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FAC 2020-06 APPLIES ACQUISITION-RELATED THRESHOLD INFLATION ADJUSTMENTS TO EXISTING CONTRACTS

Federal Acquisition Circular (FAC) 2020-06 is essentially a mop-up action, finalizing rules that had been in the works for a while: one makes inflation adjustments of acquisition-related thresholds applicable to existing contracts on the date of the adjustment; another removes the portions of the Federal Acquisition Regulation (FAR) that required service contractors and their subcontractors to offer employees of the predecessor contractor and its subcontractors a right of first refusal of employment; and the last one establishes regulations for the imposition of a tax on payments made by the U.S. government to foreign persons.

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■ **Applicability of Inflation Adjustments of Acquisition-Related Thresholds:** This finalizes the rule that proposed to implement the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Public Law 115-91), Section 821, Amendment Relating to Applicability of Inflation Adjustments, which makes inflation adjustments of statutory acquisition-related thresholds applicable to existing contracts and subcontracts in effect on the date of the adjustment.

Title 41 of the U. S. Code, Section 1908, Inflation Adjustment of Acquisition-Related Dollar Thresholds (41 USC 1908), requires that statutory acquisition-related thresholds be adjusted every five years for inflation (except for thresholds under the Construction Wage Rate Requirements statute [formerly known as the Davis-Bacon Act], the Service Contract Labor Standards statute [formerly known as the Service Contract Act], and trade agreements thresholds). The last time thresholds in the FAR were adjusted was in 2015 (see the August 2015 ***Federal Contracts Perspective*** article "FAC 2005-83 Adjusts Federal Acquisition-Related Thresholds, Makes FAR Subpart 13.5 Permanent").

41 USC 1908(d) had stated "The [Federal Acquisition Regulatory] Council shall publish a notice of the adjusted dollar thresholds under this section in the ***Federal Register***. The thresholds take effect on the date of publication." Section 821 added to the end of 41 USC 1908(d) "and shall apply, in the case of the procurement of property or services by contract, to a contract, and any subcontract at any tier under the contract, in effect on that date without regard to the date of award of the contract or subcontract", so that it now states "The Council shall publish a notice of the adjusted dollar thresholds under this section in the ***Federal Register***. The thresholds take effect on the date of publication and shall apply, in the case of the procurement of property or services by contract, to a contract, and any subcontract at any tier under the contract, in effect on

that date without regard to the date of award of the contract or subcontract." Therefore, if acquisition-related thresholds are adjusted under 41 USC 1908 during the life of a contract, then that contract and all of its subcontracts are subject to the adjusted thresholds.

To implement Section 821, the following were the significant changes proposed to the FAR:

- Throughout the FAR, numerical values that are based on the value of the micro-purchase threshold or the simplified acquisition threshold would be replaced with the "micro-purchase threshold" or "simplified acquisition threshold."

- The following paragraph (d) would be added to FAR 1.109, Statutory Acquisition-Related Dollar Thresholds – Adjustment for Inflation: "The statute [41 USC 1908], as amended by Section 821 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91), requires the adjustment described in paragraph (a) of this section be applied to contracts and subcontracts without regard to the date of award of the contract or subcontract. Therefore, if a threshold is adjusted for inflation as set forth in paragraph (a) of this section, then the changed threshold applies throughout the remaining term of the contract, unless there is a subsequent threshold adjustment." (**EDITOR'S NOTE:** FAR 1.109(a) states "41 USC 1908 requires that the FAR Council periodically adjust all statutory acquisition-related dollar thresholds in the FAR for inflation...This adjustment is calculated every 5 years, starting in October 2005, using the Consumer Price Index (CPI) for all-urban consumers, and supersedes the applicability of any other provision of law that provides for the adjustment of such acquisition-related dollar thresholds.")

- The following paragraph (e) would be added to FAR 52.202-1, Definitions: "When a solicitation provision or contract clause uses a word or term that is defined in the Federal Acquisition Regulation (FAR), the word or term has the same meaning as the definition in FAR 2.101 [Definitions] in effect at the time the solicitation was issued, unless...(e) The word or term defines an acquisition-related threshold (*i.e.*, "micro-purchase threshold" or "simplified acquisition threshold"), and if the threshold is adjusted for inflation as set forth in FAR 1.109(a), then the changed threshold applies throughout the remaining term of the contract, unless there is a subsequent threshold adjustment; see FAR 1.109(d)." Also, several other FAR clauses were proposed to be amended to add language similar to that in FAR 52.202-1(e).

One respondent submitted comments on the proposed rule, but no changes were made to the final rule in response to those comments. However, the respondent suggested that a list be prepared, preferably in table form, of the actual calendar dates of threshold effectiveness. This has been done, and the table is available at **https://www.acquisition.gov/tableofeffectivedatesforMPTandSAT**.

Vivina McVay, Editor-in Chief

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In addition, editorial changes are made to three clauses to change the paragraph heading of "Flowdown" to "Subcontracts" to conform to FAR drafting conventions. This change is unrelated to the proposed rule.

For more on the proposed rule, see the July 2019 ***Federal Contracts Perspective*** article "Two FAR Amendments Proposed."

■ **Revocation of Executive Order on Nondisplacement of Qualified Workers:** This final rule implements Executive Order (EO) 13897, Improving Federal Contractor Operations by Revoking Executive Order 13495. EO 13495, Nondisplacement of Qualified Workers Under Service Contracts, required service contractors and their subcontractors to offer employees of the predecessor contractor and its subcontractors a right of first refusal of employment for positions for which they are qualified.

EO 13495 was implemented with the addition of FAR subpart 22.12, Nondisplacement of Qualified Workers Under Service Contracts, and FAR 52.222-17, Nondisplacement of Qualified Workers, by FAC 2005-64 (for more on EO 13495, see the March 2009 ***Federal Contracts Perspective*** article "Obama Issues Four Labor-Related Executive Orders"; for more on FAC 2005-64, see the January 2013 ***Federal Contracts Perspective*** article "FAR Amended to Require Nondisplacement of Predecessor Service Contractor's Employees").

To implement EO 13897, this final rule removes FAR subpart 22.12 and FAR 52.222-17. For more on EO 13897, see the December 2019 ***Federal Contracts Perspective*** article "EO Ordering Nondisplacement of Employees Rescinded."

■ **Tax on Certain Foreign Procurement:** This finalizes, without changes, the rule that proposed to amend FAR part 29, Taxes, and add FAR 52.229-11, Tax on Certain Foreign Procurements – Notice and Representation, and FAR 52.229-12, Tax on Certain Foreign Procurements, to implement the Department of the Treasury regulations at Title 26 of the Code of Federal Regulations (CFR), Section 1.5000C (26 CFR 1.5000C).

The James Zadroga 9/11 Health and Compensation Act of 2010 (Public Law 111-347), Section 301, Excise Tax on Certain Foreign Procurement, imposes a 2% tax on payments made by the U.S. government to foreign persons for "(1) the provision of goods, if such goods are manufactured or produced in any country which is not a party to an international procurement agreement with the United States, or (2) the provision of services, if such services are provided in any country which is not a party to an international procurement agreement with the United States." Section 301 became codified as Section 5000C of Title 26 of the U.S. Code, which is the Internal Revenue Code (26 USC 5000C). 26 CFR 1.5000C, Tax on Specified Federal Procurement Payments, consists of the Treasury regulations that implement 26 USC 5000C. (For more on the IRS regulations, see the September 2016 ***Federal Contracts Perspective*** article "IRS Issues Regulations on 2% Foreign Procurement Tax.")

To comply with 26 USC 5000C and Treasury's implementing regulations at 26 CFR 1.5000C, the rule proposed the following changes to the FAR:

– FAR 29.204, Federal Excise Tax on Specific Foreign Contract Payments, would be added. It would explain the excise tax requirements to contracting officers ("agencies [must] collect this excise tax via withholding on applicable contract payments…Agencies merely withhold the tax…for the Internal Revenue Service (IRS). All substantive issues regarding the underlying Section 5000C tax, *e.g.*, the imposition of, and exemption from

the tax, are matters under the jurisdiction of the IRS"). In addition, it states that "exemptions from the withholding in the IRS regulations at 26 CFR 1.5000C-1(d)(1) through (d)(4) are captured under the provision prescription at [FAR] 29.402-3(a) (*i.e.*, the contracting officer will not include the provision [FAR 52.229-11] when one of the [FAR] 29.402-3(a) exceptions applies)...The exemptions at 26 CFR 1.5000C-1(d)(5) through (d)(7) must be claimed by the offeror when it submits an IRS Form W-14 [Certificate of Foreign Contracting Party Receiving Federal Procurement Payments] with the offer. If not submitted with the offer, exemptions will not be applied to the contract."

– FAR 29.402-3, Tax on Certain Foreign Procurements, would require the inclusion of FAR 52.229-11 in solicitations, including solicitations conducted under the procedures in FAR part 12, Acquisition of Commercial Items, unless one of the exceptions in 26 CFR 1.5000C-1(d)(1) through (d)(4) applies: (d)(1) acquisitions under FAR part 13, Simplified Acquisition Procedures, that do not exceed the simplified acquisition threshold [$250,000]; (d)(2)(i) acquisitions using the authority in FAR 6.302-2, Unusual and Compelling Urgency; (d)(2)(ii) acquisitions using the procedures in FAR part 18, Emergency Acquisitions; (d)(3) contracts with an individual for personal services that will not exceed the simplified acquisition threshold on an annual calendar year basis for all years of the contract; and (d)(4) certain foreign humanitarian assistance contracts. (**EDITOR'S NOTE:** The 26 CFR 1.5000C-1(d)(5) through (d)(7) exemptions requiring an IRS Form W-14 are: (d)(5) payments made under certain international agreements; (d)(6) goods manufactured or produced or services provided in the U.S.; and (d)(7) goods manufactured or produced or services provided in a country that is a party to an international procurement agreement.)

  In addition, FAR 29.402-3 would require the inclusion of FAR 52.229-12 in: (1) solicitations that contain FAR 52.229-11; and (2) resultant contracts in which the contractor has indicated that it was a foreign person in FAR 52.229-11.

– FAR 52.229-11 would be added to notify offerors of the excise tax withholding requirements and to have them represent (1) whether they are a foreign person ("any person other than a United States person"), and (2) whether they would claim an exemption on the IRS Form W-14.

– FAR 52.229-12 wold be added to establish the excise tax withholding requirements. It includes the following definition for "United States person", which is taken from paragraph (a)(30) of 26 USC 7701, Definitions [used in IRS Code]: "(1) A citizen or resident of the United States, (2) a domestic partnership, (3) a domestic corporation, (4) any estate (other than a foreign estate...), and (5) any trust if – (i) a court within the United States is able to exercise primary supervision over the administration of the trust; and (ii) one or more United States persons have the authority to control all substantial decisions of the trust." In addition, it provides the IRS website address for questions relating to the interpretation of the IRS regulations: **https://www.irs.gov/help/tax-law-questions**.

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 "Three New FAR Rules Proposed."

RUNNING OUT OF ACTIONS TO TAKE AGAINST COVID-19

After the plethora of actions taken by the acquisition community to quell the COVID-19 pandemic (see the April 2020 ***Federal Contracts Perspective*** article "Coronavirus Overruns United States, Emergency Acquisition Authorities Invoked," and the May 2020 ***Federal Contracts Perspective*** article "Acquisition Community Fighting COVID-19 On a Multitude of Fronts"), there was not much left to do in May. However, that doesn't mean there were no actions taken to aid the federal government against COVID-19.

■ **Civilian Agency Acquisition Council (CAAC) Memorandum on FAR Deviation Eliminating Hard Copy Original Documents, Signatures, Notarization, and Seals:** This memorandum, issued May 1 by William Clark, Chairman of the CAAC, authorizes civilian agencies to issue class deviations from the FAR to eliminate hard copy original documents, signatures, notarization, seals on bonds, and other seals for certain contract requirements because it is difficult or impossible to obtain the services of notaries public during the COVID-19 pandemic.

"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." Besides, "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)] expressly authorizes agencies to 'accept electronic signatures and records in connection with government contracts.'"

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..."

This memorandum authorizes civilian agencies to deviate from specific portions of the FAR: (1) when obtaining financial protection against losses under contracts in accordance with FAR part 28, Bonds and Insurance; (2) when processing assignment of claims in accordance with FAR subpart 32.8, Assignment of Claims; and (3) when executing novation agreements and change-of-name agreements in accordance with FAR subpart 42.12, Novation and Change-of-Name Agreements. The Department of Health and Human Services (HHS), the Department of Homeland Security (DHS), the Department of the Interior (DOI), and the Department of Commerce have used this CAAC memorandum as the basis for their required consultations with the CAAC and issued their own deviations on the subject.

In addition, the General Services Administration (GSA) issued two deviations prior to the CAAC memorandum that, collectively, cover much the same subject matter as the CAAC memorandum: GSAR Deviation CD-2020-05, which allows its vendors and sureties to use electronic signatures in lieu of manual signatures, and eliminates the requirement for any seals for bonds; and GSAR Deviation CD-2020-10, which eliminates the requirement for hard copy original documents, notarization, and seals in several scenarios in connection with the COVID-19 (see the May 2020 ***Federal Contracts Perspective*** article "Acquisition Community Fighting COVID-19 On a Multitude of Fronts").

EDITOR'S NOTE: The Department of Defense (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 a FAR rule on the subject. DOD has taken such action and issued its own deviation that parallels the CAAC memorandum.

■ **CAAC Memorandum on FAR Deviation Regarding Customary Progress Payment Rates Based on Costs:** The Department of Commerce issued a deviation authorizing its contracting officers to increase the customary progress payment rates based on costs in paragraph (a) of FAR 32.501-1, Customary Progress Payment Rates, from 85% to 95% for small businesses, and from 80% to 90% for all other contractors in response to COVID-19. In doing so, the Department of Commerce joins GSA, HHS, and the DOI in issuing a deviation based on the CAAC memorandum on the same subject (see the May 2020 ***Federal Contracts Perspective*** article "Acquisition Community Fighting COVID-19 On a Multitude of Fronts").

DOD took a similar action earlier in the COVID-19 pandemic – see the April 2020 ***Federal Contracts Perspective*** article "Coronavirus Overruns United States, Emergency Acquisition Authorities Invoked," and the May 2020 ***Federal Contracts Perspective*** article "Acquisition Community Fighting COVID-19 on a Multitude of Fronts."

■ **GSA Memorandum on Purchase Exceptions From the AbilityOne Program in Response to COVID-19:** This memorandum, issued April 29 (but posted May 1) by Jerry Koses, GSA Senior Procurement Executive, provides a list of items on the AbilityOne Procurement List for which AbilityOne has granted temporary purchase exceptions (PEs) because nonprofit agencies (NPAs) cannot meet GSA's requirements within needed timeframes during the COVID-19 pandemic. "These purchase exceptions allow contracting officers to fill requirements utilizing non-Procurement List items (supplies or services) designated by the AbilityOne Commission as Essentially the Same (ETS) as those on the Procurement List."

The AbilityOne Program is one of the largest sources of employment in the United States for people who are blind or have significant disabilities. Approximately 500 nonprofit organizations employ these individuals and provide quality products and services to the federal government at a fair market price. GSA spends over $500,000,000 annually on products and services listed on the AbilityOne Procurement List.

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

While normally the Commission would grant a purchase exception to a particular contracting activity, "in the interest of efficiency for COVID-19, GSA leadership is coordinating all purchase exceptions directly with the AbilityOne Commission." The purchase exception list will be reviewed every 30 days for potential adjustments.

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

■ **DOD Memorandum on Procurement Integrated Enterprise Environment (PIEE) Capabilities:** This memorandum, issued May 5 by Kim Herrington, Acting Principal Director,

Defense Pricing and Contracting, highlights two capabilities recently added to the PIEE (**https://wawf.eb.mil**) that can enable exchanges of information with industry in a secure, traceable environment. This is particularly important "in light of the national emergency response to the COVID-19 pandemic, and the impact on secure exchanges of information that would normally travel via mail, in secure email, or in person delivery."

The two capabilities are:

- **Solicitation Module:** "The Solicitation Module enables posting of solicitations to a widespread or restricted audience. This includes the ability to post draft or final solicitations, amendments, and attachments. Government users can designate either the entire solicitation or specific attachments as limited to use by specific companies. Contractors are able to submit their proposals via the portal, and contracting personnel are then able to use the portal to distribute proposals to reviewers. The system does not yet enable posting required notices at Contract Opportunities at Beta.SAM [**https://beta.sam.gov/**], but this will be available in the coming months. In the interim, the solicitation module can be used for solicitations not requiring announcements, such as those under fair opportunity procedures, or by separately posting the notice at Beta.SAM with a link to the solicitation. The module was recently modified to also support submission of unsolicited proposals by industry."

- **Contracting Communications Module:** "The communication module in PIEE enables secure transmission of messages and files among the parties involved in administering a contract. This can avoid the need for sending sensitive information by less than secure means. The module is available by default to existing users who are contract specialists, contracting officers, contracting officer representatives, and acceptors, as well as the contractors."

LIST OF DOMESTICALLY NONAVAILABLE ITEMS TO BE UPDATED

The FAR Council is considering amending FAR 25.104, Nonavailable Items, to update the list of domestically nonavailable articles under the Buy American Act. The Council is seeking information that will assist in identifying domestic capabilities and for evaluating whether some articles on the list of domestically nonavailable articles are now mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

The Buy American Act (41 USC Chapter 83, Buy American) restricts the purchase of supplies that are not domestic end products. However, there are several exceptions listed in FAR 25.103, Exceptions. One of the exceptions is in paragraph (b), Nonavailability: "The Buy American statute does not apply with respect to articles, materials, or supplies if articles, materials, or supplies of the class or kind to be acquired, either as end items or components, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality."

FAR 25.104 lists the items for which a nonavailability determination has been made. The list is a comprehensive and wide-ranging mix of natural resources, compounds, materials, and other items of supply. Some articles on the list have no known domestic production sources (*e.g.*,

quartz crystals or vanilla beans); many of the articles are known to have some domestic production sources, but those sources have been determined in the past to be inadequate to meet U.S. demand – examples range from goat and kidskins (negligible domestic production), to crude iodine (5% of U.S. government and nongovernment demand), to bismuth (not in excess of 50% of U.S. government and nongovernment demand).

Besides these examples, the list includes items such as anise, bananas, unroasted Brazil nuts, English chalk, goat hair canvas, hog bristles for brushes, lavender oil, olive oil, quartz crystals, shellac, tea in bulk, and cobra venom.

The FAR Council is seeking information to determine whether some articles should be removed from the list because they are now mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. "Specific information with regard to domestic production capacity in relation to U.S. government and nongovernment demand and the quality of domestically produced items would be most helpful in determining whether articles should remain on or be removed from the list."

Comments regarding items on the nonavailability list must be submitted no later than July 13, 2020, identified as "FAR Case 2020-009," through the Federal eRulemaking Portal at **http://www.regulations.gov**.

EDITOR'S NOTE: FAR 25.104(b) requires that the list be reviewed every five years – the last time the list was published for review in 2015 (see the April 2015 ***Federal Contracts Perspective*** article "Comments Sought on Domestically Nonavailable Articles"). No changes were made to the list at that time.

DOD ISSUES DEVIATIONS BANNING CHINESE, RUSSIAN PRODUCTS

Besides the two COVID-19-related actions taken by DOD (see above article), DOD issued two deviations: one prohibiting the procurement of Chinese unmanned aircraft systems, the other prohibits the acquisition of energy produced inside the Russia Federation for U.S. operating bases in Europe. In addition, DOD issued two memoranda addressing acquisition data systems.

■ **Deviation Prohibiting the Procurement of Foreign-Made Unmanned Aircraft Systems:** This deviation implements the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Public Law 116-92), Section 848, Prohibition on Operation or Procurement of Foreign-Made Unmanned Aircraft Systems, which prohibits DOD from operating, entering into, or renewing a contract for:

- An unmanned aircraft system (UAS), or any related services or equipment, that:
    - Is manufactured in the People's Republic of China or by an entity domiciled in the People's Republic of China;
    - Uses flight controllers, radios, data transmission devices, cameras, or gimbals manufactured in the People's Republic of China or by an entity domiciled in the People's Republic of China;

- Uses a ground control system or operating software developed in the People's Republic of China or by an entity domiciled in the People's Republic of China; or

- Uses network connectivity or data storage located in, or administered by an entity domiciled in, the People's Republic of China; or

– A system for the detection or identification of a UAS, or any related services or equipment, that is manufactured in the People's Republic of China or by an entity domiciled in the People's Republic of China.

Section 848 permits the Secretary of Defense to waive the prohibition on a case-by-case basis by certifying in writing to the congressional defense committees that the procurement is required in the national interest of the United States.

This deviation requires the inclusion of Defense FAR Supplement (DFARS) 252.225-7972, Prohibition on the Procurement of Foreign-Made Unmanned Aircraft Systems (DEVIATION 2020-O0015), in all solicitations (including those for commercial items acquired through FAR part 12 procedures), and DFARS 252.225-7973 Prohibition on the Procurement of Foreign-Made Unmanned Aircraft Systems – Representation (DEVIATION 2020-O0015), in all contracts and solicitations (including those for commercial items acquired through FAR part 12 procedures) unless the Secretary of Defense has granted a waiver, or the acquisition is for (1) counter-unmanned aircraft system surrogate testing and training, or (2) intelligence, electronic warfare, and information warfare operations, texting, analysis, and training. DFARS 252.225-7972 (DEVIATION 2020-O0015) states the prohibition, and DFARS 252.225-7973 (DEVIATION 2020-O0015) contains the following representation: "By submission of its offer, the offeror represents that it will not provide or use: (1) a UAS [unmanned aircraft system]…in the performance of any contract, subcontract, or other contractual instrument resulting from this solicitation; and (2) a system for the detection or identification of a UAS…in the performance of any contract, subcontract, or other contractual instrument resulting from this solicitation."

■ **Deviation Prohibiting Use of Certain Energy Sourced from Inside the Russian Federation:** This deviation implements the NDAA for FY 2020 (Public Law 116-92), Section 2821, Improved Energy Security for Main Operating Bases in Europe, which prohibits the DOD from "the acquisition of furnished energy for a covered military installation in Europe [that uses] any energy sourced from inside the Russian Federation as a means of generating the furnished energy for the covered military installation." It defines "furnished energy" as "energy furnished to a covered military installation in any form and for any purpose, including heating, cooling, and electricity"; and "covered military installation" as "a military installation in Europe identified by the Department of Defense as a main operating base." Also, Section 2821 permits the Secretary of Defense to waive the prohibition if the secretary certifies to the congressional defense committees that the waiver is necessary to ensure an adequate supply of furnished energy for the covered military installation, and the secretary "has balanced these national security requirements against the potential risk associated with reliance upon the Russian Federation for furnished energy."

To implement Section 2821, this deviation requires the inclusion of DFARS 252.225-7971, Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation – Representation (DEVIATION 2020-O0018), in solicitations for the acquisition of furnished

energy for a covered military installation (including solicitations using FAR part 12 procedures for the acquisition of commercial items), and DFARS 252.225-7970, Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation (DEVIATION 2020-O0018), in solicitations and contracts for the acquisition of furnished energy for a covered military installation (including solicitations using FAR part 12 procedures for the acquisition of commercial items), unless the Secretary of Defense has granted a waiver.

DFARS 252.225-7971 (DEVIATION 2020-O0015) states the prohibition, and DFARS 252.225-7970 (DEVIATION 2020-O0015) contains the following representation: "By submission of its offer, the offeror represents that the offeror will not use any energy sourced from inside the Russian Federation as a means of generating the furnished energy for the covered military installation in the performance of any contract, subcontract, or other contractual instrument resulting from this solicitation."

■ **Memorandum Updating the Standard Procurement System (SPS) Sunset Date:** This memorandum forwards the April 28, 2020, memorandum signed by Ellen Lord, Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)), that establishes a new sunset date for the Standard Procurement System (SPS) for DOD (the SPS is the standardized automated procurement system for use by the DOD procurement community). The updated goal to sunset SPS is for no contracts, agreements, orders, or solicitations be awarded through SPS after September 30, 2023. Use of SPS for changes to documents issued prior to September 30, 2023, is expected to continue until September 30, 2026.

Previously, the sunset date for SPS was September 30, 2020, with the use of SPS for changes to documents issued prior to September 30, 2020, to continue through September 30, 2023.

"Although Department of Defense components committed to meeting the original SPS sunset," writes Undersecretary Lord, "only the Air Force has completed the transition from SPS to a new contracting capability. The Army and Navy have selected a replacement solution and are actively executing acquisition programs that will enable the transition from SPS in accordance with the new September 30, 2023, sunset date."

■ **Memorandum on Reporting Source Selection Process in the Federal Procurement Data System (FPDS):** This memorandum, issued May 21 by Kim Herrington, Acting Principal Director, Defense Pricing and Contracting, alerts the DOD contracting community of the new data element the General Services Administration (GSA) plans to deploy on June 26, 2020, to collect information about the source selection processes used to select offerors for award in the Federal Procurement Data System (FPDS – **https://www.fpds.gov**).

The new GSA data element "Source Selection Process" is being introduced in response to the NDAA for FY 2020 (Public Law 116-92), Section 806, Standardizing Data Collection and Reporting on Use of Source Selection Procedures by Federal Agencies, which requires GSA to "ensure that data are collected: (1) at a minimum, on the usage of the lowest price technically acceptable contracting methods and best value contracting methods process; and (2) on all applicable contracting actions, including task orders or delivery orders issued under indefinite delivery-indefinite quantity contracts."

The "Source Selection Process" data element will be a required data field for all new contract awards reported to FPDS except for basic ordering agreements (BOAs); blanket purchase agreements (BPAs) issued under FAR part 13, Simplified Acquisition Procedures; task and delivery orders issued using single-award indefinite-delivery contracts; and call orders issued

under single-award BPAs and using the procedures of FAR part 8, Required Sources of Supplies and Services.

Three choices will be provided for the "Source Selection Process" data element:

- "**Lowest Price Technically Acceptable (LPTA)** – Select this option if contract award used the LPTA source selection process. LPTA is defined in FAR 15.101-2 [Lowest Price Technically Acceptable Source Selection Process], but select this option if the process was used for competitive procurements conducted in accordance with other parts (*e.g.*, 8, 12 [Acquisition of Commercial Items], 13, 16 [Types of Contracts)."

- "**Trade-Off** – Select this option if contract award used any type of tradeoff process using price/cost and non-price/cost factors to determine the successful offeror award. Trade-off is defined in FAR 15.101-1 [Tradeoff Process], but select this option if the process was used for competitive procurements conducted in accordance with other parts (*e.g.*, 8, 12, 13, 16)."

- "**Other** – Select this option if contract award did not use LPTA or a Trade-off process, to determine the successful offeror (*e.g.*, price-only, sole-source)."

The DFARS Procedures, Guidance, and Information (PGI) 204.606, Reporting Data, will be updated to include instructions for this data element.

TWO SOCIO-ECONOMIC PROGRAMS' REGULATIONS AMENDED

The Small Business Administration (SBA) has issued two final rules on socio-economic programs it administers: one requires that participants in the Women-Owned Small Business Program be certified as eligible; and the other removes 16 sections of the small disadvantaged business regulations because they are obsolete.

■ **Women-Owned Small Business and Economically Disadvantaged Women-Owned Small Business Certification:** This finalizes, with changes, the rule that proposed to amend Title 13 of the Code of Federal Regulations (CFR), Part 127, Women-Owned Small Business Federal Contracting Program (13 CFR part 124), to implement a statutory requirement in the NDAA for FY 2015 (Public Law 113-291), Section 825, Sole Source Contracts for Small Business Concerns Owned and Controlled by Women, to certify women-owned small businesses (WOSB) and economically disadvantaged women-owned small businesses (EDWOSB) participating in the Women-Owned Small Business Contract Program. The certification requirement applies only to those businesses wishing to compete for set-aside or sole source contracts under the program. WOSBs that do not participate in the program may continue to self-certify their status and receive contract awards outside the program, and those awards will count toward an agency's goal for awards to WOSBs. For those purposes, contracting officers would be able to accept self-certifications without requiring them to verify any documentation.

In addition, this final rule adjusts the economic disadvantage thresholds for determining whether an individual qualifies as economically disadvantaged under the 8(a) Business Development Program. The new thresholds will be used for assessing the economic disadvantage

of both applicants to the 8(a) Business Development Program and applicants seeking EDWOSB status.

Prior to the enactment of Section 825, 15 USC 637, Additional Powers [of the SBA], paragraph (m), Procurement Program for Women-Owned Small Business Concerns, provided that WOSBs and EDWOSBs could participate in the WOSB program if "each of the concerns (i) is certified by a federal agency, a state government, or a national certifying entity approved by the administrator [of SBA], as a small business concern owned and controlled by women; or (ii) certifies to the contracting officer that it is a small business concern owned and controlled by women and provides adequate documentation, in accordance with standards established by the [SBA], to support such certification." Section 825 deleted the "self-certification" authority in subparagraph (ii), thus requiring that all participants in the WOSB program be certified.

SBA issued a proposed rule to implement this portion of Section 825 that would revamp the SBA's regulations at 13 CFR part 127, Subpart C, Certification of EDWOSB and WOSB Status, to establish the process by which SBA would certify firms as WOSBs or EDWOSBs. In addition, the proposed rule would amend Subpart D, Eligibility Examinations (to be retitled "Maintaining WOSB and EDWOSB Status and Eligibility Examinations") to establish procedures for maintaining a concern's certification as an WOSB or EDWOSB and conducting program examinations of WOSB program participants after certification. (For more on the proposed rule, see the June 2019 ***Federal Contracts Perspective*** article "SBA Proposes WOSB Certification Procedures.")

The SBA received comments from 307 respondents on the proposed rule. Among the changes made in response to these comments are the following:

- Proposed paragraph (a)(3) of 13 CFR 127.300, How is a concern certified as an WOSB or EDWOSB?, which covers WOSB certification, had stated that "a concern may submit evidence to SBA that it is a women-owned concern that is a certified 8(a) participant…" In addition, paragraph (b)(2), which covers EDWOSB certification, had stated "a women-owned business that is a certified 8(a) participant qualifies as an EDWOSB…" This was confusing, because a participant in the 8(a) Business Development Program that is 51% owned and controlled by a woman or women is automatically an EDWOSB because economic disadvantage is a component of 8(a) program eligibility, and all EDWOSBs are WOSBs, whereas a WOSB is not necessarily an EDWOSB. Therefore, the reference to 8(a) participants is removed from paragraph (a)(3) but retained in paragraph (b)(2), which is revised to state "a concern that is a certified participant in the 8(a) Business Development Program and owned and controlled by one or more women qualifies as an EDWOSB."

- Several respondents opposed proposed 13 CFR 127.305, Can an applicant ask SBA to reconsider SBA's initial decision to decline its application?, and proposed 13 CFR 127.306, May declined or decertified concerns seek recertification at a later date?, particularly its one-year "cooling-off" period ("a concern that SBA has declined or decertified may seek certification after one year from the date of decline or decertification…"). In response, SBA has removed the proposed Section 127.305 and renumbered proposed 13 CFR 127.306 as 13 CFR 127.305, and revised the "cooling-off" period from one year to 90 days.

– 13 CFR 127.400, How does a concern maintain its WOSB or EDWOSB certification?, would have required that concerns recertify their eligibility every three years. However, to more closely align the WOSB program regulations with other SBA regulations, and in response to the commenters concerned that recertification every three years is insufficient, the final rule revises 13 CFR 127.400 to require concerns to annually attest to SBA that they meet the program requirements, and to undergo a full program examination and recertification every three years.

Finally, the rule proposed to revise paragraph (c) of 13 CFR 124.104, Who is economically disadvantaged [under the 8(a) program]?, to make the economic disadvantage requirements for the 8(a) program consistent with the economic disadvantage requirements for women-owned firms seeking EDWOSB status.

To be considered economically disadvantaged for EDWOSB status, 13 CFR 127.203, What are the rules governing the requirement that economically disadvantaged women must own EDWOSBs?, requires that: (1) a woman's personal net worth must be less than $750,000, excluding her ownership interest in the concern and her equity interest in her primary personal residence (paragraph (b)); (2) a woman's personal income cannot exceed $350,000 averaged over the preceding three years (paragraph (c)(3)(i)); and (3) the fair market value of all her assets (including her primary residence and the value of the business concern) may not exceed $6,000,000 (paragraph (c)(4)). These economic disadvantage criteria are the same criteria that an 8(a) participant, once accepted into the 8(a) program, needs to meet to continue in the 8(a) program (13 CFR 124.104(c)(2), (c)(3), and (c)(4), respectively).

Yet there is much stricter criteria for those seeking to enter the 8(a) program ("initial eligibility"): (1) the net worth of an individual claiming disadvantage must be less than *$250,000* (13 CFR 124.104(c)(2)); (2) an individual's personal income cannot exceed *$250,000* averaged over the preceding three years (13 CFR 124.104(c)(3)); and (3) the fair market value of all the individual's assets (including his or her primary residence and the value of the business concern) may not exceed *$4,000,000* (13 CFR 124.104(c)(4)).

This produced the following anomaly: a concern applying for EDWOSB and 8(a) status at the same time could be found economically disadvantaged for EDWOSB purposes but denied eligibility for the 8(a) program based on not being economically disadvantaged. SBA stated in the proposed rule that "SBA does not believe that it makes sense to allow a woman to qualify as economically disadvantaged for EDWOSB purposes, but to then be declined from 8(a) participation for not being economically disadvantaged." After considering all the comments on this, SBA has decided to finalize 13 CFR 124.104 so that the 8(a) eligibility criteria are the same as those for EDWOSB eligibility.

However, some respondents asked about whether retirement accounts are included in calculations of an economically disadvantaged individual's net worth. In response, SBA has decided to add the following sentence to 13 CFR 124.104(c)(2)(ii) and 13 CFR 127.203(b)(3): "Funds invested in an Individual Retirement Account (IRA) or other official retirement account will not be considered in determining an individual's net worth."

According to SBA, the following are some important dates:

– The rule goes into effect on July 15, 2020.

– The current self-certification process will remain available for firms until October 15, 2020, in **https://certify.sba.gov**.

– Between now and July 15, 2020, WOSBs must download their documentation, currently housed in the WOSB Program Repository at **https://certify.sba.gov**.

– On July 15, 2020, firms can begin submitting applications for initial processing.

– On October 15, 2020, SBA will begin issuing decisions on certifications.

■ **Small Disadvantaged Businesses Regulatory Reform:** This final rule removes 16 sections of SBA's small disadvantaged business (SDB) regulations that are no longer necessary because they are either redundant or obsolete.

The SBA is amending and removing the following SDB regulations from 13 CFR part 124, 8(a) Business Development/Small Disadvantaged Business Status Determinations:

– 13 CFR 124.516, Who decides contract disputes arising between a Participant and a procuring activity after the award of an 8(a) contract?, which states "a dispute arising between an 8(a) contractor and the procuring activity contracting officer will be decided by the procuring activity," is removed because it is redundant. 13 CFR 124.512, Delegation of Contract Administration to Procuring Agencies, already delegates 8(a) contract administration functions to procuring agencies and contract dispute resolution is an element of contract administration.

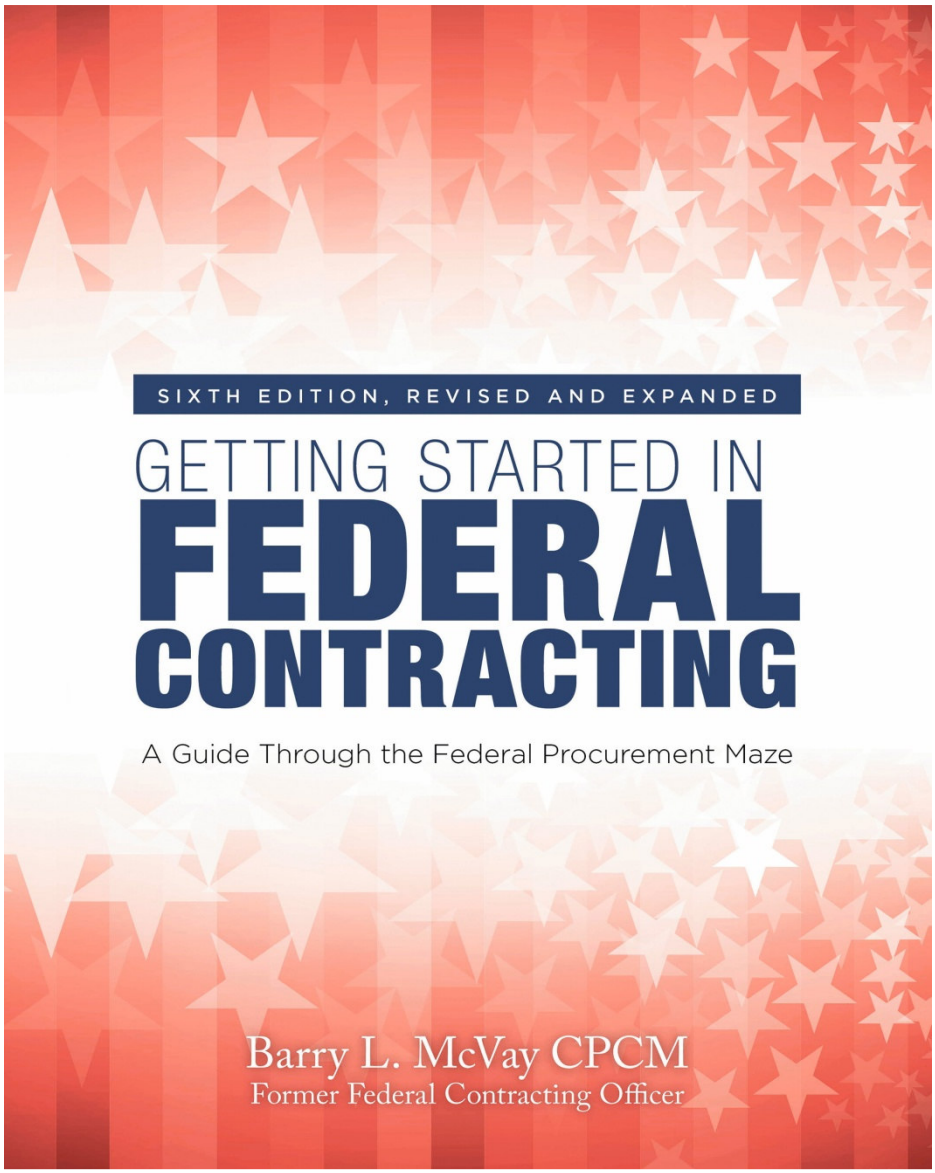
– 13 CFR 124.1001, General Applicability [of regulations relating to federal small business programs], is amended to eliminate references to SBA's SDB protest and appeal procedures as well as the SDB certification program, as these provisions are now obsolete. In addition, this section is amended to incorporate the substantive provisions of the SDB in 13 CFR 124.1002, What is a Small Disadvantaged Business (SDB)?, which is removed (see next).

– All provisions of 13 CFR part 124, subpart B, Eligibility, Certification, and Protests Relating to Federal Small Disadvantaged Business Programs, except 13 CFR 124.1001 (see above), are removed because SBA no longer administers an SDB certification program (SBA terminated the SDB certification program in 2008; see the October 2008 ***Federal Contracts Perspective*** article "SBA Ceases Certifying SDBs"), nor does it process SDB protests or appeals (see reference to 13 CFR 124.512 above). These provisions are: 13 CFR 124.1002, What is a Small Disadvantaged Business (SDB)?; 13 CFR 124.1003, How does a firm become certified as an SDB?; 13 CFR 124.1004, What is a misrepresentation of SDB status?; 13 CFR 124.1005, How long does an SDB certification last?; 13 CFR 124.1006, Can SBA initiate a review of the SDB status of a firm claiming to be an SDB?; 13 CFR 124.1007, Who may protest the disadvantaged status of a concern?; 13 CFR 124.1008, When will SBA not decide an SDB protest?; 13 CFR 124.1009, Who decides disadvantaged status protests?; 13 CFR 124.1010, What procedures apply to disadvantaged status protests?; 13 CFR 124.1011, What format, degree of specificity, and basis does SBA require to consider an SDB protest?; 13 CFR

124.1012, What will SBA do when it receives an SDB protest?; 13 CFR 124.1013, How does SBA make disadvantaged status determinations in considering an SDB protest?; 13 CFR 124.1014, Appeals of disadvantaged status determinations; 13 CFR 124.1015, What are the requirements for representing SDB status, and what are the penalties for misrepresentation?; and 13 CFR 124.1016, What must a concern do in order to be identified as an SDB in any federal procurement database?

This direct final rule will become effective on August 6, 2020, unless significant adverse comment is received by July 7, 2020. If significant adverse comment is received, SBA will withdrawal the rule.

Comments on this direct final rule must be submitted no later than July 7, 2020, identified as "RIN 3245–AH13 by either of the following methods: (1) through the Federal eRulemaking Portal**: http:// www.regulations.gov**; or (2) by mail or hand delivery/courier: Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416.



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