FSS solicitations and contracts (for example, as an addendum to FAR 52.212-1, Instructions for Offerors – Commercial Items, or FAR 52.212-4, Contract Terms and Conditions – Commercial Items).

Three respondents submitted numerous comments on the proposed rule, and many of the suggested changes have been adopted. However, the final rule had many errors in it, so an extensive correction had to be issued. For more on the proposed rule, see the October 2014 ***Federal Contracts Perspective*** article "GSA to Update GSAR FSS Provisions/Clauses."

SBA PROPOSES WOSB CERTIFICATION PROCEDURES

The Small Business Administration (SBA) is proposing to amend its regulations to implement a statutory requirement in the NDAA for FY 2015 (Public Law 113-291), Section 825, Sole Source Contracts for Small Business Concerns Owned and Controlled by Women, to certify women-owned small businesses (WOSB) and economically disadvantaged women-owned small businesses (EDWOSB) participating in the Women-Owned Small Business Contract Program.

Section 825 amended Title 15 of the U.S. Code, Section 637 (15 USC 637), Additional Powers (of the SBA), paragraph (m), Procurement Program for Women-Owned Business Concerns, to: (1) grant contracting officers the authority to award sole source awards to WOSBs and EDWOSBs; and (2) to require that a concern be certified as a WOSB or EDWOSB by a federal agency, a state government, the SBA, or a national certifying entity approved by the SBA, in order to be awarded a set aside or sole source contract under the authority of 15 USC 637(m). (**EDITOR'S NOTE:** For more on Section 825, see the January 2015 ***Federal Contracts Perspective*** article "Authority to Use Simplified Procedures for Commercial Items Up to $6,500,000 Made Permanent.")

In September 2015, the SBA issued a final rule implementing the sole source authority for WOSBs and EDWOSBs (see the October 2015 ***Federal Contracts Perspective*** article "Women-Owned Business Sole Source Regulations Finalized"), and FAC 2005-91 amended FAR subpart 19.15, Women-Owned Small Business Program, to implement the SBA final rule (see the October 2016 ***Federal Contracts Perspective*** article "FAC 2005-91 Finalizes Rule on Women-Owned Small Business Sole Source Contracts"). However, SBA's final rule did not address the certification portion of Section 825 "because its implementation is more complicated, could not be accomplished by merely incorporating the statutory language into the regulations, and would have delayed the implementation of the sole source authority unnecessarily. SBA notified the public that because it did not want to delay the implementation of the WOSB sole source authority by combining it with the new certification requirement, SBA decided to implement the certification requirement through a separate rulemaking." This proposed rule is that "separate rulemaking."

As part of the process to draft the regulations governing the WOSB/EDWOSB certification program, SBA issued an Advance Notice of Proposed Rulemaking (ANPR) in December 2015 that solicited comments to assist SBA in drafting a proposed rule to implement a WOSB/EDWOSB certification program. SBA received 122 comments in response to the ANPR, and SBA reviewed all the comments while drafting this proposed rule.

This rule proposes to revamp the SBA's regulations in Title 13 of the Code of Federal Regulations (CFR), Part 127, Women-Owned Small Business Federal Contracting Program (13 CFR part 127), Subpart C, Certification of EDWOSB and WOSB Status, and Subpart D, Eligibility Examinations (proposed to be renamed "Maintaining WOSB and EDWOSB Status and Eligibility Examinations"). The following are the significant changes being proposed:

- Subpart C, Certification of EDWOSB and WOSB Status

  – Section 127.300, How is a concern certified as an WOSB or EDWOSB?, would state that there will be no cost to apply to the SBA for certification. SBA may rely solely upon the information submitted by the applicant to establish eligibility, may request additional

information, or may verify the information before making a determination. A WOSB applicant may submit evidence to SBA that it is a women-owned concern that is: (1) a certified 8(a) participant; (2) certified by the Department of Veterans Affairs (VA) as a service-disabled veteran owned business or veteran-owned business; or (3) certified as a Disadvantaged Business Enterprise (DBE) by a state agency authorized by the Department of Transportation (DOT); or (4) a concern may submit evidence that it has been certified as a WOSB by an approved third party certifier. A WOSB that is a certified 8(a) Participant qualifies as an EDWOSB. Firms certified by the VA or under DOT's DBE program as WOSBs will be deemed to be owned and controlled by women, but they must apply to SBA to demonstrate their economic disadvantage in order to be certified as EDWOSBs. An applicant may submit evidence that it has been certified as an EDWOSB by a third party certifier.

- Section 127.301, When may a concern apply to SBA for certification?, would state, "A concern may apply for WOSB or EDWOSB certification and submit the required information whenever it can represent that it meets the eligibility requirements…"

- Section 127.302, Where can a concern apply for certification from SBA?, would direct applicants to **https://certify.sba.gov** or any successor system.

- Section 127.303, What must a concern submit to SBA?, would require applicants to provide documents and information demonstrating that it meets the requirements for WOSB or EDWOSB certification. "SBA maintains a list of the minimum required documents that can be found at **https://certify.sba.gov**. A firm may submit additional documents and information to support its eligibility…This may include, but is not limited to, corporate records, business and personal financial records, including copies of signed federal personal and business tax returns, and individual and business bank statements."

- Section 127.304, How will SBA process the application for certification?, would detail how SBA will process applications. WOSB applicants will have their packages reviewed, similar to the 8(a) program, within 15 calendar days for completeness of an application. Concerns will be notified if required information is missing; SBA will not process incomplete applications. SBA will make its determination within 90 days after a concern submits a complete application. This is consistent with the time frames and policies established for SBA's other certification programs. A concern must be eligible when it applies, and it must maintain its eligibility throughout the time SBA is evaluating its application. A concern has an affirmative duty to notify SBA of any changes in circumstances may be relevant to a concern's eligibility, and SBA may decline to certify a concern that fails to notify SBA of changed circumstances.

- Section 127.305, Can an applicant ask SBA to reconsider SBA's initial decision to decline its application?, would authorize a reconsideration process, which would permit a firm found ineligible to address deficiencies and change its bylaws, articles of incorporation, or other ownership documents to come into compliance with SBA's ownership and control requirements. This reconsideration process would be consistent with SBA's current application eligibility process for the 8(a) program.

- Section 127.306, May declined or decertified concerns seek recertification at a later date?, would provide that concerns may reapply for certification one year after a final decline or decertification decision.

- Section 127.350, What is a third party certifier?, would state, "A third party certifier is a non-governmental entity that SBA may approve to certify that an applicant firm is qualified for the WOSB or EDWOSB contracting program. A third party certifier may be a for-profit or non-profit entity. The list of SBA-approved third party certifiers may be found on SBA's website at **sba.gov**."

- Section 127.351, What third party certifications may a concern use as evidence of its status as a qualified EDWOSB or WOSB?, would state that "the concern must have a current, valid certification from an entity designated as an SBA-approved certifier. The third party certification must be submitted to SBA through **https://certify.sba.gov** (or a successor system)."

- Section 127.352, What is the process for becoming a third party certifier?, would state, "SBA will periodically hold open solicitations. All entities that believe they meet the criteria to act as a third party certifier will be free to respond to the solicitation. SBA will review the submissions, and if SBA determines that an entity has demonstrated it meets SBA criteria, SBA will enter into an agreement and designate the entity as an approved third party certifier."

- Section 127.353, May third party certifiers charge a fee?, would allow third party certifiers to charge a reasonable fee, but require the certifiers to notify applicants, in writing, that SBA offers certification for free.

- Section 127.354, What are the minimum required certification standards for a third party certifier?, would identify minimum standards that must be met.

- Section 127.355, How will SBA ensure that approved third party certifiers are meeting the requirements?, would state that SBA will conduct periodic compliance reviews, and that SBA may revoke its approval of a third party certifier that is not meeting the requirements.

- Section 127.356, How does a concern obtain certification from an approved certifier?, would provide that concerns submit their applications directly to the third party certifier, register in System for Award Management (SAM – **https://www.sam.gov**), and upload all of the documents to **https://certify.sba.gov**. Once certified, the applicant will upload the approval document to **https://certify.sba.gov**.

- Section 127.357, What happens if a firm is found not eligible by a third party certifier?, would permit a concern found to be ineligible by a third party certifier to request reconsideration and a redetermination, at no additional cost to the concern. The third party certifier would be required to complete the reconsideration process within 60 calendar days.

- Subpart D, Maintaining WOSB and EDWOSB Status and Eligibility Examinations

  - Section 127.400, How does a concern maintain its WOSB or EDWOSB certification?, would require that concerns recertify their eligibility every three years, and that failure to recertify in the time period provided will result in the concern being decertified and removed as a certified WOSB or EDWOSB from the Dynamic Small Business Search (DSBS) system. (**EDITOR'S NOTE:** DSBS [**http://web.sba.gov/pro-net/search/dsp_dsbs.cfm**] is a database that government agencies use to find small business contractors for upcoming contracts. Information provided by those registered in SAM is used to populate DSBS.)

  - Section 127.401, What are an EDWOSB's and WOSB's ongoing obligations to SBA?, would require all certified concerns to notify SBA of any material changes in writing.

  - Section 127.402, What happens if a concern fails to recertify or notify SBA of a material change?, would state that such concerns would be decertified.

  - Section 127.403, What is a program examination, who will conduct it, and what will SBA examine?, would establish that an examination is an investigation by SBA to verify the accuracy of any WOSB or EDWOSB certification and to ensure that currently certified concerns continue to meet the eligibility criteria of the WOSB program.

  - Section 127.404, When may SBA conduct program examinations?, would authorize SBA to conduct program examinations at its discretion any time, and without advance notification, after a concern has submitted an application to be certified.

  - Section 127.405, May SBA require additional information from a WOSB or EDWOSB during a program examination?, would make clear that the answer is "yes." "SBA may draw an adverse inference from the failure of a concern to cooperate with a program examination or provide requested information."

  - Section 127.406, What happens if SBA determines that the concern is no longer eligible for the program?, would state that SBA will notify the concern that it has been proposed for decertification and identify the reasons why SBA has proposed decertification. The WOSB or EDWOSB would have 20 calendar days to respond to each of the reasons. SBA will consider the concern's response and render a final decision.

Finally, this proposed rule would revise paragraph (c) of Section 124.104, Who is economically disadvantaged?, to make the economic disadvantage requirements for the 8(a) program consistent with the economic disadvantage requirements for women-owned firms seeking EDWOSB status.

To be considered economically disadvantaged for EDWOSB status, Section 127.203, What are the rules governing the requirement that economically disadvantaged women must own EDWOSBs?, requires that: (1) a woman's personal net worth must be less than $750,000, excluding her ownership interest in the concern and her equity interest in her primary personal residence (paragraph (b)); (2) a woman's personal income cannot exceed $350,000 averaged

over the preceding three years (paragraph (c)(3)(i)); and (3) the fair market value of all her assets (including her primary residence and the value of the business concern) may not exceed $6,000,000 (paragraph (c)(4)). These economic disadvantage criteria are the same criteria that an 8(a) participant, once accepted into the 8(a) program, needs to meet to continue in the 8(a) program (Section 124.104(c)(2), (c)(3), and (c)(4), respectively).

However, there is much stricter criteria for those seeking to *enter* the 8(a) program: (1) the net worth of an individual claiming disadvantage must be less than *$250,000* (paragraph (c)(2)); (2) an individual's personal income cannot exceed *$250,000* averaged over the preceding three years (paragraph (c)(3)); and (3) the fair market value of all the individual's assets (including his or her primary residence and the value of the business concern) may not exceed *$4,000,000* (paragraph (c)(4)).

This has produced an anomaly. A concern applying for EDWOSB and 8(a) status at the same time can be found economically disadvantaged for EDWOSB purposes, but denied eligibility for the 8(a) program based on not being economically disadvantaged. "SBA does not believe that it makes sense to allow a woman to qualify as economically disadvantaged for EDWOSB purposes, but to then be declined from 8(a) participation for not being economically disadvantaged."

Comments on this proposed rule must be submitted no later than July 15, 2019, identified as "RIN: 3245-AG75," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) mail, paper, disk, or CD/ROM submissions: Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416; or (3) hand delivery or courier: Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416.

HUDAR GETS CLEANED UP

The Department of Housing and Urban Development (HUD) has made miscellaneous changes to the HUD Acquisition Regulation (HUDAR). The most obvious change is the replacement of the unique-HUD term "government technical representative" (GTR) with contracting officer representative" (COR) throughout the HUDAR, and the removal of the term "government technical monitor" from the HUDAR.

The following are some of the more significant changes made to the HUDAR by this rule:

- HUDAR 2442.1107, Contract Clause, is revised to codify a class deviation previously approved by the Chief Procurement Officer (CPO) that: (1) revises the procurement instruments, types of contracts, and types of services applicable to HUDAR 2452.242-71, Contract Management Systems; and (2) adjusts the applicability threshold of the clause from $500,000 to $1,000,000.

- HUDAR 2452.216-81, Level of Effort and Fee Payment, and HUDAR 2452.216-82, Labor Categories, Requirements, and Estimated Level of Effort, are added. HUDAR 2452.216-81 provides contractors with the total level of effort to be provided and the method for calculating the fee, and HUDAR 2452.216-82 provides estimated hours and labor categories

to assist vendors in developing proposals for immediate requirements. These are HUD-specific, and HUD wanted to codfiy them.

- Paragraph (b)(2) of HUDAR 2452.232-71, Voucher Submission (Cost-Reimbursement, Time-and-Materials, and Labor Hour), is revised to codify a class deviation approved by the CPO that requires contractors to provide supporting documentation with vouchers that adequately prove the legitimacy and compliance of costs claimed, and the ability to appropriately allocate costs claimed.

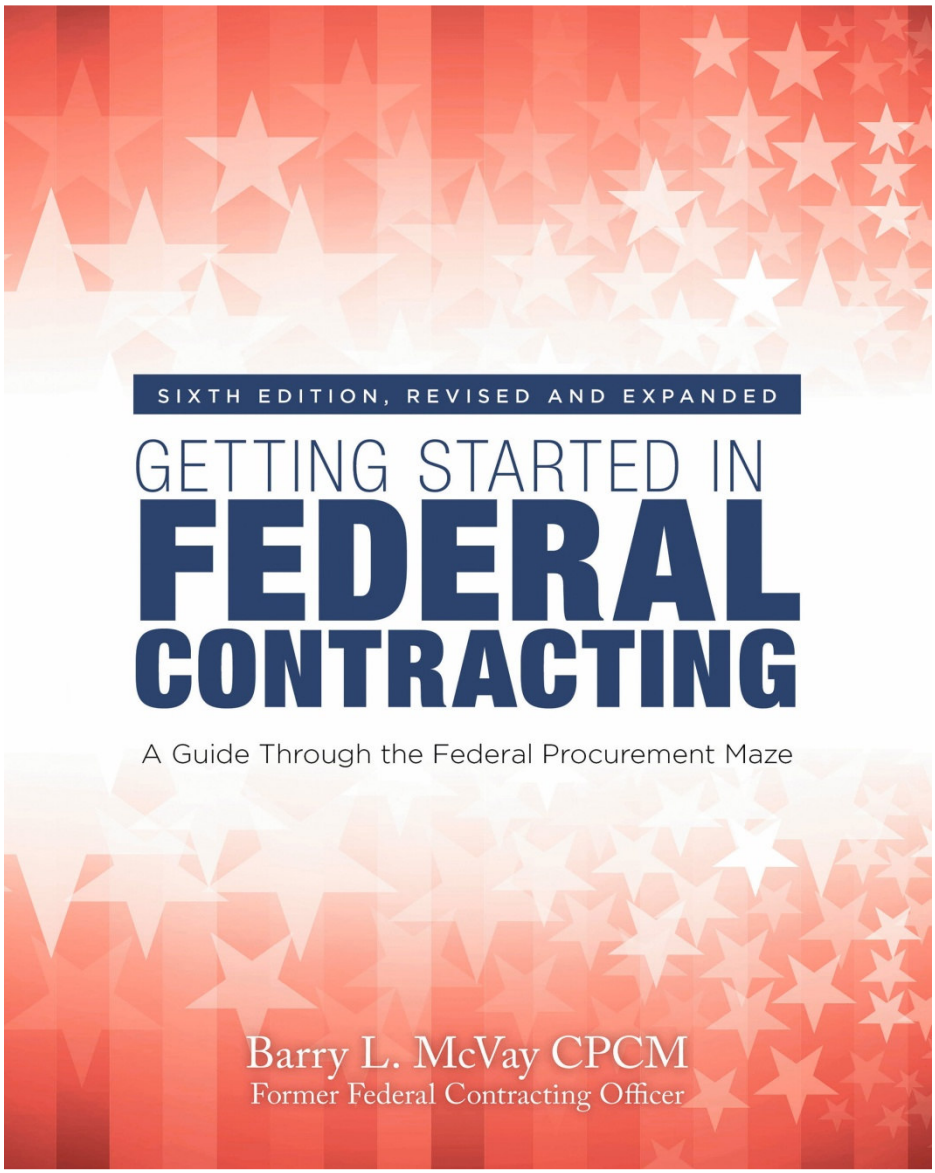
- Provision HUDAR 2452.237–82, Access to Controlled Unclassified Information (CUI), and clause HUDAR 2452.237–83, Access to Controlled Unclassified Information (CUI), are added to codify a class deviation previously approved by the CPO relating to CUI.

- Amend HUDAR 2452.237-75, Access to HUD Facilities, and HUDAR 2452.239-70, Access to HUD Systems, to codify a class deviation approved by the CPO that requires contractors to report the status of personal identify verification (PIV) cards to the government on a quarterly basis.

- Amend HUDAR subpart 2452.3, Provision and Clause Matrix, to reflect the addition of provisions and clauses by this rule.

No comments were submitted in response to the proposed rule, so the proposed rule is finalized without changes. For more on the proposed rule, see the May 2018 ***Federal Contracts Perspective*** article "HUDAR Revisions Proposed."

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