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FAC 2019-05 PROHIBITS ACQUISITION OF CHINESE TELECOMMUNICATIONS AND SURVEILLANCE EQUIPMENT

In response to Congressional concern about making federal databases vulnerable to access by the Chinese government through Chinese-produced video surveillance and telecommunications equipment, Federal Acquisition Circular (FAC) 2019-05 implements the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Public Law 115-232), Section 889, Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment, with the addition of Federal Acquisition Regulation (FAR) subpart 4.21, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.

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Section 889 prohibits agencies from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as a critical technology as part of any system, on or after August 13, 2019 (one year after the enactment of the NDAA for FY 2019).

Section 889 defines "covered telecommunications equipment or services" as any of the following: "(A) telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities); (B) for the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities); (C) telecommunications or video surveillance services provided by such entities or using such equipment; [and] (D) telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country." In addition, Section 889 defines "covered foreign country" as "the People's Republic of China."

To implement Section 889, this interim rule revises the title of FAR part 4 from "Administrative Matters" to "Administrative and Information Matters," and adds FAR subpart 4.21, which consists of:

– FAR 4.2100, Scope of Subpart, which states that FAR subpart 4.21 implements Section 889.

– FAR 4.2101, Definitions, which includes the Section 889 definitions mentioned above. In addition, it includes the definition of "critical technologies" in the NDAA for FY 2019, Section 1703, Definitions [for the Foreign Investment Risk Review Modernization Act of 2018]:

> "(i) Defense articles or defense services included on the United States Munitions List set forth in the International Traffic in Arms Regulations under Subchapter M of Chapter I of Title 22, Code of Federal Regulations.
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> "(ii) Items included on the Commerce Control List set forth in Supplement No. 1 to Part 774 of the Export Administration Regulations under Subchapter C of Chapter VII of Title 15, Code of Federal Regulations, and controlled –
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> > "(I) Pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or
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> > "(II) For reasons relating to regional stability or surreptitious listening;
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> "(iii) Specially designed and prepared nuclear equipment, parts and components, materials, software, and technology covered by Part 810 of Title 10, Code of Federal Regulations (relating to assistance to foreign atomic energy activities);
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> "(iv) Nuclear facilities, equipment, and material covered by Part 110 of Title 10, Code of Federal Regulations (relating to export and import of nuclear equipment and material);
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> "(v) Select agents and toxins covered by Part 331 of Title 7, Code of Federal Regulations, Part 121 of Title 9 of such Code, or Part 73 of Title 42 of such Code; or
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> "(vi) Emerging and foundational technologies controlled pursuant to Section 1758 of the Export Control Reform Act of 2018 (50 USC 4817)."

Adopting this definition ensures "critical technologies" is defined in a consistent manner, thus facilitating consistent application. While there are elements of this definition that may not raise concerns regarding covered telecommunications equipment or services (for example, the inclusions of select agents or toxins), the majority of identified categories in the definition include, or could potentially include, covered telecommunications

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equipment or services. Since the prohibition does not apply if no covered telecommunications equipment or services are present, a definition that includes categories that may be unlikely to include telecommunications equipment or services incurs no additional cost and ensures the benefits of consistency with other government efforts.

- FAR 4.2102, Prohibition, states the prohibition mentioned above and identifies a couple of exceptions authorized by Section 889.

- FAR 4.2103, Procedures, requires contracting officers to follow agency procedures if: (1) an offeror affirms it will "provide covered telecommunications equipment or services to the government in the performance of any contract, subcontract or other contractual instrument resulting from this solicitation;" or (2) a contractor reports "covered telecommunications equipment or services used as a substantial or essential component of any system, or as critical technology as part of any system, during contract performance, or the contractor is notified of such by a subcontractor at any tier or by any other source…"

- FAR 4.2104, Waivers, authorizes the head of an executive agency to waive the prohibition in FAR 4.2104. This authority is included in Section 889.

- FAR 4.2105, Solicitation Provision and Contract Clause, requires that: (1) new FAR 52.204-24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment, be included in all solicitations for contracts or orders under indefinite-delivery indefinite-quantity (IDIQ) contracts; and (2) new FAR 52.204-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment, in all solicitations and contracts.

  DFARS 52.204-24 requires the offeror to represent whether "It [ ] will, [ ] will not provide covered telecommunications equipment or services to the government in the performance of any contract, subcontract or other contractual instrument resulting from this solicitation."

  DFARS 52.204-25 provides the definitions, prohibitions, exceptions, and reporting requirements identified above. It also requires that the contractor "insert the substance of the clause in all subcontracts and other contractual instruments, including subcontracts for the acquisition of commercial items."

Comments on this interim rule must be submitted no later than October 15, 2019, identified as "FAR Case 2018-017," 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), 1800 F Street NW, 2nd Floor, Washington, DC 20405.

In response to FAC 2019-05, the Department of Defense (DOD) issued a memorandum outlining the DOD-specific procedures for DOD contracting officers to comply with FAR subpart 4.21. These implementation procedures apply to contracts, task orders, and delivery orders, including basic ordering agreements (BOAs), orders against BOAs, blanket purchase agreements (BPAs), and calls against BPAs.

Also, the General Service Administration (GSA) has issued a FAR and GSA Acquisition Regulation (GSAR) deviation to limit the representation requirements in the new FAR 52.204-24 to the contract level for low and medium risk IDIQ contract vehicles instead of at the IDIQ contract level *and* order-level. In addition, the deviation adds DFARS 552.204-70, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment, which requires that the representation in FAR 52.204-24 be provided as part of the proposal *and* resubmitted on an annual basis from the date of award.

FAC 2019-04 PROVIDES INFO ON TASK ORDER OMBUDSMEN

FAC 2019-04 finalizes, with editorial changes, the rule that proposed to add FAR 52.216-32, Task-Order and Delivery-Order Ombudsman, to standardize the identification of the task-order and delivery-order ombudsman as required by paragraph (a)(4)(v) of FAR 16.504, Indefinite-Quantity Contracts.

Paragraph (f) of Title 10 of the U.S. Code, Section 2304c (10 USC 2304c), Task and Delivery Order Contracts: Orders, and paragraph (g) of 41 USC 4106, Orders, require agencies to appoint or designate a task- and delivery-order ombudsman who is responsible for reviewing complaints from offerors and contractors, and ensure that all offerors are afforded a fair opportunity to be considered for the award of an order. However, neither paragraph explains how agencies are to make offerors aware of how to contact this official.

To implement the statutory requirement in 10 USC 2304c and 41 USC 4106, FAR 16.504(a)(4)(v) specifies that "a solicitation and contract for an indefinite-quantity must...include the name, address, telephone number, facsimile number, and e-mail address of the agency task and delivery order ombudsman…if multiple awards may be made..."

In response to the requirement in FAR 16.504(a)(4)(v), several agencies created agency-level contract clauses that provide this information to contractors. Others did not, leaving it to their contracting officers to provide this information as they saw fit.

To rectify this situation, a standardized clause was proposed: FAR 52.216-32 which would explain the purpose of the ombudsman, the ombudsman's duties, and a blank line for the "contracting officer to insert name, address, telephone number, and email address for the agency ombudsman or provide the URL address where this information may be found."

Three respondents submitted comments on the proposed rule, but none of the suggested changes were adopted. However, several edits were made to the final rule for accuracy and clarification.

For more on the proposed rule, see the December 2018 ***Federal Contracts Perspective*** article "Task/Delivery Order Ombudsman Identification Proposed."

TWO MORE FAR CHANGES PROPOSED

Besides FAC 2019-04 and FAC 2019-05 (see the two previous articles), two additional changes to the FAR have been proposed:

■ **Applicability of Small Business Regulations Outside the United States:** This proposed rule would amend FAR part 19, Small Business Programs, to support the Small Business

Administration' (SBA) policy of including overseas contracts in agency small business contracting goals.

Paragraph (b) of FAR 19.000, Scope of Part [19], currently states that FAR part 19 (except for FAR subpart 19.6, Certificates of Competency and Determinations of Responsibility) "applies only in the United States or its outlying areas." Some contracting officers have interpreted this to mean that they are not allowed to use the set-aside and sole-source procedures of FAR part 19 for overseas procurements, while others have interpreted this to mean that they are not required to use FAR part 19 procedures for overseas procurements but may do so if they choose.

Although SBA believed that the Small Business Act granted the necessary authority for its small business programs to be used in appropriate circumstances overseas, SBA sought in 2013 to clarify this confusion by amending its regulations at Title 13 of the Code of Federal Regulations (CFR), Section 125.2, What are SBA's and the procuring agency's responsibilities when providing contracting assistance to small businesses? (13 CFR 125.2). It revised paragraph (a) of 13 CFR 125.2 to state, "Small business concerns must receive any award (including orders, and orders placed against Multiple Award Contracts) or contract, part of any such award or contract, and any contract for the sale of Government property, *regardless of the place of performance*…" (*emphasis* added). In addition, it amended 13 CFR 125.2(c)(1) to state, "The Small Business Act requires each federal agency to foster the participation of small business concerns as prime contractors and subcontractors in the contracting opportunities of the government *regardless of the place of performance of the contract*" (*emphasis* added).

Therefore, to bring the FAR into conformance with SBA's regulations, this proposed rule would make the following changes:

- The definition of "bundling" in FAR 2.101, Definitions, would be amended by deleting paragraph (3), which states, "This definition does not apply to a contract that will be awarded and performed entirely outside of the United States." The Small Business Act does not exempt an agency from justifying its bundling of contract requirements based on location of award, location of service performance, or location of supply delivery.

- Paragraph (b) of FAR 19.000, Scope of Part, would be revised to state, "Unless otherwise specified in this part (see [FAR] subparts 19.6 and 19.7 [The Small Business Subcontracting Program]): (i) contracting officers shall apply this part in the United States and its outlying areas; and (ii) contracting officers may apply this part outside the United States and its outlying areas." In addition, paragraph (b) would specify that "offerors that participate in any [FAR] part 19 procurement are required to meet the definition of 'small business concern' at FAR 2.101 and the definition of 'concern' at FAR 19.001 [Definitions]."

- FAR 19.309, Solicitation Provisions and Contract Clauses, contains the prescriptions for FAR 52.219-1, Small Business Program Representations, FAR 52.219-2, Equal Low Bids, and FAR 52.219-28, Post-Award Small Business Program Rerepresentation, all of which require that they be included "when the contract will be performed in the United States or its outlying areas." The three prescriptions in FAR 19.309 would be revised by adding "or when the contracting officer has applied [FAR] part 19 in accordance with [FAR] 19.000(b)(1)(ii)."

Comments on this proposed rule must be submitted no later than October 11, 2019, identified as "FAR Case 2016-002," 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), 1800 F Street NW, 2nd Floor, Washington, DC 20405.

■ **Orders Issued via Fax or Electronic Commerce:** This rule proposes to revise FAR 52.216-18, Ordering, to permit the issuance of task or delivery orders via fax or electronic commerce and to clarify when an order is considered "issued" when using these methods.

Paragraph (c) of FAR 52.216-18, which is included in solicitations and contracts when an indefinite-delivery definite-quantity, requirements, or indefinite-delivery indefinite-quantity (IDIQ) contract is contemplated, provides that "if mailed, a delivery order or task order is considered 'issued' when the government deposits the order in the mail. Orders may be issued orally, by facsimile, or by electronic commerce methods only if authorized in the Schedule."

This clause was last updated in 1995. In today's business environment, the government and its contractors frequently use email, fax, or other electronic commerce methods to communicate with one another. To reflect current business practices and maintain speed and efficiency in the ordering process, this rule would revise FAR 52.219-18 to delete the requirement for a separate authorization in the contract to use fax or electronic commerce to issue task or delivery orders.

Since task or delivery orders are not issued orally as frequently as other issuance methods and the use of such a method is dependent upon the particular circumstances of the procurement, the authority to issue orders orally still must be authorized under the contract and would not being amended by this rule ("orders may be issued by methods other than those enumerated in this clause only if authorized in the contract").

In addition, this proposed rule would identify when a task or delivery order is considered "issued" when using such methods: "(1) If sent by mail (includes transmittal by U.S. mail or private delivery service), the government deposits the order in the mail; (2) if sent by fax, the government transmits the order to the contractor's fax number; or (3) if sent electronically, the government either: (i) posts a copy of the delivery order or task order to a government document access system, and notice is sent to the contractor; or (ii) distributes the delivery order or task order via email to the contractor's email address."

Comments on this proposed rule must be submitted no later than October 22, 2019, identified as "FAR Case 2018-022," 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), 1800 F Street NW, 2nd Floor, Washington, DC 20405.

DOD RESUMES DFARS CLEAN-UP

After a couple of months of relative quiet, the Department of Defense (DOD) has resumed its scrubbing of the Defense FAR Supplement (DFARS) to comply with provisions of various National Defense Authorization Acts (NDAA), and to bring to the attention of the acquisition workforce miscellaneous changes and clarifications. DOD has done this with the issuance of four final rules, two proposed rules, and two class deviations.

■ **Preference for Certain Commercial Services:** This final rule adds DFARS 212.272, Preference for Certain Commercial Products and Services, to partially implement the National

Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Public Law 114-328), Section 876, Preference for Commercial Services, which requires that approval be obtained before entering into a contract for certain commercial services if no commercial services are suitable.

The commercial services covered by Section 876 are facilities-related services, knowledge-based services (except engineering services), medical services, transportation services, and construction services. However, construction services are not covered by this rule but will be addressed in an upcoming rule.

If an acquisition for one of the covered services is greater than the simplified acquisition threshold (currently $250,000) but less than or equal to $10,000,000, but no commercial services are suitable to meet the agency's needs, Section 876 requires that the contracting officer make this determination in writing before entering into a contract for the non-commercial service.

If an acquisition for one of the covered services is greater than $10,000,000 but no commercial services are suitable to meet the agency's needs, Section 876 requires that either the head of the contracting activity, the combatant commander of the combatant command concerned, or the Under Secretary of Defense for Acquisition and Sustainment (as applicable) make this determination in writing before the head of the agency may enter into a contract for the non-commercial service.

New DFARS 212.272 states the requirements of Section 876. In addition, paragraph (a) includes a cross-reference to DFARS 239.101, Policy [for the acquisition of information technology products and services], which implements the NDAA for FY 2016 (Public Law 114-92), Section 855, Market Research and Preference for Commercial Items. Section 855 requires that the head of the agency must determine in writing that no commercial information technology products are suitable before entering into a contract for non-commercial information technology products that exceeds the simplified acquisition threshold.

Finally, a cross-reference to DFARS 212.272 is added as paragraph (b) to DFARS 237.102, Policy [for service contracts].

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

Section 811 requires that the following be added to Title 10 of the U.S. Code, Section 2326 (10 USC 2326), Undefinitized Contractual Actions: Restricitions:

– "(e)(2) If a contractor submits a qualifying proposal to definitize an undefinitized contractual action and the contracting officer for such action definitizes the contract after the end of the 180-day period beginning on the date on which the contractor submitted the qualifying proposal, the head of the agency concerned shall ensure that the profit allowed on the contract accurately reflects the cost risk of the contractor as such risk existed on the date the contractor submitted the qualifying proposal.

– "(f) *Time Limit*. No undefinitized contractual action may extend beyond 90 days without a written determination by the Secretary of the military department concerned, the head of the Defense Agency concerned, the commander of the combatant command concerned, or the Under Secretary of Defense for Acquisition, Technology, and Logistics (as applicable) that it is in the best interests of the military department, the Defense Agency, the combatant command, or the Department of Defense, respectively, to continue the action.

– "(g) *Foreign Military Contracts*…[A] contracting officer of the Department of Defense may not enter into an undefinitized contractual action for a foreign military sale unless the contractual action provides for agreement upon contractual terms, specifications, and price by the end of the 180-day period described in subsection (b)(1)(A)." (**EDITOR'S NOTE:** 10 USC 2326(b)(1) states, "A contracting officer of the Department of Defense may not enter into an undefinitized contractual action unless the contractual action provides for agreement upon contractual terms, specifications, and price by the earlier of (A) the end of the 180-day period beginning on the date on which the contractor submits a qualifying proposal to definitize the contractual terms, specifications, and price; or (B) the date on which the amount of funds obligated under the contractual action is equal to more than 50 percent of the negotiated overall ceiling price for the contractual action.")

Section 815 requires that the following be added to 10 USC 2326:

"(c) *Limitation on Unilateral Definitization by Contracting Officer*. With respect to any undefinitized contractual action with a value greater than $50,000,000, if agreement is not reached on contractual terms, specifications, and price within the period or by the date provided in subsection (b)(1), the contracting officer may not unilaterally definitize those terms, specifications, or price over the objection of the contractor until: (1) the service acquisition executive for the military department that awarded the contract, or the Under Secretary of Defense for Acquisition and Sustainment if the contract was awarded by a Defense Agency or other component of the Department of Defense, approves the definitization in writing; (2) the contracting officer provides a copy of the written approval to the contractor; and (3) a period of 30 calendar days has elapsed after the written approval is provided to the contractor."

The proposed rule would amend DFARS subpart 217.74 to implement Section 811 and Section 815 (see the March 2019 ***Federal Contracts Perspective*** article "DFARS Amended to Comply with NDAA Statutory Changes, Directives"). Three respondents submitted comments on the proposed rule, and in response the final rule is changed as follows:

– Paragraph (c) of DFARS 217.7401, Definitions, had defined "qualifying proposal" as "a proposal containing sufficient data for the DOD to do complete and meaningful analyses and audits of the (1) data in the proposal; and (2) any other data that the contracting officer has determined DOD needs to review in connection with the contract." The proposed rule would have changed the definition to delete "complete and". This change was to comply with the definition of "qualifying proposal" in 10 USC 2326 as modified by Section 811: "The term 'qualifying proposal' means a proposal that contains sufficient

information to enable the Department of Defense to conduct a meaningful audit of the information contained in the proposal." However, one respondent pointed out that the proposed revision to DFARS 217.7401(c) did not match the revision made to 10 USC 2326 by Section 811. Therefore, the "qualifying proposal" definition in DFARS 217.7401(c) is finalized to "a proposal that contains sufficient information to enable DOD to conduct meaningful analyses and audits of the information contained in the proposal."

- Proposed paragraph (a) of DFARS 217.7404, Limitations, would have specified that the head of the agency may waive the requirements regarding entering into a UCA for an FMS. DOD has delegated this authority to the head of the contracting activity, so DFARS 217.7404(a) is finalized to reflect this.

- Proposed DFARS 217.7404(b)(2) would have specified that the "service acquisition executive for the military department that awarded the contract or the Under Secretary of Defense for Acquisition and Sustainment if the contract was awarded by a defense agency or other component of the Department of Defense" had the authority to approve the contracting officer's unilateral definitization of a UCA exceeding $50,000,000. DOD has delegated this authority to the head of the contracting activity, without power of redelegation, so DFARS 217.7404(b)(2) is finalized to reflect this.

- The proposed revision to paragraph (a)(1) of DFARS 217.7404-3, Definitization Schedule, would have prohibited the extension of the definitization of a UCA beyond 180 days after the contractor submits a qualifying proposal plus an additional 90 days unless "the Secretary of the military department concerned, the head of the defense agency concerned, the commander of the combatant command concerned, or the Under Secretary of Defense for Acquisition and Sustainment [determines] that it is in the best interests of the military department, the defense agency, the combatant command, or the Department of Defense, respectively, to continue the action for more than an additional 90 days." DOD has delegated to the head of the contracting activity, without power of redelegation, the authority to extend the definitization schedule beyond an additional 90 days, so DFARS 217.7404-3(a)(1) is finalized to reflect this.

■ **New World Trade Organization Government Procurement Agreement Country – Australia:** This final rule adds Australia as a new designated country under the World Trade Organization Government Procurement Agreement (WTO GPA). Australia became a party to the WTO GPA on May 5, 2019.

The Trade Agreements Act (19 USC 2501 *et seq*.) authorizes president to waive the Buy American Act and other discriminatory provisions for eligible products from countries that have signed an international trade agreement with the United States (such as the WTO GPA). The president has delegated this authority to the U.S. Trade Representative (USTR), and the USTR has determined that Australia will provide appropriate reciprocal competitive government procurement opportunities to United States products and services (see the May 2019 ***Federal Contracts Perspective*** article "USTR Waives Restrictions for Australia").

FAR 25.003, Definitions [applicable to FAR part 25, Foreign Acquisition], defines "WTO GPA countries" as parties to the WTO GPA, and defines "designated country" as either a WTO

GPA country, a Free Trade Agreement country, a least developed country, or a Caribbean Basin country. Since Australia is now a WTO GPA country and, therefore, a designated country, this rule adds Australia to the list of WTO GPA countries within the definition of "designated country" in DFARS 252.225-7017, Photovoltaic Devices, DFARS 252.225-7021, Trade Agreements (Basic and Alternate II), and DFARS 252.225-7045, Balance of Payments Program – Construction Material Under Trade Agreements (Basic and Alternates I, II, and III).

■ **Modification of DFARS Clauses Related to the Display of Hotline Posters:** This final rule updates contact information in two DFARS clauses that address the display of hotline posters.

DFARS 252.203-7003, Agency Office of the Inspector General, is amended to update the mailing address to correct the suite number (from "Suite 11H25" to "Suite 14L25") and to provide the following website for the DOD Office of the Inspector General: **https://www.dodig.mil/Programs/Contractor-Disclosure-Program/**. In addition, these changes are made to paragraph (b) of DFARS 203.1003, Requirements [for notification of possible contractor violation].

DFARS 252.203-7004, Display of Hotline Posters, is included in noncommercial solicitations and contracts with an estimated value exceeding $5,500,000 in place of FAR 52.203-14, Display of Hotline Posters. DFARS 252.203-7004 requires contractors to display DOD hotline posters when contract performance is in the United States or overseas and provides contractors with an online address to use to obtain the current DOD hotline poster. This rule updates the DOD hotline poster online address in paragraph (c)(1) of the clause by removing "http://www.dodig.mil/hotline/hotline_posters.htm" and replacing it with "**https://www.dodig.mil/Resources/Posters-and-Brochures/**".

■ **Management of Should-Cost Review Process:** This proposed rule would amend DFARS 215.407-4, Should-Cost Review, and add DFARS 252.215-701X, Program Should-Cost Review, to implement the NDAA for FY 2018 (Public Law 115-91), Section 837, Should-Cost Management. Section 837 requires that the DFARS be amended "to provide for the appropriate use of the should-cost review process of a major weapon system in a manner that is transparent, objective, and provides for the efficiency of the systems acquisition process in the Department of the Defense." It requires that the DFARS amendment include, "at a minimum, the following elements: (1) a description of the features of the should-cost review process; (2) establishment of a process for communicating with the prime contractor on the program the elements of a proposed should-cost review; (3) a method for ensuring that identified should-cost savings opportunities are based on accurate, complete, and current information and can be quantified and tracked; (4) a description of the training, skills, and experience that Department of Defense and contractor officials carrying out a should-cost review…should possess; (5) a method for ensuring appropriate collaboration with the contractor throughout the review process; [and] (6) establishment of review process requirements that provide for sufficient analysis and minimize any impact on program schedule."

Paragraph (a) of FAR 15.407-4, Should-Cost Review, states that "should-cost reviews are a specialized form of cost analysis. Should-cost reviews differ from traditional evaluation methods because they do not assume that a contractor's historical costs reflect efficient and economical operation. Instead, these reviews evaluate the economy and efficiency of the contractor's existing work force, methods, materials, equipment, real property, operating systems, and management.

These reviews are accomplished by a multi-functional team of government contracting, contract administration, pricing, audit, and engineering representatives."

There are two types of should-cost review: program should-cost review, and overhead should-cost review. Since the six elements of a should-cost review required by Section 837 address reviews of major weapon systems, DOD is proposing to add a new paragraph (b) to DFARS 215.407-4 to correspond to FAR 15.407-4(b), which covers program should-cost reviews.

Paragraph (b) would elaborate on those six elements. It would start by stating, "(i) Major weapon system should-cost reviews may include the following features: (A) a thorough review of each contributing element of the program cost and the justification for each cost; (B) an analysis of non-value added overhead and unnecessary reporting requirements; (C) benchmarking against similar DOD programs, similar commercial programs (where appropriate), and other programs by the same contractor at the same facility; (D) an analysis of supply chain management to encourage competition and incentive cost performance at lower tiers; (E) a review of how to restructure the program (government and contractor) team in a streamlined manner, if necessary; (F) identification of opportunities to break out government-furnished equipment versus prime contractor-furnished materials; (G) identification of items or services contracted through third parties that result in unnecessary pass-through costs; (H) evaluation of ability to use integrated developmental and operational testing and modeling and simulation to reduce overall costs; (I) identification of alternative technology and materials to reduce developmental or lifecycle costs for a program; (J) identification and prioritization of cost savings opportunities; [and] (K) establishment of measurable targets and ongoing tracking systems."

The proposed rule would continue elaborating on the six elements with the following (b)(1) subparagraphs:

> "(ii) The should-cost review shall provide for sufficient analysis while minimizing the impact on program schedule by engaging stakeholders early, relying on information already available before requesting additional data, and establishing a team with the relevant expertise early.
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> "(iii) The should-cost review team shall be comprised of members, including third-party experts if necessary, with the training, skills, and experience in analysis of cost elements, production or sustainment processes, and technologies relevant to the program under review. The review team may include members from the Defense Contract Management Agency, the department or agency's cost analysis center, and appropriate functional organizations, as necessary.
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> "(iv) The should-cost review team shall establish a process for communicating and collaborating with the contractor throughout the should-cost review, including notification to the contractor regarding which elements of the contractor's operations will be reviewed and what information will be necessary to perform the review, as soon as practicable, both prior to and during the review.
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> "(v) The should-cost review team report shall ensure, to the maximum extent practicable, review of current, accurate, and complete data, and shall identify cost savings opportunities associated with specific engineering or business changes that can be quantified and tracked."

DFARS 252.215-701X, Program Should-Cost Review, would be required to be included in solicitations and contracts for the development or production of a major weapon system to ensure objectivity and efficiency in the should-cost review process if a program should-cost review is performed. It would state that (1) the government has the right to perform a program should-cost review; (2) the contractor shall provide access to accurate and complete cost data and contractor facilities and personnel necessary to permit the government to perform the program should-cost review; and (3) the government has the right to use third-party experts to supplement the program should-cost review team.

Comments on this proposed rule must be submitted no later than October 8, 2019, identified as "DFARS Case 2018-D015," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) email: **osd.dfars@mail.mil**; (3) fax: 571-372-6094; or (4) mail: Defense Acquisition Regulations System, Attn: Heather Kitchens, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Review of Defense Solicitations by Procurement Center Representatives:** This proposed rule would add DFARS 219.402, Small Business Administration Procurement Center Representatives, to implement the NDAA for FY 2017 (Public Law 114-328), Section 1811, Scope of Review by Procurement Center Representatives, which "limit[s] the scope of review by the [Small Business Administration's] procurement center representative for any solicitation of a contract or task order if such solicitation is awarded by or for the Department of Defense and (i) is conducted pursuant to Section 22 of the Arms Export Control Act (22 USC 2762 [Procurement for Cash Sales]); (ii) is a humanitarian operation as defined in Section 401(e) of Title 10, United States Code [Humanitarian and Civic Assistance Provided in Conjunction with Military Operations]; (iii) is for a contingency operation, as defined in Section 101(a)(13) of Title 10, United States Code [Definitions]; (iv) is to be awarded pursuant to an agreement with the government of a foreign country in which Armed Forces of the United States are deployed; or (v) both the place of award and the place of performance are outside of the United States and its territories." (**EDITOR'S NOTE:** The Small Business Administration states that "Procurement Center Representatives [PCRs] help small businesses win federal contracts. PCRs view many federal acquisition and procurement strategies before they're announced. This enables them to influence opportunities that should be set aside for small businesses. PCRs also conduct market research, assist small businesses with payment issues, provide counseling on the contracting process, and more." FAR 19.402, Small Business Administration Procurement Center Representatives, provides additional information on the duties and responsibilities of PCRs.)

To implement Section 1811, proposed DFARS 219.402 would be added. Besides citing the five exclusions from procurement center representative review in paragraph (c)(iii), paragraph (c)(ii) would include a definition of "humanitarian and civic assistance" and the corresponding exclusion in paragraph (c)(iii) would be "in support of humanitarian and civic assistance." Section 1811 refers to "a humanitarian operation as defined in Section 401(e) of Title 10, United States Code." However, 10 USC 401 is titled "Humanitarian and Civic Assistance Provided in Conjunction with Military Operations," and the type of activities it covers are quite different from those defined as "humanitarian or peacekeeping operation" in FAR 2.101, Definitions, and used in the DFARS. 10 USC 401(e) states that "humanitarian and civic assistance" means "(1) medical, surgical, dental, and veterinary care provided in areas of a country that are rural or are underserved by medical, surgical, dental, and veterinary professionals, respectively, including

education, training, and technical assistance related to the care provided; (2) construction of rudimentary surface transportation systems; (3) well drilling and construction of basic sanitation facilities; [and] (4) rudimentary construction and repair of public facilities." Therefore, DFARS 219.402(c)(ii) would include the 10 USC 401(e) definition of "humanitarian and civic assistance" to avoid confusion among the contracting workforce.

Also, DFARS 219.502-1, Requirements for Setting Aside Acquisitions, which currently states, "Do not set aside acquisitions for supplies that were developed and financed, in whole or in part, by Canadian sources under the U.S.-Canadian Defense Development Sharing Program", would be amended to add "or excluded from procurement center representative review (see [DFARS] 219.402(c)(iii))."

Comments on this proposed rule must be submitted no later than October 8, 2019, identified as "DFARS Case 2019-D008," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) email: **osd.dfars@mail.mil**; (3) fax: 571-372-6094; or (4) mail: Defense Acquisition Regulations System, Attn: Jennifer Johnson, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Class Deviation on Performance-Based Payments:** This deviation permits cumulative performance-based payments (PBPs) to exceed the cumulative contract cost incurred under the contract. This deviates from the policy stated in paragraph (a) of DFARS 232.1001 Policy [for PBPs]: "performance-based payments should never exceed total cost incurred at any point during the contract." To implement this change in policy, DFARS 252.232-7012, Performance-Based Payments – Whole-Contract Basis (DEVIATION 2019-O0011), is to be used instead of DFARS 252.232-7012, Performance-Based Payments – Whole-Contract Basis, when PBPs will apply to the entire contract and not to specific deliverable items, and DFARS 252.232-7013, Performance-Based Payments – Deliverable-Item Basis (DEVIATION 2019-O0011), is to be used instead of DFARS 252.232-7013, Performance-Based Payments – Deliverable-Item Basis, when PBPs will be made when items under specific Contract Line Item Numbers (CLINs) are delivered.

PBPs are contract financing payments that are not payments for accepted items. They can be used on fixed-price type noncommercial contracts, but not on cost-reimbursement contracts. PBPs may be made on any of the following bases: (a) performance measured by objective, quantifiable methods; (b) accomplishment of defined events [for example, milestones]; or (c) other quantifiable measures of results. Each event or performance criterion that will trigger a PBP must be an integral and necessary part of contract performance and must be identified in the contract, along with a description of what constitutes successful performance of the event or attainment of the performance criterion. The events and criteria may be independent of each other or may be dependent on the previous accomplishment of another event. A contract may provide for more than one series of severable and/or cumulative performance events or criteria performed in parallel.

Because this deviation permits PBPs that exceed the total costs incurred under the contract, paragraph (c) of both DFARS 252.232-7012 (DEVIATION 2019-O0011) and DFARS 252.232-7013 (DEVIATION 2019-O0011) goes into great detail on the types of security that are acceptable for receipt of PBPs: "Title to the property described in paragraph (f) of the clause at FAR 52.232-32, Performance-Based Payments, is the preferred security for receipt of performance-based payments." (**EDITOR'S NOTE:** Paragraph (f) lists the following as "property": "(i) Parts, materials, inventories, and work in process; (ii) special tooling and special

test equipment to which the government is to acquire title; (iii) nondurable (*i.e.,* noncapital) tools, jigs, dies, fixtures, molds, patterns, taps, gauges, test equipment and other similar manufacturing aids, title to which would not be obtained as special tooling under…this clause; and (iv) drawings and technical data, to the extent the contractor or subcontractors are required to deliver them to the government by other clauses of this contract.")

However, "if the contractor's accounting system is not capable of identifying and tracking through the build cycle the property that is allocable and properly chargeable to the contract, the contracting officer may consider acceptance of one or a combination of the following alternative forms of security sufficient to constitute adequate security for the performance-based payments and so specify in the contract…: (A) a paramount lien on assets; (B) an irrevocable letter of credit from a federally insured financial institution; (C) a bond from a surety, acceptable in accordance with FAR part 28 [Bonds and Insurance]; (D) a guarantee of repayment from a person or corporation of demonstrated liquid net worth, connected by significant ownership interest to the contractor; [or] (E) title to identified contractor assets of adequate worth… In the event the contractor fails to provide adequate security as required in this contract, no financing payment will be made under this contract."

■ **Class Deviation on Peer Reviews of Contracts for Supplies or Services:** This deviation eliminates the conduct of peer reviews "for competitive procurements above $1 billion, as required by DFARS 201.170(a)(1)(i) [Peer Reviews], except for procurements of major defense acquisition programs above $1 billion for which the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) is the milestone decision authority and USD(A&S) special interest programs." In addition, this deviation eliminates the conduct of "postaward peer reviews for acquisitions for services with a total estimated value greater than $1 billion as required by DFARS 201.170(a)(1)(iii)."

Finally, the deviation states, "The requirement for noncompetitive peer reviews remains unchanged." This requirement is in DFARS 201.170(a)(1)(ii).

OFCCP CLARIFIES RELIGIOUS EXEMPTION

The Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) is proposing to amend its regulations to clarify the scope and application of the religious exemption in Executive Order 11246, Equal Employment Opportunity.

On July 2, 1964, President Lyndon B. Johnson signed the Civil Rights Act of 1964 (Public Law 88-352). Title VII of the statute, "Equal Employment Opportunity," makes it an unlawful employment practice for an employer to discriminate because of an individual's "religion, sex, or national origin" (see Section 703 of the statute). Title VII also provides an accommodation for religious employers and religious educational institutions: "This title shall not apply…to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities…" (see Section 702); "Notwithstanding any other provision of this title…it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported,

controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion" (see Section 703(e)(2)).

In 1965, President Johnson signed Executive Order 11246, Equal Employment Opportunity, which requires equal employment opportunity in federal government contracting. The order mandates that all government contracts include a provision stating that "the contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin" (see Section 202). In 1967, President Johnson issued Executive Order 11375, Amending Executive Order No. 11246, Relating to Equal Employment Opportunity, which expands Executive Order 11246 to prohibit discrimination on the bases of sex and religion (see paragraph (2)). Finally, in 2002, President George W. Bush issued Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, which amended Executive Order 11246 by expressly importing Title VII's exemption for religious organizations ("Section 202 of this order [Executive Order 11246, as amended by Executive Order 11375] shall not apply to a government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities"). This statement is in paragraph (c)(1) of FAR 52.222-26, Equal Opportunity, which is required to be included in all solicitations and contracts (with limited exceptions). Executive Order 11246, as amended, is implemented by FAR subpart 22.8, Equal Employment Opportunity.

In 1972, Congress enacted the Equal Employment Opportunity Act of 1972 (Public Law 92-261), which expanded the religious exemption in Title VII's Section 702 by adding educational institutions to the list of those eligible for exemption. In addition, Congress broadened the scope of the Section 702 exemption to cover not just religious activities, but all activities of a religious organization: "This title shall not apply…to a religious corporation, association, *educational institution*, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, *educational institution*, or society of its activities" (*emphasis* added) (see Section 3). This expansion of the religious exemption to all activities of religious organizations was upheld unanimously by the Supreme Court against an Establishment Clause challenge in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* (1987). (**EDITOR'S NOTE:** The "Establishment Clause" is in the first amendment in the Bill of Rights: "Congress shall make no law respecting an establishment of religion, or abridging the free practice thereof…")

Because there has been some variation among federal circuit courts in interpreting the scope and application of the Title VII religious exemption, the OFCCP has decided it is time to propose amending its regulations in Title 41 of the Code of Federal Regulations (CFR), Chapter 60, Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor, Part 60-1, Obligations of Contractors and Subcontractors (41 CFR 60-1), "to provide clarity regarding the scope and application of the religious exemption…Among other changes, this proposal is intended to make clear that the Executive Order 11246 religious exemption covers not just churches but employers that are organized for a religious purpose, hold themselves out to the public as carrying out a religious purpose, and engage in exercise of religion consistent with, and in furtherance of, a religious purpose. It is also intended to make clear that religious employers can condition employment on acceptance of or adherence to

religious tenets without sanction by the federal government, provided that they do not discriminate based on other protected bases. In addition, consistent with the administration policy to enforce federal law's robust protections for religious freedom, the proposed rule states that it should be construed to provide the broadest protection of religious exercise permitted by the Constitution and other laws. While only a subset of contractors and would-be contractors may wish to seek this exemption, the Supreme Court, Congress, and the President have each affirmed the importance of protecting religious liberty for those organizations who wish to exercise it" (from the preamble of the proposed rule).

Therefore, OFCCP proposes to add the following five definitions to 41 CFR 60-1.3, Definitions:

> "*Exercise of religion*" means any exercise of religion, whether or not compelled by, or central to, a system of religious belief. An exercise of religion need only be sincere.
>
> "*Particular religion*" means the religion of a particular individual, corporation, association, educational institution, society, school, college, university, or institution of learning, including acceptance of or adherence to religious tenets as understood by the employer as a condition of employment, whether or not the particular religion of an individual employee or applicant is the same as the particular religion of his or her employer or prospective employer.
>
> "*Religion*" includes all aspects of religious observance and practice, as well as belief.
>
> "*Religious corporation, association, educational institution, or society*" means a corporation, association, educational institution, society, school, college, university, or institution of learning that is organized for a religious purpose; holds itself out to the public as carrying out a religious purpose; and engages in exercise of religion consistent with, and in furtherance of, a religious purpose. To qualify as religious a corporation, association, educational institution, society, school, college, university, or institution of learning may, or may not: have a mosque, church, synagogue, temple, or other house of worship; be nonprofit; or be supported by, be affiliated with, identify with, or be composed of individuals sharing, any single religion, sect, denomination, or other religious tradition.
>
> "*Sincere*" means sincere under the law applied by the courts of the United States when ascertaining the sincerity of a party's religious exercise or belief."

In addition, 41 CFR 60-1.5, Exemptions, would be amended to add the following paragraph: "(e) *Broad interpretation*. This subpart shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the United States Constitution and law, including the Religious Freedom Restoration Act of 1993 [Public Law 103-141], as amended, 42 USC 2000bb *et seq.* [Religious Freedom Restoration]."

Comments on this notice of proposed rulemaking (NPRM) must be submitted no later than September 16, 2019, identified as "RIN 1250-AA09," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) fax: 202-693-1304; or (4) mail: Harvey D. Fort, Acting Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs, Room C-3325, 200 Constitution Avenue NW, Washington, DC 20210.

FY 2020 PER DIEM RATES RELEASED

The General Services Administration (GSA) has established the Fiscal Year (FY) 2020 per diem rates for the lower 48 Continental United States (CONUS), which are the maximum allowances that federal employees of civilian agencies are reimbursed for expenses incurred while on official travel (the Department of Defense employees are subject to per diem rates established under the Joint Travel Regulations). The rates are available at **https://www.gsa.gov/travel/plan-book/per-diem-rates**. (Note that the FY 2020 rates are ***not*** the default rates until October 1, 2019. One must select "2020" from the drop-down list under "Search By City, State, or ZIP" or "Search by State." Otherwise, the search will return FY 2019 rates.)

The CONUS per diem rate for an area is actually three allowances: the lodging allowance, the meals allowance, and the incidental expense allowance. Most of the CONUS (approximately 2600 counties) are covered by the standard CONUS per diem rate of $151 ($96 lodging, $55 meals and incidental expenses). In FY 2020, there are 322 Non-Standard Areas (NSAs) that have per diem rates higher than the standard CONUS rate.

The following locations have been designated as NSAs in FY 2020:

- Boise, ID (Ada County) is a new NSA location this year.
- Park County, MT has been added to the Big Sky, MT NSA area.
- Missoula and Flathead Counties in Montana were separated into their own NSAs instead of a combined NSA.

The following locations that were NSAs (or part of an established NSA) in FY 2019 will move into the standard CONUS rate category:

- Dover, DE (Kent County)
- South Bend, IN (St. Joseph County)
- Benton Harbor/St. Joseph/Stevensville, MI (Berrien County)
- Lake County, MT
- Medina County, OH
- Aiken County, SC
- Sheboygan County, WI

As a reminder, Federal Travel Regulation (FTR) Part 301-11, Per Diem Expenses, Subpart D, Actual Expense, allows for actual expense reimbursement when per diem rates are insufficient to meet necessary expenses.

VA CONTINUES UPDATING THE VAAR

The Department of Veterans Affairs (VA) is continuing its methodical amending of the VA Acquisition Regulation (VAAR) to revise or remove any policy that has been superseded by changes in the FAR; remove any procedural guidance that is internal to the VA; incorporate new regulations and policies; correct inconsistencies within the VAAR; remove redundant and duplicate material already covered by the FAR; delete outdated material or information; and renumber VAAR text, clauses, and provisions to conform to the FAR format, numbering, and arrangement.

This rule makes the following changes to the VAAR:

■ VAAR Part 823, Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace, is added. It consists of the following two subparts:

- VAAR subpart 823.1, Sustainable Acquisition Policy, which consists of:
  - VAAR 823.103-70, Policy, which permits contracting officers to include an evaluation factor for an offeror's Sustainable Action Plan when acquiring sustainable products and services, and requires offerors to provide their Sustainable Action Plan in their technical proposals when the solicitation includes VAAR 852.223-70, Instruction to Offerors – Sustainable Acquisition Plan (see below). (**EDITOR'S NOTE:** FAR subpart 23.1, Sustainable Acquisition Policy, provides guidance on the types of products that might be classified as "sustainable.")
  - VAAR 823.103-71, Solicitation Provision, which requires that VAAR 852.223-70 be included in solicitations above the micro-purchase threshold ($10,000) when the contracting officer decides a Sustainable Acquisition Plan is necessary.
- VAAR subpart 823.3, Hazardous Material Identification and Material Safety Data, consists of VAAR 823.300, Scope of subpart, which states, "This subpart provides a contract clause for use in administering safety and health requirements", and VAAR 823.303-70, Contract Clause, which prescribes the use of VAAR 852.223-71, Safety and Health, in solicitations and contracts that involve hazardous materials for research, development, or test projects; transportation of hazardous materials; or construction.

■ VAAR Part 824, Protection of Privacy and Freedom of Information, consists of:

- VAAR subpart 824.1, Protection of Individual Privacy, which is revised as follows:
  - VAAR 824.102, General, is revised to add the title of the section in 38 CFR chapter 1 (38 CFR 1.575 through 38 CFR 1.584) that addresses VA's implementation of the Privacy Act of 1974 (Public Law 93–579) – "Safeguarding Personal Information in Department of Veterans Affairs Records".

- VAAR 824.103, Procedures, is added to implement the procedures in FAR 24.103 by citing specific VA handbooks in solicitations and contracts that require the design, development, or operation of a system of records; and by requiring the contracting officer to include in Statements of Work and Performance Work Statements procedures to follow in the event of a personally identifiable information (PII) breach. In addition, this section calls for government surveillance plans for contracts that require the design, development, or operation of a system of records to include monitoring of the contractor's adherence to the Privacy Act and PII regulations.

– In VAAR subpart 824.2, Freedom of Information Act, VAAR 824.203, Policy, is revised to update the CFR reference for rules implementing the Freedom of Information Act (FOIA) (38 CFR 1.550 through 38 CFR 1.562), to advise the public that the VA FOIA Service Office handles all FOIA requests, and to provide a link to VA's FOIA website (**http://www.oprm.va.gov/foia/**).

■ VAAR Part 826, Other Socioeconomic Programs, is added. It consists of VAAR subpart 826.2, Disaster or Emergency Assistance Activities, which consists of the following:

– VAAR 826.202-1, Local Area Set-Aside, which requires the contracting officer to determine whether a local area set-aside should be further restricted to verified Service-Disabled Veteran-Owned Small Businesses (SDVOSB) or Veteran-Owned Small Businesses (VOSB).

– VAAR 826.202-2, Evaluation Preference, which requires that the contracting officer include evaluation factors in accordance with VAAR 815.304, Evaluation Factors and Significant Subfactors, and VAAR 852.215-70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors.

■ In VAAR Part 836, Construction and Architect-Engineer Contracts, VAAR 836.578, Changes – Supplement, which prescribes VAAR 852.236-88, Contract Changes – Supplement, is removed because VAAR 852.236-88 has been revised, retitled, and renumbered as VAAR 852.243-70, Construction Contract Changes – Supplement (see below). The prescription for VAAR 852.243-70 has been moved to VAAR 843.205-70, Contract Changes – Supplement.

■ VAAR Part 843, Contract Modifications, is added. It consists of VAAR subpart 843.2, Change Orders, which consists of two sections: (1) VAAR 843.205, Contract Clauses, which provides contracting officers with guidance for establishing the number of days (up to 60 days), the contractor may be granted to assert its right to an equitable adjustment within the various Changes clauses (FAR 52.243-1, Changes – Fixed Price; FAR 52.243-2, Changes – Cost-Reimbursement; FAR 52.243-3, Changes – Time-and-Materials; and FAR 52.243-4, Changes); and (2) VAAR 843.205-70, Contract Changes – Supplement (which is moved from VAAR 836.578), which prescribes the use of VAAR 852.243-70, Construction Contract Changes – Supplement (formerly VAAR 852.236-88).

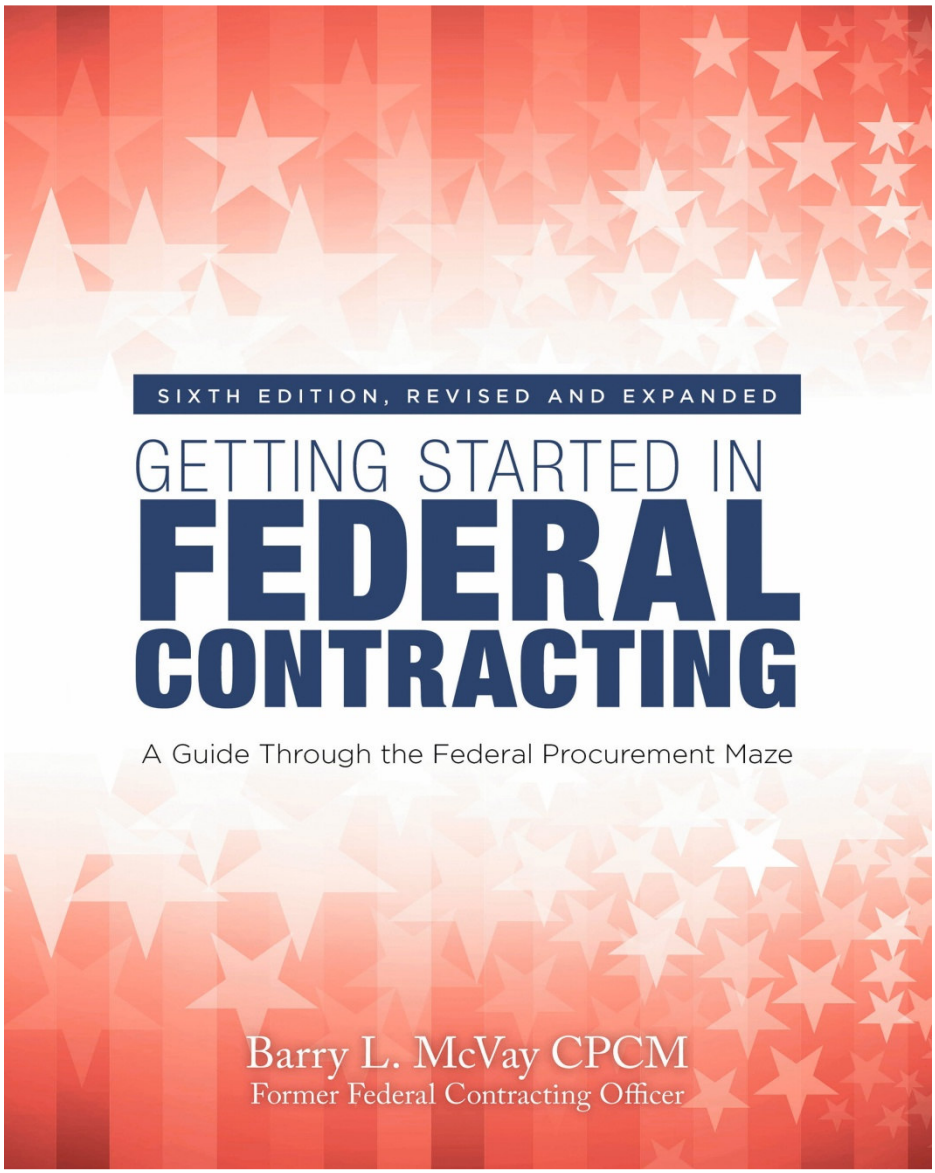
■ In VAAR Part 852, Solicitation Provisions and Contract Clauses, VAAR subpart 852.2, Text of Provisions and Clauses, is revised as follows:

- VAAR 852.223-70, Instructions to Offerors – Sustainable Acquisition Plan, is added for use when the contracting officer decides to include an evaluation factor for an offeror's Sustainable Action Plan when acquiring sustainable products and services in accordance with VAAR 823.103-72, Solicitation Provision.

- VAAR 852.223-71, Safety and Health, is added. It requires contractors to comply with all federal, state, and local laws and regulations applicable to the work being performed, and cites several references that the contractor must comply with "when developing and implementing health and safety operating procedures and practices for both personnel and facilities involving the use or handling of hazardous materials and the conduct of research, development, or test projects." Its prescription is in new VAAR 823.303-70 (see above).

- VAAR 852.236-88, Contract Changes – Supplement, is renumbered as VAAR 852.243-70, Construction Contract Changes – Supplement, and revised to clarify the basis for allowing overhead and profit under change orders on construction contracts, add definitization schedule requirements, and reinforce the need for the contractor's timely response with a proposal to definitize the change order. Its prescription is in new VAAR 843.205-70, Contract Changes – Supplement.

REVISED AND EXPANDED!



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