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FAC 2021-01 MAKES 5-YEAR INFLATION ADJUSTMENT TO ACQUISITION-RELATED THRESHOLDS

Federal Acquisition Circular (FAC) 2021-01 undertook the 5-year adjustment of acquisition-related thresholds required by Title 41 of the U. S. Code, Section 1908, Inflation Adjustment of Acquisition-Related Dollar Thresholds (41 USC 1908), which requires that statutory acquisition-related thresholds in the Federal Acquisition Regulation (FAR) be adjusted for inflation on October 1 of each year that is divisible by five. The year 2020 is divisible by 5, so the thresholds were adjusted to reflect the change in the Consumer Price Index (CPI) for all urban consumers from 2015, the last time the adjustments were made, to 2020. As a matter of policy, the FAR Council decided to use the same methodology to adjust nonstatutory FAR acquisition-related thresholds. (EDITOR'S NOTE: 41 USC 1908 prohibits the application of the threshold adjustments to the thresholds under the Construction Wage Rate Requirements statute [40 USC Chapter 31, Subchapter IV, formerly known as the Davis-Bacon Act – see FAR subpart 22.4, Labor Standards for Contracts Involving Construction], the Service Contract Labor Standards statute [41 USC Chapter 67, formerly known as the Service Contract Act – see FAR subpart 22.10, Service Contract Labor Standards], and trade agreements thresholds [see FAR subpart 25.4, Trade Agreements].

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Once the inflation factor is applied to the acquisition-related threshold, the threshold is rounded as follows:

Less than $10,000	Round to the nearest $500
$10,000 to less than $100,000	Round to the nearest $5,000
$100,000 to less than $1 million	Round to the nearest $50,000
$1 million to less than $10 million	Round to the nearest $500,000
$10 million to less than $100 million	Round to the nearest $5 million
$100 million to less than $1 billion	Round to the nearest $50 million
$1 billion or more	Round to the nearest $500 million

While the FAC 2021-01 threshold adjustments occur throughout the FAR, the following are the adjustments made to some of the most-used acquisition-related thresholds (adjusted thresholds are in **bold**):

- The threshold for preparing justifications for limiting competition under the SBA's 8(a) program is increased from $22 million to **$25 million** in paragraph (b) of FAR 6.204, Section 8(a) Competition; paragraphs (b)(4) and (c)(2)(iii) of FAR 6.302-5, [Sole Source Contracts] Authorized or Required by Statute; paragraph (b) of FAR 6.303-1, Requirements [for justifications]; and paragraphs (b) and (d) of FAR 6.303-2, Content [of justifications]. (**EDITOR'S NOTE:** The NDAA for FY 2020 (Public Law 116-92), Section 823, Modification of Justification and Approval Requirement for Certain Department of Defense Contracts, increased the DOD threshold for requiring a justification to award a sole source 8(a) contract from $22 million to **$100 million**. DOD has issued a final rule implementing this change – see "Justification and Approval Threshold for 8(a) Contracts" in the July 2020 ***Federal Contracts Perspective*** article "DOD Revs Up the Regulation Changes.")

- The limitation in paragraph (c) of FAR 13.500, General, on using the simplified procedures for commercial items in FAR subpart 13.5, Simplified Procedures for Certain Commercial Items, is increased from $7 million to **$7.5 million**, and the limitation on using the simplified procedures in FAR subpart 13.5 to support contingency operations or to facilitate defense against cyber, nuclear, biological, chemical, or radiological attacks, is increased from $13 million to **$15 million**.

- The threshold in paragraphs (a)(1)(i), (a)(1)(ii), and (a)(1)(iii) of FAR 19.702, Statutory Requirements [for the prime contractor to submit a subcontracting plan], is increased from $700,000 to **$750,000**, but the construction threshold of $1.5 million does not change.

Some frequently-used acquisition-related thresholds are not changed by FAC 2021-01:

- The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Public Law 115-91), Section 805, Increased Simplified Acquisition Threshold, and Section 806, Requirements Related to the Micro-Purchase, increased the simplified acquisition threshold from $150,000 to $250,000, and the micro-purchase threshold from $3,500 to $10,000. This was implemented by FAC 2020-07 (see "Increased Micro-Purchase and Simplified Acquisition Thresholds" in the August 2020 ***Federal Contracts Perspective*** article "FAC 2020-07 Increases Simplified Acquisition, Micro-Purchase Thresholds").

- The NDAA for FY 2018, Section 811, Modifications to Cost or Pricing Data and Reporting Requirements, amended 10 USC 2306a, Cost or Pricing Data: Truth in Negotiations, and 41 USC 3502, Required Cost or Pricing Data and Certification, to increase the threshold for

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requesting certified cost or pricing data from $750,000 to $2,000,000. This was implemented by FAC 2020-07 (see "Modifications to Cost or Pricing Data Requirements" in the August 2020 ***Federal Contracts Perspective*** article "FAC 2020-07 Increases Simplified Acquisition, Micro-Purchase Thresholds").

In addition, the acquisition-related thresholds adjustments are based on that year's March CPI for all urban consumers. The proposed rule estimated that the March 2020 CPI for all urban consumers would be 258.6. Dividing the estimated March 2020 CPI for all urban consumers by the March 2015 CPI of 236.119 produces an estimated 9.52% inflation since the last adjustment, and this rate was used to calculate the proposed 5-year adjustments. Some of the proposed thresholds were very close to the 41 USC 1908 calculation formula amount. However, the actual March 2020 CPI for all urban consumers was 258.115, which means the actual 5-year inflation was slightly lower – 9.32%. This means that several of the proposed thresholds did not meet the 41 USC 1908 calculation formula amount, so this final rule removes those proposed threshold changes.

In FAR 50.102-3, Limitations on Exercise of Authority [for extraordinary contractual actions], the proposed rule would have increased the threshold requiring notification of the Senate and House Committees on Armed Services from $34 million to $40 million. Because the March 2020 CPI for all urban consumers was slightly lower than expected, the threshold is increased only to **$35 million**.

Finally, some thresholds were inadvertently omitted but are included in the final rule:

- The limitation on the use of requirements contracts for advisory and assistance contracts in paragraph (d)(1) of FAR 16.503, Requirements Contracts, is increased from $13.5 million to **$15 million**.

- The limitation on awarding a sole-source order to an 8(a) contractor under an indefinite delivery contract in paragraph (c)(2) of FAR 19.804-6, Indefinite Delivery Contracts [for participants in the 8(a) program] is increased from $7 million to **$7.5 million** for acquisitions assigned manufacturing North American Industry Classification System (NAICS) codes, and from $4 million to **$4.5 million** for all other acquisitions.

- The limitation on awarding a sole-source contract to an economically disadvantaged women-owned small business (EDWOSB) in paragraph (c)(1) of FAR 19.1506, Women-Owned Small Business Program Sole Source Awards, is increased from $6.5 million to **$7.0 million** for acquisitions assigned manufacturing NAICS codes, and from $4 million to **$4.5 million** for all other acquisitions.

- The proposed contract price threshold requiring an offeror to certify that it has filed all federal tax returns in paragraph (b) of FAR 52.209-12, Certification Regarding Tax Matters, is increased from $5 million to **$5.5 million**.

- Both the contract dollar threshold requiring a compliance plan prohibiting trafficking-related activities in paragraph (h)(1)(ii) of FAR 52.222-50, Combating Trafficking in Persons, and the threshold for including FAR 52.222-50 in subcontracts that is in paragraph (i)(1)(ii) are increased from $500,000 to **$550,000**.

■ The contract dollar threshold requiring a compliance plan prohibiting trafficking-related activities in paragraph (b)(2) of FAR 52.222-56, Certification Regarding Trafficking in Persons Compliance Plan, is increased from $500,000 to **$550,000**.

For more on the proposed rule, see "Inflation Adjustment of Acquisition-Related Thresholds" in the July 2020 ***Federal Contracts Perspective*** article "Inflation Adjustment of Acquisition-Related Thresholds Proposed."

FAC 2021-02 ADDRESSES ROTC, RECREATIONAL SERVICES

Besides making the inflation adjustments in FAC 2021-01 (see above article), the FAR Council issued FAC 2021-02, which cleaned up several miscellaneous proposed rule changes, such as prohibiting the award of contracts to colleges that prohibit military recruiting on campus, exempting contracts for seasonal recreational services on federal lands from the federally-mandated minimum wage, and exempting contracts performed in Afghanistan from Afghan taxes.

■ **Reserve Officer Training Corps (ROTC) and Military Recruiting on Campus:** This finalizes, with changes, the rule that proposed to add FAR 9.110, Reserve Officer Training Corps and Military Recruiting on Campus, and FAR 52.209-14, Reserve Officer Training Corps and Military Recruiting on Campus, to implement 10 USC 983, Institutions of Higher Education That Prevent ROTC Access or Military Recruiting on Campus: Denial of Grants and Contracts from Department of Defense, Department of Education, and Certain Other Departments and Agencies, which prohibits the award of certain federal contracts to institutions of higher education that prohibit ROTC units or military recruiting on campus.

The contents of FAR 9.110 in the proposed rule consisted of the following:

– FAR 9.110-1, Definitions, which contained the following definition of "covered agency": "(1) the Department of Defense; (2) any department or agency for which regular appropriations are made in a Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act; (3) the Department of Homeland Security; (4) the National Nuclear Security Administration of the Department of Energy; (5) the Department of Transportation; or (6) the Central Intelligence Agency."

– FAR 9.110-2, Authority, which stated, "This section implements 10 USC 983."

– FAR 9.110-3, Policy, which stated that "10 USC 983 prohibits the covered agency from providing funds by contract to an institution of higher education if the Secretary of Defense determines that the institution has a policy or practice that prohibits or in effect prevents: (1) the Secretary of a military department from maintaining, establishing, or operating a unit of the Senior Reserve Officer Training Corps (ROTC) at that institution; (2) a student at that institution from enrolling in a unit of the Senior ROTC at another institution of higher education; (3) the Secretary of a military department or the Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is

provided to any other employer; or (4) military recruiters from accessing certain information pertaining to students (who are 17 years of age or older) enrolled at that institution: (i) name, address, and telephone listings; [or] (ii) date and place of birth, educational level, academic majors, degrees received, and the most recent educational institution enrolled in by the student." The policy would exempt institutions that have a long-standing policy of pacifism based on historical religious affiliation, and institutions that have ceased the prohibited policy or practice.

– FAR 9.110-4, Procedures, which provided that "if the Secretary of Defense determines… that an institution of higher education is ineligible to receive funds from a covered agency because of a policy or practice described in [FAR] 9.110-3: (a) the Secretary of Defense will create an active exclusion record for the institution in the System for Award Management [**https://www.sam.gov/**]; and (b) a covered agency shall not solicit offers from, award contracts to, or consent to subcontracts with the institution."

– FAR 9.110-5, Contract Clause, which required that FAR 52.209-14, Reserve Officer Training Corps and Military Recruiting on Campus, be included in solicitations and contracts with institutions of higher education that are expected to exceed the simplified acquisition threshold when using funds from a covered agency. The clause would not be included in solicitations conducted under the procedures in FAR part 12, Acquisition of Commercial Items, and resultant contracts.

FAR 52.209-14 would explain what is expected of the institution of higher education and how an agency is to handle the situation when the institution of higher education is identified by the Secretary of Defense as having policies or practices in place that prevent the ROTC and military recruiting on campus. In general, it would reiterate the policies and procedures in proposed FAR 9.110. The clause would include one additional provision: "The government will terminate this contract for default for the institution's material failure to comply with the terms and conditions of award."

Four respondents submitted comments on the proposed rule, and all of them strongly supported the proposed FAR rule, so no changes were made to the rule in response to the comments. However, the FAR Council decided to add language to FAR 9.110-4(b) and paragraph (c) of FAR 43.105, Availability of Funds, to state that the prohibition does not apply to acquisitions at or below the simplified acquisition threshold ($250,000) or to acquisitions of commercial items, including commercially available off-the-shelf items.

For more on the proposed rule, see "Reserve Officer Training Corps (ROTC) and Military Recruiting on Campus" in the October 2019 ***Federal Contracts Perspective*** article "Three New FAR Rules Proposed."

■ **Recreational Services on Federal Lands:** This finalizes, with changes, the rule that proposed to amend FAR subpart 22.19, Establishing a Minimum Wage for Contractors, and FAR 52.222-55, Minimum Wages Under Executive Order 13658, to conform to a Department of Labor (DOL) rule that implemented Executive Order (EO) 13838, Exemption From Executive Order 13658 for Recreational Services on Federal Lands, which exempted certain contracts from the requirements of EO 13658, Establishing a Minimum Wage for Contractors.

EO 13658 established hourly minimum wages to be paid to workers performing on federal contracts (currently $10.80/hour; to be $10.95/hour on January 1, 2021 – see the September 2020

Federal Contracts Perspective article "Federal Minimum Wage Increased to $10.95/Hour for 2021"). EO 13838 exempts from the EO 13658 mandated hourly minimum wage "contracts or contract-like instruments entered into with the federal government in connection with seasonal recreational services or seasonal recreational equipment rental for the general public on federal lands, but this exemption shall not apply to lodging and food services associated with seasonal recreational services. Seasonal recreational services include river running, hunting, fishing, horseback riding, camping, mountaineering activities, recreational ski services, and youth camps."

To implement EO 13838, DOL amended its regulations at Title 29 of the Code of Federal Regulations (CFR), Part 10, Establishing a Minimum Wage for Contractors, Section 10.4, Exclusions (29 CFR 10.4), by adding paragraph (g): "Contracts in connection with seasonal recreational services and seasonal recreational equipment rental offered for public use on federal lands. This part shall not apply to contracts or contract-like instruments entered into with the federal government in connection with seasonal recreational services or seasonal recreational equipment rental for the general public on federal lands, but this exemption shall not apply to lodging and food services associated with seasonal recreational services. Seasonal recreational services include river running, hunting, fishing, horseback riding, camping, mountaineering activities, recreational ski services, and youth camps." (For more on EO 13838 and the implementing DOL rule, see the October 2018 ***Federal Contracts Perspective*** article "Federal Minimum Wage Increased to $10.60/Hour for 2019.")

To bring the FAR into conformance with DOL regulations, the proposed rule would revise the FAR as follows:

– Amend FAR 22.1901, Definitions, to add the following definition of "seasonal recreational services": "Seasonal recreational services, as used in this subpart, means services that include river running, hunting, fishing, horseback riding, camping, mountaineering activities, recreational ski services, and youth camps."

– Amend FAR 22.1903, Applicability, by adding as paragraph (b)(2)(iii) the following exemption to EO 13658: "Seasonal recreational services or seasonal recreational equipment rental for the general public on federal lands, except for lodging and food services associated with seasonal recreational services, in accordance with Executive Order 13838, Exemption from Executive Order 13658 for Recreational Services on Federal Lands...as implemented by the U.S. Department of Labor regulations at 29 CFR 10.4(g)."

– Amend FAR 52.222-55 to add the FAR 22.1901 definition of "seasonal recreational services" to paragraph (a), Definitions, and add the FAR 22.1903(b)(2)(iii) exemption as new paragraph (c)(2)(iii).

Eighteen respondents submitted comments on the proposed rule, and while none of the comments were adopted, the following definition of "seasonal recreational equipment rental" was added to FAR 22.1901 to provide clarity: "any equipment rental in connection with seasonal recreational services."

For more on the proposed rule, see "Recreational Services on Federal Lands" in the November 2019 ***Federal Contracts Perspective*** article "Four FAR Rules Proposed."

■ **Taxes on Foreign Contracts in Afghanistan:** This finalizes, with a clarifying change, the rule that proposed to add two new clauses that notify U.S. contractors that contracts performed in Afghanistan are exempt from payment liability for Afghan taxes, customs, duties, fees or similar charges pursuant to the Security and Defense Cooperation Agreement between the Islamic Republic of Afghanistan and the United States of America (the "Agreement"), and the Status of Forces Agreement between the North Atlantic Treaty Organization (NATO) and the Islamic Republic of Afghanistan (the "SOFA").

The proposed rule would require the inclusion of FAR 52.229-13, Taxes – Foreign Contracts in Afghanistan, in all solicitations and contracts performed in Afghanistan, including solicitations conducted under the procedures in FAR part 12, Acquisition of Commercial Items, and resultant contracts, unless FAR 52.229-14 is used (see below). The clause would state that the Agreement exempts the United States government, and its contractors and subcontractors (other than those that are Afghan legal entities or residents), from paying any tax or similar charge assessed on activities associated with contracts within Afghanistan. It would require contractors to exclude any Afghan taxes, customs, duties, or similar charges from contract prices, other than those charged to Afghan legal entities or residents.

In addition, the proposed rule would require the inclusion of FAR 52.229-14, Taxes – Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement), instead of FAR 52.229-13 in all solicitations and contracts performed in Afghanistan on behalf of NATO, including solicitations conducted under the procedures in FAR part 12 and resultant contracts. The clause would state that the SOFA exempts: (1) NATO forces and its contractors and subcontractors (other than those that are Afghan legal entities or residents) from paying any tax or similar charge assessed within Afghanistan; and (2) the acquisition, importation, exportation, transportation, and use of supplies and services in Afghanistan, by or on behalf of NATO forces, from all Afghan taxes, customs, duties, or similar charges.

No comments were submitted in response to the proposed rule, but both FAR 52.229-13 and FAR 52.229-14 are revised to clarify that the clauses only exempt taxes or similar charges assessed by the government of Afghanistan with the addition of "the government of Afghanistan" to the first sentence of paragraph (b)(1) of both clauses: "The Agreement [SOFA] exempts the United States Government [NATO forces], and its contractors and subcontractors (other than those that are Afghan legal entities or residents), from paying any tax or similar charge assessed *by the government of Afghanistan* on activities associated with this contract within Afghanistan if the activities are on behalf of or in support of U.S. Forces [NATO Forces]" (*emphasis* added).

For more on the proposed rule, see "Taxes on Foreign Contracts in Afghanistan" in the October 2019 ***Federal Contracts Perspective*** article "Three New FAR Rules Proposed."

■ **Documentation of Market Research:** This final rule amends FAR 10.002, Procedures [for market research], and FAR 12.101, Policy [on the acquisition of commercial items], to implement the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Public Law 116-92), Section 818, Documentation of Market Research Related to Commercial Item Determinations, which requires that the head of the agency document the results of market research in a manner appropriate to the size and complexity of the acquisition.

FAR 10.002(e) states that "agencies should document the results of market research in a manner appropriate to the size and complexity of the acquisition." To implement Section 818,

this rule changes "agencies should" to "the head of the agency shall". In addition, the rule amends the introduction to FAR 12.101 from "Agencies shall" to "The head of the agency shall".

■ **Update to Excess Personal Property Procedures:** This final rule amends FAR 8.103, Information on Available Excess Personal Property, and FAR 8.104, Obtaining Nonreportable Property, to update internal government procedures on how agencies can locate excess personal property and to remove obsolete requirements.

FAR subpart 8.1, Excess Personal Property, has not been substantively amended since its original publication in 1983, and it reflects outdated and obsolete procedures, such as agencies having to submit GSA [General Services Administration] Form 1539, Request for Excess Personal Property, to get information on the availability of excess personal property. The GSA Form 1539 was discontinued in 1997. Similarly, agencies can no longer look at "reports and samples" of excess personal property in GSA regional offices or at excess personal property "catalogs and bulletins" issued by GSA.

To update FAR subpart 8.1, FAR 8.103 is revised to read "Information regarding the availability of excess personal property can be obtained through: (a) reviewing and requesting available excess personal property in GSAXcess® (see **https://gsaxcess.gov**); and (b) personal contact with GSA or the activity holding the property." In addition, FAR 8.104 is amended to replace "41 CFR 102-36.90" with "41 CFR 102-36.220" [Must we report all excess personal property to GSA], and to add the following sentence: "Visit **www.gsa.gov/ppmo** for contact information" (PPMO stands for GSA's Office of Personal Property Management).

■ **Removal of FAR Appendix:** This final rule removes all references to the "FAR appendix," which was the Cost Accounting Standards (CAS) but no longer appears in the Code of Federal Regulations (CFR). The appendix appears in the version of the FAR currently available online at **https://www.acquisition.gov/browse/index/far** as "Chapter 99 (CAS)", and under Title 48 of the CFR, Chapter 99, Cost Accounting Standards Board, Office of Federal Procurement Policy, Office of Management and Budget (48 CFR chapter 99), at the electronic Code of Federal Regulation (eCFR) website (**https://www.ecfr.gov**).

The original purpose of the appendix was to provide an easy way for readers to read the CAS which are heavily referenced in FAR part 30, Cost Accounting Standards Administration. Because the appendix to the FAR no longer exists, references throughout the FAR to the "FAR appendix" are deleted, particularly in FAR part 30. out of date. Wherever "FAR appendix" is deleted, "chapter 99" is maintained to direct the workforce to the supporting regulation.

Finally, this final rule deletes the few additional references to the "FAR loose-leaf" because the FAR loose-leaf version is now published online at **https://www.acquisition.gov**. It is no longer published as a paper loose-leaf version.

■ **Removal of Obsolete Definitions:** This final rule amends FAR 19.101, Definitions [pertinent to small business size standards] to remove the definitions of "annual receipts" and "number of employees," because they do not conform with the definitions in the Small Business Administration's (SBA) regulations at 13 CFR 121.104, How does SBA calculate annual receipts?, and 13 CFR 121.106, How does SBA calculate number of employees? Besides, the definitions are not necessary for contracting officers because SBA has sole responsibility for prescribing how these terms are used to determine small business size.

In addition, the only place where the term "affiliates" appears in FAR part 19, Small Business Programs, is in the definitions of "annual receipts" and "number of employees" in FAR 19.101. With the removal of "annual receipts" and "number of employees" from FAR 19.101, the definition of "affiliates" is no longer needed in FAR part 19, so it is removed from FAR 19.101 as well. Since the definitions of these three terms constitute the contents of FAR 19.101, FAR 19.101 is removed in its entirety. However, since "affiliates" is used elsewhere in the FAR, the definition for "affiliates" is added to the definition of "small business concerns" in FAR 2.101, Definitions; FAR 52.212-3, Offeror Representations and Certifications – Commercial Items; FAR 52.219-1, Small Business Program Representations; FAR 52.219-6, Notice of Total Small Business Set-Aside; FAR 52.219-7, Notice of Partial Small Business Set-Aside; and FAR 52.219-28, Post-Award Small Business Program Rerepresentation.

REVISION OF "COMMERCIAL ITEM" DEFINITION PROPOSED

As if the issuances of FAC 2021-01 and FAC 2021-02 were not enough, the FAR Council issued a rule proposing to revise the definition of "commercial item" by splitting it in two: "commercial product" and "commercial services." Then, a week later, the FAR Council issued another proposed rule to increase the threshold for requiring fair opportunity on orders under multiple-award contracts to the "micro-purchase threshold."

■ **Revision of Definition of "Commercial Item":** This rule proposes to revise FAR 2.101, Definitions, to separate the definition of "commercial item" into definitions of "commercial product" and "commercial services" to implement the NDAA for FY 2019 (Public Law 115-232), Section 836, Revision of Definition of Commercial Item for Purposes of Federal Acquisition Statutes, which mandates the separation to provide clarity over how to identify eligible commercial products and services. Section 836 does not expand or shrink the universe of products or services that the government may procure using the procedures in FAR part 12, Acquisition of Commercial Items, nor does it change the terms and conditions that apply to contractors and vendors.

This rule proposes to remove the definition of "commercial item" from FAR 2.101 and replace it with the following two definitions, which closely follows those in Section 836:

> "Commercial product" means –
>
> (1) A product, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and –
>
> (i) Has been sold, leased, or licensed to the general public; or
>
> (ii) Has been offered for sale, lease, or license to the general public;
>
> (2) A product that evolved from a product described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a government solicitation;

(3) A product that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, except for –
    (i) Modifications of a type customarily available in the commercial marketplace; or
    (ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet federal government requirements. "Minor modifications" means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;
(4) Any combination of products meeting the requirements of paragraphs (1), (2), or (3) of this definition that are of a type customarily combined and sold in combination to the general public;
(5) A product, or combination of products, referred to in paragraphs (1) through (4) of this definition, even though the product, or combination of products, is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or
(6) A nondevelopmental item, if the procuring agency determines the product was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple state and local governments or to multiple foreign governments.

"Commercial service" means –
(1) Installation services, maintenance services, repair services, training services, and other services if –
    (i) Such services are procured for support of a commercial product as defined in this section, regardless of whether such services are provided by the same source or at the same time as the commercial product; and
    (ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the federal government;
(2) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. For purposes of these services –
    (i) Catalog price means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and
    (ii) Market prices means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be

substantiated through competition or from sources independent of the offerors;

(3) A service referred to in paragraphs (1) or (2) of this definition, even though the service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

The primary differences between the definitions in Section 836 and the proposed FAR 2.101 definitions are: (1) the "minor modifications" definition in paragraph (3)(ii) of the "commercial product" definition has been part of the "commercial item" definition in FAR 2.101 since 1995; and (2) in the "commercial service" definition, the definitions of "catalog price" in paragraph (2)(i) of, and of "market prices" in paragraph (2)(ii) were added to the FAR 2.101 "commercial items" definition in 2001 (see "Acquisition of Commercial Items" in the November 2001 ***Federal Contracts Perspective*** article "2001 FAR Published; FAC 2001-01 Addresses Veterans, Davis-Bacon, Commercial Items, Very Small Businesses").

In addition, the rule proposes to replace throughout the FAR each instance of "commercial item" with "commercial product," "commercial service," or "commercial products and commercial services," as appropriate.

Comments on this proposed rule must be submitted no later than December 14, 2020, identified as "FAR Case 20180-018," through the Federal eRulemaking Portal: **http://www.regulations.gov**.

■ **Application of Micro-Purchase Threshold To Task and Delivery Orders**: This rule proposes to amend FAR 16.505, Ordering [under indefinite-delivery contracts], to implement the NDAA for FY 2020 (Public Law 116-92), Section 826, Uniformity in Application of Micro-Purchase Threshold to Certain Task or Delivery Orders, which increases the threshold for requiring fair opportunity on orders under multiple-award contracts from $2,500 to the "micro-purchase threshold".

Paragraph (c) of 41 USC 4106, Orders [under task and delivery order contracts], requires that "when multiple contracts are awarded…all contractors awarded the contracts shall be provided a fair opportunity to be considered…for each task or delivery order in excess of $2,500 that is to be issued under any of the contracts…" unless an exception applies. Section 826 increases the $2,500 threshold to "the micro-purchase threshold".

41 USC 4106(c) is implemented in FAR 16.505(b)(1)(i), which states "The contracting officer must provide each awardee a fair opportunity to be considered for each order exceeding $3,500 issued under multiple delivery-order contracts or multiple task-order contracts", and FAR 16.505(b)(2)(i), which states "The contracting officer shall give every awardee a fair opportunity to be considered for a delivery-order or task-order exceeding $3,500 unless one of the following statutory exceptions applies…" The $3,500 threshold is the product of inflation adjustments; the micro-purchase threshold was increased from $2,500 to $3,000 in 2006 (see "Inflation Adjustment of Acquisition-Related Thresholds" in the October 2006 ***Federal Contracts Perspective*** article "Micro-Purchase, Cost or Pricing Data, 8(a) Competition Thresholds Adjusted for Inflation"), and from $3,000 to $3,500 in 2015 (see "Inflation Adjustment of Acquisition-Related Thresholds" in the August 2015 ***Federal Contracts Perspective*** article "FAC 2005-83 Adjusts Federal Acquisition-Related Thresholds, Makes FAR Subpart 13.5 Permanent").

To implement Section 826, the rule proposes amending FAR 16.505(b)(1)(i) and FAR 16.505(b)(2)(i) by removing $3,500" and replacing it with "the micro-purchase threshold". In addition, the rule proposes to make the same change to FAR 16.505(b)(2)(ii)(A), which requires the contracting officer to document the basis for using an exception to the fair opportunity process for orders exceeding $3,500, but not exceeding the simplified acquisition threshold.

Comments on this proposed rule must be submitted no later than December 21, 2020, identified as "FAR Case 2020-004," through the Federal eRulemaking Portal: **http://www.regulations.gov**.

OFCCP SEEKS MATERIALS ON RACE, SEX STEREOTYPING

In response to Executive Order (EO) 13950, Combating Race and Sex Stereotyping, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) is soliciting "comments, information, and materials from the public relating to workplace trainings that involve race or sex stereotyping or scapegoating" (for more on EO 13950, see the October 2020 ***Federal Contracts Perspective*** article "President Orders 'Divisive, Anti-American' Training Cease").

EO 13950 notes that materials teaching that men and members of certain races are inherently sexist and racist have recently appeared in workplace diversity trainings across the country, and asserts that "it shall be the policy of the United States not to promote race or sex stereotyping or scapegoating in the federal workforce or in the Uniformed Services…In addition, federal contractors will not be permitted to inculcate such views in their employees."

OFCCP is inviting the public "to provide information or materials concerning any workplace trainings of federal contractors that involve such stereotyping or scapegoating…To gain a better understanding regarding potentially unlawful training materials that are being used by federal contractors and subcontractors, President Trump instructed the Director of OFCCP to request information from these contractors and subcontractors and their employees regarding the trainings that have been provided." Therefore, OFCCP is requesting comments, information, and materials from federal contractors, federal subcontractors, and employees of federal contractors and subcontractors concerning workplace trainings involving prohibited race or sex stereotyping or scapegoating. "You may provide various other types of materials, such as PowerPoints, photographs, videos, handwritten notes, or printed handouts. OFCCP welcomes all forms of media and data that have in recent years been used, or that may soon be used, in both voluntary and mandatory trainings, workshops, or similar programming."

OFCCP has created an email and telephone hotline to report potentially non-compliant workplace training materials. Employees and other concerned members of the public are encouraged to report potentially unlawful training materials by calling (202) 343-2008 or emailing **OFCCPComplaintHotline@dol.gov**.

In addition, federal contractors and subcontractors questioning whether their workplace trainings, workshops, or similar programs are compliant with EO 13950 are encouraged to voluntarily submit the information and materials. OFCCP will provide compliance assistance to federal contractors and subcontractors that voluntarily submit such information or materials.

OFCCP will not take enforcement action against a federal contractor or subcontractor that voluntarily submits information or materials determined by OFCCP to be non-compliant with EO 13950 provided the contractor or subcontractor promptly comes into compliance with EO

13950 as directed by OFCCP. Such information or materials must be submitted to OFCCP by one of the contractor's or subcontractor's executives, owners, or legal representatives with actual authority to legally bind the contractor or subcontractor in agreements with the U. S. government.

If the federal contractor or subcontractor voluntarily submits information or materials that is determined by OFCCP to be non-compliant, and the contractor or subcontractor refuses to correct the issue after compliance assistance is provided, OFCCP may take enforcement action against the contractor or subcontractor if OFCCP later receives the contractor's or subcontractor's materials through a separate source, such as from an employee.

There is one key final point: "There are no adverse legal consequences for choosing not to participate in this request for information. This request for information is strictly voluntary; it simply offers federal contractors and subcontractors an opportunity in the exercise of OFCCP's enforcement discretion to come into compliance with their legal obligations to the extent they have concerns."

OMB EXTENDS TRANSITION DATE TO UNIQUE ENTITY IDENTIFIER

The General Services Administration (GSA) has announced that the deadline for the transition from using Data Universal Numbering System (DUNS®) numbers to identify non-governmental organizations to using new System for Award Management (SAM)-generated Unique Entity Identifiers has been extended from December 2020 to April 2022.

DUNS® numbers, developed by and proprietary to Dun and Bradstreet (D&B), have been used since 1962 to identify entities doing business with the government. DUNS® numbers permits the government to: (1) uniquely identify a contractor entity; and (2) roll-up government procurements to the ultimate parent organization to show the corporate family receiving U.S. obligations. The government required its contractors to obtain and report a unique DUNS® number as a condition for receiving a contract award. However, the Digital Accountability and Transparency Act of 2014 (DATA Act) (Public Law 113-101) specifically states that the data shall, to the extent reasonable and practicable, "incorporate a widely accepted, *nonproprietary*, searchable, platform-independent computer-readable format" and "include unique identifiers for federal awards and entities receiving federal awards that can be consistently applied governmentwide" (*emphasis* added).

In March 2019, GSA awarded a one-year with four option years contract to Ernst and Young LLP (E&Y) to develop a unique entity identifier system to take the place of DUNS® numbers (see the April 2019 ***Federal Contracts Perspective*** article "GSA Announces Award for Entity Validation Services"). E&Y was to develop the unique entity identifier system, and the government was originally to transition to its use by December 2020, which was originally thought to give agencies time to recode all their systems that used DUNS® numbers. However, the Office of Management and Budget (OMB) has decided that more time is needed, so it has extended the transition deadline to April 2022.

In the meantime, GSA will contract with D&B to ensure full continuity of services, including DUNS® number assignment and validation of entity uniqueness, during the extended transition period.

For more on the Unique Entity Identification and its uses, see the August 2019 ***Federal Contracts Perspective*** article "GSA Issues Unique ID Standard for SAM.gov".

SBA MERGES MENTOR-PROTÉGÉ PROGRAMS

The Small Business Administration (SBA) has decided to merge the 8(a) Business Development (BD) mentor-protégé program and the all small mentor-protégé program to eliminate confusion regarding perceived differences between the two programs and remove unnecessary duplication of functions within SBA. In addition, SBA is revising its small business regulations to further reduce unnecessary or excessive burdens on small businesses and to more clearly delineate SBA's intent.

The mentor-protégé program is designed to enhance the capabilities of protégé firms by requiring approved mentors to provide BD assistance to protégé firms and to improve the protégé firms' ability to successfully compete for federal contracts. This assistance may include technical and/or management assistance, financial assistance in the form of equity investments and/or loans, subcontracts (either from the mentor to the protégé or from the protégé to the mentor), trade education, and/or assistance in performing prime contracts with the government through joint venture arrangements. Mentors are encouraged to provide assistance relating to the performance of contracts set aside or reserved for small business so that protégé firms may more fully develop their capabilities. By mentoring a protégé, the mentor: (1) establishes a long-term business relationship with the protégé, thus improving the performance of subcontracts; (2) is permitted to acquire a minority interest in the protégé, and (3) can enter into joint-venture arrangements with its protégé to compete for, and perform on, federal government contracts.

Several agencies had developed mentor-protégé programs, some with congressional approval (Department of Defense, National Aeronautics and Space Administration, Department of Homeland Security, and Federal Aviation Administration), and some without (Department of Energy, Department of State, Department of Veterans Affairs, Environmental Protection Agency, General Services Administration, and U.S. Agency for International Development). All of these had different requirements, different rules, different procedures, etc.

Congress recognized that the various mentor-protégé programs helped small businesses develop into viable and important government contractors, but that the agencies' disparate programs were needlessly confusing and burdensome. Therefore, Congress passed the Small Business Jobs Act of 2010 (Public Law 111-240), which contained Section 1347, Small Business Contracting Parity. Section 1347 provided that "the [SBA] Administrator may establish mentor-protégé programs for small business concerns owned and controlled by service-disabled veterans, small business concerns owned and controlled by women, and HUBZone small business concerns modeled on the mentor-protégé program of the [SBA] for small business concerns participating in programs under Section 8(a) of the Small Business Act…"

Subsequently, Congress enacted the NDAA for FY 2013 (Public Law 112-239), and it included Section 1641, Mentor-Protégé Progams, which provided that "the [SBA] Administrator is authorized to establish a mentor-protégé program for all small business concerns. The mentor-protégé program…shall be identical to the mentor-protégé program of the [SBA] for small business concerns that participate in the program under Section 8(a)…except that the [SBA] may modify the program to the extent necessary given the types of small business concerns included as protégés" (see the February 2013 ***Federal Contracts Perspective*** article "FY 2013 National Defense Authorization Act Extends FAR Subpart 13.5 Procedures Through 2014"). (**EDITOR'S NOTE:** The Department of Defense was allowed to keep and operate its own mentor-protégé program because it was the first to do so [authorized by the NDAA for FY 1991 (Public Law 101-510), Section 831, Mentor-Protégé Pilot Program] and the program was such a success it

inspired the establishment of the other mentor-protégé programs. See paragraph (c)(1) of Title 13 of the Code of Federal Regulations [CFR], Section 125.10, Mentor-Protégé Programs of Other Agencies [13 CFR 125.10]. The SBA originally established its mentor-protégé program for 8(a) participants in 1998.)

To implement these two statutory sections, the SBA decided to create one new small business mentor-protégé program instead of four new mentor-protégé programs (one for small businesses, one for service-disabled veteran-owned small businesses, one for women-owned small businesses, and one for HUBZone small businesses), and to keep the 8(a) BD mentor-protégé program. The small business mentor-protégé program was drafted to be as similar to the 8(a) mentor-protégé program as possible" (see the August 2016 ***Federal Contracts Perspective*** article "Governmentwide Mentor-Protégé Program Established").

In response to Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs (see the February 2017 ***Federal Contracts Perspective*** article "President Trump Orders Regulatory Freeze"), which is intended to reduce unnecessary and burdensome regulations and to control costs associated with regulations, SBA decided to merge the 8(a) BD mentor-protégé and the all small mentor-protégé programs. While SBA has made many conforming changes to its small business regulations to effect this merger, the most important change is in paragraph (a) of 13 CFR 124.520, Can 8(a) BD Program Participants participate in SBA's Mentor-Protégé program? (formerly titled "What are the rules governing SBA's Mentor/Protégé program?): "An 8(a) BD program participant, as any other small business, may participate in SBA's All Small Mentor-Protégé program authorized under §125.9 of this chapter [13 CFR 125.9, What are the rules governing SBA's small business mentor-protege program?]."

In addition to the merger of the mentor-protégé programs, this 36-page rule makes many other changes to the SBA's small business regulations, most of which are technical in nature; for example, the requirement that 8(a) participants seeking to be awarded a competitive 8(a) contract as a joint venture submit the joint venture agreement to SBA for review and approval prior to contract award is eliminated (paragraph (e) of 13 CFR 124.513, Under what circumstances can a joint venture be awarded an 8(a) contract?).

EIGHT INDUSTRIAL SECTOR SIZE STANDARDS TO BE REVISED

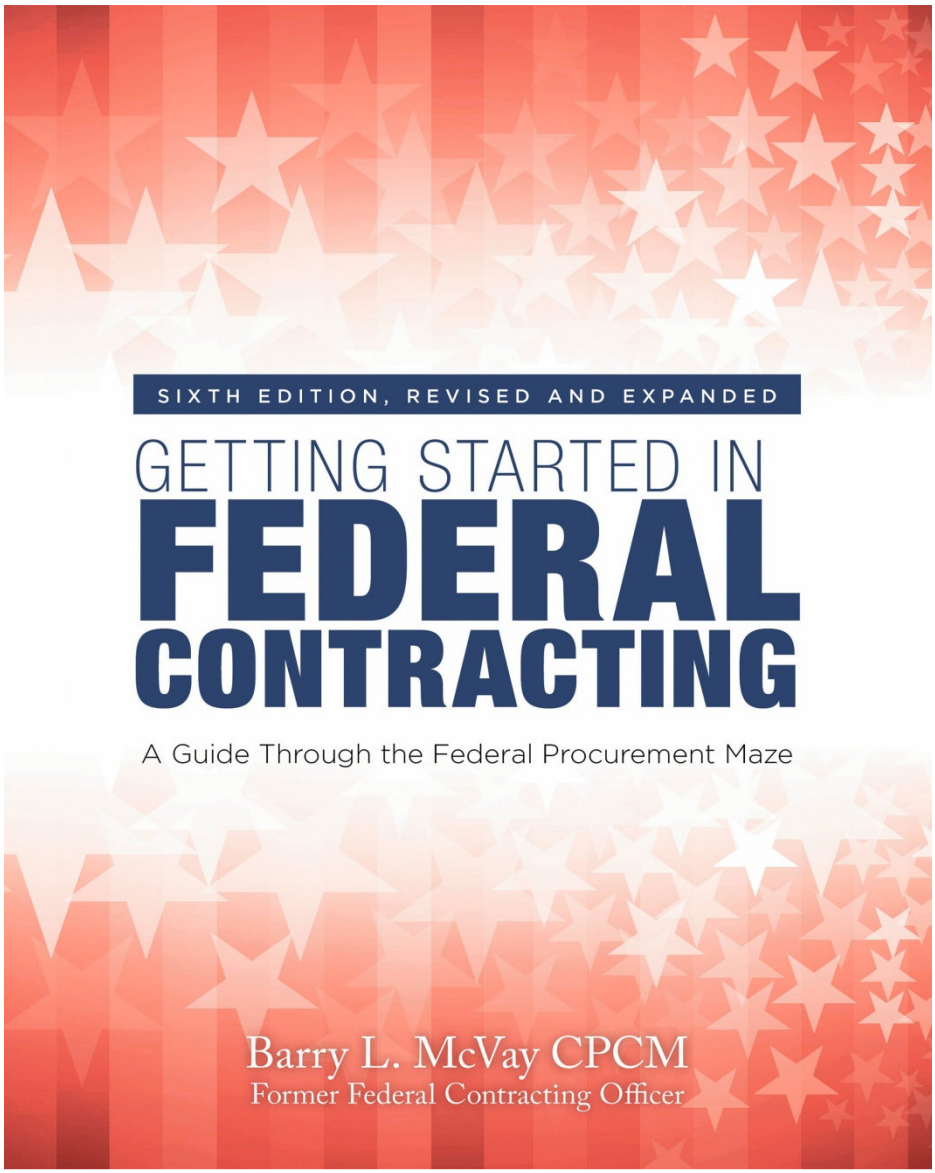
The SBA is seeking comments on two proposed rules that would revise the small business size standards in 13 CFR 121.201, What Size Standards has SBA Identified by North American Industry Classification System Codes?, for businesses in eight North American Industrial Classification System (NAICS) sectors to increase small business eligibility for SBA's loan and contracting programs. The SBA estimates that more than 50,000 additional firms in these eight sectors will become eligible for SBA's programs under the revised size standards, if adopted.

The first rule proposes to increase the receipts-based small business size definitions (commonly referred to as "size standards") for 58 industries and two subindustries ("exceptions") in NAICS Sector 11, Agriculture, Forestry, Fishing and Hunting; three industries in Sector 21, Mining, Quarrying, and Oil and Gas Extraction; three industries in Sector 22, Utilities; and one industry and one subindustry in Sector 23, Construction. Comments on this proposed rule must be submitted by December 1, 2020, identified as "RIN 3245-AG89" and submitted by one of the following methods: (1) Federal eRulemaking Portal:

https://www.regulations.gov; or (2) mail/hand delivery/courier to: Khem R. Sharma, Ph.D., Chief, Office of Size Standards, 409 Third Street SW, Mail Code 6530, Washington, DC 20416.

The second rule proposes to increase the receipts-based small business size standards for 18 industries in NAICS Sector 48-49, Transportation and Warehousing; eight industries in NAICS Sector 51, Information; 10 industries in NAICS Sector 52, Finance and Insurance; and nine industries in NAICS Sector 53, Real Estate and Rental and Leasing. Comments on this proposed rule must be submitted by December 1, 2020, identified as "RIN 3245-AG90" and submitted by one of the following methods: (1) Federal eRulemaking Portal: **https://www.regulations.gov**; or (2) mail/hand delivery/courier to: Khem R. Sharma, Ph.D., Chief, Office of Size Standards, 409 Third Street SW, Mail Code 6530, Washington, DC 20416.

SBA's proposed revisions relied on its recently revised "Size Standards Methodology," which is available at **https://www.sba.gov/document/support--size-standards-methodology-white-paper**. SBA seeks comments on its proposed changes to size standards in the above sectors, and the data sources it evaluated to develop the proposed size standards. The SBA considers the structural characteristics of individual industries, including average firm size, the degree of competition, and federal government contracting trends. This ensures that small business size standards reflect current economic conditions in those industries.



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