

# FEDERAL CONTRACTS PERSPECTIVE

Federal Acquisition Developments, Guidance, and Opinions

Vol. XXI, No. 1

January 2020

## 2020 DEFENSE AUTHORIZATION ACT EXTENDS DOD MENTOR-PROTÉGÉ PROGRAM

On December 20, President Trump signed the \$738 billion National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Public Law 116-92). Besides establishing the Space Force as the sixth branch of the military (Title IX, Subtitle D), the NDAA for FY 2020 was a “standing in place” piece of legislation, primarily concerned with authorizing a 3% increase in defense spending over that authorized by the NDAA for FY 2019 (Public Law 115-232). Within the NDAA for FY 2020 are some provisions that address issues involving acquisition; most of those provisions are in Title VIII, Acquisition Policy, Acquisition Management, and Related Matters (Sections 800-893), though there are a few other acquisition-related provisions scattered elsewhere in the statute.

CONTENTS	
Defense Authorization Extends Mentor-Protégé Program	1
Prohibition on Telecommunications Modified	4
Trade Agreements Thresholds Increased	5
DOD Performs a Little Year End Cleanup	7
Calculating Average Annual Receipts Method Revised	15
SBA Proposes Nonmanufacturer Rule Waiver	16
GSA Adopts CMc Project Delivery Method	16
DOE Issues Deviation Increasing CPARS Threshold	18
Prompt Payment Interest Rate Set at 2 1/8%	18

While most of the acquisition-related provisions are limited to the Department of Defense (DOD), there are a few acquisition-related provisions that apply governmentwide.

The following are some of the more noteworthy acquisition-related provisions in the 1119-page NDAA for FY 2020:

- **Section 803, Failure to Provide Other Than Certified Cost or Pricing Data Upon Request:** If a DOD contracting officer is unable to determine proposed prices are fair and reasonable by any other means (that is, through data other than certified cost or pricing data), an offeror who fails to make a good faith effort to comply with a reasonable request to submit data is ineligible for award unless the head of the contracting activity determines that it is in the best interest of the government to make the award to that offeror.
- **Section 816, Modification of Written Approval Requirement for Task and Delivery Order Single Contract Awards:** A task or delivery order contract in an amount estimated to exceed \$100,000,000 (including all options) awarded by the DOD may be awarded to a single source if the head of the agency has made a written determination that procedures other than competitive procedures may be used for the awarding of such contract.

■ **Section 823, Modification of Justification and Approval Requirement for Certain Department of Defense Contracts:** No justification and approval is required for a sole-source contract awarded by the DOD for an amount not exceeding \$100,000,000 if approved by the head of the procuring activity.

■ **Section 861, Defense Acquisition Workforce Certification, Education, and Career Fields:** DOD is to implement a certification program to provide for a professional certification requirement for all members of the acquisition workforce. The certification requirement for any acquisition workforce career field is to be based on standards developed by a third-party accredited program based on nationally or internationally recognized standards. The requirement that a person “have completed at least 24 semester credit hours (or the equivalent) of study from an accredited institution of higher education in any of the following disciplines: accounting, business, finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, and organization and management” to qualify for the GS-1102 contracting series positions is eliminated.

■ **Section 862, Software Development and Software Acquisition Training and Management Programs:** DOD is to establish software development and software acquisition training and management programs for all software acquisition professionals and software developers.

■ **Section 865, Use of Qualified Apprentices by Military Construction Contractors:** Each offeror for a military construction project contract must certify that, if awarded such a contract, the offeror will establish a goal that not less than 20% of the total workforce employed in the performance of such a contract are qualified apprentices; and make a good faith effort to meet or exceed such goal.

■ **Section 872, Reauthorization and Improvement of Department of Defense Mentor-Protégé Program:** The expiration date for DOD mentor-protégé program agreements is extended from September 30, 2018, to September 30, 2024, and the deadline for incurring reimbursable expenses under a DOD mentor-protégé agreement is extended from September 30, 2021, to September 30, 2026. In addition, the maximum length of a mentor-protégé agreement has been reduced from three years to two years. Finally, the definition of “disadvantaged small business concern” is changed from “a firm that *has less than half the size standard* corresponding to its primary North American Industry Classification System code...” to “a firm that *is not more than the size standard* corresponding to its primary North American Industry Classification System code...” (*emphasis added*).

■ **Section 873, Accelerated Payments Applicable to Contracts with Certain Small Business Concerns Under the Prompt Payment Act:** This directs the Office of Management

Vivina McVay, Editor-in Chief

©2020 by Panoptic Enterprises. All rights reserved. Reproduction, photocopying, storage, or transmission by any means is prohibited by law without the express written permission of Panoptic Enterprises. Under no circumstances should the information contained in *Federal Contracts Perspective* be construed as legal or accounting advice. If a reader feels expert assistance is required, the services of a professional counselor should be retained.

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

and Budget (OMB) to prescribe regulations that: (1) require an agency paying a prime contractor that is a small business to establish an accelerated payment date with a goal of 15 days after receipt of a proper invoice for the amount due if a specific payment date is not established in the contract; and (2) require an agency paying a prime contractor that subcontracts with a small business to establish an accelerated payment date with a goal of 15 days after receipt of a proper invoice for the amount due if a specific payment date is not established by contract, and such prime contractor agrees to make payments to such subcontractor in accordance with such accelerated payment date, to the maximum extent practicable, without any further consideration from or fees charged to such subcontractor.

■ **Section 874, Postaward Explanations for Unsuccessful Offerors for Certain Contracts:**

This requires that the Federal Acquisition Regulation (FAR) be revised to require that with respect to an unsuccessful offer for a task order or delivery order in an amount greater than the simplified acquisition threshold (\$250,000) and less than or equal to \$5,500,000 issued under an indefinite delivery-indefinite quantity contract, the contracting officer shall, upon written request from the unsuccessful offeror, provide a brief explanation as to why the offer was unsuccessful. The explanation must include a summary of the rationale for the award and an evaluation of the significant weak or deficient factors in the unsuccessful offeror's offer.

The following miscellaneous sections of Public Law 116-92 involving acquisition are outside of Title VIII:

■ **Section 1123, Prohibition on Criminal History Inquiries by Contractors Prior to Conditional Offer:** This prohibits a contracting officer from asking an individual or sole proprietor who submits a bid for a contract to disclose his or her criminal history record information, and requires, as a condition of receiving a federal contract and receiving payments under such contract, that the contractor will not ask, verbally or through written form request, the disclosure of criminal history record information regarding an applicant for a position related to work under such contract before such contractor extends a conditional offer to the applicant. There are exceptions, such as when the individual must have access to classified information. This prohibition applies governmentwide.

■ **Section 1212, Extension and Modification of Authority to Acquire Products and Services Produced in Countries Along a Major Route of Supply to Afghanistan:** This extends from December 31, 2019, to December 31, 2021, the end date of the authority to limit competition to products or services that are from one or more countries along a major route of supply to Afghanistan, or to provide a preference for products or services that are from one or more countries along a major route of supply to Afghanistan.

■ **Section 3015, Consideration of Contractor History in Contracts for Privatized Military Housing:** This requires DOD to develop a process by which consideration is given to: (1) any history of the contractor providing substandard housing; (2) the recommendation of the commander of the installation for which housing units will be provided under the contract; and (3) the recommendation of the commander of any other installation for which the eligible entity has provided housing units.

## **FAC 2020-03 MODIFIES PROHIBITION ON TELECOMMUNICATIONS**

Federal Acquisition Circular (FAC) 2020-03 consists of an interim rule that allows an offeror that represents in Federal Acquisition Regulation (FAR) 52.204-26, Covered Telecommunications Equipment or Services – Representation, or in paragraph (v) of FAR 52.212-3, Offeror Representations and Certifications – Commercial Items, that it “does not provide covered telecommunications equipment or services as a part of its offered products or services to the government in the performance of any contract, subcontract, or other contractual instrument”, to skip the offer-by-offer representation within FAR 52.204-24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.

The NDAA for FY 2019 (Public Law 115-232), Section 889, Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment, 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. This section was included in the NDAA for FY 2019 because of Congressional concern about federal databases being vulnerable to access by the Chinese government through Chinese-produced video surveillance and telecommunications equipment.

FAC 2019-05 implemented Section 889 with an interim rule that added FAR subpart 4.21, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment; FAR 52.204-24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment, and FAR 52.204-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.

FAR 4.2101, Definitions, defines “covered telecommunications equipment or services” as “(1) telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation, (or any subsidiary or affiliate of such entities); (2) 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); (3) telecommunications or video surveillance services provided by such entities or using such equipment; or (4) telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of 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.”

FAR 52.204-24, which is to be included in all solicitations for contracts or orders under indefinite-delivery indefinite-quantity (IDIQ) contracts, 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.” FAR 52.204-25, which is to be included in all solicitations and contracts, provides the definitions, prohibitions, exceptions, and reporting requirements.

This second interim rule adds FAR 52.204-26, Covered Telecommunications Equipment or Services – Representation, which requires an offeror to represent annually if it does or does not provide covered telecommunications equipment or services as a part of its offered products or services to the government. If an offeror represents that it “does not,” FAR 52.204-24 is

amended to state that the offeror shall not complete the offer-by-offer representation in FAR 52.204-24 or FAR 52.212-3(v). An offeror that represents it “does” must complete the representation at FAR 52.204-24 and provide the information required by FAR 52.204-24(e).

The purpose of this second interim rule is to provide an annual representation, thus reducing the information collection burden imposed on the public.

Comments on this second interim rule must be submitted no later than February 11, 2020, 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.

For more on the first interim rule, see the September 2019 *Federal Contracts Perspective* article “FAC 2019-05 Prohibits Acquisition of Chinese Telecommunications and Surveillance Equipment.”

In addition, the Department of Defense (DOD) is proposing a rule that would amend its DOD FAR Supplement (DFARS) to implement Section 889 and another section from the NDAA for FY 2018 (Public Law 115-91) – see article below.

## TRADE AGREEMENTS THRESHOLDS INCREASED

On December 20, the U.S. Trade Representative performed the biennial adjustment of the thresholds for the various trade agreements into which the United States has entered with other countries. The adjustments are made to account for inflation that occurred in the previous two years and changes in the value of the respective currencies. These thresholds will be incorporated into FAR part 25, Foreign Acquisition, (specifically FAR subpart 25.4, Trade Agreements).

The following are the revised thresholds (with the previous thresholds in parentheses):

- ***World Trade Organization (WTO) Agreement on Government Procurement (GPA)***
  - Supplies: **\$182,000** (\$180,000)
  - Services: **\$182,000** (\$180,000)
  - Construction: **\$7,008,000** (\$6,932,000)
  
- ***U.S.-Australia Free Trade Agreement (FTA)***
  - Supplies: **\$83,099** (\$80,317)
  - Services: **\$83,099** (\$80,317)
  - Construction: **\$7,008,000** (\$6,932,000)
  
- ***U.S.-Bahrain FTA***
  - Supplies: **\$182,000** (\$180,000)
  - Services: **\$182,000** (\$180,000)
  - Construction: **\$10,802,884** (\$10,441,216)
  
- ***U.S.-Dominican Republic-Central America FTA (CAFTA-DR)***
  - Supplies: **\$83,099** (\$80,317)
  - Services: **\$83,099** (\$80,317)
  - Construction: **\$7,008,000** (\$6,932,000)

- ***U.S.-Chile FTA***
  - Supplies: **\$83,099** (\$80,317)
  - Services: **\$83,099** (\$80,317)
  - Construction: **\$7,008,000** (\$6,932,000)
  
- ***U.S.-Columbia Trade Promotion Agreement (TPA)***
  - Supplies: **\$83,099** (\$80,317)
  - Services: **\$83,099** (\$80,317)
  - Construction: **\$7,008,000** (\$6,932,000)
  
- ***U.S.-Korea FTA***
  - Supplies: \$100,000 (unchanged)
  - Services: \$100,000 (unchanged)
  - Construction: **\$7,008,000** (\$6,932,000)
  
- ***U.S.-Morocco FTA***
  - Supplies: **\$182,000** (\$180,000)
  - Services: **\$182,000** (\$180,000)
  - Construction: **\$7,008,000** (\$6,932,000)
  
- ***North American FTA (NAFTA)***
  - Canada**
    - Supplies: \$25,000 (unchanged)
    - Services: **\$83,099** (\$80,317)
    - Construction: **\$10,802,884** (\$10,441,216)
  - Mexico**
    - Supplies: **\$83,099** (\$80,317)
    - Services: **\$83,099** (\$80,317)
    - Construction: **\$10,802,884** (\$10,441,216)
  
- ***U.S.-Oman FTA***
  - Supplies: **\$182,000** (\$180,000)
  - Services: **\$182,000** (\$180,000)
  - Construction: **\$10,802,884** (\$10,441,216)
  
- ***U.S.-Panama FTA***
  - Supplies: **\$182,000** (\$180,000)
  - Services: **\$182,000** (\$180,000)
  - Construction: **\$7,008,000** (\$6,932,000)
  
- ***U.S.-Peru TPA***
  - Supplies: **\$182,000** (\$180,000)
  - Services: **\$182,000** (\$180,000)
  - Construction: **\$7,008,000** (\$6,932,000)

- **U.S.-Singapore FTA**
  - Supplies: **\$83,099** (\$80,317)
  - Services: **\$83,099** (\$80,317)
  - Construction: **\$7,008,000** (\$6,932,000)

Within a few days of the U.S. Trade Representative’s action, the Department of Defense (DOD) issued a final rule incorporating the revised thresholds into DOD FAR Supplement (DFARS) part 225, Foreign Acquisition, and corresponding clauses in DFARS part 252, Solicitation Provisions and Contract Clauses.

## **DOD PERFORMS A LITTLE YEAR-END CLEANUP**

Besides incorporating the revised trade agreements thresholds into the DFARS (see above article), the DOD did a bit of tidying up for the New Year, issuing four other final rules and one interim rule.

■ **Review of Defense Solicitations by Procurement Center Representatives:** This finalizes, without changes, the rule that proposed adding DFARS 219.402, Small Business Administration Procurement Center Representatives, to implement the National Defense Authorization Act (NDAA) for Fiscal Year (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.”

The Small Business Administration (SBA) 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(c)(iii) would cite the five exclusions from PCR review. However, the “humanitarian operation” exclusion in Section 1811 cites “as defined in Section 401(e) of Title 10, United States Code.” The type of activities covered by 10 USC 401(e), “humanitarian and civic assistance,” 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, proposed 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.

No comments on the proposed rule were submitted, so the proposed rule is finalized without changes. For more on the proposed rule, see the September 2019 *Federal Contracts Perspective* article “DOD Resumes DFARS Clean-Up.”

In addition, SBA revised its PCR regulations in November 2019 to implement Section 1811. For more on SBA’s revision, see the December 2019 *Federal Contracts Perspective* article “SBA Takes on Small Business Contracting Programs.”

■ **Demonstration Project for Contractors Employing Persons with Disabilities:** This finalizes, with changes, the rule that proposed to add DFARS subpart 226.72, Demonstration Project for Contractors Employing Persons with Disabilities, to implement the NDAA for FY 2019 (Public Law 115-232), Section 888, Instruction on Pilot Program Regarding Employment of Persons with Disabilities. Section 888 requires that the DFARS be updated to include an instruction on the demonstration project authorized by the NDAA for FY 2004 (Public Law 108-136), Section 853, Demonstration Project for Contractors Employing Persons with Disabilities, which authorized the secretary of defense to establish a demonstration project for contractors employing disabled people to provide defense contracting opportunities for entities employing individuals who are severely disabled.

The rule proposed to add DFARS subpart 226.72, consisting of the following sections:

- DFARS 226.7200, Scope of Subpart, which would reference Section 853 of the NDAA for FY 2004.
- DFARS 226.7201, Definitions, which would provide definitions for the terms “eligible contractor” (“a business entity...that (1) employs severely disabled individuals at a rate that averages not less than 33% of its total workforce over the 12-month period prior to issuance of the solicitation; (2) pays not less than the minimum wage...; and (3) provides for its employees’ health insurance and a retirement plan...”), and “severely disabled individual” (“an individual with a disability...who has a severe physical or mental impairment that seriously limits one or more functional capacities”). These definitions are based on those in Section 853.
- DFARS 226.7202, Policy and Procedures, which would: (1) provide the purpose of the demonstration program (“Contracting officers may use this demonstration project to award one or more contracts to an eligible contractor for the purpose of providing defense contracting opportunities for entities that employ severely disabled individuals”); (2) explain the mandatory evaluation factor (“when using this demonstration project, one of the evaluation factors shall be the percentage of the offeror’s total workforce that consists of severely disabled individuals employed by the offeror. Contracting officers may use a rating method in which a higher percentage of the offeror’s total workforce consisting of severely disabled individuals would result in a higher rating for this evaluation factor”);

and (3) provide that “contracts awarded to eligible contractors under this demonstration project may be counted toward DOD’s small disadvantaged business goal”).

- DFARS 226.7203, Solicitation Provision, which would prescribe the use of solicitation provision DFARS 252.226-7002, Representation for Demonstration Project for Contractors Employing Persons with Disabilities, for use in solicitations using the demonstration program.

In addition, DFARS 252.226-7002 would be added, which would provide the definitions of the terms “eligible contractor” and “severely disabled individual” that are in DFARS 226.7202; announce that “this solicitation is issued pursuant to the Demonstration Project for Contractors Employing Persons with Disabilities...To be eligible for award, an offeror must be an eligible contractor...”; and require the offeror to represent whether it is or is not an eligible contractor.

Twenty respondents submitted comments on the proposed rule, and the following changes have been made to the final rule in response:

- DFARS 226.7000 is revised to clarify that DFARS subpart 226.72 does not supersede the requirements for contracting officers to use the mandatory sources in FAR part 8, Required Sources of Supplies and Services, or the small business programs in FAR part 19, Small Business Programs (“nothing in this subpart supersedes the requirement to use the mandatory sources in FAR part 8 or the small business programs in FAR part 19”). Depending on the specifics of a particular procurement, this means that FAR part 8 or FAR part 19 may require a contracting officer to use a program other than the demonstration project.
- To limit competition to entities that meet the definition of “eligible contractor,” DFARS 226.7202 is revised to clarify that a written justification and approval is required in accordance with FAR 6.302-5, Authorized or Required by Statute (new paragraph (a)(2)). This means that prior to issuing the solicitation, a contracting officer must explain, in writing, the rationale for using the demonstration project, and must obtain approval at the appropriate level based on the dollar value of the procurement.

In addition, DFARS 226.7202 is revised to provide that when options are exercised on a demonstration project contract the DOD will continue to receive credit toward its small disadvantaged business goal only if the contractor is still an “eligible contractor” (new second sentence in paragraph (c)(1)). The contracting officer must verify whether the contractor is still an eligible contractor (for example, by checking the representation in the System for Award Management [SAM – <https://www.sam.gov>]) prior to exercising an option on a demonstration project contract (new paragraph (c)(2)).

- DFARS 226.7203 is revised to clarify that contracting officers may use the demonstration project to purchase commercial items, including commercially available off-the-shelf (COTS) items, by including DFARS 252.226-7002 in solicitations that use the procedures in FAR part 12, Acquisition of Commercial Items. In addition, DFARS 212.301, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items, is amended to require the inclusion of DFARS 252.226-7002 in solicitations under the demonstration project (new paragraph (x)(B)) and new Alternate II of DFARS

252.219-7003, Small Business Subcontracting Plan (DOD Contracts) (new paragraph (f)(vii)(B)(3) – see next).

- Alternate II of DFARS 252.219-7003 is added for use in solicitations and contracts under the demonstration project that use FAR part 12 procedures and which contain FAR 52.219-9, Small Business Subcontracting Plan (which is included in solicitations and contracts that offer subcontracting possibilities and are expected to exceed \$700,000). Alternate II includes the definition of “eligible contractor” and allows the prime contractor to receive credit toward its small disadvantaged business subcontracting goal for subcontracts issued to eligible contractors.

For more on the proposed rule, see the May 2019 *Federal Contracts Perspective* article “DOD Shakes Up the DFARS.”

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

DFARS 225.7018 consists of five subsections:

- DFARS 225.7018-1, Definitions, which provides definitions for “covered material” and “covered country.”
- DFARS 225.7018-2, Restriction, which prohibits the acquisition of any covered material from a covered country unless an exception applies or the covered material is not available.
- DFARS 225.7018-3, Exceptions, which lists the following exceptions to the restriction: (1) acquisitions at or below the simplified acquisition threshold (currently \$250,000); (2) acquisition outside the U.S. of an item for use outside the U.S.; (3) an end item that is (i) a commercially available off-the-shelf (COTS) item other than (A) a commercially available off-the-shelf item that is 50% or more tungsten by weight, or (B) a tungsten heavy alloy mill product, such as bar, billet, slab, wire, cube, sphere, block, blank, plate, or sheet, that had not been incorporated into an end item, subsystem, assembly, or component; (ii) an electronic device, unless the Secretary of Defense determines that the domestic availability of a particular electronic device is critical to national security; or (iii) a neodymium-iron-boron magnet manufactured from recycled material if the milling of the recycled material and sintering of the final magnet takes place in the United States. DFARS 225.7018-3 goes on to provide that an acquisition may be exempt from the restriction “if the authorized agency official concerned, without power of redelegation, determines that covered materials of satisfactory quality and quantity, in the required

form, cannot be procured as and when needed at a reasonable price from a source other than a covered country...” (a “nonavailability determination”).

- DFARS 225.7018-4, Nonavailability Determination, which provides details on what the authorized agency officials (that is, the Under Secretary of Defense [Acquisition and Sustainment], the secretaries of the Army, Navy, and Air Force, and the Director of the Defense Logistics Agency) must consider and do to execute a nonavailability determination.
- DFARS 225.7018-5, Contract Clause, which requires the inclusion of DFARS 252.225-7052 in solicitations and contracts that exceed the simplified acquisition threshold (currently \$250,000), including solicitations and contracts using the procedures in FAR part 12, Acquisition of Commercial Items, unless the acquisition is for items outside the United States for use outside the United States or a nonavailability determination has been executed in accordance with DFARS 225.7018-4.

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

Four respondents submitted comments on the interim rule, and the following are the most significant changes made to the final rule in response:

- The definitions for “assembly,” “end item,” and “subsystem,” which apply to both specialty metals (see DFARS 225.7003, Restrictions on Acquisition of Specialty Metals) and certain magnets and tungsten (see DFARS 225.7018) are moved from DFARS 225.7003 to DFARS 225.7001, Definitions [applicable to foreign acquisitions], and added to DFARS 252.225-7052.
- DFARS 225.7018-1 and DFARS 252.225-7052 are amended to add definitions for “electronic device” and “tungsten heavy alloy.”
- A description of the production of tungsten is added as DFARS 225.7018-2(c) to explain the applicability of the restrictions on the production of tungsten.
- A explanation of “required form” as it relates to the nonavailability exception for tungsten heavy alloy and certain magnets is added as DFARS 225.7018-3(d) and DFARS 252.225-7052(c)(2).
- DFARS 225.7018-4 is amended to lower the approval level for individual nonavailability determination from the under secretary of defense (acquisition and sustainment) or the service secretaries to the head of the contracting activity (paragraph (a)(1)).

For more on the interim rule, see the May 2019 *Federal Contracts Perspective* article “DOD Shakes Up the DFARS.”

■ **Contractor Purchasing System Review Threshold:** This finalizes, without changes, the proposed rule that would add DFARS 244.302, Requirements [for granting, withholding, or withdrawing approvals of contractor purchasing system reviews (CSPRs)], to raise the CPSR threshold in paragraph (a) of FAR 44.302, Requirements, from \$25,000,000 to \$50,000,000.

FAR 44.302(a) requires the administrative contracting officer (ACO) to determine whether a contractor's sales to the government are expected to exceed \$25,000,000 during the next 12 months and, if so, perform a review of the contractor's past performance of the contractor and the volume, complexity, and dollar value of its subcontracts to determine if a CPSR is needed. FAR 44.302(a) also provides that "the head of the agency responsible for contract administration may raise or lower the \$25,000,000 review level if it is considered to be in the government's best interest." The \$25,000,000 threshold has not been changed since 1996, and adjusting the threshold would account for inflation, reduce the burden on small contractors, and allow a more efficient and effective use of CPSR resources to review larger contractors where more taxpayer dollars are at risk.

Three respondents submitted comments on the proposed rule, but none of the recommendations were adopted, so the proposed rule is finalized without change.

For more on the proposed rule, see the June 2019 *Federal Contracts Perspective* article "DOD Keeps Up Frenzied Pace of DFARS Changes."

■ **Covered Defense Telecommunications Equipment or Services:** This interim rule adds DFARS subpart 204.21, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment, two solicitation provisions, and a contract clause to implement: (1) the NDAA for FY 2018 (Public Law 115-91), Section 1656, Security of Nuclear Command, Control, and Communications System from Commercial Dependencies; and (2) the NDAA for FY 2019 (Public Law 115-232), Section 889, Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment, paragraph (a)(1)(A). These sections prohibit the procurement of 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 a part of any system.

Section 1656 prohibits DOD from procuring or obtaining (or extending or renewing a contract to procure or obtain) any equipment, system, or service to carry out the DOD nuclear deterrence or homeland defense missions that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as a critical technology as a part of any system. Covered telecommunications equipment or services includes telecommunications equipment or services from certain Chinese entities (Huawei Technologies Company and ZTE Corporation or any of their subsidiaries or affiliates) and from any other entities that the Secretary of Defense reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of the People's Republic of China or the Russian Federation.

Section 889(a)(1)(A) establishes a governmentwide prohibition on 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 a part of any system. Covered telecommunications equipment or services includes certain video surveillance and telecommunications equipment or services from certain Chinese entities (Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, and Dahua Technology Company or any of their

subsidiaries or affiliates for video surveillance and telecommunications equipment used for public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes; Huawei Technologies Company and ZTE Corporation or any of their subsidiaries or affiliates for telecommunications equipment), and from any other entities that the secretary of defense, in consultation with the Director of 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 the People's Republic of China. The governmentwide prohibition in Section 889 was incorporated into the FAR as FAR subpart 4.21, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment by FAC 2019-05 (see the September 2019 *Federal Contracts Perspective* article "FAR 2019-05 Prohibits Acquisition of Chinese Telecommunications and Surveillance Equipment") and modified by FAC 2020-03 (see above article).

The difference between the DOD prohibition under Section 1656 and the governmentwide prohibition under Section 889(a)(1)(A) in that Section 1656: (1) applies to equipment, systems, or services to carry out the DOD nuclear deterrence or homeland defense missions; (2) includes different definitions of "covered telecommunications equipment or services" and "covered foreign country"; and (3) does not include exceptions from the prohibition (as does Section 889). Therefore, this interim DFARS rule implements the Section 1656 prohibition for DOD, and is structured to align with the FAR implementation of the Section 889(a)(1)(A) governmentwide prohibition. The interim rule does not specifically address the Section 889(a)(1)(A) prohibition except for the DOD-specific procedures for handling representations from offerors and reports from contractors that apply to both the Section 1656 and Section 889 prohibitions.

DFARS subpart 204.21 consists of the following sections:

- DFARS 204.2100, Scope of Subpart, which cites Section 1656 and Section 889(a)(1)(A).
- DFARS 204.2101, Definitions, which provides definitions for "covered telecommunications equipment or services," "covered foreign country," and "covered missions."
- DFARS 204.2102, Prohibition, which states that, in addition to the prohibition in FAR 4.2102, "the contracting officer shall not procure or obtain, or extend or renew a contract (*e.g.*, exercise an option) to procure or obtain, any equipment, system, or service to carry out covered missions that uses covered defense telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system."
- DFARS 204.2103, Procedures, which explains what contracting officers are to do when the offeror represents it will or will not provide covered defense telecommunications equipment or services as a part of its offered products or services, and provides agency procedures for handling reports received under FAR 52.204-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment, and DFARS 252.204-7018, Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services (see below).

- DFARS 204.2104, Waivers, which provides procedures for the Secretary of Defense to waive the prohibition for a single one-year period.
- DFARS 204.2105, Solicitation Provisions and Contract Clause, which requires that the following be included in all solicitations (including those at or below the simplified acquisition threshold [currently \$250,000], those using FAR part 12 procedures for the acquisition of commercial items), and solicitations for task and delivery orders, basic ordering agreements (BOAs), orders against BOAs, blanket purchase agreements (BPAs), and calls against BPAs): (1) DFARS 252.204-7016, Covered Defense Telecommunications Equipment or Services – Representation; (2) DFARS 252.204-7017, Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services – Representation; and (3) DFARS 252.204-7018, Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services (this is to be included in all resultant contracts as well).

The FAR uses a two-tier representation structure to implement the Section 889(a)(1)(A) prohibition because it significantly reduces the reporting burden on the public by allowing for an annual representation, in lieu of an offer-by-offer representation, if an offeror does not offer the prohibited products and services to the government. FAR 52.204-26, Covered Telecommunications Equipment or Services – Representation, requires an offeror to represent annually “if it [ ] does, [ ] does not provide covered telecommunications equipment or services to the government in the performance of any contract, subcontract or other contractual instrument.” If an offeror represents that it “does not” offer such products or services, FAR 52.204-24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment, states that the offeror shall not complete the offer-by-offer representation in FAR 52.204-24(d) or paragraph (v) of FAR 52.212-3, Offeror Representations and Certifications – Commercial Items. An offeror that represents it “does provide covered telecommunications equipment or services to the government” must complete the representation in FAR 52.204-24(d) and provide the information required by FAR 52.204-24(e).

This interim rule provides a similar two-tier representation structure to ensure contracting officers comply with the Section 1656 prohibition. DFARS 252.204-7016 requires offerors to represent in the System for Award Management (SAM – <https://www.sam.gov>) at least annually whether they provide covered defense telecommunications equipment or services as part of their offerings to the government. Only offerors who represent that they do provide covered defense telecommunications equipment or services in the annual representation will be required to provide the offer-by-offer representation in DFARS 252.204-7017(d). If an offeror represents in its DFARS 252.204-7017(d) representation that it will provide covered defense telecommunications equipment or services as part of its offered products or services to DOD in the performance of any award resulting from the solicitation, then the offeror must provide information about the equipment or services required by DFARS 252.204-7017(e). DOD will use the information provided to determine whether the award is prohibited or if a waiver request may be appropriate.

In addition to these two provisions, new DFARS 252.204-7018 provides definitions for the key terms, states the Section 1656 prohibition, requires contractors and subcontractors to report through the Defense Industrial Base Cybersecurity Program website <https://dibnet.dod.mil> any discovery of covered defense telecommunications equipment or services that are being used as a

substantial or essential component of any system, or as critical technology as part of any system, during the course of contract performance, and requires that the clause be included in all subcontracts, including those for the acquisition of commercial items.

Comments on this interim rule must be submitted no later than March 2, 2020, identified as “DFARS Case 2018-D022,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) email: [osd.dfars@mail.mil](mailto: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.

## **METHOD OF CALCULATING AVERAGE ANNUAL RECEIPTS REVISED**

The Small Business Administration (SBA) is modifying its method for calculating annual average receipts used to prescribe receipts- and assets-based small business size standards.

Section 3(a)(2)(C)(ii)(II) of the Small Business Act (which is codified in Title 15 of the U.S. Code, Section 632, Definitions, subparagraph (a)(2)(C)(ii)(II) [15 USC 632(a)(2)(C)(ii)(II)]), provided that “unless specifically authorized by statute, no federal department or agency may prescribe a size standard for categorizing a business concern as a small business concern, unless such proposed size standard...(ii) provides for determining...(II) the size of a business concern providing services on the basis of the annual average gross receipts of the business concern over a period of not less than 3 years...” However, the Small Business Runway Extension Act of 2018 (Public Law 115-324) modified the method for prescribing size standards for business concerns by striking “3 years” in 15 USC 632(a)(2)(C)(ii)(II) and inserting “5 years”.

To implement this change, SBA proposed substituting “5” for “3” in Title 13 of the Code of Federal Regulations, Section 121.104 [13 CFR 121.104], How does SBA calculate annual receipts?, paragraph (c), which addresses the “period of measurement.”

Two hundred and twelve respondents submitted comments on the proposed rule. In response, SBA is not including its 7(a) Loan Program, the Microloan Program, the Intermediary Lending Pilot Program, the Development Company Loan Program, Physical Disaster Business Loans, Economic Injury Disaster Loans, Military Reservist Economic Injury Disaster Loans, and Immediate Disaster Assistance Program Loans in this change (13 CFR 121.104(c)(4)). Because several respondents expressed concern that SBA lenders and loan program applicants would experience burden, SBA will seek additional comment and public input through a proposed rule at a later date to determine how best to consider changes to size eligibility in the Business Loan and Disaster Loan Programs.

In addition, SBA is adopting a two-year transition period through January 6, 2022, during which a firm may choose between calculating receipts using a 3-year average or a 5-year average (13 CFR 121.104(c)(1)).

For more on the proposed rule, see the August 2019 *Federal Contracts Perspective* article “SBA Adjusts Monetary-Based Small Business Size Standards, Proposes Change in Calculation.”

## SBA PROPOSES NONMANUFACTURER RULE WAIVER

The Small Business Administration (SBA) is proposing to issue a nonmanufacturer rule waiver for commercially available off-the-shelf laptop and tablet computers under Product Service Code (PSC) 7435, Office Information System Equipment, North American Industry Classification System (NAICS) code 334111, Electronic Computer Manufacturing.

SBA is inviting the public to comment on this proposed waiver or to provide information on potential small business sources on any small business manufacturers of this class of products that are available to participate in the federal market by January 16, 2020 , to the Federal Rulemaking Portal at <https://www.regulations.gov> under Docket ID SBA-2017-0006.

**EDITOR'S NOTE:** Public Law 100-656, enacted November 15, 1988, requires those with federal contracts that are set-aside for small businesses or awarded through the 8(a) program to provide the product of a small business manufacturer or processor if the recipient is not the actual manufacturer or processor (see paragraph (f) of FAR 19.102, Size Standards). This is called the “nonmanufacturer rule.” However, SBA may waive this requirement if there are no small business manufacturers or processors.

The SBA regulation on the nonmanufacturer rule is in Title 13 of the Code of Federal Regulations (CFR), Business and Credit Administration; part 121, Small Business Size Standards; under paragraph (b) of Section 121.406, How does a small business concern qualify to provide manufactured products or other supply items under a small business set-aside, service-disabled veteran-owned small business set-aside, WOSB [women-owned small business] or EDWOSB [economically disadvantaged women-owned small business] set-aside, or 8(a) contract? (13 CFR 121.406(b)). The SBA regulation on the waiver of the nonmanufacturer rule is 13 CFR 121.1202, When Will a Waiver of the Nonmanufacturer Rule Be Granted for a Class of Products?

More information on the nonmanufacturer rule and class waivers can be found at <https://www.sba.gov/contracting/contracting-officials/non-manufacturer-rule/non-manufacturer-waivers>. A complete list of products for which the nonmanufacturer rule has been waived is available at <https://www.sba.gov/document/support--non-manufacturer-rule-class-waiver-list>.

## GSA ADOPTS CMc PROJECT DELIVERY METHOD

The General Services Administration (GSA) has officially adopted an additional project delivery method for construction known as “construction manager as constructor” (CMc), which is commonly used in the private sector but is not addressed in the Federal Acquisition Regulation (FAR). The CMc method becomes the third method used by GSA for acquiring construction services; the other two are design-bid-build and design-build.

The CMc technique used by GSA follows industry best practices that have been commonly used in the private sector for many years, and has worked well for numerous GSA construction procurements. There is ample guidance on traditional and design-build procurements in the FAR but there is no guidance on CMc procurement. GSA has implemented CMc through internal Public Building Services policies. GSA is centralizing all its guidance on CMc in new GSAR subpart 536.71, Construction-Manager-as-Constructor Contracting, and this will enable industry

to better understand and execute CMc construction contracts and ensure consistent application of construction project principles across GSA.

GSA issued a rule that proposed to add GSAR subpart 536.71, which would address pertinent definitions, solicitation procedures, contract award, contract administration, contract closeout, and add two clauses: GSAR 552.236-79, Construction-Manager-As-Constructor, which would provide guidance specific to a CMc project, including addressing the guaranteed maximum price, conversion to firm-fixed-price, and final settlement; and GSAR 552.236-80, Accounting Records and Progress Payments, which would provide guidance specific to a CMc project and address records maintenance and the auditing of accounts and progress payments. In addition, the rule proposed to include the following definition of CMc in GSAR 536.102, Definitions: “the project delivery method where design and construction are contracted concurrently through two separate contracts and two separate contractors. Unlike the traditional design-bid-build delivery method, under the CMc delivery method, the government awards a separate contract to a designer (*i.e.*, architect-engineer contractor) and to a construction contractor (*i.e.*, CMc contractor) prior to the completion of the design documents. The government retains the CMc contractor during design to work with the architect-engineer contractor to provide constructability reviews and cost estimating validation. The CMc contract includes design phase services at a firm-fixed-price and an option for construction at a guaranteed maximum price.”

Five respondents submitted comments on the proposed rule. In response to the comments, the following changes to definitions in GSAR 536.7102, Definitions, are made to the final rule:

- The proposed definition for “CMc contingency allowance” was “an allowance for the exclusive use of the construction contractor to cover reimbursable costs during construction that are not the basis of a change order. These costs could include estimating and planning errors in the final Estimated Cost of the Work (ECW) or other contractor errors.” The definition is revised to include scheduling error costs: “an allowance for the exclusive use of the construction contractor to cover reimbursable costs during construction that are not the basis of a change order. These costs could include estimating, *scheduling*, and planning errors in the final Estimated Cost of the Work (ECW) or other contractor errors” (*emphasis added*).
- The proposed definition for “fee for the construction” was “a fixed amount established in the construction contract for all of the contractor’s indirect costs, including overhead and profit, for the construction work.” The definition is revised to clarify that this definition encompasses solely profit and home office overhead costs: “the amount established in the construction contract for the contractor’s profit and home office overhead costs, as described in FAR part 31 [Contract Cost Principles and Procedures], for the construction work.”

For more on the proposed rule, see the December 2018 *Federal Contracts Perspective* article “GSA Proposes Construction Manager as Constructor.”

## **DOE ISSUES DEVIATION INCREASING CPARS THRESHOLD**

The Department of Energy (DOE) has issued a deviation to paragraphs (b), (c), and (d) of Federal Acquisition Regulation (FAR) 42.1502, Policy [for contractor performance information], increasing the threshold for DOE evaluation and reporting of contractor performance through the Contractor Performance Assessment Reporting System (CPARS – <https://www.cpars.gov>) from the simplified acquisition threshold (currently \$250,000) to \$1,000,000.

Contracts with small businesses are exempted from this deviation as the lower threshold will allow them to continue generating past performance information, thus better positioning themselves for future business opportunities. Also excluded from this deviation are construction and architect-engineer contracts, which have separate thresholds (FAR 42.1502(e) and (f)). Their thresholds remain unchanged at \$700,000 and \$35,000, respectively.

## **PROMPT PAYMENT INTEREST RATE SET AT 2 1/8%**

The Treasury Department has established 2 1/8% (2.125%) as the interest rate for the computation of payments made between January 1, 2020, through June 30, 2020, under the Prompt Payment Act and the Contracts Disputes Act. This rate is also used in facilities capital cost of money calculations.

The interest rate for the prior six-month period (July 1, 2019, through December 31, 2019) was 2 5/8% (2.625%). The interest rate for January 1, 2019, through June 30, 2019, was 3 5/8% (3.625%).

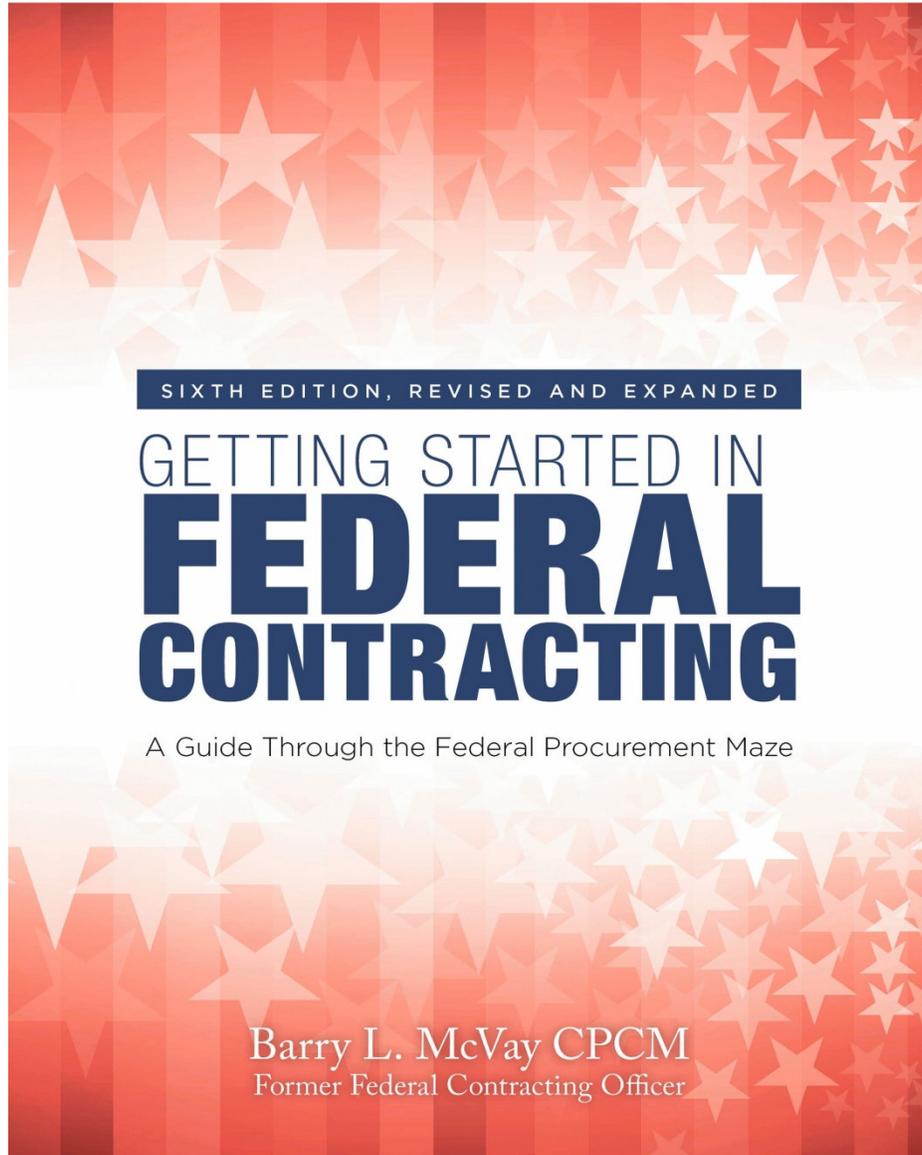
All prompt payment interest rates since 1980 (in six-month increments) are available at <https://www.fiscal.treasury.gov/prompt-payment/rates.html>.

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

**Visit <http://www.FedGovContracts.com>**

***for more information on the rapidly-changing world  
of federal contracting!***

**REVISED AND EXPANDED!**



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

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

**Sample Chapters:**

**Chapter 11, Small Business Programs, go to**  
**<http://www.FedGovContracts.com/Chap11.pdf>**

**Chapter 13, Federal Supply Schedules, go to**  
**<http://www.FedGovContracts.com/Chap13.pdf>**