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DOD ADJUSTS ACQUISITION-RELATED THRESHOLDS FOR INFLATION, IMPLEMENTS CYBERSECURITY REQUIREMENTS

The Department of Defense (DOD) undertook some significant revisions to the Defense Federal Acquisition Regulation Supplement (DFARS) in September, including the five-year inflation adjustment to DOD-specific acquisition-related thresholds, and a rule requiring contractors to implement cybersecurity measures. Also, a clause and a provision are repealed; the acquisition of tantalum from North Korea, China, Russia, or Iran is prohibited; and several other changes were made and proposed.

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■ **Inflation Adjustment of Acquisition-Related Thresholds:** This finalizes, with editorial corrections, the rule that proposed to amend various parts of the DFARS to make adjustments to Department of Defense (DOD)-specific acquisition-related dollar thresholds in accordance with Title 41 of the U.S. Code, Section 1908 (41 USC 1908), Inflation Adjustment of Acquisition-Related Dollar Thresholds, which requires that each acquisition-related dollar threshold provided by law be adjusted on October 1 of each year evenly divisible by five, such as this year – 2020. (**EDITOR'S NOTE:** The FAR Council has published a proposed rule adjusting the acquisition-related dollar thresholds in the FAR; see the July 2020 ***Federal Contracts Perspective*** article "Inflation Adjustment of Acquisition-Related Thresholds Proposed.")

Some of the adjustments proposed by the rule were to increase the threshold for public announcement in DFARS 205.303, Announcement of Contract Awards, from $7 million to $7.5 million; increase the threshold in DFARS 219.502-2, Total Set-Asides, under which construction contracts are to be set aside for small businesses from $2.5 million to $3 million; and increase the limitation in DFARS 212.271, Limitation on Acquisition of Right-Hand Drive Passenger Sedans on the price per vehicle from $40,000 to $45,000.

No comments were submitted in response to the proposed rule, so it is finalized with two minor corrections. For more on the proposed rule, see "Inflation Adjustment of Acquisition-Related Thresholds" in the May 2020 ***Federal Contracts Perspective*** article "DOD Cranks Up the Non-COVID-19 Rules, Too!"

■ **Modification of Determination Requirement for Certain Task- or Delivery-Order Contracts:** This final rule amends DFARS 216.504, Indefinite-Quantity Contracts, to implement the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Public Law 116-92), Section 816, Modification of Written Approval Requirement for Task and Delivery Order Single Contract Awards, which amended 10 USC 2304a, Task and Delivery Order Contracts:

General Authority, to permit the award of a DOD task- or delivery-order contract estimated to exceed $100 million to a single source without a written determination by the head of the agency if the head of the agency made a written determination that other than competitive procedures were authorized for the award of such contract.

The requirement for the 10 USC 2304a written determination is in FAR 16.504(c)(1)(ii)(D), which prohibits the award of a task- or delivery-order contract in excess of $100 million to a single source unless the head of the agency makes a written determination that the acquisition meets one of four specific circumstances that necessitate an award to a single source.

To implement Section 816, this final rule adds paragraph (c)(1)(ii)(D)(*3*)(*i*) to DFARS 216.504, Indefinite-Quantity Contracts, which states, "In accordance with Section 816 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92), the determination at FAR 16.504(c)(1)(ii)(D) is not required if a justification has been executed, in accordance with FAR subpart 6.3 [Other Than Full and Open Competition] and [DFARS] subpart 206.3."

■ **Repeal of "Substitutions for Military or Federal Specifications and Standards" Clause:** This finalizes, without changes, the rule that proposed to delete DFARS 252.211-7005, Substitutions for Military or Federal Specifications and Standards, and DFARS 211.273, Substitutions for Military or Federal Specifications and Standards, because they are no longer necessary.

DFARS 252.211-7005 is included in solicitations and contracts for the acquisition of previously developed items. It encourages offerors to propose Single Process Initiative (SPI) processes in place of military of federal specifications; provides a link to an obsolete Defense Contract Management Agency guidebook; and requires the offeror, when proposing to use an SPI process, to provide certain information with its offer. DFARS 211.273 provides DOD contracting officers internal guidance on the use and acceptance of SPI processes, and includes the prescription for DFARS 252.211-7005.

The SPI process was established to aid DOD and contractors in the transition from an acquisition environment of strict adherence to military specifications to a balanced approach of commercial practices and military specifications. The SPI permits offerors to propose alternatives to military or federal specifications and standards cited in DOD solicitations for previously developed items.

Since the implementation of the SPI, acquisition reform efforts have provided additional latitude to contracting officers and contractors to utilize performance specifications and commercial standards in place of military and federal specifications and standards. As a result, the use of SPI has declined, so DFARS 252.211-7005 and DFARS 211.273 are no longer necessary and are removed.

One comment was submitted in response to the proposed rule but it was outside the scope of the rule, so the proposed rule is finalized without changes. For more on the proposed rule, see "Proposed Repeal of 'Substitutions for Military or Federal Specifications and Standards' Clause" in the May 2020 ***Federal Contracts Perspective*** article "DOD Cranks Up the Non-COVID-19 Rules, Too!"

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■ **Repeal of "Alternate Preservation, Packaging, and Packing" Provision:** This finalizes, without changes, the rule that proposed to delete DFARS 252.211-7004, Alternate Preservation, Packaging, and Packing, because it is no longer necessary.

DFARS 252.211-7004 is included in solicitations that include military preservation, packaging, or packing specifications when it is feasible to evaluate and award using commercial or industrial preservation, packaging, or packing. It notifies offerors that they may submit two prices for the item: one based on the military requirements and one based on commercial standards; specifies the information to be provided with the proposed commercial alternative; and requires the offeror to agree to use the military requirements if the proposed commercial standards are not accepted by the contracting officer.

Since December 1991, the date of this provision, acquisition reform has provided additional latitude to contracting officers to use performance and commercial specifications and standards in place of military specifications and standards. Now, contracting officers regularly rely on commercial preservation, packaging, and packing standards, unless the use of other specifications and standards is essential to the acquisition. In addition, acquisition officials are capable of making tradeoffs between commercial standards and military specifications as part of acquisition planning, so DFARS 252.211-7004 is no longer considered necessary and is removed along with its prescription in DFARS 211.272, Alternate Preservation, Packaging, and Packing.

No comments were submitted in response to the proposed rule, so it is finalized without changes. For more on the proposed rule, see "Proposed Repeal of 'Alternate Preservation, Packaging, and Packing' Provision:" in the May 2020 ***Federal Contracts Perspective*** article "DOD Cranks Up the Non-COVID-19 Rules, Too!"

■ **Treatment of Certain Items as Commercial Items:** This finalizes, with changes, the rule that proposed to amend DFARS 212.102, Applicability [of FAR part 12 and DFARS part 212, Acquisition of Commercial Items], DFARS 244.402, Policy Requirements, and DFARS 252.244-7000, Subcontracts for Commercial Items, to implement the NDAA for FY 2017 (Public Law 114-328), Section 877, Treatment of Commingled Items Purchased by Contractors as Commercial Items; the NDAA for FY 2017, Section 878, Treatment of Services Provided by Nontraditional Contractors as Commercial Items; and the NDAA for FY 2018 (Public Law 115-91), Section 848, Commercial Item Determinations, all of which address treatment of commingled items purchased by contractors and services provided by nontraditional defense contractors as commercial items.

Section 877 provides that "items valued at less than $10,000 that are purchased by a contractor for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract shall be treated as a commercial item..." To implement Section 877, it was proposed that this language be added as paragraph (S-70) to DFARS 244.402. In addition, this requirement would be imposed on contractors in a new paragraph (c) added to DFARS 252.244-7000, which is included in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items. In addition, paragraph (c) would require that "the contractor shall ensure that any such items to be used in performance of this contract meet all terms and conditions of this contract that are applicable to commercial items."

Section 878 provides that "services provided by a business unit that is a nontraditional defense contractor…shall be treated as commercial items…to the extent that such services use the same pool of employees as used for commercial customers and are priced using methodology

similar to methodology used for commercial pricing." To implement Section 878, it was proposed that a new paragraph (a)(iv)(B) be added to DFARS 212.102 consisting of this language.

Section 848 provides that a contract for an item using FAR part 12 procedures shall serve as a prior commercial item determination unless the appropriate official determines that the use of such procedures was improper or that it is no longer appropriate to acquire the item using commercial item acquisition procedures. To implement Section 848, it was proposed that several paragraphs of DFARS 212.102 be amended.

Two respondents submitted comments on the proposed rule, and while none of the comments were adopted, DOD has decided to publish a separate proposed rule addressing Section 848 implementation, so the proposed changes to DFARS 212.102 pertaining to Section 848 have been removed from this final rule. In addition, DOD has made several editorial changes for clarity.

For more on the proposed rule, see "Treatment of Certain Items as Commercial Items" in the December 2019 ***Federal Contracts Perspective*** article "DOD Takes It Easy."

■ **Assessing Contractor Implementation of Cybersecurity Requirements:** This interim rule amends DFARS subpart 204.73, Safeguarding Covered Defense Information and Cyber Incident Reporting, adds DFARS subpart 204.75, Cybersecurity Maturity Model Certification, and adds a provision and two clauses to implement a DOD Assessment Methodology and Cybersecurity Maturity Model Certification framework to assess contractor implementation of cybersecurity requirements and enhance the protection of unclassified information within the DOD supply chain.

DOD is working with industry to enhance the protection of unclassified information within the supply chain. Toward this end, DOD has developed the following assessment methodology and framework to assess contractor implementation of cybersecurity requirements: (1) the National Institute of Standards and Technology (NIST) Special Publication (SP) 800-171 [Protecting Controlled Unclassified Information in Nonfederal Systems and Organizations] DOD Assessment Methodology; and (2) the Cybersecurity Maturity Model Certification (CMMC) Framework.

DFARS 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting, is included in all solicitations and contracts, including those using the procedures in FAR part 12, Acquisition on Commercial Items (except for acquisitions solely for commercially available off-the-shelf [COTS] items). It requires contractors to apply the security requirements of NIST SP 800-171 to "covered contractor information systems" ("unclassified information system that is owned, or operated by or for, a contractor and that processes, stores, or transmits covered defense information") that are not part of an information technology service or system operated on behalf of the government. The NIST SP 800-171 DOD Assessment Methodology provides for the assessment of a contractor's implementation of NIST SP 800-171 security requirements, as required by DFARS 252.204-7012.

The assessment uses a standard scoring methodology that reflects the net effect of NIST SP 800-171 security requirements not yet implemented by a contractor, and three assessment levels (Basic, Medium, and High), which reflect the depth of the assessment performed and the associated level of confidence in the score resulting from the assessment. A Basic Assessment is a self-assessment completed by the contractor, while Medium or High Assessments are

completed by the government. The assessments are completed for each covered contractor information system that is relevant to the offer, contract, task order, or delivery order.

The results of assessments are entered in the Supplier Performance Risk System (SPRS) at **https://www.sprs.csd.disa.mil/** to provide DOD components with visibility into the scores of assessments already completed; and verify that an offeror has a current (not more than three years old, unless a lesser time is specified in the solicitation) assessment, at any level, on record prior to contract award.

This interim rule amends DFARS subpart 204.73, Safeguarding Covered Defense Information and Cyber Incident Reporting, to implement the NIST SP 800-171 DOD Assessment Methodology. The new coverage in the completely revised DFARS 204.7303, Procedures, directs contracting officers to verify in SPRS that an offeror has a current NIST SP 800-171 DOD Assessment on record, prior to contract award if the offeror is required by DFARS 252.204-7012 to implement NIST SP 800-171. DFARS 204.7304, Solicitation Provisions and Contract Clauses, requires the contracting officer to include new DFARS 252.204-7019, Notice of NIST SP 800-171 DOD Assessment Requirements, and new DFARS 252.204-7020, NIST SP 800-171 DOD Assessment Requirements, in solicitations and contracts, including solicitations using FAR part 12 procedures for the acquisition of commercial items (except for solicitations solely for the acquisition of COTS items).

DFARS 252.204-7019 advises offerors required to implement the NIST SP 800-171 standards of the requirement to have a current (not older than three years) NIST SP 800-171 DOD Assessment on record to be considered for award. DFARS 252.204-7019 requires offerors to ensure the results of any applicable current assessments are posted in SPRS and provides offerors with additional information on conducting and submitting an assessment when a current one is not posted in SPRS.

DFARS 252.204-7020 requires the contractor to provide the government with access to its facilities, systems, and personnel when it is necessary for DOD to conduct or renew a higher-level assessment. In addition, DFARS 252.204-7020 requires the contractor to ensure that applicable subcontractors also have the results of a current assessment posted in SPRS prior to awarding a subcontract or other contractual instruments. Also, it provides additional information on how a subcontractor can conduct and submit an assessment when one is not posted in SPRS, and requires the contractor to include the requirements of the clause in all applicable subcontracts or other contractual instruments.

This interim rule adds new DFARS subpart 204.75, Cybersecurity Maturity Model Certification (CMMC), to specify the policy and procedures for awarding a contract, or exercising an option on a contract, that includes the requirement for a CMMC certification. It directs contracting officers to verify in SPRS that the apparently successful offeror's or contractor's CMMC certification is current and meets the required level prior to making the award.

New DFARS 252.204-7021, Cybersecurity Maturity Model Certification Requirements, is prescribed for use in all solicitations and contracts or task orders or delivery orders, excluding those exclusively for the acquisition of COTS items. It requires a contractor to maintain the requisite CMMC level for the duration of the contract, ensure that its subcontractors have the appropriate CMMC level prior to awarding a subcontract or other contractual instruments, and include the requirements of the clause in all subcontracts or other contractual instruments. (**EDITOR'S NOTE:** DFARS 204.7503, Contract Clause, states that DFARS 252.204-7021 is to be used as follows: "(a) Until September 30, 2025, in solicitations and contracts or task orders or

delivery orders, including those using FAR part 12 procedures for the acquisition of commercial items, except for solicitations and contracts or orders solely for the acquisition of commercially available off-the-shelf (COTS) items, if the requirement document or statement of work requires a contractor to have a specific CMMC level. In order to implement a phased rollout of CMMC, inclusion of a CMMC requirement in a solicitation during this time period must be approved by [Office of the Under Secretary of Defense for Acquisition and Sustainment]. (b) On or after October 1, 2025, in all solicitations and contracts or task orders or delivery orders, including those using FAR part 12 procedures for the acquisition of commercial items, except for solicitations and contracts or orders solely for the acquisition of COTS items.")

Comments on this interim rule must be submitted no later than November 30, 2020, identified as "DFARS Case 20190-D041," by either of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; or (2) email: **osd.dfars@mail.mil**.

■ **Restriction on the Acquisition of Tantalum:** This interim rule amends DFARS 225.7018, Restriction on Acquisition of Certain Magnets, Tantalum, and Tungsten (previously titled "Restriction on Acquisition of Certain Magnets and Tungsten"), and DFARS 252.225-7052, Restriction on the Acquisition of Certain Magnets, Tantalum, and Tungsten (previously titled "Restriction on Acquisition of Certain Magnets and Tungsten"), to implement the NDAA for FY 2020 (Public Law 116-92), Section 849, Modification of Prohibition on Acquisition of Sensitive Materials from Non-Allied Foreign Nations, to add tantalum to the definition of "covered materials" in 10 USC 2533c, Prohibition on Acquisition of Sensitive Materials from Non-Allied Foreign Nations. 10 USC 2533c prohibits the acquisition of any covered material melted or produced in any covered country (North Korea, China, Russia, or Iran), or any end item, manufactured in any covered country, that contains a covered material. (**<B>EDITOR'S NOTE:</B>** "Covered material" also includes samarium-cobalt magnets, neodymium-iron-boron magnets, tungsten metal powder, and tungsten heavy alloy or any finished or semi-finished components containing tungsten heavy alloy.)

To implement Section 849, this interim rule amends the title of DFARS 225.7018 by adding "tantalum"; adds ``tantalum metal and alloys'' to the definition of "covered material" in DFARS 225.7018-1, Definitions; and includes tantalum in the explanation of exceptions in paragraph (c)(1)(ii) of DFARS 225.7018-3, Exceptions (that is, the exception for commercially available off-the-shelf (COTS) items does not apply to tantalum metal, tantalum alloy, or tungsten heavy alloy mill product that has not been incorporated into an end item, subsystem, assembly, or component), and paragraph (d)(1) (pertaining to the nonavailabilty of a covered material in the required form).

In addition, a new paragraph (c) is added to DFARS 225.7018-2, Restriction, to explain that the restriction on production of tantalum metal and alloys includes the reduction of tantalum chemicals such as oxides, chlorides, or potassium salts, to metal powder and all subsequent phases of production of tantalum metal and alloys, such as consolidation of metal powders.

These same changes are incorporated in DFARS 252.225-7052, now titled "Restriction on the Acquisition of Certain Magnets, Tantalum, and Tungsten."

Comments on this interim rule must be submitted no later than November 30, 2020, identified as "DFARS Case 2020-D007," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) email: **osd.dfars@mail.mil**; (3) fax: 571-372-6094; or (4) mail: Defense Acquisition Regulations System, Attn: Amy Williams, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Source Restrictions on Auxiliary Ship Components:** This rule proposes to amend DFARS 225.7010, Restriction on Certain Naval Vessel Components, and add DFARS 252.225-7038, Restriction on Acquisition of Large Medium-Speed Diesel Engines, to implement the NDAA for FY 2020 (Public Law 116-92), Section 853, Requirement That Certain Ship Components Be Manufactured in the National Technology and Industrial Base, which amends 10 USC 2534, Miscellaneous Limitations on the Procurement of Goods Other Than United States Goods, to limit the procurement of large medium-speed diesel engines for new construction of an auxiliary ship to engines manufactured in the national technology and industrial base, which includes the United States, Australia, Canada, and the United Kingdom.

To implement Section 853, this proposed rule would make the following changes:

- Revise the title of DFARS 225.7010 to "Restrictions on Certain Naval Vessel and Auxiliary Ship Components."
- Add paragraph (b) to DFARS 225.7010-1, Restrictions, to restrict the acquisition of "large medium-speed diesel engines for auxiliary ships using funds available for National Defense Sealift Fund programs or Shipbuilding and Conversion, Navy" to those manufactured in the United States, Australia, Canada, or the United Kingdom.
- Add paragraph (b) to DFARS 225.7010-2, Exceptions, to state that the restriction in DFARS 225.7010-1(b) does not apply to contracts or subcontracts that do not exceed the simplified acquisition threshold ($250,000) or to large medium-speed diesel engines for icebreakers or special mission ships.
- Add DFARS 252.225-70XX, Restriction on Acquisition of Large Medium-Speed Diesel Engines. The clause would apply to acquisitions greater than the simplified acquisition threshold, including contracts using the procedures in FAR part 12, Acquisition of Commercial Items, that require large medium-speed diesel engines for new construction of auxiliary ships using funds available for National Defense Sealift Fund programs or Shipbuilding and Conversion, Navy. However, the restriction would not apply to large medium-speed diesel engines for icebreakers or special mission ships.

Comments on this proposed rule must be submitted no later than November 30, 2020, identified as "DFARS Case 2019-D017," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) email: **osd.dfars@mail.mil**; (3) fax: 571-372-6094; or (4) mail: Defense Acquisition Regulations System, Attn: Kimberly Bass, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Memorandum "Recording Implementation of Section 889(a)(1)(B) When Using the Governmentwide Commercial Purchase Card":** This memorandum, issued by Kim Herrington, Acting Principal Director, Department of Defense (DOD) Pricing and Contracting, provides guidance for recording compliance with the requirements of the NDAA for FY 2019 (Public Law 115-232), Section 889, Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment, paragraph (a)(1)(B), when making purchases with a Governmentwide Commercial Purchase Card (GPC).

Section 889(a)(1)(B) prohibits agencies from entering into a contract (or extending or renewing a contract) with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. Section 889 defines "covered telecommunications

equipment or services" as "(A) telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities); [or] (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)."

Federal Acquisition Circular (FAC) 2020-08 amended FAR subpart 4.21, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment, to implement the Section 889(a)(1)(B) prohibition. Before a purchase may be made from an offeror or vendor, FAC 2020-08 requires that the offeror or vendor complete the following representation in paragraph (d)(2) of FAR 52.204-24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment: "After conducting a reasonable inquiry, for purposes of this representation, the offeror represents that it [ ] does, [ ] does not use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services." (For more on FAC 2020-08, see the August 2020 ***Federal Contracts Perspective*** article "Contractors with Chinese Telecommunications Prohibited.")

In August, Kim Herrington issued a memorandum stating that the FAC 2020-08 requirements applies to GPC micro-purchase cardholders, GPC contingency contracting cardholders, overseas GPC simplified acquisition cardholders, and warranted contingency contracting cardholders. In addition, Mr. Herrington directed GPC holders to "seek a representation equivalent to that required at FAR 52.204-24(d)(2) from eligible merchants (from a person who is authorized to bind the merchant)." (For more on Mr. Herrington's August memorandum, see "Department of Defense (DOD) Memorandum 'Governmentwide Commercial Purchase Card Guidance Related to Implementation of the Section 889(a)(1)(B) Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment'" in the September 2020 ***Federal Contracts Perspective*** article "More Guidance on Prohibited Telecommunications and Video Surveillance Equipment Issued.")

The "Recording Implementation of Section 889(a)(1)(B)" memorandum addresses "allowable purchase log entries" that the cardholder must enter to justify the purchase. The entries range from "899 Merchant Rep," which represents "Merchant provided the required 889 representation at Federal Acquisition Regulation (FAR) 52.204-24(d)(2) with a "**does not**" response; the cardholder relied upon the representation to make the purchase" (**emphasis** in memorandum), through three entries for when the offeror or vendor provides a "**does**" response but the purchase was made because of an exception or waiver, an entry for use when the GPC was used as a method of payment, and an entry for when "**the purchase was NOT in compliance with GPC policy**."

THREE RULE CHANGES PROPOSED FOR THE FAR

Since the Federal Acquisition Regulation (FAR) Council didn't issue any Federal Acquisition Circulars (FACs) modifying the FAR, the Council issued three proposal rules that would amend the FAR to address several miscellaneous topics: encouraging Buy American in federal acquisition; applying to contracts the Mexico City Policy, which prohibits foreign nongovernmental organizations from performing or actively promoting abortion as a method of family planning; and encouraging vendor feedback to support continual improvement of the acquisition process.

■ **Maximizing Use of American-Made Goods, Products, and Materials:** This proposed rule would amend FAR part 25, Foreign Acquisition, and related provisions and clauses in FAR part 52, Solicitation Provisions and Contract Clauses, to implement Executive Order (EO) 13881, Maximizing Use of American-Made Goods, Products, and Materials, which directed the federal government "to maximize, consistent with law, the use of goods, products, and materials produced in the United States."

The Buy American Act (the "Buy American statute" codified in Title 41 of the United States Code, Chapter 83 [41 USC Chapter 83], Buy American), provides pricing preferences to offerors who certify their compliance with the domestic purchasing requirements stated in the act. It requires public agencies to procure articles, materials, and supplies that were mined, produced, or manufactured in the United States, substantially all from domestic components, subject to exceptions for nonavailability of domestic products, unreasonable cost of domestic products, and when it would not be in the public interest to buy domestic products. The Buy American statute is covered in FAR subpart 25.1, Buy American Act – Supplies, and FAR subpart 25.2, Buy American Act – Construction Materials.

The analysis of whether a manufactured end product or construction material qualifies as domestic is done using a two-part test: (1) the end product or construction material must be manufactured in the United States; and (2) more than 50% of all component parts (determined by cost of the components) must also be mined, produced, or manufactured in the United States.

The 50% factor in the definitions of "domestic end product" and "domestic construction material" in FAR 25.003, Definitions [applicable to FAR part 25], came from EO 10582 of December 17, 1954, Prescribing Uniform Procedures for Certain Determinations under the Buy American Act (available at **https://www.archives.gov/federal-register/codification/executive-order/10582.html**). EO 10582 interpreted the statutory requirement that domestic products must be manufactured "substantially all" from domestic components as meaning in excess of 50%. If a product meets this two-part test, then it can be considered a "domestic end product" or "domestic construction material" under the Buy American statute. End products or construction material that do not qualify as domestic under this test are treated as foreign (except when the U.S. has a reciprocal trade agreement with a country or countries). Also, EO 10582 established that, in determining whether the bid or offered price of materials of domestic origin is unreasonable or inconsistent with the public interest, the executive agencies shall add 6% to the total bid or offered price of materials of foreign origin. (**EDITOR'S NOTE:** Subsequently, this was amended to provide that 12% would be added to the total bid or offered price of materials of foreign origin if the lowest domestic offer is from a small business – see paragraph (b) of FAR 25.105, Determining Reasonableness of Cost.)

On July 15, 2019, President Trump signed EO 13881 (see the August 2019 ***Federal Contracts Perspective*** article "EO Promotes American-Made Goods, Products, Materials"). EO 13881 made the following changes to the Buy American statute implementation:

- The domestic content requirement for iron and steel end products is increased to 95%. For everything else, the domestic content requirement is increased from 50% to 55% of the cost of all components.

- In determining whether the bid or offered price of materials of domestic origin is unreasonable or inconsistent with the public interest, the executive agencies shall add 20% to the total bid or offered price of materials of foreign origin (up from 6%); the executive agencies shall add 30% to the total bid or offered price of materials of foreign origin if the lowest domestic offer is from a small business (up from 12%). (**EDITOR'S NOTE:** The 6% price preference was originally established by EO 10582, which permitted the head of an executive agency to determine that a greater differential is appropriate because of national security. In October 1958, the Assistant Secretary of Defense (Supply and Logistics) and the Assistant Secretary of State agreed that a differential of 12% would be used for offers from small business. Also, for Department of Defense procurements, the price preference for end products from both large and small businesses is 50%. This was not affected by EO 13881.)

To implement EO 13881, the following are the significant changes being proposed to FAR part 25 and FAR part 52:

- The definitions of "domestic construction material" and "domestic end product" in FAR 25.003; FAR 52.225-1, Buy American – Supplies; FAR 52.225-3, Buy American – Free Trade Agreements – Israeli Trade Act; FAR 52.225-9, Buy American – Construction Materials; and FAR 52.225-11, Buy American – Construction Materials Under Trade Agreements, would be amended to state that the cost of its components mined, produced, or manufactured in the United States must exceed 55% of the cost of all its components. In addition, a new paragraph is added to each of these definitions that states, "For an end product that consists wholly or predominantly of iron or steel or a combination of both, an end product manufactured in the United States, if the cost of iron and steel not produced in the United States (excluding fasteners) as estimated in good faith by the contractor, constitutes less than 5% of the cost of all the components used in the end product (produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, except metallurgical processes involving refinement of steel additives)."

- In paragraph (b) of FAR 25.105, Determining Reasonableness of Cost [for supplies]; paragraph (b) of FAR 25.204, Evaluating Offers of Foreign Construction Material; paragraph (b)(3)(i) of FAR 52.225-9, Buy American – Construction Materials; and paragraph (b)(4)(i) of FAR 52.225-11, Buy American – Construction Materials Under Trade Agreements, the evaluation factors to be applied to offers of foreign end products or foreign construction material when determining whether the cost of offered domestic end products or domestic construction material is unreasonable would be increased for acquisitions of end products from 6% to 20% to a foreign offer if the potential domestic

awardee is other than a small business, and from 12% to 30% if the potential awardee would be a small business. (**EDITOR'S NOTE:** The introduction to the proposed rule states, "Consistent with current FAR coverage for acquisitions of foreign construction material under a construction contract, the higher preference for small businesses is inapplicable because, under a construction contract, there are not separately identifiable offers on each item of construction material, but it is part of an overall bid on the project. The foreign material is evaluated on the basis of market research, not a specific competing offer. Thus, only the 20 percent factor would be applied to construction material.")

Comments on this proposed rule must be submitted no later than November 13, 2020, identified as "FAR Case 2019-016," to **http://www.regulations.gov**.

■ **Protecting Life in Global Health Assistance:** This proposed rule would amend FAR subpart 25.10, Additional Foreign Acquisition Regulations, to add FAR 25.100X, Protecting Life in Global Health Assistance, which would implement the Protecting Life in Global Health Assistance policy in connection with the presidential memorandum "The Mexico City Policy," dated January 23, 2017.

The Mexico City Policy was first issued by President Reagan in 1984, and it required foreign nongovernmental organizations (NGOs) to agree, as a condition of receiving U.S. Agency for International Development (USAID) family planning assistance, not to perform or actively promote abortion as a method of family planning with any source of funds. Under the Mexico City Policy, U.S. NGOs did not have to agree that they would not perform or actively promote abortion as a method of family planning, but they were required to flow down the policy's requirements to foreign NGOs receiving family planning assistance under their awards. The Mexico City Policy was rescinded by President Clinton in 1993, reinstated by President Bush in 2001, and rescinded by President Obama in 2009. When in effect previously, the Mexico City Policy's requirements only applied to USAID family planning assistance, and it only applied to federal assistance and not contracts.

To extend the Mexico City Policy as directed by the presidential memorandum, the Secretary of State approved a plan to implement the manner in which U.S. government departments and agencies will apply the provisions of the Mexico City Policy to foreign NGOs that receive U.S. funding for global health assistance. The plan, called the "Protecting Life in Global Health Assistance" policy, expanded the application of the Mexico City Policy in three respects: (1) it extended the policy to all affected federal agencies (previously, the Mexico City Policy only applied to U.S. Agency for International Development (USAID) family planning assistance; (2) it extended the policy to all global health assistance; and (3) it required the extension of the policy to federal contracts.

To comply with the Secretary of State's plan, this rule proposes to add the following:

– FAR 7.10X, Additional [acquisition planning] Requirements for Global Health Assistance Acquisitions, which would provide that "when planning to procure supplies or services for global health assistance, the requiring activity is responsible for notifying the contracting officer, in writing, when the contract will be funded partially or wholly with global health assistance funding, as defined in [FAR] 25.100X-4" (see below).

– FAR 25.100X, Protecting Life in Global Health Assistance, which would consist of the following:

  ○ FAR 25.100X-1, Scope of Section, which would state that the section implements the presidential memorandum and the Secretary of State's Protecting Life in Global Health Assistance policy.

  ○ FAR 25.100X-2, Authority, which would identify the Foreign Assistance Act of 1961 (22 USC 2151 *et seq*.) and the presidential memorandum as the authority for the section.

  ○ FAR 25.100X-3, Applicability, which would state that the section "applies to all executive agencies that implement programs or activities funded partially or wholly with global health assistance funding as defined in [FAR] 25.100X-4."

  ○ FAR 25.100X-4, Definitions, which would consist of definitions for "abortion as a method of family planning," "actively promote abortion as a method of family planning," "foreign contractor," "foreign nongovernmental organization," "global health assistance funding," "perform abortions," "provide financial support," and "public international organization."

  ○ FAR 25.100X-5, Policy, which would state that "the Protecting Life in Global Health Assistance policy is that executive agencies take appropriate actions to ensure that foreign nongovernmental organizations agree that they shall not perform or actively promote abortion as a method of family planning, nor provide financial support to any other foreign nongovernmental organization that conducts such activities, during the term of a contract funded with global health assistance funding." It would go on to state, "a foreign contractor or subcontractor is required to agree not to perform or actively promote abortion as a method of family planning or provide financial support to any other foreign nongovernmental organization that conducts such activities. U.S. contractors are required to flow this requirement down to all foreign subcontracts subject to this policy."

  ○ FAR 25.100X-6, Procedures, which would require the requiring activity to notify the contracting officer in writing that global health assistance funding is to be used for the procurement (see FAR 7.10X above), and require the contracting officer to include the FAR 52.225-XX, Protecting Life in Global Health Assistance (see below). In addition, this subsection would require the contracting officer, when providing consent to subcontract with a foreign subcontractor in accordance with FAR subpart 44.2, Consent to Subcontract, to ensure that the contractor has provided a description of the due diligence performed by the contractor on the subcontractor relating to the requirements in FAR 52.225-XX.

  ○ FAR 25.100X-7, Contract Clauses, which would require that FAR 52.225-XX be included in solicitations and contracts that: "(1) provide supplies or services for international health activities that are funded partially or wholly with global health

assistance funding, including contracts for technical assistance and training of foreign individuals or entities and services listed in [FAR] 37.203(b)(1)-(6) [Policy (for advisory and assistance services)]; and (2) are performed partially or wholly outside the United States (the 50 states, the District of Columbia, and outlying areas)." In addition, it would provide that the clause is not required to be used for: (1) contracts at or below the micro-purchase threshold, as defined in FAR 2.101, Definitions [$10,000]; (2) contracts for personal services with individuals; or (3) contracts for the acquisition of commercial items.

– FAR 52.225-XX, Protecting Life in Global Health Assistance, would contain the definitions from FAR 25.100X-4 in addition to definitions for "full cooperation" and "parastatal." It would prohibit the contractor from subcontracting "for supplies or services using global health assistance funding under this contract with a foreign contractor unless the subcontractor at any tier agrees, by entering into such subcontract, that it shall not, during the term of the subcontract: (1) perform or actively promote abortion as a method of family planning, outside the United States (the 50 states, the District of Columbia, and outlying areas); or (2) provide financial support to any other foreign nongovernmental organization that conducts such activities." The same prohibition would apply to foreign prime contractors. Any violation will result in contract termination, suspension of contract payments, and/or suspension or debarment. The contractor would be required to include the clause in all subcontracts awarded with global health assistance funding at any tier except for subcontracts at or below the micro-purchase threshold, for personal services with individuals, or for the acquisition of commercial items.

Comments on this proposed rule must be submitted no later than November 13, 2020, identified as "FAR Case 2018-002," to **http://www.regulations.gov**.

■ **Use of Acquisition 360 to Encourage Vendor Feedback:** This proposed rule would add FAR 1.102-3, Evaluating Agency Acquisition Processes, and FAR 52.201-XX, Acquisition 360: Voluntary Survey, to encourage use of feedback mechanisms to support continual improvement of the acquisition process.

In 2015, the Office of Federal Procurement Policy (OFPP) issued a memorandum "Acquisition 360 – Improving the Acquisition Process through Timely Feedback from External and Internal Stakeholders." The memorandum established the Acquisition 360 Survey tool, a voluntary online survey developed to elicit industry feedback on the pre-award and debriefing processes in a consistent and standardized manner.

An advanced notice of proposed rulemaking (ANPR) was published in 2018 to obtain comments and suggestions regarding matters related to contractor feedback, the overall cost of compliance and any specific regulatory requirements that are particularly burdensome (see the August 2018 ***Federal Contracts Perspective*** article "*Acquisition 360* Proposed as Standard Survey Allowing Offerors to Critique Solicitations"). Based on the comments, the proposed rule would add the following to the FAR:

– FAR 1.102-3, Evaluating Agency Acquisition Processes, which would encourage agencies to "develop internal procedures seeking voluntary feedback from interested

parties in an acquisition to assess process strengths and weaknesses and improve effectiveness and efficiency of the acquisition process." It would continue to state that agencies may "(1) utilize a variety of feedback mechanisms available to the public (*e.g.*, surveys, in-person, and/or group exchanges); (2) utilize the core pre-award and debriefing survey questions at **https://www.acquisition.gov/360**; and (3) seek additional feedback on targeted aspects of an acquisition throughout its lifecycle (*e.g.*, performance standards…or post-award contract administration responsibilities…)." It would further encourage contracting officers to include FAR 52.201-XX in accordance with agency procedures (this flexibility would allow agencies to target specific types of requirements or aspects of the acquisition lifecycle where feedback may be most helpful to the agency), and would prohibit contracting officers from reviewing information until after contract award and from considering it in the award decision. (**EDITOR'S NOTE:** The ANPR had proposed to include this language in FAR subpart 5.4, Release of Information, and FAR part 42, Contract Administration and Audit Services, but it was decided to include it in FAR part 1, Federal Acquisition Regulations System, because the survey tool may be applied to procurements in general.)

– FAR 52.201-XX, Acquisition 360: Voluntary Survey, would state that "all actual and potential offerors are encouraged to provide feedback on the preaward and debriefing process. Feedback may be provided to agencies up to 45 days after award. The feedback is anonymous, unless the participant self-identifies in the survey. Actual and potential offerors can participate in the survey by selecting the following link: **https://www.acquisition.gov/360**. The contracting officer will not review the information provided until after contract award and will not consider it in the award decision. The survey is voluntary and does not convey any protections, rights, or grounds for protest. It creates a way for actual and potential offerors to provide the government constructive feedback about the pre-award and debriefing process on a specific acquisition."

Comments on this proposed rule must be submitted no later than November 16, 2020, identified as "FAR Case 2017-014," to **http://www.regulations.gov**.

PRESIDENT ORDERS "DIVISIVE, ANTI-AMERICAN" TRAINING CEASE

President Trump, having been alerted that "Executive Branch agencies have spent millions of taxpayer dollars to date 'training' government workers to believe divisive, anti-American propaganda," has directed federal agencies to "cease and desist from using taxpayer dollars to fund these divisive, un-American propaganda training sessions," and to "identify all contracts or other agency spending related to any training on 'critical race theory,' 'white privilege,' or any other training or propaganda effort that teaches or suggests either (1) that the United States is an inherently racist or evil country or (2) that any race or ethnicity is inherently racist or evil. In addition, all agencies should begin to identify all available avenues within the law to cancel any such contracts and/or to divert federal dollars away from these un-American propaganda training sessions."

Executive Order 13950, Combating Race and Sex Stereotyping, mandates that all government contracting agencies include in every government contract the following provisions:

- "The contractor shall not use any workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating, including the concepts that:

  "(a) one race or sex is inherently superior to another race or sex;

  "(b) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;

  "(c) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;

  "(d) members of one race or sex cannot and should not attempt to treat others without respect to race or sex;

  "(e) an individual's moral character is necessarily determined by his or her race or sex;

  "(f) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;

  "(g) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or

  "(h) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race."

- "The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under the executive order…"

- "In the event of the contractor's noncompliance with the requirements of [the executive order], or with any rules, regulations, or orders that may be promulgated in accordance with the executive order…this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further government contracts…and such other sanctions may be imposed and remedies invoked as provided by any rules, regulations, or orders the Secretary of Labor has issued or adopted…"

- "The contractor will include [these] provisions…in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor, so that such provisions will be binding upon each subcontractor or vendor."

Less than a week after the executive order, the Office of Management and Budget (OMB) issued a memorandum to all the heads of departments and agencies providing detailed guidance on implementation of the order:

- "Agency employees and contractors are not to engage in divisive training of federal workers."

- "Federal contractors are to be required to represent that they will not conduct such trainings for their own employees, with potential sanctions for noncompliance."
- "Within 90 days of the date of [the] order, each agency shall report to OMB all spending in Fiscal Year 2020 on federal employee training programs relating to diversity or inclusion, whether conducted internally or by contractors. Such report shall, in addition to providing aggregate totals, delineate awards to each individual contractor."
- "Review these [diversity and inclusion] trainings to determine whether they teach, advocate, or promote the divisive concepts specified in the executive order…(*e.g.*, that the United States is fundamentally racist or sexist or that an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive)."
- "Contractors who are found to have provided a training for agency employees that teaches, advocates, or promotes the divisive concepts specified in the executive order in violation of the applicable contract will be considered for suspension and debarment procedures consistent with the executive order and in accordance with the procedures set forth in Part 9 of the Federal Acquisition Regulation [Contractor Qualifications]."
- "All training programs for agency employees relating to diversity or inclusion must be reviewed by the Office of Personnel Management (OPM) for compliance with the executive order prior to the training program being used."

GSA DOES SOME EXTENDING

Because the COVID-19 has lingered much longer than expected, the General Services Administration (GSA) has decided to extend three acquisition-related actions. In addition, GSA has decided to extend three National Interest Action (NIA) codes and add another (NIA codes are used when reporting awards to indicate the reason for the award).

■ **Extension of Moratorium on Enforcement of "Contract Sales Criteria" Clause in Response to COVID-19:** This memorandum extends from September 30, 2020, to March 31, 2021, the moratorium on the enforcement of the minimum sales requirements of Federal Supply Schedule (FSS) clause I-FSS-639, Contract Sales Criteria, because of the economic impact COVID-19 has on GSA's FSS program industry partners.

I-FSS-639 states:

> "(a) A contract will not be awarded unless anticipated sales are expected to exceed $25,000 within the first 24 months following contract award, and are expected to exceed $25,000 in sales each 12-month period thereafter.
>
> "(b) The government may cancel the contract in accordance with [GSA Acquisition Regulation] clause 552.238-79, Cancellation, unless reported sales are at the levels specified in paragraph (a) above."

This moratorium means no FSS contractor will have its FSS contract cancelled for failing to meet the sales levels specified in I-FSS-639(a) until March 31, 2021.

For more on this moratorium, see "Moratorium on Enforcement of 'Contract Sales Criteria' Clause in Response to COVID-19" in the July 2020 ***Federal Contracts Perspective*** article "GSA Takes Two COVID-19 Related Actions."

■ **Supplement to Extend Authority Regarding Purchase Exceptions from the U.S. AbilityOne Commission in Response to COVID-19:** This supplement extends from September 30, 2020, to December 31, 2020, the temporary purchase exceptions granted by AbilityOne (one of the largest sources of employment in the United States for people who are blind or have significant disabilities) to a list of items on the AbilityOne Procurement List because nonprofit agencies cannot meet GSA's requirements within needed timeframes during the COVID-19 pandemic.

FAR subpart 8.7, Acquisition from Nonprofit Agencies Employing People Who Are Blind or Severely Disabled, provides procedures for purchasing from the AbilityOne Procurement List. FAR 8.704, Purchase Priorities, states, "41 USC Chapter 85 [Committee for Purchase from People Who Are Blind or Severely Disabled] requires the government to purchase supplies or services on the Procurement List, at prices established by the Committee, from AbilityOne participating nonprofit agencies if they are available within the period required."

While normally the Commission would grant a purchase exception to a particular contracting activity, "in the interest of efficiency for COVID-19, GSA leadership is coordinating all purchase exceptions directly with the AbilityOne Commission."

The list of items covered by this blanket purchase exception include towelettes, hand sanitizer, lotion hand soap, dispensers, disposable gloves, and utility pails.

For more on these purchase exceptionss, see "GSA Memorandum on Purchase Exceptions From the AbilityOne Program in Response to COVID-19" in the June 2020 ***Federal Contracts Perspective*** article "Running Out of Actions to Take Against COVID-19."

■ **Supplement to Extend Authority Regarding Exceptions for Non-Availability to Trade Agreements and Buy American Statutes in Response to COVID-19:** This supplement extends from September 30, 2020, to December 31, 2020, the non-availability exception determination issued by Jeffrey Koses, Senior Procurement Executive, that certain supplies are temporarily unavailable in sufficient quantity or satisfactory quality because of COVID-19, and that these supplies are exempt from the trade agreements (see paragraph (c) of FAR 25.403, World Trade Organization Government Procurement Agreement and Free Trade Agreements) and the Buy American Act (see paragraph (b) of FAR 25.103, Exceptions [to the Buy American Act]). In addition, Mr. Koses has decide to expand the list of supplies to include disposable gloves.

The items covered by this non-availability exception are: N95 masks (Federal Supply Classification [FSC] code 4240, Safety and Rescue Equipment); sodium hypochlorite (bleach) (FSC 6810, Chemicals); disinfectants including cleaners, sprays and wipes (FSC 6840, Pest Control Agents and Disinfectants); cleaners, including sanitizing surface and floor cleaners (FSC 7930, Cleaning and Polishing Compounds and Preparations); disposable gloves (FSC 8415, Clothing, Special Purpose); and hand sanitizers, soaps, and dispensers (FSC 8520, Personal Toiletry Articles).

This non-availability exception applies to GSA contracts, and the orders placed against GSA contracts (such as Federal Supply Schedule contracts) at any dollar amount. However, this non-

availability exception does not apply to most transactions involving Cuba, Iran, and Sudan, and most imports from Burma or North Korea.

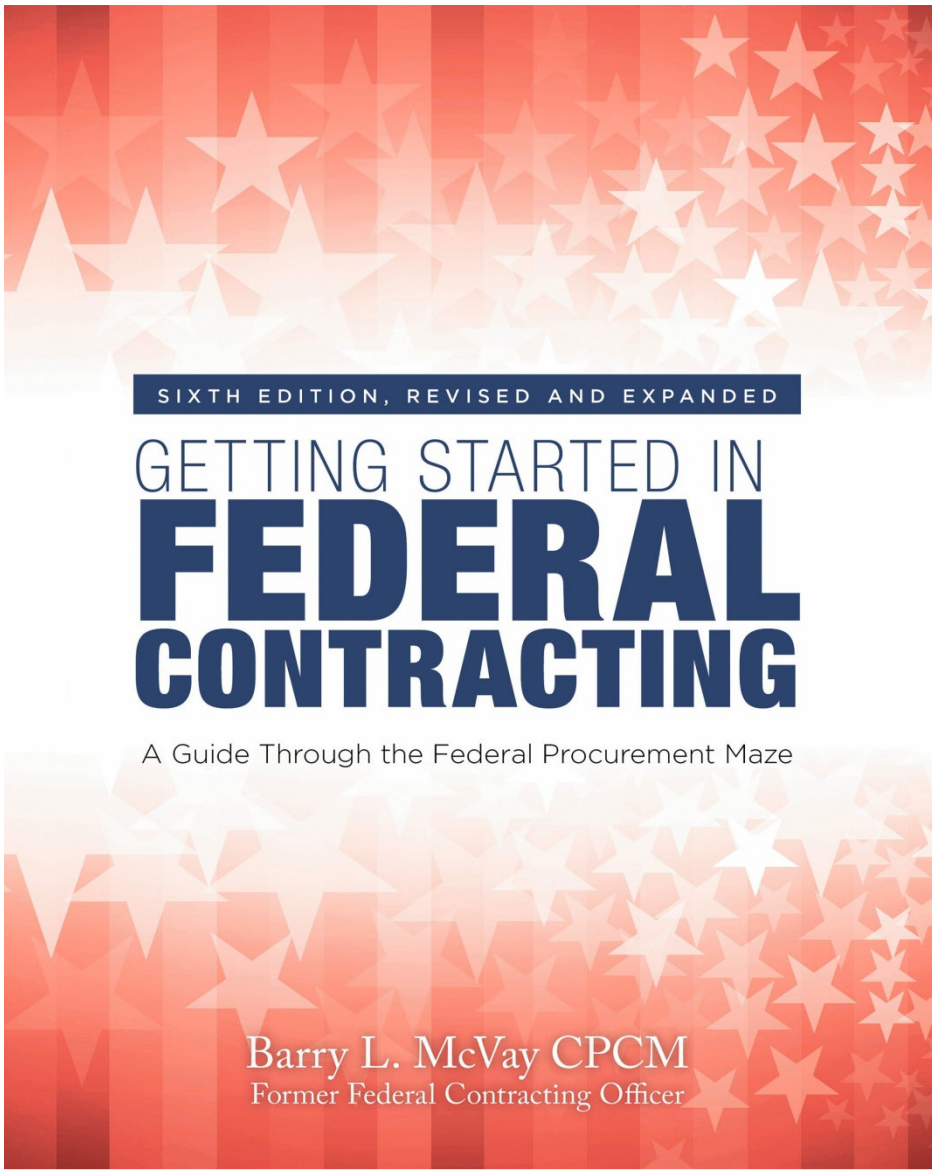
For more on this authority, see "General Services Administration (GSA) Regulation (GSAR) Non-Availability Exception for Trade Agreements and Buy American Statute Clauses" in the May 2020 ***Federal Contracts Perspective*** article "Acquisition Community Fighting COVID-19 on a Multitude of Fronts."

■ **NIA Extension for "COVID-19 2020" (Code P20C):** The expiration date has been extended from July 1, 2020, to March 31, 2021. The code is valid for awards from March 13, 2020, through March 31, 2021.

■ **NIA Extension for "Operations in Iraq and Syria" (Code O14S):** The expiration date has been extended to September 30, 2023. The code is valid for awards from September 14, 2014, to September 30, 2023.

■ **NIA Extension for "Operation Freedom's Sentinel" (Code O15F):** The expiration date has been extended to December 31, 2023. The code is valid for awards from January 1, 2015, to December 31, 2023. (**EDITOR'S NOTE:** "Operation Freedom's Sentinel" refers to operations in Afghanistan.)

■ **NIA for "Hurricane Laura 2020" (Code H20L):** This code is valid for awards from August 26, 2020, to November 30, 2020. (**EDITOR'S NOTE:** Hurricane Laura was the Gulf of Mexico Category 4 hurricane that made landfall in Louisiana on August 27, 2020.)



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