

# FEDERAL CONTRACTS PERSPECTIVE

Federal Acquisition Developments, Guidance, and Opinions

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## OFPP SEEKS COMMENTS ON PROPOSED DEFINITION OF “PROCUREMENT ADMINISTRATIVE LEAD TIME”

The Office of Federal Procurement Policy (OFPP) is requesting public comments on a proposed definition of the term “Procurement Administrative Lead Time” (PALT) and a plan for measuring and publicly reporting governmentwide data on PALT for contracts and orders above the simplified acquisition threshold (SAT – currently \$250,000). This action is being undertaken in accordance with the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Public Law 115-232), Section 878, Procurement Administrative Lead Time Definition and Plan.

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Section 878 requires the OFPP administrator to “develop, make available for public comment, and finalize: (1) a definition of the term ‘procurement administrative lead time’ or ‘PALT’, to be applied governmentwide, that describes the amount of time from the date on which a solicitation for a contract or task order is issued to the date of an initial award of the contract or task order; and (2) a plan for measuring and publicly reporting data on PALT for federal government contracts and task orders in amounts greater than the simplified acquisition threshold.”

Section 878 continues by requiring that, “unless the [OFPP] administrator determines otherwise, the amount of time in the definition of PALT developed...shall: (1) begin on the date on which an initial solicitation is issued by a federal department or agency for a contract or task order; and (2) end on the date of the award of the contract or task order.”

OFPP is proposing to define PALT as “the time between the date on which an initial solicitation for a contract or order is issued by a federal department or agency and the date of the award of the contract or order.” This language is very similar to the suggested definition in Section 878 (“the amount of time from the date on which a solicitation for a contract or task order is issued to the date of an initial award of the contract or task order”), and very similar to the suggested definition in the NDAA for FY 2018 (Public Law 115-91), Section 886, Development of Procurement Administrative Lead Time (“the amount of time from the date on which a solicitation is issued to the date of an initial award of a contract or task order of the Department of Defense”) which was adopted by the Department of Defense (DOD) (see the July 2018 *Federal Contracts Perspective* article “DOD Continues Deluge of Rules, Deviations”).

In addition, to support measuring and public reporting of PALT, OFPP is proposing to leverage the publicly available data in the Federal Procurement Data System – Next Generation

(FPDS-NG – <https://www.fpds.gov>), which is the authoritative source for federal government procurement award data.

“Establishing a common definition of PALT and a plan for measuring and publicly reporting PALT data are important steps in helping the federal government to understand and better address causes of procurement delays,” states OFPP in its request for comments. “PALT can help to drive continual process improvement and the pursuit of more innovative procurement practices, especially when the data are used in combination with other inputs for evaluating the overall effectiveness of the acquisition process in delivering value to the taxpayer, such as cost and the quality of the contractor's performance. PALT can also create incentives to drive greater efficiencies in the requirements development process, which has long been recognized as one of the most significant sources of delay in the acquisition lifecycle.”

Comments must be submitted no later than February 20, 2020, identified as “Procurement Administrative Lead Time,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) fax: 202-395-5105; or (3) mail: Curtina Smith, Office of Federal Procurement Policy, 725 17th Street NW, Washington, DC 20503.

## **NONDISPLACEMENT OF WORKERS REGULATIONS RESCINDED**

In response to President Trump’s Executive Order (EO) 13897, Improving Federal Contractor Operations by Revoking Executive Order 13495, the Department of Labor (DOL) is rescinding its regulations in Title 29 of the Code of Federal Regulations (CFR), part 9 (29 CFR part 9), Nondisplacement of Qualified Workers Under Service Contracts, which were issued to implement President Obama’s EO 13495, Nondisplacement of Qualified Workers Under Service Contracts.

EO 13495 mandated the inclusion of a contract clause requiring a successor contractor and its subcontractors to offer the employees employed under the predecessor contract the right of first refusal of employment in positions under the successor contract for which they are qualified (that clause became Federal Acquisition Regulation (FAR) 52.222-17, Nondisplacement of Qualified Workers). DOL’s regulations (29 CFR part 9) applied to contracts subject to the Service Contract Act that require performance of the same or similar services at the same location that exceeded the simplified acquisition threshold (now \$250,000). These are the regulations DOL is rescinding.

For more on EO 13897, see the December 2019 *Federal Contracts Perspective* article “EO Ordering Nondisplacement of Employees Rescinded.” For more on EO 13495, see the March 2009 *Federal Contracts Perspective* article “Obama Issues Four Labor-Related Executive Orders.” For more on the DOL’s implementing regulations, see the September 2011 *Federal Contracts Perspective* article “Displaced Service Workers Get Right of First Refusal.” For more on the FAR implementation of the DOL’s regulations, see the see the January 2013 *Federal Contracts Perspective* article “FAR Amended to Require Nondisplacement of Predecessor Service Contractor’s Employees.”

Vivina McVay, Editor-in Chief

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## FAC 2020-04 INCREASES TRADE AGREEMENTS THRESHOLDS

To implement the biennial adjustment of the thresholds for the various trade agreements into which the United States has entered with other countries, Federal Acquisition Circular (FAC) 2020-04 incorporates into the Federal Acquisition Regulation (FAR) the increased thresholds announced by the U.S. Trade Representative in December (see the January 2020 *Federal Contracts Perspective* article “Trade Agreements Thresholds Increased”).

FAC 2020-04 amends the following FAR sections to increase the trade agreement thresholds:

- FAR 22.1503, Procedures for Acquiring End Products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor:
  - Paragraph (b)(3) by replacing “\$80,317” with “\$83,099;” and
  - Paragraph (b)(4) by replacing “\$180,000” with “\$182,000.”
- Paragraph (c) of FAR 25.202, Exceptions [to the Buy American Act for construction materials], by replacing “\$6,932,000” with “\$7,008,000.”
- Table 1 to paragraph (b) of FAR 25.402, General [for trade agreements], which includes all the trade agreements thresholds for supplies, services, and construction.
- Paragraph (c)(1) of FAR 25.603, Exceptions [to the Buy American Act for construction materials acquired under the American Recovery and Reinvestment Act], by replacing “\$6,932,000” with “\$7,008,000.”
- FAR 25.1101, Acquisition of Supplies [solicitation provisions and contract clauses]:
  - Paragraphs (b)(1)(i)(A), (c)(1), and (d) by replacing “\$180,000” with “\$182,000”; and
  - Paragraphs (b)(1)(iii), (b)(1)(iv), (b)(1)(iv), (b)(2)(iii), and (b)(2)(iv) by replacing “\$80,317” with “\$83,099.”
- FAR 25.1102, Acquisition of Construction [solicitation provisions and contract clauses]:
  - The introductory texts for paragraphs (a) and (c) by replacing “\$6,932,000” with “\$7,008,000”;
  - Paragraphs (c)(d) and (d)(3) by replacing “\$6,932,000” and “\$10,441,216” with “\$7,008,000” and “\$10,802,884,” respectively.
- Paragraphs (c)(1)(xxi)(C) and (c)(1)(xxi)(D) of FAR 52.204-8, Annual Representations and Certifications, by replacing “\$80,317” with “\$83,099.”
- FAR 52.222-19, Child Labor – Cooperation with Authorities and Remedies:
  - Paragraph (a)(3) by replacing “\$80,317” with “\$83,099”; and
  - Paragraph (a)(4) by replacing “\$180,000” with “\$182,000.”

## SBA PROPOSES THREE NONMANUFACTURER RULE WAIVERS

The Small Business Administration (SBA) issued three proposed nonmanufacturer rule (NMR) waivers during January. According to each of the proposed NMR waivers, “no small business manufacturer can supply the identified products to the federal government. If granted, the class waiver would allow otherwise qualified regular dealers to supply the waived item(s), regardless of the business size of the manufacturer, on a federal contract set aside for small business, service-disabled veteran-owned small business (SDVOSB), women-owned small business (WOSB), economically disadvantaged women-owned small business (EDWOSB), historically underutilized business zones (HUBZone), or participants in the SBA’s 8(a) Business Development (BD) program.”

- **Recreational and Gymnastic Equipment:** This proposed NMR waiver would cover manufactured kettlebells, rubber machine balls, Olympic weight plates, stretch bands, and spring collars under North American Industry Classification System Code (NAICS) 339920, Sporting and Athletic Goods Manufacturing, and Product Service Code (PSC) 7830, Recreational and Gymnastic Equipment. This waiver would exclude apparel and footwear.

SBA is inviting the public to comment on this proposed waiver or to provide information on potential small business sources on any small business manufacturers of this class of products that are available to participate in the federal market by February 18, 2020, to the Federal Rulemaking Portal at <https://www.regulations.gov>.

- **Commercial Handheld Land Mobile Radios:** This proposed NMR waiver would cover handheld land mobile radios under NAICS code 334220, Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, and PSC 5820, Radio TV Equipment, Except Airborne.

SBA is inviting the public to comment on this proposed waiver or to provide information on potential small business sources on any small business manufacturers of this class of products that are available to participate in the federal market by February 21, 2020, to the Federal Rulemaking Portal at <https://www.regulations.gov>.

- **Leather Holsters (M18 System) and Accessories:** This proposed NMR waiver would cover leather holsters (M18 System) and accessories under NAICS code 316998, All Other Leather Good and Allied Product Manufacturing, and PSC 8465, Individual Equipment.

SBA is inviting the public to comment on this proposed waiver or to provide information on potential small business sources on any small business manufacturers of this class of products that are available to participate in the federal market by February 24, 2020, to the Federal Rulemaking Portal at <https://www.regulations.gov>.

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

The SBA regulation on the nonmanufacturer rule is in Title 13 of the Code of Federal Regulations (CFR), Business and Credit Administration; part 121, Small Business Size

Standards; under paragraph (b) of Section 121.406, How does a small business concern qualify to provide manufactured products or other supply items under a small business set-aside, service-disabled veteran-owned small business, HUBZone, WOSB or EDWOSB, or 8(a) contract? (13 CFR 121.406(b)). The SBA regulation on the waiver of the nonmanufacturer rule is 13 CFR 121.1202, When Will a Waiver of the Nonmanufacturer Rule Be Granted for a Class of Products?

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

## COMMENTS SOUGHT ON COMPUTER SOFTWARE ACQUISITION

The Department of Defense (DOD) is seeking information that will assist in the development of a revision to the Defense Federal Acquisition Regulation Supplement (DFARS) to implement the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Public Law 115-91), Section 871, Noncommercial Computer Software Acquisition Considerations. Section 871 adds to Title 10 of the U.S. Code a new Section 2322a, Requirement for Consideration of Certain Matters During Acquisition of Noncommercial Computer Software (10 USC 2322a), which requires that those conducting negotiations to acquire noncommercial computer software consider acquiring “all software and related materials necessary: (1) to reproduce, build, or recompile the software from original source code and required libraries; (2) to conduct required computer software testing; and (3) to deploy working computer software system binary files on relevant system hardware.”

DOD has prepared an initial draft of proposed revisions to the DFARS to implement Section 871. The initial draft is available at <http://www.regulations.gov> by searching for “DFARS Case 2018-D018,” clicking on “Open Docket Folders,” and then viewing “Supporting Documents.”

The most significant of the proposed changes to implement 10 USC 2322a would be to DFARS 227.7203-2, Acquisition of Noncommercial Computer Software and Computer Software Documentation. The three required considerations in 10 USC 2322a(a) (consider acquiring “all software and related materials necessary: (1) to reproduce, build, or recompile the software...”) would be added to DFARS 227.7203-2 as paragraph (b)(2).

Also, the requirements of 10 USC 2322a(b) would be added to DFARS 227.7203-2 as paragraph (c)(6). 10 USC 2322a(b) requires (and proposed DFARS 227.7203-2(c)(6) would require) that “any computer software, related data, and associated license rights...shall, to the extent appropriate: (i) include computer software delivered in a digital format compatible with applicable computer programs on relevant system hardware; (ii) not rely on external or additional noncommercial or commercial computer software or data, including any required software libraries, unless such software or data is included in the items to be delivered or is commercially available, along with all necessary license rights; and (iii) when the negotiated terms do not allow for the inclusion of the external or additional noncommercial or commercial computer software or data, include sufficient information to support maintenance and understanding of interfaces and software revision history, along with all necessary license rights.”

In addition to seeking comments on the draft DFARS revisions, DOD is also seeking information regarding any corresponding costs or savings resulting from contractors and subcontractors complying with the draft revised DFARS implementation.

Comments on this advance notice of proposed rulemaking (ANPR) must be submitted no later than March 16, 2020, identified as “DFARS Case 2018-D018,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) email: [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil); (3) fax: 571-372-6094; or (4) mail: Defense Acquisition Regulations System, Attn: Jennifer Johnson, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Finally, DOD will hold a public meeting on February 18, 2020, between 10:00 am and 1:00 pm, Eastern time, to hear the views of interested parties. The public meeting will be held in the Pentagon Library and Conference Center (PLCC), Conference Room B6, 1155 Defense Pentagon, Washington, DC 20301. Conference Room B6 is located on the lower level of the PLCC.

To facilitate security screening and entry to the PLCC, individuals wishing to attend the public meeting must register by close of business on February 11, 2020, by sending the following information via email to [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil): (1) full name; (2) valid email address; (3) valid telephone number; (4) company or organization name; (5) whether the individual is a U.S. citizen; (6) the date of the public meeting the individual wishes to attend; and (7) whether the individual intends to make a presentation, and, if so, the individual’s title.

Those wishing to make a presentation must submit an electronic copy of the presentation to [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil), identified as “Public Meeting, DFARS Technical Data Rights Cases,” no later than February 11, 2020. The presentation should be in PowerPoint to facilitate projection during the meeting and should include the presenter’s name, organization affiliation, telephone number, and email address on the cover page.

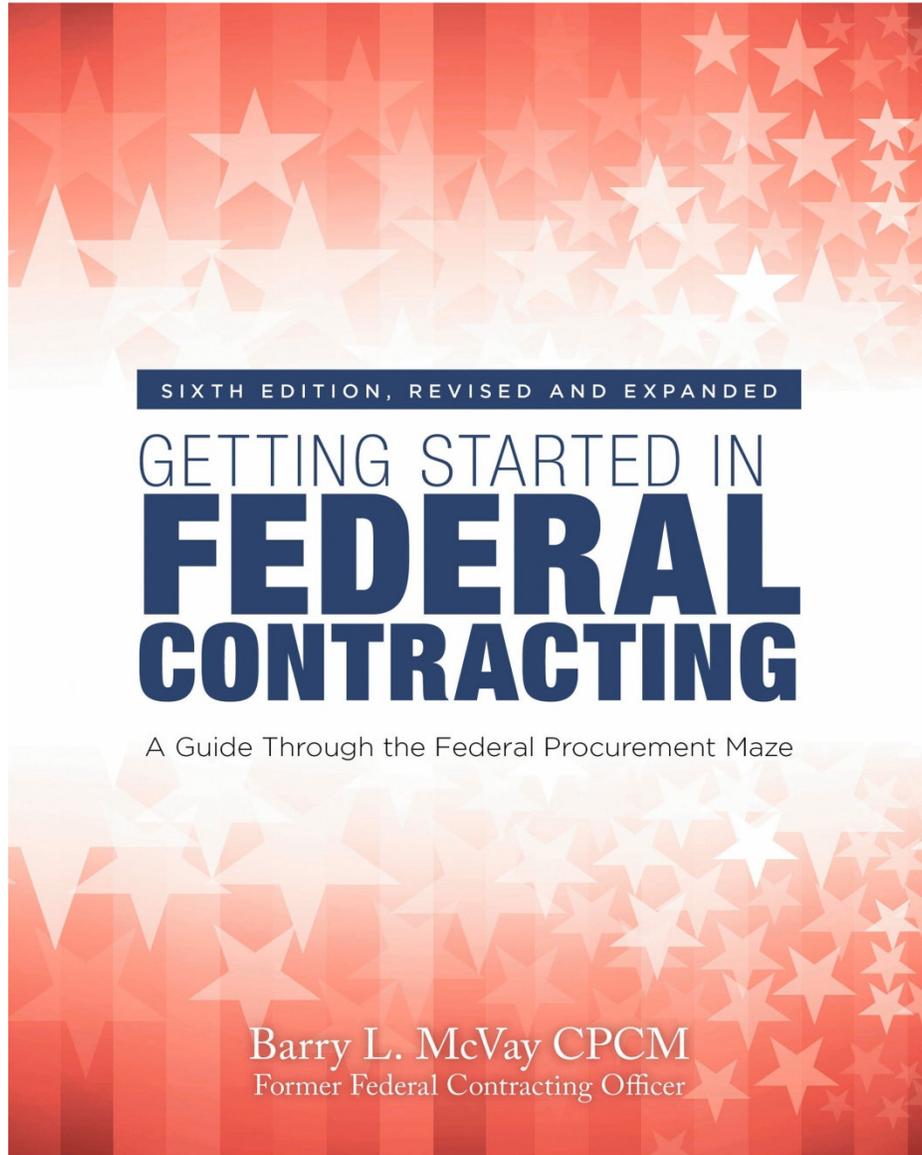
## **MILEAGE REIMBURSEMENT SET AT 57.5¢ PER MILE FOR AUTOS**

The General Services Administration (GSA) is reducing the mileage reimbursement rate for use of a privately owned automobile on official travel from 58¢ per mile to 57.5¢ per mile, and the rate for use of a motorcycle on official travel from 55¢ per mile to 54.5¢ per mile. The rate for use of a privately owned aircraft is increased from \$1.26 per mile to \$1.27 per mile. These revised rates are effective for travel performed on or after January 1, 2020, through December 31, 2020.

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