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CORONAVIRUS OVERRUNS UNITED STATES, EMERGENCY ACQUISITION AUTHORITIES INVOKED

The Novel Coronavirus (or “COVID-19” – “coronavirus disease first identified on December 31, 2019”) swept through the United States in March, killing thousands and infecting hundreds of thousands more. On March 13, President Trump declared a national emergency, recognizing that COVID-19 poses a threat to national security. Hospitals are overrun with patients and are running out of supplies for the patients and the doctors and nurses. To address this “pandemic,” the president has invoked emergency powers and authorized federal agencies to exercise powers provided in a number of laws. This presidential declaration has activated Federal Acquisition Regulation (FAR) part 18, Emergency Acquisitions, which, for example, increases the micro-purchase threshold from \$10,000 to \$20,000 and the simplified acquisition threshold from \$250,000 to \$750,000 (see FAR 2.101, Definitions, and FAR part 13, Simplified Acquisition Procedures).

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The following are some of the more significant actions taken by the president and federal agencies to combat the COVID-19:

- **Department of Defense (DOD) Memorandum on “Continuation of Essential Contractor Services”:** This memorandum, dated March 5, issued by Kim Herrington, Acting Principal Director, Defense Pricing and Contracting, reminds contracting officers to include Defense Federal Acquisition Regulation Supplement (DFARS) 252.237-7023, Continuation of Essential Contractor Services, and DFARS 252.237-7024, Notice of Continuation of Essential Contractor Services, in all solicitations and contracts for services in support of mission-essential functions. “Today’s changing environment has increased the need for continuity of operations capabilities and plans that enable agencies to continue their essential functions across a broad spectrum of emergencies. Threats to continuity of operations include natural disasters, severe/inclement weather, pandemic, and a variety of other crisis situations.”
- **DOD Memorandum on “Emergency Acquisition Flexibilities – Disaster or Emergency Assistance Activities”:** This memorandum, dated March 6, issued by Kim Herrington, reminds heads of contracting activities that they have been delegated the authority to invoke emergency

acquisition flexibilities, such as increased acquisition thresholds, when the president has made a major disaster or emergency declaration. In addition, the memorandum mentions that “contracting officers have an array of emergency acquisition flexibilities available for their use to expedite the delivery of critical supplies and services. FAR subpart 18.2 [Emergency Acquisition Flexibilities] and DFARS subpart 218.2 outline those emergency acquisition flexibilities. Additionally, FAR subpart 18.1 [Available Acquisition Flexibilities] and DFARS subpart 218.1 provide contracting officers other available acquisition flexibilities when certain conditions are met.”

■ **DOD Memorandum on “Planning for Potential Novel Coronavirus Contract Impacts”:**

This memorandum, dated March 10, issued by Kim Herrington, reiterates that DOD missions “are accomplished by the total force: military, civilian, and contractor. The global situation concerning the novel coronavirus disease (COVID-19) is rapidly evolving, and the entire workforce is encouraged to monitor the Centers for Disease Control and Prevention’s (CDC) website at <https://www.cdc.gov/coronavirus/2019-ncov/index.html> for the latest information on appropriation health and safety precautions regarding COVID-19.” The memorandum goes on to encourage contracting officers to “engage with their government program managers and requirements owners to determine what, if any, measures should be taken to ensure the welfare and safety of the total workforce, while ensuring mission continuity.”

■ **Letter from the President on Emergency Determination Under the Stafford Act:** This letter, dated March 13, to Acting Secretary of Homeland Security Chad Wolf, Secretary of the Treasury Steven Mnuchin, Secretary of Health and Human Services Alex Azar, and Administrator of the Federal Emergency Management Agency (FEMA) Pete Gaynor notifies them that he has “determined that the ongoing Coronavirus Disease 2019 (COVID-19) pandemic is of sufficient severity and magnitude to warrant an emergency determination under Section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 USC 5121-5207 (the ‘Stafford Act’).” The president goes on to state that the emergency exists nationwide, and authorizes FEMA to “provide, as appropriate, assistance...for emergency protective measures not authorized under other federal statutes.” (**EDITOR’S NOTE:** For more on the Stafford Act, see FAR subpart 26.2, Major Disaster or Emergency Assistance Activities.)

■ **Department of Energy (DOE) Policy Flash 2020-18, “Initial Guidance Regarding Actions to Address Effect of Coronavirus Disease 2019 (COVID-19)”:** This policy flash, dated March 13 and issued by the Director, Contract and Financial Assistance Policy Division, directs DOE contracting officers to “take all actions within their authority they deems prudent to minimize the potential negative effect of disruptions due to Coronavirus Disease 2019 (COVID-19)...They should use every authority and flexibility at their disposal pertaining to dealing with the risk associated with COVID-19 – law, regulation, the terms and conditions of the contract – to achieve the department’s mission...Contracting officer at a minimum should consider

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assessing how the type of contract, its term, and relevant contract clauses apply. Such clauses may include FAR 52.247-17, Government Delay of Work, FAR 52.249-14, Excusable Delays, FAR 52.242-14, Suspension of Work, FAR 52.242-15, Stop-Work Order, and the clause “Federal Holidays and Other Closures.”

■ **Office of Federal Contract Compliance Programs (OFCCP) Memorandum “Contracts for Coronavirus Relief Efforts”:** This memorandum, issued March 17 by Director Craig Leen, waives the following affirmative action obligations of the Equal Employment Opportunity clauses for supply and service and construction contracts providing COVID-19 relief:

- ***FAR 52.222-26, Equal Opportunity:*** Subparagraphs (c)(2), (c)(3), (c)(4), (c)(5)(ii), (c)(6), (c)(8), and the phrase “on-site compliance evaluations and” in subparagraph (c)(9) (“the contractor shall permit access to its premises, during normal business hours, by the contracting agency or the OFCCP for the purpose of conducting *on-site compliance evaluations and* complaint investigations” [*emphasis added*]. However, “the exemption and waivers do not apply to the processing of complaints of discrimination...”)
- ***FAR 52.222-35, Equal Opportunity for Veterans:*** In subparagraph (b), the phrase “and requires affirmative action by the contractor to employ and advance in employment qualified protected veterans” is waived from the sentence “This clause prohibits discrimination against qualified protected veterans, *and requires affirmative action by the contractor to employ and advance in employment qualified protected veterans*” (*emphasis added*). Also in subparagraph (b), the phrase “requirements of the equal opportunity clause at 41 CFR 60-300.5(a) [Equal Opportunity Clause]” in the sentence “The contractor shall abide by the *requirements of the equal opportunity clause at 41 CFR 60-300.5(a)...*” (*emphasis added*) is interpreted to exclude paragraphs 2-7, 9-10, and 12 of 41 CFR 60-300.5(a), all of which address the listing of employment openings. Finally, the phrase “take affirmative action to employ, advance in employment and otherwise” in paragraph 1 of 41 CFR 60-300.5(a) is waived from the sentence “The contractor agrees to *take affirmative action to employ, advance in employment and otherwise* treat qualified individuals without discrimination based on their status as a protected veteran in all employment practices...” (*emphasis added*).
- ***FAR 52.222-36, Equal Opportunity for Workers with Disabilities:*** In subparagraph (a), the phrase “and requires affirmative action by the contractor to employ and advance in employment qualified individuals with disabilities” is waived from the sentence “This clause prohibits discrimination against qualified individuals on the basis of disability, *and requires affirmative action by the contractor to employ and advance in employment qualified individuals with disabilities*” (*emphasis added*). Also in subparagraph (a), the phrase “requirements of the equal opportunity clause at 41 CFR 60-741.5(a) [Equal Opportunity Clause]” is interpreted to exclude paragraphs 4-5 and 7 of 41 CFR 60-741.5(a), all of which address the listing of employment openings. Finally the phrase “take affirmative action to employ and advance in employment individuals with disabilities, and to” in paragraph 1 of 41 CFR 60-741.5(a) is waived from the sentence “The contractor agrees to *take affirmative action to employ and advance in employment individuals with disabilities, and to* treat qualified individuals without discrimination on

the basis of their physical or mental disability in all employment practices...” (*emphasis added*).

■ **Executive Order 13909, Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19:** This executive order, issued by President Trump on March 18, invoked the powers authorized by the Defense Production Act of 1950 (DPA – Public Law 81-774) to expedite and expand the supply of resources from the U.S. industrial base to support military, energy, space, and homeland security programs. The president’s authorities under the DPA are delegated to the heads of various federal departments and agencies by Executive Order 13603, National Defense Resources Preparedness, dated March 16, 2012, issued by President Obama. Executive Order 13603 delegated to the Department of Health and Human Services (HHS) the president’s DPA authority with respect to health resources.

“To ensure that our healthcare system is able to surge capacity and capability to respond to the spread of COVID-19, it is critical that all health and medical resources needed to respond to the spread of COVID-19 are properly distributed to the nation’s healthcare system and others that need them most at this time,” states the president in the executive order. “Accordingly, I find that health and medical resources need to respond to the spread of COVID-19, including personal protective equipment and ventilators, meet the criteria specified in [the DPA]. Under the delegation of authority provided in this order, the secretary of Health and Human Services may identify additional specific health and medical resources that meet the criteria of [the DPA].”

EDITOR’S NOTE: The DPA authorizes the president to require acceptance and priority performance of contracts or orders and to allocate materials, services, and facilities to promote the national defense. HHS has been delegated the authority to exercise DPA authority for health resources, which are defined as “drugs, biological products, medical devices, materials, facilities, health supplies, services and equipment required to diagnose, mitigate or prevent the impairment of, improve, treat, cure, or restore the physical or mental health conditions of the population.”

Available in the Panoptic Enterprises’ Bookstore is the monograph “*The Defense Priorities and Allocations System: Making the Defense Production Act Work.*” This monograph describes the power and procedures of the Defense Priorities and Allocations System (DPAS), upon which the Health Resources Priorities and Allocations System (HRPAS) is based. It can be ordered for \$19.95 plus shipping and handling at <https://www.fedgovcontracts.com/bookstor.htm#mono7>.

■ **Department of Homeland Security’s (DHS) Cybersecurity & Infrastructure Security Agency (CISA) Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response:** This advisory memorandum was issued March 19 by CISA and gives guidance to state, local, tribal, and territorial jurisdictions and the private sector in identifying the critical infrastructure sectors and defining the essential critical infrastructure workers needed to maintain the services and functions Americans depend on daily. On March 28 CISA issued updated guidance.

The guidance identifies the following 17 sectors as having “essential critical infrastructure workers” and identifies the kinds of workers within each sector “who conduct a range of operations and services that are typically essential to continued critical infrastructure viability, including staffing operations centers, maintaining and repairing critical infrastructure, operating call centers, working construction, and performing operational functions, among others.”

However, “this list is advisory in nature. It is not, nor should it be considered, a federal directive or standard.”

- *Healthcare/Public Health*
- *Law Enforcement, Public Safety, and Other First Responders*
- *Food and Agriculture*
- *Energy*
- *Water and Wastewater*
- *Transportation and Logistics*
- *Public Works and Infrastructure Support Services*
- *Communications and Information Technology*
- *Critical Manufacturing*
- *Hazardous Materials*
- *Financial Services*
- *Chemical*
- *Defense Industrial Base*
- *Commercial Facilities*
- *Residential/Shelter Facilities and Services*
- *Hygiene Products and Services*
- *Other Community- or Government-Based Operations and Essential Functions* (such as weather forecasters and clergy)

■ **DOD Deviation Increasing Progress Payment Rates:** This deviation, issued March 20 by Kim Herrington in response to the COVID-19 national emergency, increases the progress payment rates at DFARS 232.501-1, Customary Progress Payment Rates, from 85% to 90% for large businesses and from 90% to 95% for small businesses (for the rest of the federal government, FAR 32.501-1 establishes 80% for large businesses and 85% for small businesses). To effect this deviation, contracting officers are to use DFARS 252.232-7004, DOD Progress Payment Rates (DEVIATION 2020-O0010), in place of DFARS 252.232-7004; FAR 52.232-16, Progress Payments (DEVIATION 2020-O0010), in place of FAR 52.232-16; and Alternate II (DEVIATION 2020-O0010), in lieu of Alternate II of FAR 52.232-16.

■ **DOD Memorandum on “Contract Place of Performance – Public Health Considerations”:** This memorandum, issued March 20 by Kim Herrington, asks “that the same maximum telework flexibilities extended to DOD service members and civilians also be made available to contractors when contract services can be delivered, without mission degradation, while off-site. Given that keeping the total force safe and stemming the spread of COVID-19 is paramount to our entire nation, this flexibility should be allowed and encouraged, where appropriate, and done so without need for further consideration during this national emergency.”

■ **Office of Management and Budget (OMB) Memorandum “Managing Federal Contract Performance Issues Associated with COVID-19”:** This memorandum, issued March 20 by Margaret Weichart, Deputy Director for Management, provides a set of “frequently asked questions” (FAQs) intended to provide additional guidance to the acquisition workforce as it addresses impacts due to COVID-19. The following are some of the more significant FAQs and their answers:

- If contractor personnel must be quarantined due to exposure to the virus, whether or not related to performance of the contract, and this action results in a slip in the contract schedule, may contracts be extended or otherwise altered? *Answer:* Yes. “Agencies are encouraged to be as flexible as possible in finding solutions.”
- How should agencies address requests for equitable adjustment associated with costs related to safety measures taken by contractors to protect their employees from COVID-19? *Answer:* Requests for equitable adjustment should be considered on a case-by-case basis.
- Are the special emergency procurement flexibilities of FAR 18.202 [Defense or Recovery from Certain Events] available for use in addressing requirements connected to COVID-19? *Answer:* Yes. These flexibilities include: (1) increasing the micro-purchase threshold from \$10,000 to \$20,000 for domestic purchases and to \$30,000 for purchases outside the U.S.; (2) increasing the simplified acquisition threshold from \$250,000 to \$750,000 for domestic purchases and \$1,500,000 for purchases outside the U.S.; and (3) agencies may use simplified acquisition procedures for purchases of commercial items up to \$13,000,000.

■ **General Services Administration (GSA) Memorandum “Guidance Regarding Acquisitions and Contracts for GSA Essential Critical Infrastructure Activities and Novel Coronavirus Disease 2019 (COVID-19)”:** This memorandum, issued March 26 by Jeffrey Koses, Senior Procurement Executive, Office of Acquisition Policy, addresses GSA contractors who must work on-site, such as those involved with construction, operation and maintenance of federally owned and leased facilities, and working with classified information. Since many states have issued mandatory shelter-in-place/stay-at-home orders, the memorandum cites the March 19 CISA memorandum (see above) that provides guidance on identifying who are essential critical infrastructure workers, and provides a letter that can be issued GSA heads of contracting activities to contractors attesting that the person “is an employee of a contractor working to support an essential critical infrastructure project for the U.S. government. This individual needs to travel to and from his/her place of work in order to provide support to America’s critical infrastructure.”

■ **Public Law 116-136, Coronavirus Aid, Relief, and Economic Security (CARES) Act:** On March 27, President Trump signed into law the CARES Act in response to the COVID-19. The \$2.2 trillion CARES Act provides supplemental appropriations for federal agencies; funds various loans, grants, and other forms of assistance for businesses, industries, states, local governments, and hospitals; provides tax rebates of up to \$1,200 per individual and an additional \$500 per child, subject to limits based on adjusted gross income; temporarily expands unemployment benefits; and suspends payments and interest on federal student loans.

The most notable acquisition-related section in the CARES Act is Section 3610, Federal Contractor Authority. Section 3610 gives agencies the discretion to modify the terms and conditions of the contract to reimburse paid leave where contractor employees could not access work sites or telework but actions were needed to keep such employees in a ready state.

■ **Presidential Order Under the Defense Production Act Regarding General Motors**

Company: This order, issued March 27, directs the Secretary of Health and Human Services Alex Azar to “use any and all authority available under the [Defense Production] Act to require General Motors Company to accept, perform, and prioritize contracts or orders for the number of ventilators that the secretary determines to be appropriate.” This is the first DPA order issued in response to COVID-19.

■ **Contracting with the Department of Defense: A Step by Step Approach to the DOD**

Marketplace: This document, issued March 27 by Kim Herrington, is an updated version of a standard document that is intended to assist newcomers to DOD contracting with information needed to contract with DOD. It is updated to include “COVID-19 Emergency Response Information,” which includes links to DOD Contracting COVID-19 Information:

<https://www.acq.osd.mil/dpap/pacc/cc/COVID-19.html>; Acquisition.gov Coronavirus Acquisition-Related Information and Resources: <https://www.acquisition.gov/coronavirus>; and System for Award Management (SAM) Disaster Response Registry:

<https://www.acquisition.gov/disaster-response-registry> (“*Note: It is critical that suppliers intending to provide medical devices and medical personal protective equipment register here.*”)

“I ask your help in disseminating this document broadly, and along with our thanks for the offers of support in our collective fight to respond to this pandemic,” writes Mr. Herrington.

■ **DOD Memorandum on “Managing Defense Contracts Impacts of the Novel**

Coronavirus”: This memorandum, issued March 30 by Kim Herrington, reminds the DOD contracting community of regulatory tools to ensure that both DOD and vital industrial base personnel remain healthy for the duration of the COVID-19 emergency.

Mr. Herrington points out that “DOD contracts contain clauses that excuse performance delays, including FAR 52.249-14, Excusable Delays; various “Termination” clauses [FAR 52.249 series of clauses]; and FAR 52.212-4 [Contract Terms and Conditions – Commercial Items] for commercial contracts. Each of these clauses provides that a contractor will not be in default because of a failure to perform the contract if the failure arises beyond the control and without the fault or negligence of the contractor. In the event of such a delay, the contractor is entitled to an equitable adjustment of the contract schedule. Where the contracting officer directs changes in the terms of contract performance, which may include recognition of COVID-19 impacts on performance under that contract, the contractor may also be entitled to an equitable adjustment to contract price using the standard FAR changes clauses (*e.g.*, FAR 52.243-1 [Changes – Fixed-Price] or FAR 52.243-2 [Changes – Cost-Reimbursement].”

In addition, Mr. Herrington notifies the acquisition workforce of the existence of Section 3610 of the CARES Act (see above), and that Defense Pricing and Contracting “will provide implementing guidance for this section as soon as practicable.”

Undoubtedly, much more direction and guidance on confronting the COVID-19 will be forthcoming in April.

DOD ISSUES TWO DEVIATIONS, ONE MEMO

The COVID-19 pandemic did not monopolize all of DOD's attention during March – besides issuing the deviation changing the progress payment rates in response to the COVID-19 pandemic (see preceding article), it issued two more deviations and one acquisition-related memoranda.

■ **Deviation on Justification and Approval Threshold for 8(a) Contracts:** This deviation implements the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Public Law 116-92), Section 823, Modification of Justification and Approval Requirement for Certain Department of Defense Contracts, by increasing the threshold for execution of a justification and approval of a sole source contract under the Small Business Administration's (SBA) 8(a) program from \$22,000,000 (see FAR 19.808-1, Sole Source [8(a) contracts]), to \$100,000,000. Also, instead of the approval requirements in paragraph (a) of FAR 6.304, Approval of the Justification, the approval authority for justifications of 8(a) sole source awards exceeding \$100,000,000 is the head of the procuring activity.

■ **Deviation Protecting Data and Computer Software Under Small Business Innovation Research (SBIR) Program Contracts:** This deviation requires the inclusion of DFARS 252.227-7018, Rights in Noncommercial Technical Data and Computer Software – Small Business Innovation Research (SBIR) Program (DEVIATION 2020-O0007), in place of DFARS 252.227-7018, Rights in Noncommercial Technical Data and Computer Software – Small Business Innovation Research (SBIR) Program, in new solicitations and contracts awarded under the SBIR program when technical data or computer software will be generated during contract performance.

This deviation implements the Small Business Administration's (SBA) *Small Business Innovation Research Program and Small Business Technology Transfer Program Policy Directive* (see the May 2019 *Federal Contracts Perspective* article "SBA Issues Combined SBIR Program and STTR Program Policy Directive"). The policy directive extends the period of time during which the government must protect technical data and computer software developed or generated under SBIR contracts against unauthorized use and disclosure. This protection period begins at contract award and ends 20 years after contract award. Also, the policy directive allows the government to use, and to authorize others to use on its behalf, the data for government purposes.

DFARS 252.227-7018 (DEVIATION 2020-O0007) is different from DFARS 252.227-7018 as follows:

- Paragraph (a), Definitions, includes a definition for "data": "recorded information, regardless of the form or method of the recording. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information."
- Paragraph (a), Definitions, includes a definition for "government purpose rights": "the rights to (i) use, modify, reproduce, release, perform, display, or disclose technical data or computer software within the government without restriction; and (ii) release or

disclose technical data or computer software outside the government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose that data for United States government purposes.”

- Paragraph (a), Definitions, includes a definition for “*SBIR data*”: “all data developed or generated in the performance of a SBIR contract.”
- Paragraph (a), Definitions, includes a definition for “*SBIR data protection period*”: “the period of time during which the government is obligated to protect SBIR data against unauthorized use and disclosure in accordance with SBIR data rights. The SBIR protection period begins on the date of award of the contract under which the SBIR data are developed or generated and ends 20 years after that date. This protection period is not extended by any subsequent SBIR contracts under which any portion of that SBIR data is used or delivered. The SBIR data protection period of any such subsequent SBIR contract applies only to the SBIR data that are developed or generated under that subsequent contract.”
- To paragraph (b), Rights in Technical Data and Computer Software, is added the specific rights, policies, procedures, and the periods of government purpose rights for “not SBIR data” and “SBIR data.”
- Paragraph (f)(2), Government Purpose Rights Marking, is added to specify how data delivered to the government with government purpose rights are to be marked/identified.

■ **Updated List of Supplies to be Competed When Purchasing from Federal Prison**

Industries (FPI): Section 827 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181) requires the DOD to publish a list of product categories for which the FPI’s share of the DOD market is greater than 5%. Products on the list must be procured using competitive (or fair opportunity) procedures (see DFARS 208.602-70, Acquisition of Items for Which FPI Has a Significant Market Share). In conducting such a competition, DOD contracting officers must consider a timely offer from FPI for any of the products on the list. In addition, FPI must be included in the process even if the procurement otherwise would have been set aside in accordance with FAR part 19, Small Business Programs. When the FPI item is determined to provide the best value as a result of FPI’s response to a competitive solicitation, contracting officers are to follow the ordering procedures at <http://www.unicor.gov>.

Kim Herrington, the Acting Principal Director of Defense Pricing and Contracting, has forwarded a memorandum to each service’s deputy assistant secretary for procurement that contains a list of such product categories, by Federal Supply Classification (FSC) codes. The following is the list of products:

FSC	Description
7110	Office Furniture
7125	Cabinets, Lockers, Bins, and Shelving
7210	Household Furnishings
8405	Outerwear, Men’s

8415	Clothing, Special Purpose
8420	Underwear and Nightwear, Men's

FSC 7110, FSC 8405, and FSC 8415 are added to the list. FSC 7540, Standard Forms, FSC 7810, Athletic and Sporting Equipment, and FSC 8470, Armor, Personal, are removed from the list.

For more on the changes made to the list last year, see the March 2019 *Federal Contracts Perspective* article “DFARS Amended to Comply with NDAA Statutory Changes, Directives.”

PROPOSED FAR AMENDMENT ON SECTION 508 REVISIONS

Section 508 of the Rehabilitation Act of 1973 (Title 29 of the U.S. Code, Section 794d [29 USC 794d]), Electronic and Information Technology, requires federal agencies to make their electronic and information technology (now generally referred to as “information and communication technology” [ICT]) accessible to people with disabilities. To incorporate recent revisions and updates to accessibility standards issued by the U.S. Access Board (also known as the Architectural and Transportation Barriers Compliance Board) to “refresh” its existing set of accessibility standards under Section 508 to address advances in ICT and to harmonize with accessibility standards developed by standards organizations worldwide, a proposed rule has been published that would amend the FAR accordingly.

The proposed rule would make the following changes to the FAR:

- In FAR 2.101, Definitions, the definition for “electronic and information technology (EIT)” would be removed and replaced with the following definition of “information and communication technology (ICT)”: “information technology and other equipment, systems, technologies, or processes, for which the principal function is the creation, manipulation, storage, display, receipt, or transmission of electronic data and information, as well as any associated content. Examples of ICT include, but are not limited to: computers and peripheral equipment; information kiosks and transaction machines; telecommunications equipment; customer premises equipment; multifunction office machines; software; applications; website; videos; and electronic documents.”
- Throughout the FAR, “EIT” would be removed and replaced with “ICT,” and “Architectural and Transportation Barriers Compliance Board” would be removed and replaced with “U.S. Access Board.”
- In FAR 7.105, Contents of Written Acquisition Plans, language would be added in new paragraph (b)(5)(iv) to require that the applicable accessibility standards be identified in the acquisition plan and whether an exception or exemption of the standards applies to the acquisition.
- Paragraph (f) of FAR 11.002, Policy [for describing agency needs], would be revised to guide the contracting officer rather than requiring activities (“the contracting officer shall obtain from the requiring activity requirements documents” rather than “requiring activities

must prepare requirements documents”), and to more clearly identify the ICT information that is required in the requirements documents.

- Paragraph (d) of FAR 12.202, Market Research and Description of Agency Need, would be revised from “requirements documents for electronic and information technology must comply with the applicable accessibility standards...” to “requirements documents shall identify the applicable information and communication technology accessibility standards...”
- To FAR 39.001, Applicability [of FAR part 39, Acquisition of Information Technology], would be added paragraph (b) to clarify the scope of FAR part 39 (“(b) information and communication technology by or for the use of agencies or for the use of the public, unless an exception (see [FAR] 39.204) or an exemption (see [FAR] 39.205) applies.”
- In FAR 39.101, Policy [for FAR part 39], the term “accommodations” would be removed and replaced with “accessibility” to more closely align the FAR with the terminology used by the U.S. Access Board.
- Several changes would be made to FAR 39.203, Applicability [of FAR subpart 39.2, Electronic and Information Technology (which would be renamed “Information and Communication Technology”)]:
 - Paragraph headings would be added for easier navigation through the subject matter.
 - Paragraph (b), Indefinite-Quantity Contracts, would clarify that “confirmation of an exception or a determination of an exemption is not required prior to award of an indefinite-quantity contract, except for requirements that are to be satisfied by initial award.”
 - In redesignated paragraph (c) (current paragraph (b)(3)), Task or Delivery Order, new language would be added to clarify that requiring and ordering activities shall document an exception or an exemption to the accessibility standards, if applicable, at the time of order issuance.
 - In redesignated paragraph (d) (current paragraph (c)(1)), Commercial Items, the requirement that commercial items must be available in time to meet the agency’s delivery requirements would be revised to state that the items must best address the agency’s needs.
 - Paragraph (e), Legacy ICT, would be added. It would state that the requirements for legacy ICT are that it was procured, maintained, or used on or before January 18, 2018; that it complies with an earlier standard issued in accordance with Section 508 of the Rehabilitation Act of 1973; and that it had not been altered after January 18, 2018 (that is, a change that affects interoperability, the user interface, or access to information or data).

- Paragraph (f), Alterations of Legacy ICT, would be added. It would state that “when altering any component or portion of existing ICT, after January 18, 2018, the component or portion must be modified to conform to the current ICT accessibility...”
- In FAR 39.204, Exceptions, obsolete language in paragraph (a) would be removed (“The requirements in [FAR] 39.203 do not apply to EIT that is purchased in accordance with [FAR] subpart 13.2 (micro-purchases) prior to April 1, 2005”). Furthermore, paragraph (a) would be restructured to clarify that the accessibility standards for ICT do not apply to acquisitions that fall under one of the three exception categories: (1) national security systems; (2) incidental contract items; and (3) maintenance or monitoring spaces. New paragraph (b) would require the contracting officer to receive written confirmation from the requiring activity that an exception applies to the ICT supply or service. Finally, current paragraph (e) regarding the exception because the accessibility standards would pose an undue burden on the agency would be moved to new FAR 39.205 (see next).
- FAR 39.205, Exceptions, would be added. Paragraph (a)(1) would be the undue burden exemption that is currently in FAR 39.204(e).
 - Paragraph (a)(2) would provide an exemption “when an agency determines that acquisition of ICT that conforms with all applicable ICT accessibility standards would result in a fundamental alteration in the nature of the ICT, such acquisition is required to conform only to the extent that conformance will not result in a fundamental alteration in the nature of the ICT.”
 - Paragraph (a)(3) would provide that “Where there are no commercial items that fully conform to the ICT accessibility standards, the agency shall procure the supplies or service available in the commercial marketplace that best meets the ICT accessibility standards consistent with the agency's needs.”
 - Paragraph (b) would require an agency to provide individuals with disabilities access to and use of information and data by an alternative means when using an exemption in paragraphs (a)(1), (a)(2), or (a)(3).
 - Paragraph (c) would address the documentation requirements for using an exemption.

Comments on this proposed rule must be submitted no later than June 1, 2020, identified as “FAR Case 2017-011,” by either of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; or (2) mail: General Services Administration, Regulatory-Secretariat Division (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd floor, Washington, DC 20405.

NONMANUFACTURING RULE FOR LAPTOP COMPUTERS WAIVED

The Small Business Administration (SBA) is waiving the nonmanufacturer rule for commercially available off-the-shelf laptop and tablet computers under Product Service Code (PSC) 7435, Office Information System Equipment, North American Industry Classification System (NAICS) code 334111, Electronic Computer Manufacturing. SBA limits this class waiver to laptops and tablet computers procured by the government that meet the definition of “commercially available off-the-shelf (COTS) items” in FAR 2.101, Definitions: “any item or

supply...that is: (i) a commercial item...; (ii) sold in substantial quantities in the commercial marketplace; and (iii) offered to the government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace...”

SBA invited the public to comment on the proposed waiver or to provide information on potential small business sources for these products. Forty-one comments were received supporting the waiver, and all supported the waiver. Therefore, SBA has determined that there are no small business manufacturers of this class of products, and it is granting the nonmanufacturing rule waiver. This waiver will allow qualified regular dealers to supply the product of any manufacturer on a federal contract set aside for small businesses, service-disabled veteran-owned small businesses (SDVOSB), women-owned small businesses (WOSB), economically disadvantaged women-owned small businesses (EDWOSB), businesses in historically underutilized business zones (HUBZones), or participants in the SBA’s 8(a) Business Development program.

For more on the proposed nonmanufacturing rule waiver, see the January 2020 *Federal Contracts Perspective* article “SBA Proposes Nonmanufacturer Rule Waiver for Laptops and Tablets.”

EDITOR’S NOTE: 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 121.406, How Does a Small Business Concern Qualify to Provide Manufactured Products or Other Supply Items Under a Small Business Set-Aside, Service-Disabled Veteran-Owned Small Business Set-Aside, WOSB [women-owned small business] or EDWOSB [economically disadvantaged women-owned small business] Set-Aside, or 8(a) Contract? (13 CFR 121.406(b)) The SBA regulation on the waiver of the nonmanufacturer rule is 13 CFR 121.1202, When Will a Waiver of the Nonmanufacturer Rule Be Granted for a Class of Products?

More information on the nonmanufacturer rule and class waivers can be found at <https://www.sba.gov/partners/contracting-officials/small-business-procurement/non-manufacturer-rule>. 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>.

EPAAR AWARD TERM INCENTIVES POLICY CLARIFIED

The Environmental Protection Agency (EPA) is amending EPA Acquisition Regulation (EPAAR) subpart 1516.4, Incentive Contracts, to remove ambiguity and provide clarity on what is required for a contractor to successfully earn award terms.

Award terms are a form of incentive contract that offers additional periods of performance without a new competition, rather than additional profit or fee as a reward for achieving prescribed performance measures. Award term incentives were developed in 1997 by the Department of the Air Force and are not described in the FAR. To assist EPA contracting officers seeking to use award term incentives, EPA believes it is necessary to amend the EPAAR to provide clear language of the requirements needed to successfully award and earn award terms.

EPA issued a proposed rule that would make the following changes to EPAAR subpart 1516.4:

- In EPAAR 1516.401-270, Definition, which consists of the definition for “acceptable quality level (AQL),” the second sentence of the definition would be split into two separate sentences and amended to make the definition more definitive. Language proposed for deletion is ~~struck through~~, and language proposed to be added is *italicized*: “~~Because~~ ~~†~~The performance necessary for eligibility for the award term incentive ~~may~~ *must* be in excess of that necessary for the government acceptance of contract deliverables; ~~†~~The AQLs associated with the award term incentive ~~may~~ *shall* exceed the AQLs associated with the acceptance of contract deliverables.”
- Paragraph (b) of EPAAR 1516.401-70, Award Term Incentives, which establishes the overall framework governing award term incentives, would be revised to add the *italicized* clarifying language: “(b) Award term incentives are designed to motivate contractors to *provide* superior performance. *Superior performance must be defined in the Award Term Incentive Plan.* Accordingly, the prescribed performance measures, i.e., acceptable quality levels (AQL), which must be achieved by a contractor to become eligible for an award term will be in excess of the AQLs necessary for government acceptance of contract deliverables, *unless rationale is documented that such service is beyond the contractor's capability or control.*”

One respondent commented on the proposed rule, but the comment was unrelated to the proposed rule, so the proposed rule is finalized without changes. For more on the proposed rule, see the April 2019 *Federal Contracts Perspective* article “EPA to Provide Award Term Incentive Policies.”

VA CONTINUES UPDATING THE VAAR

The Department of Veterans Affairs (VA) continues amending and updating its VA Acquisition Regulation (VAAR) in phased increments to revise or remove any policy superseded by changes in the FAR, to remove redundant and duplicate material already covered by the FAR; to remove procedural guidance internal to VA and place it into the VA Acquisition Manual (VAAM), correct inconsistencies within the VAAR; to incorporate any new VA-specific regulations or policies; delete outdated material or information; and renumber VAAR text, clauses, and provisions to conform to the FAR format, numbering, and arrangement.

This rule/increment revises VAAR part 812, Acquisition of Commercial Items, and VAAR part 813, Simplified Acquisition Procedures, along with associated VAAR clauses. The following are the significant changes made to these VAAR parts:

- VAAR part 812, Acquisition of Commercial Items
 - The text of VAAR 812.102, Applicability [of VAAR part 812, Acquisition of Commercial Items], is deleted because it duplicates language in FAR 12.102, Applicability. All that remains is the title “Applicability” because subsection VAAR 812.102-70, Applicability of Veterans Preferences, is being added. VAAR 812.102-70 states that the preferences in VAAR subpart 819.70, Veteran-Owned Small Business Acquisition Program, apply to VAAR part 812.

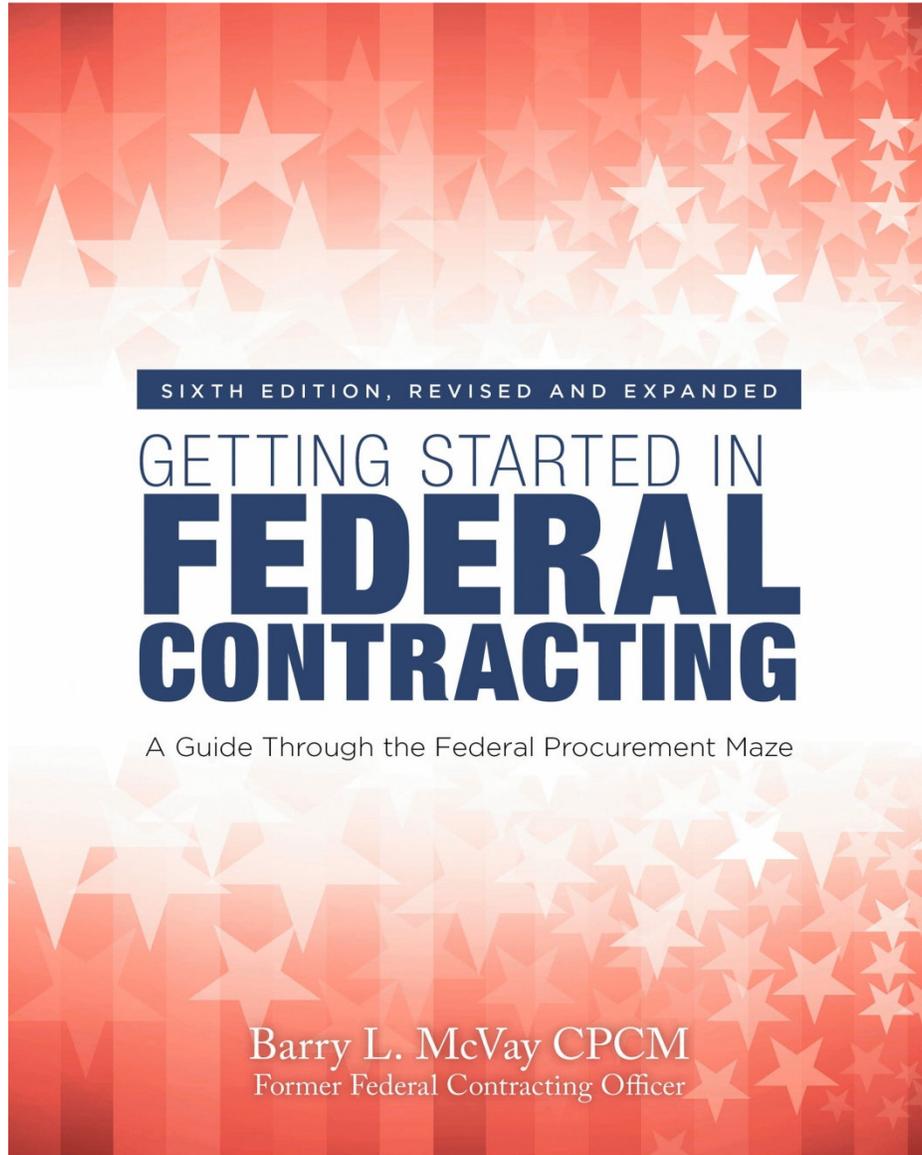
- VAAR 812.301, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items, is amended to delete the existing text and replace it with prescriptions for new VAAR 852.212-70, Provisions Applicable to VA Acquisition of Commercial Items (which lists VAAR provisions and clauses from other parts that are available for use in commercial acquisitions), and new VAAR 852.212-71, Gray Market Items (which requires a vendor of medical equipment to be an Original Equipment Manufacturer [OEM], authorized dealer, authorized distributor or authorized reseller of such equipment).
 - VAAR 812.302, Tailoring of Provisions and Clauses for the Acquisition of Commercial Items, is deleted because it consists of internal procedures for obtaining a waiver to allow tailoring of provisions and clauses to be inconsistent with customary commercial practice.
- VAAR Part 813, Simplified Acquisition Procedures
- VAAR 813.003-70, Policy, is added to explain that the Veterans First Contracting Program has broad applicability in contracts using simplified acquisition procedures.
 - VAAR 813.102, Source List, is added to require that contracting officers use the Vendor Information Pages (VIP) database (<https://www.vip.vetbiz.va.gov/>) to verify Service-Disabled Veteran-Owned Small Business (SDVOSB) and Veteran-Owned Small Business (VOSB) status.
 - The text of VAAR 813.106, Soliciting Competition, Evaluation of Quotations or Offers, Award and Documentation, removed because paragraph (a) addresses internal procedures and paragraph (b) merely states that “requirements exceeding \$25,000 must be synopsized in accordance with FAR part 5 [Publicizing Contract Actions].” All that remains is the title because subsection VAAR 813.106-70, Soliciting Competition, Evaluation of Quotations or Offers, Award and Documentation – the Veterans First Contracting Program, is being added (see below).
 - VAAR 813.106-3, Award and Documentation, is removed since it consists of material that is adequately addressed in the FAR (“the contracting officer may record a quotation on an Abstract of Offers (SF 1409 or 1419)...”
 - VAAR 813.106-70, Oral Purchase Orders, is deleted because the FAR contains no authority to issue oral purchase orders.
 - VAAR 813.106-70, Soliciting Competition, Evaluation of Quotations or Offers, Award and Documentation – the Veterans First Contracting Program, is added. It emphasizes that contracting officers can use other than competitive procedures when awarding to SDVOSBs or VOSBs as authorized by FAR 6.302-5, Authorized or Required by Statute.

- VAAR subpart 813.2, Actions at or Below the Micro-Purchase Threshold, and VAAR 813.202, Purchase Guidelines, are removed, and the contents of VAAR 813.202 is moved to the VA Acquisition Manual (VAAM) (“open market micro-purchases shall be equitably distributed among all qualified SDVOSBs or VOSBs, respectively, to the maximum extent practicable”).
- VAAR 813.302, Purchase Orders, and VAAR 813.302-5, Clauses, are removed because they prescribe VAAR 852.237-70, Indemnification and Medical Liability Insurance, which is prescribed in VAAR part 837, Service Contracting.
- VAAR 813.305-70, VA's Imprest Funds and Third Party Drafts Policy, is added to require the use of governmentwide commercial purchase card and/or convenience checks instead of imprest funds and third party drafts.
- VAAR 813.307, Forms, is removed, and the text is moved to the VAAM because it is VA internal procedural guidance. Because VAAR 813.307 is removed, VAAR 853.213, Simplified Acquisition Procedures (SF's 18, 30, 44, 1165, 1449, and OF's 336, 347, and 348), is removed because the VA forms referenced in VAAR 853.213 were referenced in VAAR 813.307.

Five respondents submitted comments on the proposed rule, and several changes were made to clarify and simplify the final rule. For more on the proposed rule, see the February 2018 *Federal Contracts Perspective* article “VAAR to be Revised to Align with the FAR.”

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