

# FEDERAL CONTRACTS PERSPECTIVE

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## ACQUISITION COMMUNITY FIGHTING COVID-19 ON A MULTITUDE OF FRONTS

Just about every department and agency of the federal government has taken action to help the acquisition community issue contracts and orders to assist in the fight against the Novel Coronavirus (or “COVID-19” – “*coronavirus disease* first identified on December 31, 2019”). Guidance on utilizing and complying with the Coronavirus Aid, Relief, and Economic Security (CARES) Act, deviations to acquisition regulations, reminders, and much, much more filled the in-boxes of the nation’s contracting officers and acquisition workforce.

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

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■ **Department of Energy (DOE) Policy Flash 2020-21, Public Law 85-804 Indemnification for Contractors Responding to COVID-19:** This memorandum, dated March 31 (but posted April 1), forwards to the DOE Senior Procurement Executive (SPE) and the National Nuclear Security Administration (NNSA) Procurement Executive the determination by Secretary of Energy Dan Brouillette authorizing DOE and NNSA contracting officers to extend Public Law 85-804 indemnification to contractors and their subcontractors engaged in tasks or activities directed or authorized by the department in response to COVID-19. Also, this memorandum provides the following indemnification clause for inclusion in appropriate contracts, and authorizes deviations from the Federal Acquisition Regulation (FAR) as necessary to effectuate such inclusion without further approval from the secretary:

“Participation in tasks or activities by the contractor or its subcontractors on or after March 13, 2020, through June 30, 2020, that is directed or authorized by the U.S. Department of Energy or the U.S. Department of Energy National Nuclear Security Administration, including work for others, as an element of activities taken now and through June 30, 2020, in response to COVID-19, including but not limited to efforts to test for the presence of COVID-19, to provide equipment and resources to address COVID-19, and to develop treatments and vaccines for COVID-19, to the extent the task or activity is not exempt from liability under the Public Readiness and Emergency Preparedness Act (PREP Act) or other law, or the exemption under the PREP Act or other law is limited in scope or amount which is not sufficient to provide complete protection against the liability to which the contractor is exposed.”

**EDITOR’S NOTE:** Public Law 85-804 is addressed in FAR subpart 50.1, Extraordinary Contractual Actions. Paragraph (a) of FAR 50.101-1, Authority, states, “Public Law 85-804 empowers the president to authorize agencies exercising functions in connection with the national defense to enter into, amend, and modify contracts, without regard to other provisions of law related to making, performing, amending, or modifying contracts, whenever the president considers that such action would facilitate the national defense.”

■ **Department of Defense (DOD) Memorandum “Reporting COVID-19 Related Actions to the Federal Procurement Data System”:** This memorandum, dated March 31 (but posted April 1) and issued by Kim Herrington, Acting Principal Director, Defense Pricing and Contracting, stresses the importance of reporting in a timely manner new awards for supplies and services, and modifications to existing awards, in response to the COVID-19. He alerts the acquisition workforce that a new National Interest Action (NIA) code (“P20C”) was added to the Federal Procurement Data System (FPDS – <https://www.fpds.gov>) on March 13, 2020, so reported actions can be identified as related to COVID-19, and that this code is to be used when reporting all actions that are for the COVID-19 pandemic.

In addition, “please ensure when your workforce report COVID-19-related actions to FPDS that they (1) select “Presidential Issued Emergency Declaration” in the Emergency Acquisition data field; and (2) include clear and concise descriptions of what is being procured in the Description of Requirements data field. Please avoid using only acronyms or codes; use plain English descriptions as much as possible.”

■ **DOD Memorandum “Determining and Making Commercial Item Procurements to Respond to COVID-19”:** Because “most of the supplies and services required by the Department of Defense (DOD) in response to the Novel Coronavirus (COVID-19) will be urgent commercial item procurements,” this memorandum, dated March 31 (but posted April 1) and issued by Kim Herrington, forwards the Defense Contract Management Agency (DCMA) Commercial Items Group class Commercial Item Determination (CID) for items that “meet the requirements of the commercial items definition under Federal Acquisition Regulation 2.101 [Definitions] and are determined to be commercial items.”

The CID states:

“In accordance with FAR 18.001(d) [Definition (for emergency acquisitions)], the President issued an emergency declaration on 13 Mar 2020. Therefore, contracting officers are encouraged to review language in FAR part 18, Emergency Acquisitions, which may also be applicable. Also, the Office of Management and Budget (OMB) released guidance to the acquisition workforce informing them they can use FAR part 13, Simplified Acquisition Procedures (SAP), for commercial items up to \$13 million (the parts [sic] threshold was previously \$7 million); see Memorandum M-20-18, dated 20 Mar 2020, from Ms. Margaret M. Weichert, Deputy Director for Management, OMB.”

Vivina McVay, Editor-in Chief

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The supplies and services covered by this CID are:

- Efforts associated with research and development (R&D) or procurement of FDA [Food and Drug Administration] approved COVID-19 vaccination(s) or anti-viral medication(s);
- Efforts associated with establishing and setting up temporary booths, testing stations, or hospitals for possible COVID-19 surges (including efforts performed by the Red Cross) (those other than real property);
- Emergency medical supplies (*e.g.*, ventilators, masks, gloves, disinfectants, thermometers, beds, blankets) and services for COVID-19 relief efforts; and
- Facility related services such as contracts for orderly shutdown, and associated building and equipment maintenance such as deep cleaning efforts.

■ **Civilian Agency Acquisition Council (CAAC) Memorandum on FAR Deviation Regarding Flexibilities for the Debarring Official’s Correspondence with Contractors:** This memorandum, dated April 1, authorizes civilian agencies to allow suspension and debarring officials (SDOs) to use electronic delivery of notices of suspension, proposed debarment, and debarment to contractors in addition to certified mail, return receipt requested, as required by FAR 9.406-3, Procedures [for debarment] and FAR 9.407-3, Procedures [for suspension]. The electronic delivery of notices “may be beneficial during times of emergency or crisis such as those presented by the Novel Coronavirus 2019 (COVID-19) pandemic.”

This CAAC memorandum serves as consultation in accordance with FAR 1.404, Class Deviations, thus allowing agencies to authorize deviations to permit electronic delivery of their notices. FAR 1.404(a)(1) states “an agency official who may authorize a class deviation, before doing so, shall consult with the chairperson of the Civilian Agency Acquisition Council...”

The Department of Homeland Security (DHS), the Environmental Protection Agency (EPA), the Department of Justice (DOJ), and the Department of the Interior (DOI) have used this memorandum as their “consultations” with CAAC and issued their own deviations on the subject.

**EDITOR’S NOTE:** DOD, the National Aeronautics and Space Administration [NASA], and the Coast Guard are not covered by this memorandum because they are *not* members of the CAAC. They will take their actions on their own if they consider it necessary – see below for DOD’s deviation on this matter.

■ **DOD Memorandum “SmartPay®3 Government-Wide Commercial Purchase Card Guidance for the Coronavirus Disease 2019 (COVID-19)”:** This memorandum, dated April 2 and issued by Kim Herrington, provides information and guidance to promote compliance with acquisition policies applicable to the DOD Governmentwide Commercial Purchase Card (GPC) program. It cites six references and gives a brief explanation of how that reference governs use of a GPC during an emergency. The six references are:

- DOD Government Charge Card Guidance for Establishing and Managing Purchase, Travel, and Fuel Card Programs, particularly Appendix B, Using the Purchase Card for

Contingency Operations, Defense Against or Recovery from Cyber, Nuclear, Biological, Chemical, or Radiological Attack, International Disaster Assistance, an Emergency or Major Disaster, and Humanitarian or Peacekeeping Operations ([https://www.acq.osd.mil/dpap/pdi/pc/docs/DOD\\_Govt\\_Charge\\_Card\\_Guide\\_04-08-20.pdf](https://www.acq.osd.mil/dpap/pdi/pc/docs/DOD_Govt_Charge_Card_Guide_04-08-20.pdf)).

- Class Deviation 2018-O0018, Micro-Purchase Threshold, Simplified Acquisition Threshold, and Special Emergency Procurement Authority (<https://www.acq.osd.mil/dpap/policy/policyvault/USA002260-18-DPC.pdf>).
- Office of the Under Secretary of Defense (Acquisition & Sustainment/Defense Pricing and Contracting Announcement: Coronavirus Disease 2019 (COVID-19) Emergency Acquisition Flexibilities (<https://www.acq.osd.mil/dpap/pacc/cc/docs/covid-19/COVID-19%20Emergency%20Acquisition%20Flexibilities%20and%20NIA%20Code,%20as%20of%20March%202013,%202020.pdf>).
- Office of the Under Secretary of Defense (Comptroller/Program-Budget Memorandum: DOD Response to the Novel Coronavirus – Cost Reporting Guidance.
- Office of the Under Secretary of Defense (Personnel and Readiness) Memorandum: Civilian Personnel Guidance for DOD Components Responding to Coronavirus Disease 2019 (<https://media.defense.gov/2020/Mar/09/2002261587/-1/-1/1/DOD-CIVILIAN-WORKFORCE-GUIDANCE.PDF>).
- Office of the Assistant Secretary of Defense (Health Affairs) Memorandum: Personal Protective Equipment Policy Guidance for Healthcare Personnel with Potential for Exposure to Infectious Agents (<https://www.health.mil/Reference-Center/Policies/2018/09/25/Personal-Protective-Equipment-Policy-Guidance>).

■ **DOD Memorandum “Implementation of Class Deviation 2020-O0010 – Progress Payment Rates”:** This memorandum, dated April 3 and issued by Kim Herrington, provides Frequently Asked Questions (FAQs) on implementing the class deviation on progress payment rates, which the class deviation increased from 85% to 90% for large businesses and from 90% to 95% for small businesses (see the April 2020 *Federal Contracts Perspective* article “Coronavirus Overruns United States, Emergency Acquisition Authorities Invoked.” (EDITOR’S NOTE: Class Deviation 2020-O0010 was revised on April 16 to remove Alternate II (DEVIATION 2020-O0010) of FAR 52.232-16, Progress Payments, because of an error. The rest of the deviation remains the same.)

Some of the FAQs are:

- “When is the deviation effective? Does it apply only to new contracts?” Answer: “The deviation applies to new contracts that include the deviation clause and to existing contracts that have been modified to include the deviation clause.”
- “Does the deviation apply to performance-based payments?” Answer: “No. Only to contracts or orders that include the Progress Payment clause, FAR 52.232-16.”

- “Can a small business with a DOD contract that doesn’t have the progress payment clause formally ask the contracting officer for progress payments?” Answer: “Yes.”
- “Is it possible to request advance payments using this clause?” Answer: “No, the deviation does not apply to advance payments.”

■ **DOD Deviation 2020-O0011, Submission of Interim Vouchers Under Classified Contracts:** In response to COVID-19, this deviation, dated April 3 and issued by Kim Herrington, instructs contracting officers to “direct contractors to submit interim vouchers under classified contracts, using an appropriate method, directly to the payment office listed in the contract. Interim vouchers under classified contracts are considered provisionally approved by the Defense Contract Audit Agency (DCAA). Contracting officers shall require contractors to follow all program security protocols and to continue to safeguard program information when submitting interim vouchers that are considered provisionally approved.”

Mr. Herrington explains that contractors have been required to submit interim vouchers to the DCAA in accordance with paragraph (b)(1) of FAR 42.803, Disallowing Costs After Incurrence, and paragraphs (b)(1)(A) and (b)(1)(B) of Defense FAR Supplement (DFARS) 242.803, Disallowing Costs After Incurrence. “For some classified contracts, contractors submit interim vouchers outside the Procurement Integrated Enterprise Environment (PIEE [<https://wawf.eb.mil/piee-landing/>]) or other authorized unclassified system because of security restrictions. This deviation relieves the requirement for the interim voucher to be submitted to DCAA prior to payment.”

■ **DOD Deviation 2020-O0012, Undefined Contract Actions During the National Emergency for the Coronavirus Disease 2019:** This deviation, dated April 3 and issued by Kim Herrington, implements: (1) Section 13004 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Public Law 116-136), which exempts DOD undefinitized contract actions (UCA) related to COVID-19 from paragraph (b)(3) of Title 10 of the U.S. Code, Section 2326, Undefined Contractual Actions: Restriction (10 USC 2326(b)(3)), which restricts the contracting officer from obligating more than 75% of the negotiated overall ceiling price until the contractual terms, specifications, and price are definitized; and (2) Section 13005 of the CARES Act, which allows the head of the agency to waive the provisions of 10 USC 2326(b), which details the limitations on entering into a UCA.

To implement Sections 13004 and 13005, this deviation applies to UCAs related to COVID-19:

- The requirement in paragraph (a) of DFARS 217.7404-4, Limitations on Obligations [for UCAs], to limit obligations after receipt of a qualifying proposal to 75% percent of the not-to-exceed price before definitization, does not apply to UCAs related to COVID-19 when determined by the head of the contracting activity.
- The head of the contracting activity may waive the limitations in paragraph (a)(1)(i) of DFARS 217.7404, Limitations [on UCAs] (“a contracting officer may not enter into a UCA for a foreign military sale unless the UCA provides for agreement upon contractual terms, specifications, and price by the end of the 180-day period beginning on the date on which the contractor submits a qualifying proposal”), paragraph (a) of DFARS 217.7404-3, Definitization Schedule [for UCAs] (“UCAs shall contain definitization schedules that

provide for definitization by the earlier of the date that is 180 days after the contractor submits a qualifying proposal...”); and DFARS 217.7404-4(a) (“the government shall not obligate more than 50% of the not-to-exceed price before definitization. However, if a contractor submits a qualifying proposal before 50% of the not-to-exceed price has been obligated by the government, then the limitation on obligations before definitization may be increased to no more than 75%”), if the head of the contracting activity determines that the waiver is necessary due to the COVID-19.

■ **General Services Administration (GSA) Regulation (GSAR) Non-Availability Exception for Trade Agreements and Buy American Statute Clauses:** This non-availability exception, dated April 3 and issued by Jeffrey Koses, Senior Procurement Executive, determines that certain supplies are temporarily unavailable in sufficient quantity or satisfactory quality, and that these supplies are exempt from the trade agreements (see paragraph (c) of FAR 25.403, World Trade Organization Government Procurement Agreement and Free Trade Agreements) and the Buy American Act (see paragraph (b) of FAR 25.103, Exceptions [to the Buy American Act]).

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

This non-availability exception is valid through July 1, 2020, and applies to GSA contracts, and the orders placed against GSA contracts (such as Federal Supply Schedule contracts) at any dollar amount. However, this non-availability exception does *not* apply to most transactions involving Cuba, Iran, and Sudan, and most imports from Burma or North Korea.

■ **DOD Memorandum “Change to the Delegation of Authority for Use of Other Transactions for Prototype Projects in Response to Coronavirus Disease 2019”:** This memorandum, dated April 6 and issued by Kim Herrington, identifies the approval authority for components authorized to execute Other Transaction (OT) for Prototype Project agreements under 10 USC 2371b, Authority of the Department of Defense to Carry Out Certain Prototype Projects, during the COVID-19 emergency:

- For OT for prototype project agreements and any follow-on production contract or OT in excess of \$100 million, approval authority is delegated to the Directors of the Defense Agencies/Field Activities with contracting authority, Commanding Officers of Combatant Commands with contracting authority, and the Director of the Defense Innovation Unit.
- For OT for prototype project agreements and any follow-on production contract or OT in excess of \$500 million, approval authority is delegated to the Senior Procurement Executives (SPE) of the military departments, the Director of the Defense Advanced Research Projects Agency (DARPA), and the Director of the Missile Defense Agency (MDA). The authority to approve OT prototype actions exceeding \$100 million but not exceeding \$500 million may be delegated from the SPE or the Director to such officials as the SPE or the Director sees fit, in accordance with Section 13006 of the CARES Act (Public Law 116-136).

In addition, Section 13006 relaxes the requirement in 10 USC 2371b for 30-day advance notification to the congressional defense committees of a transaction in excess of \$500 million that is related to COVID-19. Instead, Section 13006(b)(2) requires that the Under Secretary of Defense for Research and Engineering or the Under Secretary of Defense for Acquisition and Sustainment submit notification as soon as practicable after the commencement of such a transaction. The responsibility for making this notification is delegated to the SPE of the Military Department, the Director of DARPA, or the Director of MDA approving any such transaction.

■ **DOD Deviation 2020-O0013 on CARES Act Section 3610 Implementation:** This deviation, dated April 8 and issued by Kim Herrington, authorizes contracting officers to use DFARS 231.205-79, CARES Act Section 3610 Implementation, as a framework for implementation of Section 3610, Federal Contractor Authority, of the CARES Act (Public Law 116-136). Section 3610 allows agencies to reimburse, at the minimum applicable contract billing rates (not to exceed an average of 40 hours per week), any paid leave, including sick leave, a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of government and contractor personnel, during the public health emergency declared for COVID-19.

DFARS 231.205-79 explains which contractors are covered by Section 3610, the maximum authorized reimbursement, reductions to that maximum reimbursement, allowability of costs, etc.

■ **GSAR Deviation CD-2020-05 on Flexibilities for Signatures and Seals on Bonds:** This deviation, issued April 6 by Jeffrey Koses, allows vendors and sureties to use electronic signatures in lieu of manual signatures and eliminates the requirement for any seals for bonds. “Unfortunately, as written, the [FAR and GSAR] procedures preclude alternatives to affixing corporate seals and manual signatures to execute a bond. Neither requirement is conducive nor beneficial during times of emergency or crisis such as those presented by the Novel Coronavirus 2019 (COVID-19) pandemic.”

This deviation incorporates new FAR 28.002, Policy [for bonds and insurance], which states, “For purposes of this part, electronic, mechanically-applied and printed signatures, seals and dates may be used and shall be considered original signatures, seals and dates, without regard to the order in which they were affixed.” In addition, the last sentence of FAR 28.106-1 Bonds and Bond-Related Forms, is revised from “The bond forms shall be used as indicated in the instruction portion of each form” to “The bond forms shall be used as indicated in the instruction portion of each form, *except that a seal is not required*” (*emphasis added*).

In addition, GSAR 528.202, Acceptability of Corporate Sureties, requires corporate surety bonds to have a manual signature and an affixed corporate seal, and it requires the contracting officer to manually verify acceptability of the surety bond with the written statement “Acceptability of Bond Verified” and the contracting officers signature “on the bond or properly identified attachment.” This deviation deletes GSAR 528.202 (and GSAR 528.202-70, Acceptability of Bonds and Sureties).

■ **Presidential Memorandum Authorizing the Exercise of Authority Under Public Law 85-804:** This memorandum, issued April 10, authorizes the Department of Veterans Affairs to exercise the authority granted by Public Law 85-804 with regard to transactions directly responsive to COVID-19.

■ **DOE Policy Flashes on Providing Guidance for Using DOE’s Clauses Developed to implement Section 3610 of the CARES Act:** The first memorandum, Policy Flash 2020-22, dated April 15, provides additional guidance to Policy Flash 2020-18, Initial Guidance Regarding Actions to Address Effect of Coronavirus Disease 2019 (COVID-19) (see the April 2020 *Federal Contracts Perspective* article “Coronavirus Overrides United States, Emergency Acquisition Authorities Invoked”). Accompanying the guidance (“Contracting officers must work with the contractor to secure necessary documentation, representations, or both to prevent duplication of payment and ensure the correct reimbursement, including applicable credits”) are two DOE-developed clauses that may be used in cost reimbursement-type contracts and in fixed-price/time-and-materials type contracts. Both are titled “Paid Leave Under Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) to Maintain Employees and Subcontractors in a Ready State.”

The second memorandum, Policy Flash 2020-28, dated April 28, slightly revises Policy Flash 2020-22 to reflect additional guidance from the Office of Management and Budget (OMB) (see “OMB Memorandum ‘Preserving the Resilience of the Federal Contracting Base in the Fight Against the Coronavirus Disease 2019 [COVID-19]’” below). This Policy Flash changes reporting requirements and proscribes any additional profit or fee.

■ **DOE Policy Flash 2020-23, Procuring Enhanced Entry Screening Services (EESS):** This policy flash, dated April 15, forwards the GSA-developed “Best Practices Ordering Guide for Enhanced Entry Screening Services Under the Federal Supply Schedules in response to COVID-19.” (**EDITOR’S NOTE:** The Ordering Guide states that “Enhanced Entry Screening Services may include providing temporary signage, requesting all entrants to provide information about symptoms they may have that could indicate COVID-19 illness, and taking the temperature of individuals [with a calibrated remote temperature sensing device] requesting access to the facility. These services will augment existing security screening at government buildings or locations used by government agencies.”)

The policy flash points out that paragraph 6.c.ii of the Ordering Guide states “it is **strongly recommended** that any PPE and materials necessary for performance be provided by the government due to industry’s inability to reliably secure these items at this time” (**emphasis** in original). The policy flash goes on to state: “Accordingly, if any DOE program office, field site, or National Laboratory determines that it is necessary to place an order for these services, the requirement shall be coordinated with the DOE PPE [personal protective equipment] Coordination Team in advance in accordance with the Secretary’s memorandum dated April 3, 2020, subject: Temporary Department-wide Policy Regarding the Use, Transfer (Donations and Loans), Release, and Procurement of Personal Protective Equipment.” The April 3 memorandum is attached to the policy flash.

■ **DOD Memorandum “Implementation Guidance for Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act”:** This memorandum, dated April 9 and issued by Kim Herrington, supplements Deviation 2020-O0013 on CARES Act Section 3610 Implementation (see above), by providing instructions on ensuring traceability of costs associated with any paid and sick leave a contractor provides to keep its employees or subcontractors in a ready state. “It is critical that the contract and supporting documentation clearly identify these costs for reimbursement paid to contractors under Section 3610 authority, as well as how such costs are identified, segregated, recorded, invoiced, and reimbursed.”

■ **GSAR Deviation CD-2020-10 on Eliminating Hard Copy Original Documents, Notarization, and Seals for Certain Contract Requirements:** This deviation, issued April 15 by Jeffrey Koses, eliminates the requirement for hard copy original documents, notarization, and seals in several scenarios confronting the acquisition workforce in connection with the COVID-19. This is in addition to the coverage in GSAR Deviation CD-2020-05 on flexibilities for signatures and seals on bonds (see above).

“During times of emergency or crisis such as those presented by the COVID-19 pandemic, it has become difficult or impossible to obtain the services of notaries public. Social distancing policies and shelter-in-place orders have forced public and private sector employees to work from home, making it difficult for notaries to be present to witness oaths and affirmations and to physically affix their signature and notary stamp on documents. Remote online notarization is not approved in many states... The importance of original and notarized documents has dwindled in this electronic age. Currently, FAR 2.101 [Definitions] defines ‘signature’ or ‘signed’ to include electronic signatures, and FAR 4.502(d) [Policy (for electronic commerce in contracting)] expressly authorizes agencies to ‘accept electronic signatures and records in connection with government contracts.’”

Therefore, this deviation makes the following changes:

- When obtaining financial protection against losses under contracts in accordance with FAR part 28, Bonds and Insurance, GSA contracting officers shall use the following deviations:
  - FAR 28.106-8, Payment to Subcontractors or Suppliers, which deletes “notarized” from “a signed notarized statement...”
  - Paragraph (b) of FAR 28.203, Acceptability of Individual Sureties, which requires that the individual surety execute the Standard Form 28, Affidavit of Individual Surety, but adds “except such Standard Form 28 is not required to be sworn and notarized...”
  - Paragraph (a) of FAR 28.203-5, Release of Lien, which requires “a sworn statement by the subcontractor or supplier that the claim is correct along with a notarized authorization of release by the surety saying that it approves of such release,” is revised to state “a sworn statement by the subcontractor or supplier that the claim is correct along with a *written* authorization of by the surety saying that it approves of such release *signed* by the surety saying that it approves of such release” (*emphasis added*).
  - FAR 52.228-11, Pledges of Assets (DEVIATION APR 2020), which does not require the Standard Form 28 to be sworn and notarized, in place of FAR 52.228-11, Pledges of Assets, which does.
- When processing assignment of claims in accordance with FAR subpart 32.8, Assignment of Claims, GSA contracting officers shall use the following deviations:

- Paragraph (e) of FAR 32.802, Conditions, which deletes “true” from “a true copy of the assignment instrument.”
- Paragraphs (a), (b), (c), and (e) of FAR 32.805, Procedure, which allows the use of electronically signed documents and a copy of the assignment instrument in place of the original.
- GSAR 532.905-70, Final Payment – Construction and Building Service Contracts, which requires that the contractor submit a properly executed GSA Form 1142, Release of Claims *except that a seal is not required* (*italicized language added*).
- GSAR 552.232-23, Assignment of Claims (DEVIATION APR 2020), which states, “Any such assignment takes effect only if an when the assignee transmits by electronic means written notice of the assignment together with a copy of the instrument of assignment to the contracting officer...” instead of GSAR 552.232-23, Assignment of Claims (Sep 1999), which states, “Any such assignment takes effect only if an when the assignee files written notice of the assignment together with a true copy of the instrument of assignment with the contracting officer....”
- When executing novation agreements and change-of-name agreements in accordance with FAR part 42, Contract Administration and Audit Services, GSA contracting officers shall use the following deviations:
  - Paragraph (f) of FAR 42.1204, Applicability of Novation Agreements, which deletes “authenticated” from “an authenticated copy”; “certified” from “a certified copy”; and the requirement for corporate seals on the novation agreement.
  - Paragraph (b) of FAR 42.1205, Agreement to Recognize Contractor’s Change of Name, which deletes the requirement for corporate seals on the change-of-name agreement.

■ **DOD Memorandum “Temporary Redeployment of At-Risk Contractor Employees from Afghanistan”:** This memorandum, issued April 16 by Kim Herrington, directs DOD contracting officers to comply with a United States National Support Element – Afghanistan (USNSE-A) memorandum as soon as possible to respond to COVID-19 health concerns in Afghanistan. “Contracting officers shall inform their contractors that, in accordance with theater orders, they must redeploy employees identified as ‘at-risk personnel’ from Afghanistan...For the purpose of this direction, USNSE-A has defined ‘at-risk personnel’ are those individuals over 60 years old and those with underlying medical conditions (such as cardiovascular disease, diabetes, chronic respiratory disease, and cancer). Contractor employees meeting USNSE-A’s definition of ‘at-risk personnel’ will be redeployed unless they have an approved exception to policy.”

The reason for this directive is “USNSE-A analysis and modeling of the spread of COVID-19 has shown there is insufficient medical capability in-country to provide medical support for all personnel who may become infected...Compliance with this USNSE-A direction may result in cost impacts to some contracts. If this is the case, contracting officers shall coordinate with requiring activities/CORs [contracting officer representatives] to obtain the required funds and issue the required direction to the contractor as soon as practicable.”

■ **CAAC Memorandum on FAR Deviation Regarding Customary Progress Payment Rates Based on Costs:** This deviation, dated April 15, authorizes civilian agencies to deviate from the customary progress payment rates based on costs in paragraph (a) of FAR 32.501-1, Customary Progress Payment Rates, increasing the rates from 85% to 95% for small businesses, and from 80% to 90% for all other contractors in response to COVID-19. In addition, civilian agencies are to use FAR 52.232-16, Progress Payments (DEVIATION Apr 2020), in place of FAR 52.232-16, Progress Payments. FAR 52.232-16 (DEVIATION Apr 2020) makes the same changes to the clause as in FAR 32.501-1(a).

“Agencies are advised to review any relevant clauses in their supplement and take any action that is appropriate. It is recommended that the deviation be made effective immediately. Agencies should consider whether to cancel the deviation after the COVID-19 emergency passes.”

This CAAC memorandum serves as consultation in accordance with FAR 1.404, Class Deviations, thus allowing agencies to authorize deviations to permit the increased customary progress payment rates. GSA, the Department of Health and Human Services (HHS), and the Department of the Interior (DOI) have used this CAAC memorandum as the basis for their required consultations with the CAAC and issued their own deviations on the subject.

For similar action taken by DOD, see the April 2020 *Federal Contracts Perspective* article “Coronavirus Overruns United States, Emergency Acquisition Authorities Invoked.”

■ **OMB Memorandum “Preserving the Resilience of the Federal Contracting Base in the Fight Against the Coronavirus Disease 2019 (COVID-19)”:** This memorandum, dated April 17 and issued by Michael J. Rigas, Acting Deputy Director for Management, provides guiding principles to help agencies determine the appropriate role of Section 3610 of the CARES Act in supporting the needs of their contractors and subcontractors.

The guiding principles and subprinciples are:

- Support Contractor Resiliency
  - Carefully consider if reimbursing paid leave to keep the contractor in a ready state is in the best interest of the government for meeting current and future needs
  - Be mindful of the challenges faced by small businesses
- Exercise good stewardship
  - Maintain mission focus and evaluate use of Section 3610 in the broader context of all strategies to promote contractor resiliency
  - Follow restrictions in Section 3610
  - Work with the contractor to secure necessary documentation to support reimbursement and prevent duplication of payment
  - Track use of Section 3610

Each principle and subprinciple contains additional guidance on actions to take to ensure compliance.

■ **DOD Deviation 2020-O0014 on Flexibilities for Electronic Delivery of Information Related to Suspensions and Debarments:** This deviation, dated April 20 and issued by Kim Herrington, permits DOD contracting officers to deviate from the requirements in paragraphs (c) and (e) of FAR 9.406-3, Procedures [for debarment], and paragraphs (c) and (d)(4) of FAR 9.407-3, Procedures [for suspension], which require that notices pertaining to debarments and suspensions, respectively, be delivered “by certified mail, return receipt requested.” This deviation authorizes debarring and suspension officials to “provide such notices and decisions to contractors electronically via e-mail and/or secure file exchange service.”

■ **OMB and Office of Personnel Management (OPM) Memorandum “Aligning Federal Agency Operations with the National Guidelines for *Opening Up America Again*”:** This joint memorandum, dated April 20 and issued by Russell Vought, OMB Acting Director, and Michael Rigas, OPM Acting Director, forwards a plan to return federal government operations to normal. This plan parallels the national guidelines in *Opening Up America Again*, which presents a three-phased approach based on the advice of public health experts. “This guidance describes a process for agency heads and leaders to make decisions for their workforce operations while utilizing the different telework postures implemented during the outset of the COVID-19 response. Agencies should account for agency personnel and facility requirements when determining service levels and telework posture to meet their specific mission needs.”

■ **GSAR Deviation CD-2020-12 on CARES Act Section 3610 Implementation:** This deviation, issued April 21 by Jeffrey Koses, provides guidance to GSA contracting officers on proper implementation of Section 3610 regarding paid leave reimbursement to contractors for COVID-19, and prescribes a contract clause which implements appropriate controls.

“Steps such as actively promoting telework, GSA’s critical infrastructure policy, accelerating payments, and a series of FAR and GSAR class deviations to aid contractors have permitted GSA to keep stop work orders or suspension of work orders to a minimum. As a result of GSA’s aggressive actions, nearly all GSA contractors are able to continue to perform their work safely and, thus, paid leave is not at issue as to those contracts. Therefore, GSA, itself, does not expect significant use of the paid leave reimbursement authority. However, both in establishing contracts for use by other agencies and in performing assisted acquisition, it is important for GSA to establish clear direction.”

The deviation provides instructions for GSA contracting officers (CO) to follow in determining when to include the paid leave reimbursement authority in contracts, and specifies the process to use when consider a contractor’s request. A new clause, GSAR 552.222-70, CARES Act Section 3610 Paid Leave Reimbursements, is to be included if the Section 3610 authority is used in contracts or orders. For GSA government-wide indefinite delivery vehicles (such as Federal Supply Schedules [FSS], government-wide acquisition contracts [GWACs], One Acquisition Solution for Integrated Services [OASIS], etc.), the deviation makes clear that the Section 3610 authority applies at the order level and not the contract level. For assisted acquisitions, the deviation sets forth guidelines for when a requesting agency has and has not issued its own implementation for Section 3610.

In conjunction with the issuance of this deviation, GSA issued a “Listing of GSA Programs Subject to Limitations Under GSA Class Deviation CD-2020-12.” The listing states “There are currently no GSA programs subject to limitations.”

■ **GSA Memorandum “Temporary Policy for Contractor Onboarding and Offboarding During Novel Coronavirus Disease (COVID-19)”**: This memorandum, dated April 21 and issued by Jeffrey Koses; David Shive, GSA Chief Information Officer, Office of GSA Information Technology (IT); and Robert Carter, GSA Associate Administrator for Office of Mission Assurance, provides guidance for the acquisition workforce and physical specialist communities during COVID-19 regarding “onboarding” and “offboarding” of contractor personnel working on GSA contracts. It addresses procedures for issuance of GSA Access Cards (Personal Identity Verification [PIV] cards) to contractor personnel for entry into federal facilities, receipt of government-supplied IT equipment, and access to the GSA network with contractor IT equipment during COVID-19.

■ **DOD Notice “Early Engagement Opportunity on Implementation of the Coronavirus Aid, Relief, and Economic Security (CARES) Act”**: This notice alerts the public of an opportunity to provide early inputs on implementation of the CARES Act within the acquisition regulations.

Early inputs can be submitted through [https://www.acq.osd.mil/dpap/dars/early\\_engagement.html](https://www.acq.osd.mil/dpap/dars/early_engagement.html), or by email to [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil), and reference “Early Engagement Opportunity: CARES Act” in the subject line.

■ **DOE Policy Flash 2020-25, Temporary Suspension of Certain Safety Requirements During COVID-19**: This policy flash, dated April 22 and issued by Secretary of Energy Dan Brouillette, forwards “a list of safety and security requirements contained in current DOE Directives that detail responsibilities and deadlines where compliance is adversely impacted because of this national emergency when maximum telework and social distancing activities are being implemented throughout the department and which may therefore be suspended, at least initially, for 180 days. As such, I hereby order that obligations imposed by the specific requirements enumerated in the attachment be suspended, beginning March 13, 2020, for 180 days from the date they would otherwise apply.”

In addition, the memorandum forwards “a list of safety and security requirements contained in current regulations issued and administered by DOE. By this memorandum, I am directing that the National Nuclear Security Administration (NNSA) and the DOE Office of Enterprise Assessments (EA) exercise regulatory enforcement discretion and not pursue enforcement actions for violations of those particular requirements, beginning on March 13, 2020, for 180 days. Correspondingly, DOE’s Office of Acquisition Management, in coordination with the NNSA’s Office of Acquisition and Project Management, will issue implementing guidance to contracting officers.”

■ **DOE Policy Flash 2020-26, 180 Day Extension to Anniversary Dates for Protective Force Personnel**: This policy flash, dated April 24 and issued by Secretary of Energy Dan Brouillette, forwards his determination that, “pursuant to the authority granted by Title 10, Code of Federal Regulations (CFR), Part 1046, Medical, Physical Readiness, Training, and Access Authorization Standards for Protective Force Personnel [10 CFR Part 1046], I find that approval of a 180 day extension to the timeframes set forth in part 1046 to comply with certain medical, physical readiness, firearms, and training requirements will not endanger life or property or the common defense and security, and is otherwise in the public interest...Therefore, all anniversary dates (*e.g.*, 12 months from the date of previous medical certification) for medical examinations/

recertifications, physical readiness qualifications, firearms qualifications, and annual training for Protective Force personnel specified in 10 CFR Part 1046 may be extended for 180 days.”

The secretary has made this determination because “the COVID-19 outbreak is significantly impacting the staffing levels of the department’s sites and facilities, including medical personnel who support the DOE Protective Force program consistent with part 1046. The medical professionals in the department are being redirected to support the current COVID-19 medical situation and non-essential personnel have been placed on telework status.”

■ **DOE Policy Flash 2020-27, Guidance on Coding COVID-19 Related Actions and Funding in the Strategic Integrated Procurement Enterprise System (STRIPES), the Federal Procurement Data System (FPDS), FedConnect, and beta.SAM.gov to Promote Full, Clear, and Consistent Transparency:** This policy flash, dated April 27 and issued by Jacqueline Kniskern, Director, Contract and Financial Assistance Policy Division, Office of Policy, Office of Acquisition Management, provides guidance illustrating the fields that must be used to code COVID-19 related procurement actions and funding in STRIPES, FPDS (<https://www.fpds.gov>), FedConnect, and [beta.SAM.gov](https://beta.sam.gov) [System for Award Management]. “To the extent practical, COVID-19 related awards and modifications should be awarded separately from non COVID-19 actions.”

Watch for more COVID-19-relate guidance and direction in May.

## **DOD CRANKS UP THE NON-COVID-19 RULES, TOO!**

As was the case in March, DOD didn’t allow the COVID-19 pandemic to faze it. Despite all the effort it put into COVID-19 acquisition-related memoranda and deviations during April (see previous article), it issued five other final rules on acquisition topics, four proposed rules, and a deviation!

■ **Accelerated Payments for Small Business Contractors:** This final rule implements the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Public Law 115-232), Section 852, Prompt Payments of Small Contractors, which provides for accelerated payments to DOD contractors that are small businesses and to small business subcontractors by accelerating payments to their DOD prime contractors. Specifically, Section 852 requires DOD to establish an accelerated payment date for small business contractors, with a goal of 15 days after receipt of a proper invoice, if a specific payment date is not established by contract. For contractors that subcontract with small businesses, Section 852 requires DOD to establish an accelerated payment date, with a goal of 15 days after receipt of a proper invoice, if a specific payment date is not established by contract, and the contractor agrees to make accelerated payments to the subcontractor without any further consideration from, or fees charged to, the subcontractor.

FAR 52.232-40, Providing Accelerated Payments to Small Business Subcontractors, already includes most of the requirements of Section 852, so DOD proposed to continue using FAR 52.232-40 to avoid unnecessary duplication. However, DOD proposed to add DFARS 252.232-7017, Accelerating Payments to Small Business Subcontractors – Prohibition on Fees and Consideration, to prohibit accelerated payments to contractors unless the contractor agrees to

make accelerated payments to the subcontractor without any further consideration from, or fees charged to, the subcontractor.

Thirteen respondents submitted comments on the proposed rule, and a definition of “accelerated payment” is added to DFARS 252.232-7017 in response (“a payment made to a small business subcontractor as quickly as possible, with a goal of 15 days or less after receipt of payment from the government or receipt of a proper invoice from the subcontractor, whichever is later”).

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

See the following article for the deviation issued by the CAAC on the same subject.

■ **Performance-Based Payments:** This final rule implements the NDAA for FY 2017 (Public Law 115-232), Section 831, Preference for Performance-Based Contract Payments, which amends 10 USC 2307, Contract Financing, to address the use of performance-based payments.

Performance-based payments are a method of contract financing that may be available under fixed-price contracts (except those awarded through sealed bidding procedures in FAR part 14). Performance-based payments are made on the basis of the contractor’s achievement of objective, quantifiably measurable events, results, or accomplishments that are defined and valued in the contract prior to performance.

Section 831 amended paragraph (b) of 10 USC 2307 to make performance-based payments the preferred method of contract financing. This parallels paragraph (a) of FAR 32.1001, Policy [for performance-based payments], which since 2000 has stated “performance-based payments are the preferred government financing method when the contracting officer finds them practical, and the contractor agrees to their use” (see the April 2000 *Federal Contracts Perspective* article “FAC 97-16 Revises Contract Financing Rules, Small Business Competitiveness Demo Program”).

In addition, Section 831 added the following three provisions to 10 USC 2307(b):

- “(2) Performance-based payments shall not be conditioned upon costs incurred in contract performance but on the achievement of performance outcomes...
- “(3) The Secretary of Defense shall ensure that nontraditional defense contractors and other private sector companies are eligible for performance-based payments, consistent with best commercial practices.
- “(4) In order to receive performance-based payments, a contractor’s accounting system shall be in compliance with Generally Accepted Accounting Principles, and there shall be no requirement for a contractor to develop government-unique accounting systems or practices as a prerequisite for agreeing to receive performance-based payments.”

To implement these changes, DOD proposed the following:

- Remove the restrictions in paragraph (a) of DFARS 232.1001, Policy [for performance-based payments] (“performance-based payments should never exceed total cost incurred at any point during the contract”) and paragraph (b)(i) of both DFARS 252.232-7012 Performance-Based Payments – Whole Contract Basis, and DFARS 252.232-7013,

Performance-Based Payments – Deliverable Item Basis (“at no time shall cumulative performance-based payments exceed cumulative contract cost incurred under this contract”).

- Amend DFARS 232.1001(a) to add “Private sector companies, including nontraditional defense contractors, are eligible for performance-based payments, consistent with best commercial practices.”
- Replace the text in DFARS 232.1003-70, Criteria for Use [of performance-based payments], and paragraph (b) of both DFARS 252.232-7012 and DFARS 252.232-7013 (“a contractor’s financial statements shall be in compliance with Generally Accepted Accounting Principles [GAAP], in order to receive performance-based payments”) with: “In accordance with 10 USC 2307(b), the output of a contractor’s accounting system shall be in compliance with Generally Accepted Accounting Principles, as evidenced by audited financial statements, in order to receive performance-based payments.”
- Add DFARS 252.232-7015, Performance-Based Payments – Representation, to require each offeror to represent whether the output of its accounting system is in compliance with GAAP, as evidenced by audited financial statements.

Eleven respondents submitted comments on the proposed rule, and the following changes were made to the final rule in response:

- The requirement for compliance with Generally Accepted Accounting Principles (GAAP) in order to receive performance-based payments proposed in DFARS 232.1003-70 and DFARS 252.232-7015 is modified to apply to the contractor’s financial statements, not the “output” of the contractor’s accounting system, and the requirement that compliance with GAAP must be evidenced by audited financial statements is removed.
- Though not addressed in the proposed rule, the procedures in DFARS 232.1004, Procedure [for performance-based payments], are amended to eliminate the requirement to first agree on price using customary progress payments and then require consideration if performance-based payments are subsequently negotiated. In addition, contracting officers are encouraged to use both the progress payments and performance-based payments clauses and provisions when considering both types of financing methods.
- Paragraph (c)(2) in both DFARS 252.232-7012 and DFARS 252.232-7013 are amended to specifically state that it is not necessary to have a government-unique cost accounting system in order to report incurred costs under the clause (“an acceptable accounting system in accordance with DFARS 252.242-7006 [Accounting System Administration] is not required for reporting of incurred costs under this clause”).
- Paragraph (d) is added to DFARS 252.232-7012 and DFARS 252.232-7013 to provide some flexibility with regard to acceptable security, although title to the property described in paragraph (f) of FAR 52.232-32, Performance-Based Payments, is still the preferred security for receipt of performance-based payments. New paragraph (d) permits

the acceptance of a paramount lien of assets, an irrevocable letter of credit, a bond from a surety, a guarantee of repayment from a person or corporation of demonstrated liquid net worth, or title to identified contractor assets of adequate worth. The preferred security identified in FAR 52.232-32(f) are parts, materials, inventories, and work in process; special tooling and special test equipment to which the government is to acquire title; nondurable tools, jigs, dies, fixtures, molds, patterns, taps, gauges, test equipment and other similar manufacturing aids; and drawings and technical data.

- DFARS 252.232-7016, Notice of Progress Payments or Performance-Based Payments, is added. The provision is to be used in place of FAR 52.232-13, Notice of Progress Payments, when the solicitation contains clauses for progress payments and performance-based payments, to explain that only one type of financing will be included in the resultant contract (except as may be authorized on separate orders under indefinite delivery contracts subject to paragraph (c) of FAR 32.1003, Criteria of Use [for performance-based payments]).

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

■ **Modification of “Tax Relief” Clause:** This final rule amends DFARS 252.229-7001, Tax Relief, to incorporate the information included in DFARS 252.229-7000, Invoices Exclusive of Taxes or Duties, to streamline contract terms and conditions for contractors.

The U.S. government is eligible for relief from several taxes and duties because of the terms of various treaties and agreements with foreign governments. FAR 52.229-6, Taxes – Foreign Fixed-Price Contracts, and FAR 52.229-8, Taxes – Foreign Cost-Reimbursement Contracts, address this relief in solicitations and contracts expected to exceed the simplified acquisition threshold (\$250,000) and the contract will be performed wholly or in part in a foreign country. These clauses advise offerors and contractors that contract prices shall not include taxes and duties that are not applicable to the U.S. government, as a result of such treaties or agreements.

DFARS 252.229-7001 is included in solicitations and contracts when a contract will be awarded to a foreign concern and contract performance occurs in a foreign country. It supplements the FAR clauses by requiring offerors to list each of the taxes and duties that are excluded from the contract price, and its accompanying rate or percentage.

DFARS 252.229-7000 is included in fixed-price solicitations and contracts that will be awarded to a foreign concern. It states, “Invoices submitted in accordance with the terms and conditions of this contract shall be exclusive of all taxes or duties for which relief is available.”

Since the FAR clauses and DFARS 252.229-7001 are included in all contracts under which the U.S. government may obtain foreign tax and duty relief, DFARS 252.229-7000 is not necessary. Therefore, the text of DFARS 252.229-7000 was proposed to be added to DFARS 252.229-7001(b) and DFARS 252.229-7000 removed.

No respondents submitted comments on the proposed rule, so the proposed rule is finalized without changes. For more on the proposed rule, see the October 2019 *Federal Contracts Perspective* article “DOD Unleashes Deluge of DFARS Changes.”

■ **Modification of “Payment for Subline Items Not Separately Priced” Clause:** This final rule amends DFARS 252.204-7002, Payment for Subline Items Not Separately Priced, to simplify it.

The value of a contract line item or subline item that is “not separately priced” (NSP) is included in the price of another contract line or subline item, and it is necessary to withhold payment on the priced contract line or subline item until the related NSP item has been delivered. As an example, a gallon of paint might be priced at \$40 and a wooden paint stirrer might be “NSP.” This means the two are acquired together for a single price; the unit price of the NSP stirrer is included in the unit price of the paint.

DFARS 252.204-7002(b) stated, “The contractor shall not invoice the government for any portion of a contract line item or exhibit line item which contains an NSP until: (1) the contractor has delivered the total quantity of all related contract subline items or exhibit subline items; and (2) the government has accepted them.” This was interpreted by some as meaning the contractor is prohibited from billing for any portion of a contract line or subline item that is associated with an NSP item until all of the NSP items have also been delivered to and accepted by the government.

To clarify DFARS 252.204-7002(b), the following language was proposed: “The contractor shall not invoice the government for an item that includes in its price an NSP item until: (1) the contractor has also delivered the NSP item included in the price of the item being invoiced; and (2) the government has accepted the NSP item.”

No respondents submitted comments on the proposed rule, so the proposed rule is finalized without changes. For more on the proposed rule, see the November 2019 *Federal Contracts Perspective* article “DFARS Clauses and Provisions All Scrambled Up.”

■ **Modification of “Advanced Payment Pool” Clause:** This final rule amends DFARS 252.232-7000, Advance Payment Pool, to incorporate the information currently included in DFARS 252.232-7001, Disposition of Payments.

Advance payments are advances of money by the government to a prime contractor which are liquidated from payments due the contractor for delivery of the contracted supplies or services. It is the least preferred method of contract financing.

An advance payment pool agreement is a means of financing the performance of more than one contract held by a single contractor (see DFARS 232.470, Advance Payment Pool).

FAR 52.232-12, Advanced Payments, is included in all solicitations and contracts under which the government will provide advance payments. The clause advises contractors that advance payment will be made via a letter of credit or submission of a properly certified and approved invoice.

DFARS 252.232-7000, which supplements FAR 52.232-12, is included in all contracts that will be subject to an advance payment pool agreement with a nonprofit organization or educational institution, and it notifies contractors that “advance payments will be made in accordance with the findings, determinations, and authorization for advance payment...[and the] terms and conditions of the advance payment pool agreement...”

DFARS 252.232-7001, Disposition of Payments, was also included in contracts subject to an advanced payment pool agreement with a nonprofit organization or educational institution, but only when advance payments were to be made by the disbursing office not designated in the advance payment pool agreement (that is, when a letter of credit has not been issued under the contract and the contractor must submit an invoice of voucher in accordance with FAR 52.232-

12). DFARS 252.232-7001, which supplements FAR 52.232-12, clarifies for contractors that advance payments will be made by a dual Treasury check forwarded to the disbursing office (that is, the financial institution) for distribution to the contractor.

To streamline the contract terms and conditions, it was proposed that DFARS 252.232-7000 be amended by adding the following as paragraph (c): “When a letter of credit has not been issued to the contractor in conjunction with the contract, payment will be by a dual payee Treasury check made payable to the contractor or the disbursing office in the advance payment pool agreement and will be forwarded to that disbursing office for appropriate disposition.” Since this new paragraph (c) is essentially the complete text of DFARS 252.232-7001, DFARS 252.232-7001 would be unnecessary and was proposed for removal.

No respondents submitted comments on the proposed rule, so the proposed rule is finalized without changes. For more on the proposed rule, see the November 2019 *Federal Contracts Perspective* article “DFARS Clauses and Provisions All Scrambled Up.”

■ **Proposed Repeal of “Alternate Preservation, Packaging, and Packing” Provision:** This proposed rule would delete DFARS 252.211-7004, Alternate Preservation, Packaging, and Packing, because it is no longer necessary.

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

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

Comments on this proposed rule must be submitted no later than June 8, 2020, identified as “DFARS Case 2019-D022,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) email: [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil); (3) fax: 571-372-6094; or (4) mail: Defense Acquisition Regulations System, Attn: Carrie Moore, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Proposed Repeal of “Substitutions for Military or Federal Specifications and Standards” Clause:** This rule proposes to delete DFARS 252.211-7005, Substitutions for Military or Federal Specifications and Standards, and DFARS 211.273, Substitutions for Military or Federal Specifications and Standards, because they are no longer necessary.

DFARS 252.211-7005 is included in solicitations and contracts for the acquisition of previously developed items. It encourages offerors to propose Single Process Initiative (SPI) processes in place of military or federal specifications; provides a link to a Defense Contract

Management Agency guidebook that lists currently accepted SPI processes; and requires the offeror, when proposing to use an SPI process, to provide certain information with its offer. **(EDITOR'S NOTE: DFARS 252.211-7005(a) defines "SPI process" as "a management or manufacturing process that has been accepted previously by the Department of Defense under the Single Process Initiative (SPI) for use in lieu of a specific military or federal specification or standard at specific facilities. Under SPI, these processes are reviewed and accepted by a Management Council, which includes representatives of the Contractor, the Defense Contract Management Agency, the Defense Contract Audit Agency, and the military departments.")**

DFARS 211.273 provides DOD contracting officers internal guidance on the use and acceptance of SPI processes, and includes the prescription for DFARS 252.211-7005.

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

Since the implementation of the SPI, acquisition reform efforts have provided additional latitude to contracting officers and contractors to utilize performance specifications and commercial standards, in lieu of military and federal specifications and standards. As a result, the use of SPI has declined since its inception, so DFARS 252.211-7005 and DFARS 211.273 are no longer necessary and can be proposed for removal.

Comments on this proposed rule must be submitted no later than June 8, 2020, identified as "DFARS Case 2019-D023," 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: Carrie Moore, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **Inflation Adjustment of Acquisition-Related Thresholds:** This proposed rule would make adjustments to acquisition-related dollar thresholds in accordance with Title 41 of the U.S. Code, Section 1908 (41 USC 1908), Inflation Adjustment of Acquisition-Related Dollar Thresholds, which requires that each acquisition-related dollar threshold provided by law be adjusted on October 1 of each year evenly divisible by five, such as this year – 2020. In addition, as a matter of policy, DOD is proposing to use the same methodology to adjust some nonstatutory DFARS acquisition-related thresholds on October 1, 2020.

The following are the adjustments being proposed:

- In paragraph (b)(2)(ii) of DFARS 203.1004, Contract Clauses [for contractor code of business ethics and conduct], the threshold for including DFARS 252.203-7004, Display of Hotline Posters, in solicitations and contracts would be increased from \$5.5 million to \$6 million.
- In DFARS 205.303, Announcement of Contract Awards, the threshold for public announcement is increased from \$7 million to \$7.5 million (increase applies to all other appearances of "\$7 million" in DFARS 205.303).

- In DFARS 205.470, Contract Clause, the threshold for including DFARS 252.205-7000, Provision of Information to Cooperative Agreement Holders, in solicitations and contracts would be increased from \$1,000,000 to \$1,500,000.
- In paragraph (b) of DFARS 211.503, Contract Clauses, the threshold for including FAR 52.211-12, Liquidated Damages – Construction, in construction contracts would be increased from \$700,000 to \$750,000.
- In DFARS 212.271, Limitation on Acquisition of Right-Hand Drive Passenger Sedans, the limitation on the price per vehicle would be increased from \$40,000 to \$45,000.
- In paragraphs (d)(1)(iv) and (d)(5) of DFARS 217.170, General [for multiyear contracting], the cancellation ceiling would be increased from \$135.5 million to \$150 million.
- In paragraph (d) of DFARS 217.171, Multiyear Contracts for Services, the limit on the use of a multiyear contract for services would be increased from \$678.5 million to \$750 million.
- In paragraphs (c), (d), (f)(1), and (f)(2) of DFARS 217.172, Multiyear Contracts for Supplies, the limit on the use of a multiyear contract for supplies would be increased from \$678.5 million to \$750 million.
- In paragraph (a)(1) of DFARS 219.502-2, Total Set-Asides, the threshold under which construction contracts are to be set aside for small businesses would be increased from \$2.5 million to \$3 million.
- In paragraphs (a) and (b) of DFARS 225.7204, Solicitation Provision and Contract Clauses, the threshold for inclusion of DFARS 252.225-7003, Report of Intended Performance Outside the United States and Canada – Submission with Offer, in solicitations, and DFARS 252.225-7004, Report of Intended Performance Outside the United States and Canada – Submission After Award, in solicitations and contracts, would be increased from \$13.5 million to \$15 million.
- In paragraphs (b)(2)(i) and (b)(2)(ii) of DFARS 225.7703-2, Determination Requirements [for enhanced authority to acquire products or services from Afghanistan], the threshold for making determinations is increased from \$93 million to \$100 million.
- In the introductory text and paragraph (1) of DFARS 228.102-1, General [for performance and payment bonds for construction contracts], the threshold for fixed-price construction contracts would be increased from \$35,000 to \$40,000.
- In paragraphs (a)(4)(i) and (a)(4)(ii) of DFARS 236.303-1, Phase One [of two-phase design-build selection procedures], the threshold for selecting the number of offerors to submit phase-two proposals would be increased from \$4 million to \$4.5 million.

- In paragraphs (a)(1) and (a)(2) of DFARS 237.170-2, Approval Requirements [for contracts and task orders for services], the threshold for obtaining approval of services through a contract or task order that is not performance-based, would be increased from \$93 million to \$100 million.
- In the introductory text of DFARS 246.402, Government Contract Quality Assurance at Source, the threshold for requiring government contract quality assurance at source would be increased from \$300,000 to \$350,000.
- In paragraph (b) of DFARS 250.102-1, Delegation of Authority [for “residual powers” under Public Law 85-804], the limitation on the delegation authority would be increased from \$70,000 to \$75,000.
- In paragraph (b)(1) of DFARS 250.102-1-70, Delegations, the threshold for requests to obligate the government would be increased from \$70,000 to \$75,000.
- In paragraph (b)(1) of DFARS 252.225-7003, Report of Intended Performance Outside the United States and Canada – Submission of Offer, the threshold for submitting a report of intended performance outside the United States and Canada would be increased from \$13.5 million to \$15 million. In addition, in DFARS 252.225-7003(b)(2)(i), the threshold for an offeror to submit a report of a first-tier subcontractor’s intended performance outside the United States and Canada would be increased from \$700,000 to \$750,000.

Comments on this proposed rule must be submitted no later than June 8, 2020, identified as “DFARS Case 2019-D036,” 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: Kimberly Ziegler, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

For more on the last inflation adjustment to acquisition-related thresholds, see the August 2015 *Federal Contracts Perspective* article “FAC 2005-83 Adjusts Federal Acquisition-Related Thresholds, Makes FAR Subpart 13.5 Permanent,” and the July 2015 *Federal Contracts Perspective* article “DOD Adjusts Acquisition Thresholds to Reflect Changes in Consumer Price Index Since 2010.”

■ **Expediting Contract Closeout:** This proposed rule would add DFARS 252.204-70XX, Expediting Contract Closeout, which would provide for expedited contract closeout through a waiver by the contractor and the government of entitlement to any residual dollar amounts that are due to either party at the time of final contract closeout, thus saving administrative costs for both the contractor and the government.

DFARS 252.204-70XX would provide that “both the government and the contractor agree to waive any entitlement that otherwise might accrue to either party in any residual dollar amount of \$1,000 or less at the time of final contract closeout.” This would reduce the amount of time and money expended on reconciling small dollar residual dollar amounts in order to close out contracts.

The prescription for DFARS 252.204-70XX would be included in new DFARS 204.804-70, Contract Clause.

Comments on this proposed rule must be submitted no later than June 8, 2020, identified as “DFARS Case 2017-D042,” 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: Kimberly Bass, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

■ **DOD Deviation 2020-O0008 on Limitations on Subcontracting for Small Business:** This deviation implements revisions made by the Small Business Administration (SBA) to its regulations. “These revisions changed and standardized the limitations on subcontracting and the nonmanufacturer rule with which small businesses must comply under government contracts awarded pursuant to the set-aside, sole source, or HUBZone [Historically Underutilized Business Zone] price evaluation preference authorities of the Small Business Act. This class deviation updates the limitations on subcontracting and the nonmanufacturer rule for all small businesses in the clauses relating to awards under FAR part 19 [Small Business Programs].” (For more on the SBA regulation changes, see the December 2019 *Federal Contracts Perspective* article “SBA Takes on Small Business Contracting Programs.”)

The changes SBA made regarding limitations on subcontracting in Title 13 of the Code of Federal Regulations (CFR), Section 125.6 (13 CFR 125.6), What are the prime contractor's limitations on subcontracting?, provide that when an acquisition greater than the simplified acquisition threshold (\$250,000) is awarded or set-aside under a socioeconomic program (that is, SBA’s 8(a) program, HUBZone program, service-disabled veteran-owned small business [SDVOSB] program, women-owned small business (WOSB) program, or economically disadvantaged women-owned small business [EDWOSB] program), a small business competing for the set-aside award must agree that it will not subcontract more than 50% of the contract amount to firms that are not “similarly situated” (85% for construction contracts).

13 CFR 125.1, What definitions are important to SBA’s Government Contracting Programs?, defines a “similarly situated entity” as “a subcontractor that has the same small business program status as the prime contractor.” For example, a contractor that wins an SDVOSB set-aside for services may not subcontract more than 50% to non-SDVOSBs – subcontracts to SDVOSBs do not count against the 50% limitation. In addition, under supply and construction contracts, the cost of materials are excluded and not considered subcontracted. For services, “other direct costs may be excluded to the extent they are not the principal purpose of the acquisition and small business concerns do not provide the service, such as airline travel, work performed by a transportation or disposal entity under a contract assigned the environmental remediation NAICS [North American Industry Classification System] code (562910), cloud computing services, or mass media purchases.”

Regarding the nonmanufacturer rule, which requires that small businesses that receive a set-aside award or an 8(a) contract must provide the product of a small business manufacturer or processor if the contract recipient is not the actual manufacturer or processor, the SBA amended 13 CFR 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?, to clarify that the nonmanufacturer rule does not apply to small business set-aside contracts valued below the simplified acquisition threshold (\$250,000).

This deviation provides contract clauses that incorporate the SBA’s revised limitations on subcontracting and the nonmanufacturer rule and are to be used in place of the corresponding

FAR clauses. The deviation contract clauses are to be included in solicitations, contracts, and task or delivery orders that are conducted under the procedures in FAR part 19 as follows:

– **Small Business Concerns**

- Use FAR 52.219-6, Notice of Total Small Business Set-Aside (DEVIATION 2020-00008), in place of FAR 52.219-6 and FAR 52.219-33, Nonmanufacturer Rule.
- Use FAR 52.219-7, Notice of Partial Small Business Set-Aside (DEVIATION 2020-00008), in place of FAR 52.219-7 and FAR 52.219-33.
- Use FAR 52.219-14, Limitations on Subcontracting (DEVIATION 2020-00008), in place of FAR 52.219-14.

– **8(a) Program Participants**

- Use FAR 52.219-14, Limitations on Subcontracting (DEVIATION 2020-00008), in place of FAR 52.219-14 for competitive 8(a) procurements and 8(a) sole-source awards.
- Use FAR 52.219-33, Nonmanufacturer Rule (DEVIATION 2020-00008), in place of FAR 52.219-33 for 8(a) sole-source awards only.

– **HUBZone Small Business Concerns**

- Use FAR 52.219-3, Notice of HUBZone Set-Aside or Sole Source Award (DEVIATION 2020-00008), in place of FAR 52.219-3 and FAR 52.219-33.
- Use FAR 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns (DEVIATION 2020-00008), in place of FAR 52.219-4 and FAR 52.219-33.
- Contracting officers shall not use Alternate I of FAR 52.219-3 or Alternate I of FAR 52.219-4. These alternates conflict with the attached deviation clauses.

- **SDVOSB Concerns:** Use FAR 52.219-27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside (DEVIATION 2020-00008), in place of FAR 52.219-27 and FAR 52.219-33.

- **EDWOSB Concerns:** Use FAR 52.219-29, Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns (DEVIATION 2020-00008), in place of FAR 52.219-29 and FAR 52.219-33.

- **WOSB Concerns Eligible under the WOSB Program:** Use FAR 52.219-30, Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program (DEVIATION 2020-00008), in place of FAR 52.219-30 and FAR 52.219-33.

## TWO PROPOSED FAR RULES AND A DEVIATION ISSUED

Just because the COVID-19 is monopolizing everyone's attention doesn't mean that the FAR can be ignored. There are provisions of National Defense Acquisition Acts that need to be incorporated into the FAR, and provisions that need to be incorporated while the FAR Council finalizes changes to the FAR. During April, the FAR Council issued two proposed rules and a FAR deviation (applicable only to civilian agencies) to implement provisions of three different NDAA's.

■ **Construction Contract Administration:** This proposed rule would add FAR 36.524, Notice to Offerors Regarding Administration of Change Orders for Construction, and FAR 52.236-XX, Notice Regarding Administration of Change Orders for Construction, to implement the NDAA for FY 2019 (Public Law 115-232), Section 855, Construction Contract Administration, which requires agencies to provide a notice with solicitations for construction contracts anticipated to be awarded to small businesses to prospective offerors, including information about the agency's policies or practices in complying with FAR requirements related to the timely definitization of requests for equitable adjustment on construction contracts. In addition, the agency must provide its past performance information for the 3-year period preceding the issuance of the notice.

The rule proposes to make the following changes to the FAR:

- New FAR 36.524 would contain the prescription for the new FAR 52.236-XX (“the contracting officer shall insert the provision...in solicitations for construction that are set aside, or will be awarded on a sole-source basis, pursuant to [FAR] part 19 [Small Business Programs]. This provision does not apply to the acquisition of commercial items using [FAR] part 12 [Acquisition of Commercial Items] procedures.”)

In addition, FAR 36.524 would direct the contracting officer to “complete the fill-ins [in the provision] to provide: (1) information to offerors about the agency's policies or procedures in complying with requirements relating to timely definitization of requests for equitable adjustment for change orders for construction; and (2) data for the prior 3 fiscal years, available at [website to be determined], regarding the time required to definitize requests for equitable adjustment for change orders for construction...”

- Additional coverage is proposed for FAR 43.204, Administration [of change orders]. A new paragraph (b)(3)(ii) would be added to instruct contracting offices and contract administration offices to use a specific website (to be determined) to collect data on the time required to definitize unpriced change orders for construction contracts. The data will be used in FAR 52.236-XX.
- FAR 52.236-XX states that “this provision provides information relating to the definitization of requests for equitable adjustment for change orders under construction contracts.” It cross-references FAR 43.204, and states that “the agency issuing this solicitation has established the following policies or procedures that apply to definitization of requests for equitable adjustment for change orders under construction contracts: \_\_\_\_\_. [Contracting officer insert description of applicable policies or procedures, or address of a publicly accessible website containing this information. If no applicable policies or procedures exist, insert ‘None.’].”

Finally, FAR 52.236-XX requires the contracting officer to identify where information on the agency's past performance in definitizing requests for equitable

adjustment associated with change orders for construction is available: either a publicly accessible website or in a table with various time periods and the number of requests for equitable adjustment that were definitized during each time period during the prior three years.

Comments on this proposed rule must be submitted no later than June 1, 2020, identified as “FAR Case 2018-020,” by either of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; or (2) mail: General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, 2nd Floor, ATTN: Lois Mandell, Washington, DC 20405.

■ **Consolidation and Substantial Bundling:** This rule proposes to amend FAR 7.107-5, Notifications [of bundled or consolidated requirements], to implement the NDAA for FY 2016 (Public Law 114-92), Section 863, Notice of Contract Consolidation for Acquisition Strategies, which requires public notification of an agency’s determination to substantially bundle or consolidate contract requirements.

Section 863 requires publication of a notice when the head of a contracting agency (HCA) determines that an acquisition plan for a procurement involves substantial bundling of contract requirements. Not later than seven days after making such a determination, the HCA must publish a notice on a public website that such determination has been made. Any solicitation for a procurement related to the acquisition plan may not be published until at least seven days have passed since such notice was published, and the solicitation must include a copy of the justification for making the determination. The justification must address the specific benefits anticipated, any alternative approaches, impediments to participation by small business concerns as prime contractors, and actions designed to maximize participation of small business concerns as subcontractors.

In addition, Section 863 requires publication of a notice when the senior procurement executive (SPE) or chief acquisition officer (CAO) makes a determination that an acquisition strategy involving consolidation of contract requirements is necessary and justified. Not later than seven days after making such a determination, the SPE or CAO must publish a notice on a public website that such determination has been made. Any solicitation for a procurement related to the acquisition strategy may not be published until at least seven days have passed since such notice was published, and the solicitation must include a copy of the justification for making the determination. **(EDITOR’S NOTE:** SBA published a rule implementing Section 863 that is very similar to the Section 863 language – see the December 2019 *Federal Contracts Perspective* article “SBA Takes on Small Business Contracting Programs.”)

To implement Section 863, the proposed rule would add a paragraph (c) that would specify the Section 863 notification procedures for consolidation of contract requirements, and a paragraph (d) that would specify the Section 863 notification procedures for substantial bundling of contract requirements. In addition, it would add a paragraph (f) which would require the agency to publish on its website a list and rationale for any bundled requirement for which the agency solicited offers or issued an award. Finally, paragraph (g) of FAR 5.205, Special Situations [for synopses of proposed contract actions], would be amended to add a reference to the FAR 7.017-5(c) and (d) notification requirements.

Comments on this proposed rule must be submitted no later than June 26, 2020, identified as “FAR Case 2019-003,” by either of the following methods: (1) the Federal eRulemaking Portal:

<http://www.regulations.gov>; or (2) mail: General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, 2nd Floor, ATTN: Lois Mandell, Washington, DC 20405.

■ **Deviation Provide for Accelerated Payments to Small Business Contractors and**

**Subcontractors:** This CAAC memorandum permits civilian agencies to authorize class deviations to implement the NDAA for FY 2020 (Public Law 116-92), Section 873, Accelerated Payments Applicable to Contracts with Certain Small Business Concerns Under the Prompt Payment Act, which provides for accelerated payments to contractors that are small businesses, and to small business subcontractors by accelerating payments to their prime contractors.

Section 873 amends 31 USC 3903, Regulations [for prompt payment], which requires that agencies: (1) “establish an accelerated payment date [for small business contractors] with a goal of 15 days after a proper invoice for the amount due is received if a specific payment date is not established by contract;” and (2) establish an accelerated payment date [for prime contractors that subcontract with small businesses] with a goal of 15 days after a proper invoice for the amount due is received if (A) a specific payment date is not established by contract; and (B) such prime contractor agrees to make payments to such subcontractor in accordance with such accelerated payment date, to the maximum extent practicable, without any further consideration from or fees charged to such subcontractor.”

This memorandum authorizes agencies to deviate from FAR 32.009, Providing Accelerated Payments to Small Business Subcontractors (retitled “Providing Accelerated Payments to Small Business Contractors and to Prime Contractors that Subcontract with a Small Business Concern”), and revises FAR 32.009-1, General [for providing accelerated payments], to state, “...agencies shall provide accelerated payments, to the fullest extent permitted by law, with a goal of 15 days after receipt of a proper invoice and all other required documentation, if a specific payment date is not established by contract, to (1) small business contractors, and 2) prime contractors that subcontract with a small business concern, if the prime contractor agrees to make payments to the small business subcontractor in accordance with the accelerated payment date, to the maximum extent practicable, without any further consideration from or fees charged to the subcontractor.”

In addition, FAR 52.232-40, Providing Accelerated Payments to Small Business Subcontractors (DEVIATION APR 2020), incorporates the same changes that were made to FAR 32.009-1.

While DOD, NASA, and GSA (the members of the FAR Council) are formally incorporating the changes into the FAR, the CAAC has issued this memorandum, which serves as consultation in accordance with FAR 1.404, Class Deviations, thus allowing agencies to deviate from the FAR. FAR 1.404(a)(1) states “an agency official who may authorize a class deviation, before doing so, shall consult with the chairperson of the Civilian Agency Acquisition Council...”

The Department of Homeland Security (DHS), the Department of Health and Human Services (HHS), the Department of the Treasury, and GSA have used this memorandum as their “consultations” with CAAC and issued their own deviations on the subject.

**EDITOR’S NOTE:** DOD, the National Aeronautics and Space Administration [NASA] and the Coast Guard are not covered by this memorandum because they are *not* members of the CAAC and must take actions on their own if they cannot wait for the implementation of the FAR rule. DOD has already taken such action; see the preceding article for DOD’s final rule amending the DFARS on this matter.

## **NONMANUFACTURER RULE WAIVER FOR DIABETIC TEST STRIPS**

The Small Business Administration (SBA) is proposing to issue a nonmanufacturer rule waiver for diabetic test stripes under Product Service Code (PSC) 6515, Medical and Surgical Instruments, Equipment, and Supplies, North American Industry Classification System (NAICS) code 325413, In-Vitro Diagnostic Substance Manufacturing.

SBA is inviting the public to comment on this proposed waiver or to provide information on potential small business sources on any small business manufacturers of this class of products that are available to participate in the federal market by May 20, 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 if the recipient is not the actual manufacturer (see paragraph (c) of FAR 19.505, Limitations on Subcontracting and Nonmanufacturer Rule). This is called the "nonmanufacturer rule." However, SBA may waive this requirement if there are no small business manufacturers of the product.

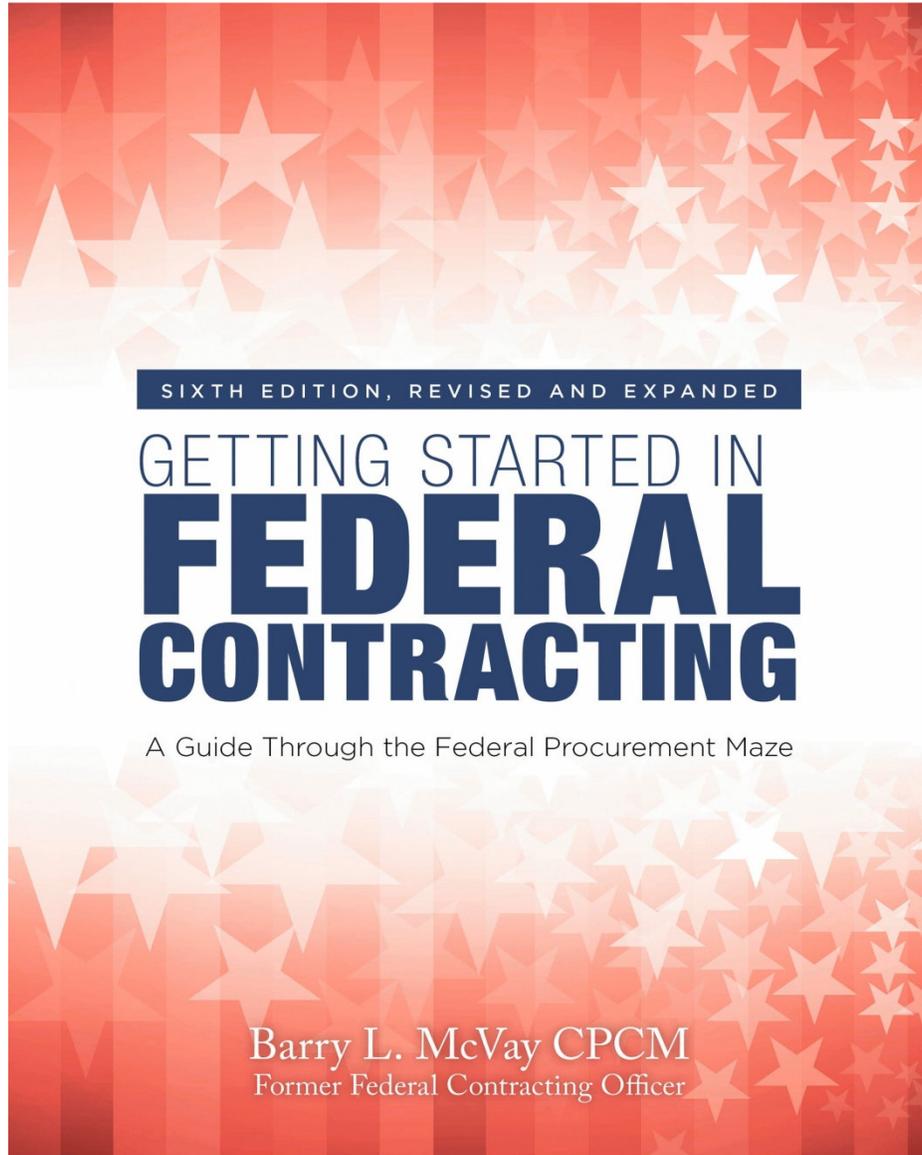
The SBA regulation on the nonmanufacturer rule is in Title 13 of the Code of Federal Regulations (CFR), Business and Credit Administration; Part 121, Small Business Size Standards; under paragraph (b) of Section 121.406, How does a small business concern qualify to provide manufactured products or other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

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

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