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FAC 2019-03 REVISES "ADEQUATE PRICE COMPETITION" STANDARD FOR DOD, NASA, COAST GUARD

Federal Acquisition Circular (FAC) 2019-03 amends Federal Acquisition Regulation (FAR) 15.403-1, Prohibition on Obtaining Certified Cost or Pricing Data (10 USC 2306a and 41 USC Chapter 35), to revise the standard for "adequate price competition" applicable to the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA), and the Coast Guard, as required by the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Public Law 114-328), Section 822, Enhanced Competition Requirements. Section 822 excludes from the standard for adequate price competition the situation in which there was an expectation of competition but only one offer is received, and substitutes "competition that results in at least two or more responsive and viable competing bids."

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FAR 2.101, Definitions, defines "cost or pricing data" as "all facts that, as of the date of price agreement..., prudent buyers and sellers would reasonably expect to affect price negotiations significantly…Cost or pricing data are more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred." Some of the factors that are considered cost or pricing data are: "(1) vendor quotations; (2) nonrecurring costs; (3) information on changes in production methods and in production or purchasing volume; (4) data supporting projections of business prospects and objectives and related operations costs; (5) unit-cost trends such as those associated with labor efficiency; (6) make-or-buy decisions; (7) estimated resources to attain business goals; and (8) information on management decisions that could have a significant bearing on costs." "Certified cost or pricing data" is cost or pricing data that are required to be submitted and certified as "accurate, complete, and current…to the best of the [certifier's] knowledge and belief."

The accumulation and presentation of such data to justify a proposed price is quite administratively burdensome and costly. Therefore, there are many exceptions to the certified cost or pricing data requirement: acquisitions under $2,000,000 (see NDAA for FY 2018 [Public Law 115-91], Section 811, Modifications to Cost or Pricing Data and Reporting Requirements);

when the prices are based on adequate price competition; when commercial items are being acquired; when prices are set by law or regulation; etc. (see FAR 15.403-1(b)).

FAR 15.403-1(c)(1) further explains each of the exceptions, and FAR 15.403-1(c)(1)(ii) states that a price is *based on adequate price competition* when "there was a reasonable expectation, based on market research or other assessment, that two or more responsible offerors, competing independently, would submit priced offers in response to the solicitation's expressed requirement, even though only one offer is received from a responsible offeror and if (A) based on the offer received, the contracting officer can reasonably conclude that the offer was submitted with the expectation of competition, *e.g*., circumstances indicate that (1) the offeror believed that at least one other offeror was capable of submitting a meaningful offer; and (2) the offeror had no reason to believe that other potential offerors did not intend to submit an offer…"

Paragraph (b)(1) of Title 10 of the U.S. Code, Section 2306a (10 USC 2306a), Cost or Pricing Data: Truth in Negotiations, had provided that "submission of certified cost or pricing data shall not be required…in the case of a contract, a subcontract, or modification of a contract or subcontract (A) for which the price agreed upon is based on (i) price competition; or (ii) prices set by law or regulation…" However, paragraph (2)(a) of Section 822 of the NDAA for FY 2017 amended paragraph (b)(1)(A)(i) to remove "price competition" and replace it with "competition that results in at least two or more responsive and viable competing bids." Now 10 USC 2306a(b)(1) provides that "submission of certified cost or pricing data shall not be required under subsection (a) in the case of a contract, a subcontract, or modification of a contract or subcontract (A) for which the price agreed upon is based on (i) *adequate competition that results in at least two or more responsive and viable competing bids*; or (ii) prices set by law or regulation…" (*emphasis* added). (**EDITOR'S NOTE:** Title 10 of the U.S. Code applies only to the DOD, NASA, and the Coast Guard. All "civilian" agencies are subject to the provisions of Title 41 of the U.S. Code, so the change made by Section 822 applies to DOD, NASA, and the Coast Guard *only*.)

To implement Section 822, a rule was proposed that would amend FAR 15.403-1(c)(1) to state that it applies to "agencies other than DOD, NASA, and the Coast Guard," and add the following as a separate standard for the DOD, NASA, and the Coast Guard: "a price is based on adequate price competition only if two or more responsible offerors, competing independently, submit responsive and viable offers. (10 USC 2306a(b)(1)(A)(i))."

Ten respondents submitted comments on the proposed rule. Because of the comments, the rule is finalized with the following changes:

■ Instead of providing a separate standard for DOD, NASA, and the Coast Guard, the final rule states in paragraph (c)(1)(i) what is common to all agencies, and then states in paragraph (c)(1)(ii) the expectations of competition applicable only to agencies other than DOD, NASA, and the Coast Guard. This clarification is considered a "drafting improvement."

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■ Instead of using the Section 822 terms "responsive" and "viable" to describe competing offers, the final rule uses the language that was used in FAR 15.403-1(c)(1)(i): "A price is based on adequate price competition when responsible offerors, competing independently, submit priced offers that satisfy the government's expressed requirement."

In addition, Section 822 is implemented in a DOD final rule that amends the Defense FAR Supplement (DFARS); see the next article for details. For more on the proposed rule that led to the FAC 2019-03 final rule and the proposed rule that led to the DOD final rule, see the July 2018 ***Federal Contracts Perspective*** article "DOD Continues Deluge of Rules, Deviations."

DOD EASES OFF THE GAS – FOR A MONTH

The Department of Defense (DOD) slowed down a bit on the issuance of DFARS revisions, publishing only three final rules and three proposed rules during June.

■ **Only One Offer:** This finalizes, with minor editorial changes, the rule that proposed to amend DFARS 215.371-3, Fair and Reasonable Price and the Requirement for Additional Cost or Pricing Data, DFARS 252.215-7008, Only One Offer, and DFARS 252.215-7010, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, to implement Section 822 of the NDAA for FY 2017, which: (1) requires that adequate price competition for the DOD, NASA, and the Coast Guard must be based on adequate competition from at least two or more responsive and viable offers from independently competing offerors; and (2) makes a prime contractor that is required to submit certified cost or pricing data responsible for determining whether a subcontractor under the contract qualifies for one of the exemptions specified in the newly amended FAR 15.403-1(c)(1)(i). This rule supplements the final rule in FAC 2019-03 (see the article above for more about FAC 2019-03 and the amended FAR 15.403-1(c)(1)(i)).

To implement Section 822, a rule was published that proposed the following changes be made:

- FAR 15.403-1(b)(1) states that when only one offer is received, that offer can be exempt from the requirement for certified cost or pricing data based on adequate price competition. Because FAR 15.403-1(b)(1) no longer applies to DOD, DFARS 215.371-3 and DFARS 252.215-7008 would be amended to limit the cross-references to FAR 15.403-1(b)(2) through (b)(5) (that is, (b)(2) prices set by law or regulation; (b)(3) commercial item is being required; (b)(4) a waiver has been granted; and (b)(5) modifications to contracts or subcontracts for commercial items).

- DFARS 215.371-3(a) references the FAR 15.403-1(c)(1)(ii) exception from certified cost or pricing data requirements for one offer submitted when there was a reasonable expectation for competition. Since FAR 15.403-1(c)(1)(ii) no longer applies to DOD, DFARS 215.371-3(a) would be removed.

- Introductory text would be added to DFARS 215.371-3 that would be revised to exempt contracts valued at or below the simplified acquisition threshold (now $250,000 in most

circumstances), as specified in FAR 15.403-1(a), which states, "Certified cost or pricing data shall not be obtained for acquisitions at or below the simplified acquisition threshold."

– DFARS 252.215-7008 covers the requirements for when only one offer is received in response to a DOD solicitation. It contains much of the same text as FAR 52.215-20, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, because it was required to be used instead of FAR 52.215-20. However, DOD subsequently added DFARS 252.215-7010, Requirement for Certified Cost or Pricing Data and Data Other than Certified Cost or Pricing Data (Basic and Alternate), to take the place of FAR 52.215-20 (see the February 2018 ***Federal Contracts Perspective*** article "DOD Provides Guidance on Commercial Item Procurement"). DFARS 252.215-7010 also contains much of the same text as FAR 52.215-20 in addition to DOD specific requirements based on statute. Since DFARS 252.215-7010 is always used when DFARS 252.215-7008 is included in a solicitation, DFARS 252.215-7008 would be revised to remove all text now covered by DFARS 252.215-7010 so that DFARS 252.215-7008 would be limited to addressing the Section 822 requirements for when only one offer is received in response to a DOD solicitation.

– A new paragraph (c)(3) would be added to both the basic and alternate DFARS 252.215-7010: "The offeror is responsible for determining whether a subcontractor qualifies for an exception from the requirement for submission of certified cost or pricing data on the basis of adequate price competition, *i.e*. two or more responsible offerors, competing independently, submit responsive and viable offers in accordance with FAR 15.403-1(c)(1)(ii)."

Three respondents submitted comments on the proposed rule. No changes were made to the final rule in response to the comments, but changes were required to the new DFARS 252.215-7010(c)(3) conform to changes in the FAC 2019-03 final rule relating to elimination of the terms "responsive" and "viable": "The offeror is responsible for determining whether a subcontractor qualifies for an exception from the requirement for submission of certified cost or pricing data on the basis of adequate price competition, *i.e.,* two or more responsible offerors, competing independently, submit *priced offers that satisfy to government's expressed* requirement in accordance with FAR 15.403-1(c)(1)(i)" (*emphasis* added).

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

■ **Repeal of Transportation-Related DFARS Provisions and Clauses:** This final rule removes several transportation-related provisions and clauses that are included in solicitations and contracts for services to prepare personal property for movement or storage, or perform intra-city of intra-area movement of personal property. These are removed because DOD subject matter experts in transportation services have advised that the information contained in these provisions and clauses is specific to the requirement and/or within the contracting officer's discretion. As such, the information more appropriately belongs in solicitation instructions or a performance work statement to ensure offerors and contractors receive cohesive set of

instructions and performance requirements. Therefore, it is concluded that these provisions and clauses are no longer necessary and can be removed.

The following provisions and clauses are removed:

- DFARS 252.247-7008, Evaluation of Bids, which provides offerors with information on how the government will evaluate bids received in response to a solicitation.

- DFARS 252.247-7009, Award, which provides offerors with the basis upon which the government will make a contract award.

- DFARS 252.247-7010, Scope of Contract, which identifies the scope of the contractor's responsibility to provide supplies and services under the contract.

- DFARS 252.247-7011, Period of Contract, which identifies the period of performance for the contract and the timeframes in which new orders may be placed or completed when the contract is close to its expiration date.

- DFARS 252.247-7013, Contract Areas of Performance, which identifies the area of performance for the contract.

- DFARS 252.247-7017, Erroneous Shipments, which identifies procedures for the contractor to follow in the event an incorrect shipment occurs under the contract.

- DFARS 252.247-7018, Subcontracting, which requires the contractor to obtain written approval from the government prior to subcontracting work under the contract.

- DFARS 252.247-7019, Drayage, which identifies the scope and applicable schedule for inbound and outbound drayage that occurs in connection with the contract.

■ **Repeal of "Price Adjustment" Clause:** This final rule removes DFARS 252.247-7001, Price Adjustment, which was required to be included in solicitations and contracts for stevedoring services when using sealed bidding. DOD subject matter experts on the acquisition of stevedoring services advise that sealed bidding is not used to procure such services and, as such, this clause is not included in stevedoring contracts. Therefore, this clause and its associated prescription at DFARS 247.270-4, Contract Clauses, are removed.

■ **Reliability and Maintainability in Weapon System Design:** This proposed rule would amend various DFARS sections to implement the NDAA for FY 2018 (Public Law 115-91), Section 834, Requirement to Emphasize Reliability and Maintainability in Weapon System Design, which amended Title 10 of the U.S. Code to add Section 2443 (10 USC 2443), Sustainment Factors in Weapon System Design, which requires program managers to ensure that reliability and maintainability are included in the performance attributes of the key performance parameters on sustainment during the development of capabilities requirements for major weapon systems design and contracts for the "(1) engineering and manufacturing development of a weapon system, including embedded software; or (2) for production of a weapon system, including embedded software."

To implement Section 834, the following changes to the DFARS are proposed:

- To DFARS 207.106, Additional Requirements for Major Systems, would be added paragraph (S-70)(2)(ii)(A), and it would require that acquisition plans for major weapons systems and subsystems "ensure that reliability and maintainability are included in the performance attributes of the key performance parameters on sustainment during the development of capabilities requirements."

- To DFARS 207.106 would be added paragraph (S-72)(5), and it would state, "acquisition plans for engineering manufacturing and development and production of major systems…and for major defense acquisition programs…shall include performance measures that are developed using best practices for responding to the positive or negative performance of a contractor for the engineering and manufacturing development or production of a weapon system, including embedded software. At a minimum the contracting officer shall (i) encourage the use of incentive fees and penalties as appropriate; and (ii) allow the program manager…to base determinations of a contractor's performance on reliability and maintainability data collected during the program. Such data collection and associated evaluation metrics shall be described in detail in the contract; and to the maximum extent practicable, the data shall be shared with appropriate contractor and government organizations."

- To DFARS 215.304, Evaluation Factors and Significant Subfactors, would be added paragraph (c)(vi), and it would require contracting officers, when performing source selections in competitive negotiated acquisitions, to "ensure source selections emphasize sustainment factors and objective reliability and maintainability evaluation criteria in competitive contracts for the (A) technical maturation and risk reduction phase of weapon system design…; (B) engineering and manufacturing development phase of a weapon system, including embedded software (10 USC 2443); or (C) production and deployment phase of a weapon system, including embedded software (10 USC 2443)."

- To DFARS 216.402-2, Technical Performance Incentives [for incentive contracts], would be added paragraph (2), and it would require contracting officers to "ensure requirements about the payment of incentive fees or the imposition of penalties are included in the solicitation for a contract for the engineering and manufacturing development or production of a weapon system, including embedded software, if the program manager or comparable requiring activity official exercising program manager responsibilities includes (i) provisions for the payment of incentive fees to the contractor, based on achievement of design specification requirements for reliability and maintainability of weapons systems under the contract; or (ii) the imposition of penalties to be paid by the contractor to the government for failure to achieve such design specification requirements (10 USC 2443)."

- To DFARS 234.004, Acquisition Strategy [for major system acquisition], would be added paragraph (3), and it would require the contracting officer to "include in solicitations for contracts for the technical maturation and risk reduction phase, engineering and manufacturing development phase or production phase of a weapon system, including

embedded software (i) clearly defined measurable criteria for engineering activities and design specifications for reliability and maintainability provided by the program manager, or the comparable requiring activity official performing program management responsibilities; or (ii) ensure a copy of the justification, executed by the program manager or the comparable requiring activity official performing program management responsibilities for the decision that engineering activities and design specifications for reliability and maintainability should not be a requirement, is included in the contract file (10 USC 2443)."

Comments on this proposed rule must be submitted no later than August 27, 2019, identified as "DFARS Case 2019-D003," 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.

■ **Accident Reporting and Investigation Involving Aircraft, Missiles, and Space Launch Vehicles:** This proposed rule would modify paragraph (d) of DFARS 228.370, Additional Clauses [for insurance], which is the prescription for DFARS 252.228-7005, Accident Reporting and Investigation Involving Aircraft, Missiles, and Space Launch Vehicles, to make the inclusion of the clause mandatory in solicitations and contracts that involve the manufacture, modification, overhaul, or repair of aircraft, missiles, and space launch vehicles. Currently, DFARS 228.370(d) states that DFARS 252.228-7005 "*may* be used in soliciations and contracts which involve the manufacture, modification, overhaul, or repair of these items" (*emphasis* added).

In addition, the word "will" would be removed and replaced with "shall" in two paragraphs of DFARS 252.228-7005 to indicate a mandatory requirement or action:

"(b) If the government conducts and investigation of the accident, the contractor will [*shall*] cooperate and assist the government's personnel until the investigation is complete.

"(c) The contractor will [*shall*] include a clause in subcontracts under this contract to require subcontractor cooperation and assistance in accident investigations."

Comments on this proposed rule must be submitted no later than August 27, 2019, identified as "DFARS Case 2018-D047," 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 the "Obligation of the Government" Clause:** This proposed rule would combine DFARS 252.239-7013, Obligation of the Government, DFARS 252.239-7014, Term of Agreement, and DFARS 252.239-7015, Continuation of Communication Service Authorizations, into one clause: DFARS 252.239-7013, Term of Agreement and Continuation of Services.

When acquiring telecommunications services, contracting officers often use a basic agreement in conjunction with communication service authorizations (CSA). A basic agreement is not a contract but a document that is negotiated between a contracting activity and a contractor that identifies the terms and conditions that will apply to any future contracts between the parties.

A CSA is a contract and is used to acquire telecommunication services under a basic agreement, which is incorporated by reference in or attachment to the CSA.

DFARS 252.239-7013 is included in all basic agreements for telecommunications services and identifies when the government's liability begins under a basic agreement. DFARS 252.239-7014 is included in all basic agreements for telecommunications services and specifies the term of the basic agreement, the method and timeframe necessary to terminate the basic agreement, and the contractor's obligation to continue performance on CSAs issued under the basic agreement prior to the termination notice. DFARS 252.239-7015 is included in basic agreements that supersede an existing basic agreement with a contractor.

DFARS 252.239-7013, DFARS 252.239-7014, and DFARS 252.239-7015 are all included in the same contracts, and all three clauses provide terms and conditions that pertain to basic agreements for telecommunications services. This proposed rule would combine the text of the three clauses into a basic and alternate clause to minimize the number of clauses in the basic agreement and streamline terms and conditions for contractors.

The new clause, DFARS 252.239-7013, Term of Agreement and Continuation of Services, would consist of the following:

- Paragraph (a) would consist of the text of current DFARS 252.239-7013 ("This basic agreement is not a contract. The government incurs liability only upon issuance of a communication service authorization, which is a contract that incorporates the terms and conditions of this basic agreement").

- Paragraph (b) would consist of the text of current DFARS 252.239-7014 ("This agreement shall continue in force from year to year, unless terminated by either party by 30 days' written notice. Termination of this basic agreement does not terminate or cancel any communication service authorizations issued under this basic agreement prior to the termination"). Note that the termination notification timeframe would be changed from 60 to 30 days to align with the requirement in paragraph (b)(2) of FAR 16.702, Basic Agreements: "Each basic agreement shall provide for discontinuing its future applicability upon 30 days' written notice by either party."

- Paragraph (c) would state, "Communication service authorizations issued under this basic agreement may be modified to incorporate the terms and conditions of a new basic agreement negotiated with the contractor.

- Alternate I, which would be used in basic agreements that supersede an existing basic agreement with the contractor, would consist of paragraphs (a) and (b) of the basic contract, but paragraph (c) would consist of the current DFARS 252.239-7015 text. Paragraph (c) of the basic clause would become paragraph (d) in Alternate I.

In addition, the prescription for DFARS 252.239-7013 in paragraph (c) of DFARS 239.7411, Contract Clauses, would require the use of the basic clause in basic agreements that do not supersede an existing basic agreement with the contractor, and the use of Alternate I in basic agreements that supersede an existing basic agreement with the contractor. Finally, DFARS 252.239-7014 and DFARS 252.239-7015 would be removed.

Comments on this proposed rule must be submitted no later than August 27, 2019, identified as "DFARS Case 2018-D046," 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.

TWO FAR AMENDMENTS PROPOSED

Besides the final rule in FAC 2019-03 (see article above), two proposed amendments to the FAR were published, and comments are being sought on them.

■ **Credit for Lower-Tier Small Business Subcontracting:** This rule proposes to amend FAR 19.704, Subcontracting Plan Requirements, to implement the NDAA for FY 2014 (Public Law 113-66), Section 1614, Credit for Certain Small Business Subcontractors, which amended the Small Business Act (specifically, Title 15 of the U.S. Code, Section 637, Additional Powers, paragraph (d) [15 USC 637(d)]) to provide that a prime contractor required to negotiate a individual subcontracting plan for a specific prime contract will receive credit towards its subcontracting plan goals for awards made to small business concerns at any tier under the contract. (**EDITOR'S NOTE:** FAR 19.701, Definitions, defines an "individual subcontracting plan" as "a subcontracting plan that covers the entire contract period [including option periods], applies to a specific contract, and has goals that are based on the offeror's planned subcontracting in support of the specific contract…" Paragraph (a) of FAR 19.702, Statutory Requirements, states that "each solicitation to perform a contract that is expected to exceed $700,000 [$1.5 million for construction] and that has subcontracting possibilities, shall require the apparently successful offeror to submit an acceptable subcontracting plan." FAR 19.702(b) exempts small businesses from the requirement to submit subcontracting plans.)

In 2016, the Small Business Administration (SBA) issued a final rule implementing Section 1614 (see the January 2017 ***Federal Contracts Perspective*** article "SBA Allows Credit for Lower Tier Subcontracting"). SBA's final rule requires a prime contractor with an individual subcontracting plan to receive subcontracting credit for subcontracts awarded to small business concerns at any tier by subcontractors with individual subcontracting plans. Further, the rule requires the prime contractor to have two sets of goals in its individual subcontracting plan: one set of goals includes the prime contractor's direct subcontract awards (the first-tier goals), while the second set of goals includes subcontracts awarded at any tier by other than small business subcontractors with individual subcontracting plans (lower-tier goals). This requirement applies only to the prime contractor's individual subcontracting plan and does not apply to subcontractors' subcontracting plans.

In addition, SBA's final rule requires that the prime contractor's performance under the individual subcontracting plan be evaluated based on its combined performance under the first-tier and lower-tier goals.

To implement Section 1614 and SBA's final rule, the following FAR changes are proposed:

– To FAR Subpart 19.7, The Small Business Subcontracting Program:

- FAR 19.701, Definitions, would be amended to add definitions for "first-tier contract" ("any subcontract with a prime contractor") and "lower-tier subcontract" (any subcontract other than a subcontract directly with the prime contractor"). In addition, the definition for subcontract would be updated ("'subcontract' means a legally binding agreement (1) between a contractor, that is under contract to another party to perform work, and a third party (*i.e.,* the subcontractor); (2) for the subcontractor to perform a part of the work that the contractor has undertaken; and (3) that is not an employer-employee relationship").

- FAR 19.704, Subcontract Plan Requirements, would be reorganized to group together basic requirements for all subcontracting plans, special requirements for commercial plans ("applies to the entire production of commercial items sold by either the entire company"), special requirements for individual subcontracting plans, and special requirements for master subcontracting plans ("a subcontracting plan that contains all the required elements of an individual subcontracting plan, except goals, and may be incorporated into individual subcontracting plans"). Existing text regarding the requirements for the first-tier goals would be revised for clarity, but the requirements would remain unchanged. A new paragraph (d), "Special Requirements for Individual Subcontracting Plans"' would be added to address existing and new requirements specific to individual plans, including the submission of individual subcontract reports (ISRs) in the Electronic Subcontracting Reporting System (eSRS – **https://www.esrs.gov/**), and the new requirements related to lower-tier goals.

– In FAR 42.1503, Procedures [regarding contractor performance information], is Table 42-2, Evaluation Rating Definitions [for the small business subcontracting evaluation factor]. Under the "Definitions" column for each of the ratings (exceptional, very good, satisfactory, marginal, and unsatisfactory), the term "goals as negotiated" would be revised to "goals as negotiated, including lower-tier goals as applicable."

– FAR 52.219-9, Small Business Subcontracting Plan, would be amended to update the definition of subcontract, add definitions of first-tier and lower-tier subcontracts, add new assurances regarding the monitoring of subcontractors, and add a requirement that the offeror's subcontracting plan include "a written statement of the types of records the offeror will maintain to demonstrate procedures that have been adopted to ensure subcontractors at all tiers comply with the requirements and goals set forth in the subcontracting plan…" Further, a new paragraph (e) applicable only to individual subcontracting plans would be added that requires the inclusion of separate goals for subcontracting at the lower tiers, and provides information on receiving credit toward those goals. Finally, a new paragraph (m) would be added to provide guidance to contractors regarding when and how to include the clause in subcontracts.

Comments on this proposed rule must be submitted no later than August 26, 2019, identified as "FAR Case 2018-003," by either of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; or (2) mail: General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd Floor, Washington, DC 20405.

■ **Applicability of Inflation Adjustments of Acquisition-Related Thresholds:** This proposed rule would implement the NDAA for FY 2018 (Public Law 115-91), Section 821, Amendment Relating to Applicability of Inflation Adjustments, which makes inflation adjustments of statutory acquisition-related thresholds applicable to existing contracts and subcontracts in effect on the date of the adjustment.

41 USC 1908, Inflation Adjustment of Acquisition-Related Dollar Thresholds, 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 FAR were adjusted was in 2015 (see the August 2015 ***Federal Contracts Perspective*** article "FAC 2005-83 Adjusts Federal Acquisition-Related Thresholds, Makes FAR Subpart 13.5 Permanent"). The next adjustments will take place in 2020.

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

To implement Section 821, the following are the significant changes to the FAR being proposed:

- Throughout the FAR, numerical values that are based on the value of the micro-purchase threshold or the simplified acquisition threshold would be replaced with the "micro-purchase threshold" or "simplified acquisition threshold," except that in FAR part 52, Solicitation Provisions and Contract Clauses, the value of the micro-purchase threshold or the simplified acquisition threshold would be replaced with the "micro-purchase threshold, as defined in FAR 2.101 [Definitions] on the date of subcontract award" or "simplified acquisition threshold, as defined in FAR 2.101 on the date of subcontract award" ("on the date of execution of the modification" or "on the date of award of this contract" would substitute for "on the date of subcontract award" when applicable).

- The following new paragraph (d) would be added to FAR 1.109, Statutory Acquisition-Related Dollar Thresholds – Adjustment for Inflation, to explain the effect of Section 821: "The statute [41 USC 1908], as amended by Section 821 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91), requires the adjustment described in paragraph (a) of this section be applied to contracts and subcontracts without regard to the date of award of the contract or subcontract. Therefore, if a threshold is adjusted for inflation as set forth in paragraph (a) of this section, then the changed threshold applies throughout the remaining term of the contract, unless there is a

subsequent threshold adjustment." (**EDITOR'S NOTE:** FAR 1.109(a) states "41 USC 1908 requires that the FAR Council periodically adjust all statutory acquisition-related dollar thresholds in the FAR for inflation…This adjustment is calculated every 5 years, starting in October 2005, using the Consumer Price Index (CPI) for all-urban consumers, and supersedes the applicability of any other provision of law that provides for the adjustment of such acquisition-related dollar thresholds.")

- To paragraph (a)(1) of FAR 15.403-4, Requiring Certified Cost or Pricing Data (10 USC 2306a and 41 USC Chapter 35), would be added the following statement after "The threshold for obtaining certified cost or pricing data is $750,000": "When a clause refers to this threshold, and if the threshold is adjusted for inflation pursuant to [FAR] 1.109(a), then pursuant to [FAR] 1.109(d) the changed threshold applies throughout the remaining term of the contract, unless there is a subsequent threshold adjustment." (**EDITOR'S NOTE:** Though FAR 15.403-4(a)(1) states that "the threshold for obtaining certified cost or pricing data is $750,000," Section 811 of the NDAA for FY 2018 amended 10 USC 2306a to increase the threshold from $750,000 to $2,000,000. The FAR is lagging behind.)

- The following new paragraph (b) would be added to FAR 30.201-1, CAS [Cost Accounting Standards] Applicability: "[T]he lower threshold for applicability of CAS is the amount set forth in 10 USC 2306a(a)(1)(A)(i), as adjusted for inflation in accordance with 41 USC 1908."

- The following new paragraph (e) would be added to FAR 52.202-1, Definitions: "When a solicitation provision or contract clause uses a word or term that is defined in the Federal Acquisition Regulation (FAR), the word or term has the same meaning as the definition in FAR 2.101 in effect at the time the solicitation was issued, unless…(e) The word or term defines an acquisition-related threshold (*i.e.*, "micro-purchase threshold" or "simplified acquisition threshold"), and if the threshold is adjusted for inflation as set forth in FAR 1.109(a), then the changed threshold applies throughout the remaining term of the contract, unless there is a subsequent threshold adjustment; see FAR 1.109(d)."

- The following statement would be added to the end of paragraph (a) of FAR 52.212-12, Subcontractor Certified Cost or Pricing Data; paragraph (b) of FAR 52.214-28, Subcontractor Certified Cost or Pricing Data – Modifications – Sealed Bidding; paragraph (b) of FAR 52.215-13, Subcontractor Certified Cost or Pricing Data – Modifications; and paragraph (a)(1) of FAR 52.215-21, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data – Modifications: "If the threshold for submission of certified cost or pricing data specified in FAR 15.403-4(a)(1) is adjusted for inflation as set forth in FAR 1.109(a), then pursuant to FAR 1.109(d) the changed threshold applies throughout the remaining term of the contract, unless there is a subsequent threshold adjustment."

- In paragraph (a) of FAR 52.230-1, Cost Accounting Standards Notices and Certification; paragraph (d) of FAR 52.230-2, Cost Accounting Standards; paragraph (d)(2) of FAR 52.230-3, Disclosure and Consistency of Cost Accounting Practices; paragraph (d)(2) of

FAR 52.230-4, Disclosure and Consistency of Cost Accounting Practices – Foreign Concerns; and paragraph (d)(2) of FAR 52.230-5, Cost Accounting Standards – Educational Institution, "$750,000" would be replaced with "the lower CAS threshold specified in Federal Acquisition Regulation (FAR) 30.201-4(b) [Contract Clauses] on the date of subcontract award."

Comments on this proposed rule must be submitted no later than August 23, 2019, identified as "FAR Case 2018-007," by either of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; or (2) mail: General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd Floor, Washington, DC 20405.

GSA SEEKS COMMENTS ON FSS CONSOLIDATION

The General Services Administration (GSA) is soliciting comments from industry on the upcoming consolidation of the Federal Supply Schedules (FSS – also referred to as Multiple Award Schedules [MAS]). There are 24 FSS/MAS covering different supplies and services; for example, Schedule 66 covers "Scientific Equipment and Services, and Schedule 71 covers "Furniture." However, each of these 24 schedules has different terms and conditions, which makes it administratively difficult for contractors with products on several different schedules. Conversely, some government needs can only be met by products on different schedules, which makes it difficult for contracting officers to issue a single order that cites various schedules with dissimilar terms and conditions.

GSA issued a Request for Information (RFI) seeking comments on the content and structure of its proposed consolidated FSS solicitation scheduled for release later this year. The RFI is requesting comments and suggestions on the proposed solicitation format, including the streamlined terms and conditions, and the solicitation cover page outlining the instructions applicable to all offerors. Comments are due July 5, 2019, to the General Services Administration, Federal Acquisition Service, The Dow Building, 100 S. Independence Mall, West, Philadelphia, PA 19106.

In addition, GSA issued another RFI seeking comments on the new large categories, subcategories, and Special Items Numbers (SINs) for the FSS/MAS solicitation. The announcement of the RFI states, "Under the new proposed category structure, companies that offer goods and services under multiple categories will no longer need to have multiple Schedules, so there will no longer be a need to 'team' with yourself to provide a total solution to customers. In addition, the reorganization, removal of duplication, and streamlining of categories and SINs will ensure that contractors with identical or similar offerings all fall under the same large category, subcategory, and SIN. This will increase order level competition for buyers and make sure our industry partners have the opportunity to respond to these opportunities."

Comments on the proposed large categories, subcategories, and SINs are due July 12, 2019, at the address mentioned above.

For more on the FSS/MAS consolidation, see the December 2018 ***Federal Contracts Perspective*** article "GSA Announces Transformation of Multiple Award Schedules."

WDOL.GOV RETIRED, WAGE DETERMINATIONS ON BETA.SAM.GOV

The General Services Administration has announced that the Wage Determinations OnLine (WDOL.gov) is retired and no longer available for wage determination information. The official source for wage determination is now part of the System for Award Management (SAM) at **https://beta.SAM.gov**. (**EDITOR'S NOTE:** SAM [**https://www.sam.gov**] is a consolidation of several acquisition-related databases. SAM provides users one login for access to all the capabilities previously found in the old systems, eliminates data overlap by sharing the data throughout the award lifecycle, and has a standardized format across all webpages to make it easier to navigate and find information. This is an ongoing effort; WDOL.gov is the latest acquisition-related database to be merged with the rest of SAM.)

Wage determinations are "the wage rates and fringe benefits found by the Department of Labor to be prevailing in the locality," and these are required to be posted in most service and construction contracts and are the minimum that covered contractors and their subcontractors must pay their laborers and mechanics. For more information on wage determinations, see FAR 22.404, Construction Wage Rate Requirements Statute Wage Determinations, and FAR 22.1008, Procedures for Obtaining Wage Determinations.

When GSA moved the WDOL functions to **beta.SAM.gov**, GSA made the following improvements:

- Added a search-based structure
- Offers the ability to search data by number, keyword, or location
- Provides search filters to quickly find the right wage determination
- Introduces the ability to search both active and inactive (archived) data at the same time
- Provides a timeline and history of changes made to the wage determinations
- Has created a learning center with frequently asked questions (FAQs), video tutorials, and glossary information
- Added capabilities such as saving searches, managing "follows" (that is, watching specific wage determinations), and accessing the workspace for those who create a user account

WDOL.gov was retired by GSA on June 14, 2019.

SMALL BUSINESS GOAL ACHIEVED FOR 6th CONSECUTIVE YEAR

The Small Business Administration (SBA) has announced that the government has exceeded its 23% small business federal contracting goal for the sixth consecutive year, awarding 25.05% of Fiscal Year (FY) 2018 prime contract expenditures to small businesses for a total of $120.8 billion, an increase from FY 2017 of nearly $15 billion, and the first time more than $120 billion in prime contracts has been awarded to small businesses. In addition, $79 billion in subcontracts was awarded to small businesses.

The government almost doubled its 5% goal for awards to small disadvantaged businesses by awarding 9.65% for a total of $46.5 billion. The government exceeded its 3% goal for awards to service-disabled veteran-owned small businesses by awarding 4.27% for a total of $20.6 billion. While the government fell short of its 5% goal for awards to women-owned small businesses

(4.75% for $22.9 billion) and 3% for awards to small businesses in Historically Underutilized Business Zones (HUBZones) (2.05% for $9.9 billion), the dollar amounts were the most that either small business category has ever been awarded.

The individual agency scorecards a detailed explanation of the methodology is available at **https://www.sba.gov/document/support--small-business-procurement-scorecard-overview**.

PROMPT PAYMENT INTEREST RATE SET AT 2 5/8%

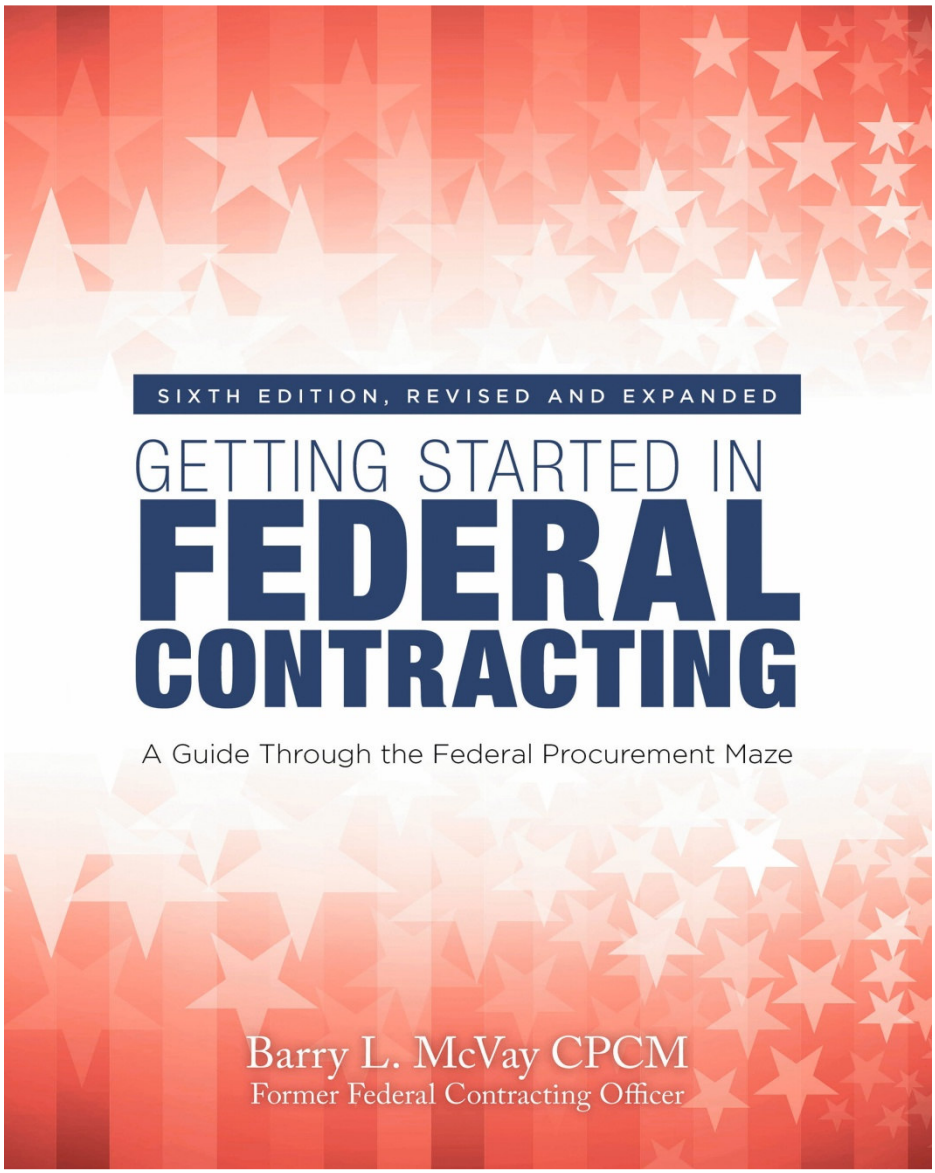
The Treasury Department has established 2 5/8% (2.625%) as the interest rate for the computation of payments made between July 1, 2019, and December 31, 2019, under the Prompt Payment Act and the Contracts Disputes Act. This rate is also used in facilities capital cost of money calculations.

The interest rate for the prior six-month period (January 1, 2019, through June 30, 2019) was 3 5/8% (3.625%). The interest rate for July 1, 2018, through December 31, 2018, was 3 1/2% (3.5%).

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

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

REVISED AND EXPANDED!



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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