Panoptic Enterprises'

FEDERAL CONTRACTS PERSPECTIVE

Federal Acquisition Developments, Guidance, and Opinions

Vol. XXI, No. 7 **July 2020**

INFLATION ADJUSTMENT OF ACQUISITION-RELATED THRESHOLDS PROPOSED

Every five years, the acquisition-related thresholds in the Federal Acquisition Regulation (FAR) are required by statute to be adjusted to compensate for inflation during those five years. To comply with this statutory requirement, a proposed rule has been published that provides the updated thresholds and explains how the threshold adjustments were calculated. In addition, two other proposed rules were published in June to implement Small Business Administration (SBA) regulation changes: one regarding joint ventures, and the other to provide examples of activities considered to be failures to make a good faith effort to comply with a small business subcontracting plan.

CONTENTS

■ **Inflation Adjustment of Acquisition-Related Thresholds:** This proposed rule would amend the FAR in accordance with Title 41 of the U. S. Code, Section 1908, Inflation Adjustment of Acquisition-Related Dollar Thresholds (41 USC 1908), which requires that statutory acquisition-related thresholds be adjusted for inflation on October 1 of each year that is divisible by five (except for thresholds under the Construction Wage Rate Requirements statute [40 USC Chapter 31, Subchapter IV – formerly known as the Davis-Bacon Act], the Service Contract Labor Standards statute [41 USC Chapter 67 – 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"). In addition, as a matter of policy, this proposed rule would adjust nonstatutory FAR acquisition-related thresholds (those imposed as policy, not by statute) on October 1, 2020, as well.

The inflation rate is calculated based on the change in the Consumer Price Index (CPI) for all urban consumers during the five years since the last adjustment. The CPI value for March 2105 was 236.119. The estimated CPI value for March 2020 is currently projected to be 258.6. Dividing the 2020 CPI by the 2015 CPI produces a 9.52% inflation since the last adjustment.

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

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

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

Note that the calculations in this proposed rule are based on the 2015 base year amount (before rounding) because using those rounded amounts (that is, the acquisition-related thresholds) as the base would distort the calculations.

The following are many of the significant threshold adjustments being proposed (and thresholds that would not being adjusted) (proposed threshold adjustments are in **bold**):

– The micro-purchase threshold in FAR 2.101, Definitions, was raised from $3,500 to $10,000 by the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Public Law 115-91), Section 806, Requirements Related to the Micro-Purchase Threshold, so no further increase to the basic threshold would be made at this time because there has been insufficient inflation since enactment. However, paragraph 3(ii) of the "micro-purchase threshold" definition, which addresses acquisitions to support contingency operations or to facilitate defense against cyber, nuclear, biological, chemical, or radiological attacks, would be increased from $30,000 to **$35,000**. (**EDITOR'S NOTE:** A proposed FAR rule has been published that would implement Section 806 – see "Increased Micro-Purchase and Simplified Acquisition Thresholds" under the November 2019 ***Federal Contracts Perspective*** article "Four FAR Rules Proposed." For more on Section 806, see the January 2018 ***Federal Contracts Perspective*** article "2018 Defense Authorization Act Increases Simplified Acquisition, Micro-Purchase Thresholds.")

– The simplified acquisition threshold in FAR 2.101 was raised from $150,000 to $250,000 by the NDAA for FY 2018 (Public Law 115-91), Section 805, Increased Simplified Acquisition Threshold, so no further increase in the basic threshold will be made at this time because has been insufficient inflation since enactment. However, paragraph (1)(i) of the "simplified acquisition threshold" definition, which addresses acquisitions to support contingency operations or to facilitate defense against cyber, nuclear, biological, chemical, or radiological attacks, would be increased from $750,000 to **$800,000**. (**EDITOR'S NOTE:** A proposed FAR rule has been published that would implement Section 805 – see "Increased Micro-Purchase and Simplified Acquisition Thresholds" under the November 2019 ***Federal Contracts Perspective*** article "Four FAR Rules Proposed." For more on Section 805, see the January 2018 ***Federal Contracts Perspective*** article "2018 Defense Authorization Act Increases Simplified Acquisition, Micro-Purchase Thresholds.")

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The ***Federal Contracts Perspective*** is published monthly by Panoptic Enterprises, 6055 Ridge Ford Drive, Burke, VA 22015.

– The pre-award and post-award notices for synopses in FAR part 5, Publicizing Contract Actions, remain at $25,000 because the synopses requirements apply to trade agreements, which are exempt from the Section 1908 requirement for threshold adjustments.

– The threshold for announcements of contract awards in paragraph (a) of FAR 5.303, Announcement of Contract Awards, would be increased from $4 million to **$4.5 million**.

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

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

– The cost or pricing data threshold in paragraph (a)(1) of FAR 15.403-4, Requiring Certified Cost or Pricing Data (10 USC 2306a and 41 USC chapter 35), was increased by the NDAA for FY 2018 (Public Law 115-91), Section 811, Modifications to Cost or Pricing Data and Reporting Requirements, from $750,000 to $2 million, so no further increase to the threshold would be made at this time because there has been insufficient inflation since enactment. (**EDITOR'S NOTE:** A proposed FAR rule has been published that would implement Section 811 – see "Modifications to Cost or Pricing Data Reporting Requirements" under the November 2019 ***Federal Contracts Perspective*** article "Four FAR Rules Proposed.")

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

Comments on this proposed rule must be submitted no later than August 31, 2020, identified as "FAR Case 2019-013," through the Federal eRulemaking Portal**:** **http://www.regulations.gov**.

■ **Policy on Joint Ventures:** This rule proposes to amend the FAR to implement statutory and regulatory changes regarding joint ventures made by the SBA to its regulations, to require contracting officers to consider the past performance of the joint venture, to clarify that 8(a) joint ventures are not certified into the 8(a) Business Development program, and to state that 8(a) joint venture agreements need only be approved by the SBA prior to contract award.

The Small Business Jobs Act of 2010 (Public Law 111-240), Section 1347, Small Business Contracting Parity, and the NDAA for FY 2013 (Public Law 112-239), Section 1641, Mentor-Protégé Programs, authorized SBA to establish governmentwide mentor-protégé programs for small businesses, service-disabled veteran-owned small businesses (SDVOSB), women-owned small businesses in the Women-Owned Small Business (WOSB) Program, and HUBZone small businesses. While the SBA considered adding four mentor-protégé programs to SBA's 8(a) mentor-protégé program, SBA decided to add only one mentor-protégé program for all small businesses (in addition to the SBA's 8(a) mentor-protégé program, which already existed). "SBA believes that having five separate small business mentor-protégé programs could become confusing to the public and procuring agencies and hard to implement by SBA…The small business mentor-protégé program was drafted to be as similar to the 8(a) mentor-protégé program as possible."

In addition, SBA's final rule allows a joint venture comprised of a protégé and its mentor to compete as a small business for any government contract as long as the protégé meets the applicable size standard. (For more on SBA's final rule, see the August 2016 ***Federal Contracts Perspective*** article "Governmentwide Mentor-Protégé Program Established.")

To implement the SBA's rule, the following changes to the FAR are proposed:

- In FAR 2.101, Definitions, the definition of "small business concern" would be revised to remove language concerning how to determine whether a small business concern is "not dominant in its field of operation." This determination is made by SBA and is addressed in Title 13 of the Code of Federal Regulations (CFR), Section 121.102 (13 CFR 121.102), How does SBA establish size standards?, paragraph (b). In addition, comparable changes would be made to the "small business concern" definitions in FAR 52.212-3, Offeror Representations and Certification – Commercial Items; FAR 52.219-1, Small Business Program Representations; FAR 52.219-8, Utilization of Small Business Concerns; and FAR 52.219-28, Post-Award Small Business Program Rerepresentation.

- To clarify that the contracting officer shall consider the past performance of the joint venture, the following would be added to FAR 9.104-3, Application of Standards [for determining responsibility], as paragraph (c)(2): "*Joint Ventures*. For a prospective contractor that is a joint venture, the contracting officer shall consider the past performance of the joint venture. If the joint venture does not demonstrate past performance for award, the contracting officer shall consider the past performance of each party to the joint venture."

  In addition, the following would be added to FAR 15.305, Proposal Evaluation, as paragraph (a)(2)(vi): "For offerors that are joint ventures, the evaluation shall take into account past performance of the joint venture. If the joint venture does not demonstrate past performance for award, the contracting officer shall consider the past performance of each party to the joint venture."

– To address how a joint venture may qualify for an award as a small business or under a socioeconomic program, FAR 19.301-1, Representation [of size] by the Offeror, would be amended to add the following as paragraph (a)(2): "(i) A joint venture may qualify as a small business concern if the joint venture complies with the requirements of 13 CFR 121.103(h) [How does SBA determine affiliation?] and 13 CFR 125.8(a) and (b) [What requirements must a joint venture satisfy to submit an offer for a procurement or sale set aside or reserved for small business?] and if: (A) each party to the joint venture qualifies as small under the size standard for the solicitation; or (B) the protégé is small under the size standard for the solicitation in a joint venture comprised of a mentor and protégé with an approved mentor-protégé agreement under an SBA mentor-protégé program. (ii) A joint venture may qualify for an award under the socioeconomic programs as described in [FAR] subparts 19.8 [Contracting with the Small Business Administration (The 8(a) Program)], 19.13 [Historically Underutilized Business Zone (HUBZone) Program], 19.14 [Service-Disabled Veteran-Owned Small Business Procurement Program], and 19.15 [Women-Owned Small Business Program]."

  Similar text would be added to FAR 52.212-3; FAR 52.219-1; FAR 52.219-8; FAR 52.219-18, Notification of Competition Limited to Eligible 8(a) Participants; FAR 52.219-27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside; FAR 52.219-29, Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns; and 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.

– FAR 19.703, Eligibility Requirements for Participating in the [Small Business Subcontracting] Program, would be amended to eliminate instructions for contractors to confirm the eligibility of a subcontractor representing itself as a HUBZone small business because they duplicate instructions already in FAR 52.219-8.

– FAR 19.804-3, SBA Acceptance [of offer for the 8(a) program], and FAR 19.805-2, Procedures [for competitive 8(a) acquisitions], would be amended to state that at least one party to the joint venture must be certified as an 8(a) program participant at the time of proposal submission, and that the 8(a) joint venture agreement shall be approved prior to contract award.

  In addition, paragraph (d) would be added to FAR 19.805-2 which would state, "(1) SBA does not certify joint ventures, as entities, into the 8(a) program. (2) A contracting officer may consider a joint venture for contract award if the SBA district office servicing the joint venture approves the joint venture agreement and provides a determination of eligibility pursuant to 13 CFR 124.507(b) [What procedures apply to competitive 8(a) procurements?] prior to contract award."

  Finally, paragraph (e) would be added to FAR 19.805-2 which would provide the general time period within which SBA expects to approve the joint venture agreement prior to award ("five working days after receipt of the contracting activity's request for an eligibility determination") and the procedure to follow if a response is not received within that time period. Finally, text from FAR 19.805-2(b) relating to how SBA determines eligibility would be removed.

– The following clauses would be amended to add the requirement that the small business or socioeconomic party to a joint venture must perform 40% of the work performed by the joint venture and that the work performed must be more than administrative functions: FAR 52.219-3, Notice of HUBZone Set-Aside or Sole Source Award; FAR 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns; FAR 52.219-14, Limitations on Subcontracting; FAR 52.219-27; FAR 52.219-29; and FAR 52.219-30.

Comments on this proposed rule must be submitted no later than August 4, 2020, identified as "FAR Case 2017-019," through the Federal eRulemaking Portal**:** **http://www.regulations.gov**.

■ **Good Faith in Small Business Subcontracting:** This rule proposes to amend FAR 19.705-7, Liquidated Damages (which would be renamed "Compliance with the Subcontracting Plan"), to implement NDAA for FY 2017 (Public Law 114-328), Section 1821, Good Faith in Contracting, which requires the SBA to amend its regulations to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. In addition, this proposed rule would amend FAR 19.704, Subcontracting Plan Requirements, and FAR 52.219-9, Small Business Subcontracting Plan, to require that all indirect costs, with certain exceptions, be included in commercial plans (which are subcontracting plans that cover the offeror's fiscal year and that applies to the entire production of commercial items by the entire company) and summary subcontract reports (SSRs) (which contractors use to report their performance in complying with their commercial plans).

EDITOR'S NOTE: Small business subcontracting plans are required from large prime contractors when a contract is expected to exceed $700,000 [$1,500,000 for construction] and has subcontracting possibilities. FAR 19.704 lists the elements of the plan, which include the contractor's goals for subcontracting to small business concerns and a description of the efforts the contractor will make to ensure that small businesses, veteran-owned small businesses (VOSBs), service-disabled veteran-owned small businesses (SDVOSBs), HUBZone small businesses, small disadvantaged businesses, and women-owned small businesses (WOSBs) have an equitable opportunity to compete for subcontracts. Failure to make a good faith effort to comply with the plan may result in the assessment of liquidated damages in accordance with FAR 52.219-16, Liquidated Damages – Subcontracting Plan.

In November 2019, SBA issued a final rule that made the required amendments to its regulations to implement Section 1821. In that same rule SBA amended its regulations to require that prime contractors with commercial subcontracting plans include indirect costs in their subcontracting goals (for more on the SBA's amended regulations, see "Material Breach of Subcontracting Plan" and "Indirect Costs in Commercial Subcontracting Plans" under the December 2019 ***Federal Contracts Perspective*** article "SBA Takes on Small Business Contracting Programs").

This proposed rule would implement the SBA's amended regulations by making the following changes to the FAR:

– FAR 19.704, Subcontracting Plan Requirements, and FAR 52.219-9 would be amended to require that "the subcontracting goals established for a commercial plan shall include all indirect costs with the exception of those such as the following: employee salaries and

benefits; payments for petty cash; depreciation; interest; income taxes; property taxes; lease payments; bank fees; fines, claims, and dues; original equipment manufacturer relationships during warranty periods (negotiated up front with the product); utilities and other services purchased from a municipality or an entity solely authorized by the municipality to provide those services in a particular geographical region; and philanthropic contributions."

FAR 52.219-9 would be amended in a slightly different manner. It would be state that "a contractor authorized to use a commercial subcontracting plan shall include in its subcontracting goals and in its SSR all indirect costs, with the exception of those such as the following…" (**EDITOR'S NOTE:** Concerns that have a commercial subcontracting plan report on performance through an SSR, and SBA required a contractor using a commercial subcontracting plan to include all indirect costs in its SSR. However, SBA's regulations did not require contractors to include indirect costs in their commercial subcontracting plan goals, and that led to inconsistencies when comparing the SSR to the commercial subcontracting plan. Therefore, SBA amended its regulations to add: "A contractor authorized to use a commercial subcontracting plan must include all indirect costs in its subcontracting goals and in its SSR...")

– FAR 19.705-7, Liquidated Damages, would be retitled "Compliance with the Subcontracting Plan" and reorganized. The revised paragraph (b)(1) of FAR 19.705-7 would include the following examples of a good faith effort:

"(i) Breaking out work to be subcontracted into economically feasible units, as appropriate, to facilitate small business participation.

"(ii) Conducting market research to identify potential small business subcontractors through all reasonable means, such as searching SAM [System for Award Management – **https://www.sam.gov**], posting notices or solicitations on SBA's SUBNet [Subcontracting Network – **https://web.sba.gov/subnet**], participating in business matchmaking events, and attending preproposal conferences.

"(iii) Soliciting small business concerns as early in the acquisition process as practicable to allow them sufficient time to submit a timely offer for the subcontract.

"(iv) Providing interested small businesses with adequate and timely information about plans, specifications, and requirements for performance of the prime contract to assist them in submitting a timely offer for the subcontract.

"(v) Negotiating in good faith with interested small businesses.

"(vi) Directing small businesses that need additional assistance to SBA.

"(vii) Assisting interested small businesses in obtaining bonding, lines of credit, required insurance, necessary equipment, supplies, materials, or services.

"(viii) Utilizing the available services of small business associations; local, state, and federal small business assistance offices; and other organizations.

"(ix) Participating in a formal mentor-protégé program with one or more small-business protégés that results in developmental assistance to the protégés.

"(x) Although failing to meet the subcontracting goal in one socioeconomic category, exceeding the goal by an equal or greater amount in one or more of the other categories.

"(xi) Fulfilling all of the requirements of the subcontracting plan."

These examples of a good faith effort are practically verbatim of paragraphs (b)(3) and (d)(3) of 13 CFR 125.3, What types of subcontracting assistance are available to small businesses?

In addition, FAR 19.705-7(b)(2) would include the following examples of a failure to make a good faith effort to comply with the subcontracting plan:

"(i) Failure to attempt through market research to identify, contact, solicit, or consider for contract award small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business concerns, through all reasonable means including outreach, industry days, or the use of federal systems such as SBA's Dynamic Small Business Search [**https://web.sba.gov/pro-net/search/dsp_dsbs.cfm**] or SUBNet systems [**https://web.sba.gov/subnet**].

"(ii) Failure to designate and maintain a company official to administer the subcontracting program and monitor and enforce compliance with the plan.

"(iii) Failure to submit an acceptable ISR [Individual Subcontract Report], or the SSR, using the eSRS [Electronic Subcontracting Reporting System – **https://www.esrs.gov/**], or as provided in agency regulations, by the report due dates specified in [FAR] 52.219-9, Small Business Subcontracting Plan.

"(iv) Failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan including subcontracting flowdown requirements.

"(v) Adoption of company policies or documented procedures that have as their objectives the frustration of the objectives of the plan.

"(vi) Failure to pay small business subcontractors in accordance with the terms of the contract with the prime contractor.

"(vii) Failure to correct substantiated findings from federal subcontracting compliance reviews or participate in subcontracting plan management training offered by the government.

"(viii) Failure to provide the contracting officer with a written explanation if the contractor fails to acquire articles, equipment, supplies, services, or materials or obtain the performance of construction work as described in [FAR] 19.704(a)(12).

"(ix) Falsifying records of subcontract awards to small business concerns."

These examples of failure to make a good faith effort are practically verbatim from paragraph (d)(3)(ii) of 13 CFR 125.3, which was added by SBA's final rule.

Comments on this proposed rule must be submitted no later than August 3, 2020, identified as "FAR Case 2019-004," through the Federal eRulemaking Portal**:** **http://www.regulations.gov**.

DOD REVS UP THE REGULATION CHANGES

After taking a break to take action against the COVID-19, the Department of Defense (DOD) got back to its normal frenetic pace in June, issuing six final rules amending the Defense FAR Supplement (DFARS) , two proposed rules, a deviation, and a policy memorandum.

■ **Modification of "Notification of Anticipated Contract Termination or Reduction" Clause:** This finalizes, with minor editorial changes, the rule that proposed to amend DFARS 249.7003, Notification of Anticipated Contract Terminations or Reductions, and DFARS 252.249-7002, Notification of Anticipated Contract Termination or Reduction, to conform the text to the current DFARS convention regarding the use of dollar thresholds in contract clauses, to update legal and DFARS citations, and to remove text that is no longer needed to implement the underlying statutory language.

DFARS 252.249-7002 is included in all contracts under a major defense program and implements the requirements of the note in 10 USC 2501, National Security Strategy for National Technology and Industrial Base, titled "Notice to Contractors and Employees Upon Proposed and Actual Termination or Substantial Reduction in Major Defense Programs." The 10 USC 2501 note requires contractors, upon receiving notice of contract termination or a substantial reduction in funding resulting from an appropriations act, to provide notice of the anticipated termination or substantial reduction to first-tier subcontractors with a subcontract of $700,000 or more, and flow down the notification to lower-tier subcontractors with a subcontract of $150,000 or more. The 10 USC 2501 note is implemented by DFARS 249.7003 and DFARS 252.249-7002.

Within the DFARS, statutory acquisition-related dollar thresholds that are subject to inflation adjustment under 41 USC 1908, Inflation Adjustment of Acquisition-Related Dollar Thresholds, are identified in the applicable DFARS policy section. Any clause that relies on such a threshold references the threshold in the applicable DFARS policy section instead of citing the actual dollar value. This drafting convention ensures that inflation adjustments of statutory acquisition-related thresholds apply to existing contracts and subcontracts in effect on the date of the adjustment.

To implement the dollar thresholds of the 10 USC 2501 note in accordance with the current DFARS drafting convention, the rule proposed to add the relevant dollar thresholds to DFARS 249.7003(c) ("when subcontracts have been issued, the prime contractor is responsible for: (1) providing notice of the termination or substantial reduction in funding to all first-tier subcontractors with a subcontract valued equal to or greater than $700,000; and (2) requiring that each subcontractor: (i) provide such notice to each of its subcontractors for subcontracts valued greater than $150,000; and (ii) impose a similar notice and flowdown requirement in subcontracts valued greater than $150,000 at all tiers"), and update DFARS 252.249-7002(d)(2)(i) and (d)(2)(ii) to refer to the thresholds in DFARS 249.7003(c).

Also, the rule proposes to amend DFARS 249.7003(a) and DFARS 252.249-7002(b), (c)(1)(iii), and (c)(2) to cite the Workforce Innovation and Opportunity Act, which is the current statute under which employee employment and training opportunities apply. DFARS 252.249-7002 advised contractors of the benefits available to affected employees through the Job Training Partnership Act (Public Law 97-300), but the Job Training Partnership Act was repealed and superseded by the Workforce Investment Partnership Act (Public Law 105-220), which itself was later repealed and superseded by the Workforce Innovation and Opportunity Act (Public Law 113-128; codified at 29 USC Chapter 32, Workforce Innovation and Opportunity).

No comments were submitted in response to the proposed rule, so it is finalized with minor editorial changes to a cross-reference in DFARS 252.249-7002(c)(2) and to the formats of the statutory references.

For more on the proposed rule, see the November 2019 ***Federal Contracts Perspective*** article "DFARS Clauses and Provisions All Scrambled Up."

■ **Correction to Restrictions on Acquisitions From Foreign Sources:** This final rule corrects a final rule that implemented the NDAA for FY 2017 (Public Law 114-328), paragraph (b) of Section 881, Greater Integration of the National Technology and Industrial Base, which amended paragraph (1) of 10 USC 2500, Definitions, by adding Australia and the United Kingdom of Great Britain and Northern Ireland as countries in the "national technology and industrial base," along with the United States and Canada (see the January 2019 ***Federal Contracts Perspective*** article "DOD Holds Year-End Regulations Clearance").

While the final rule amended DFARS 225.7004, Restriction on Acquisition of Foreign Buses; DFARS 225.7006, Restriction on Air Circuit Breakers for Naval Vessels; DFARS 252.225-7037, Evaluation of Offers for Air Circuit Breakers; and DFARS 252.225-7038, Restriction on Acquisition of Air Circuit Breakers, to add Australia and the United Kingdom, DFARS 225.7010, Restriction on Certain Naval Vessel Components, was inadvertently not amended to add Australia and the United Kingdom. Therefore, this final rule amends DFARS 225.7010-1, Restriction, to add Australia and the United Kingdom to the United States and Canada as countries exempt from the restriction.

In addition, DFARS 225.7008, Waiver of Restrictions of 10 USC 2534 [Miscellaneous Limitations on the Procurement of Goods Other Than United States Goods], addresses waivers to most of the restrictions in DFARS subpart 225.70, Authorization Acts, Appropriations Acts, and Other Statutory Restrictions On Foreign Acquisition. DFARS 225.7008 permitted the head of the contracting activity to waive a restriction if: "satisfactory quality items manufactured in the United States or Canada are not available" (paragraph (a)(2)(ii)); "application of the restriction would result in the existence of only one source for the item in the United States or Canada" (paragraph (a)(2)(iii)); and "a restriction is waived when it would cause unreasonable costs. The cost of an item of U.S. or Canadian origin is unreasonable if it exceeds 150 percent of the offered price, inclusive of duty, of items that are not of U.S. or Canadian origin" (paragraph (a)(3)). These paragraphs are amended to add Australia and the United Kingdom (and are redesignated as paragraphs (b)(2), (b)(3), and (c), respectively).

Finally, DFARS 225.7008(b), which addresses the waiver of the 10 USC 2534 restrictions for certain items manufactured in the United Kingdom, is deleted because the United Kingdom is now part of the national technology and industrial base so the waiver is no longer necessary.

■ **Repeal of Annual Reporting Requirements to Congressional Defense Committees:** This final rule implements the NDAA for FY 2018 (Public Law 115-91), Section 1051, Elimination of Reporting Requirements Terminated After November 25, 2017, Pursuant to Section 1080 of the National Defense Authorization Act for Fiscal Year 2016, which repealed numerous DOD reporting requirements to Congress, including the annual reporting requirements for commercial items and exceptional case exceptions and waivers under the NDAA for FY 2003 (Public Law 107-314), Section 817, Grants of Exceptions to Cost or Pricing Data Certification Requirements and Waivers of Cost Accounting Standards (for more on Section 817, see the January 2003 ***Federal Contracts Perspective*** article "2003 Defense Authorization Act Limits Task Orders, Extends FAR Subpart 13.5 Until January 1, 2004"). The Section 817 Congressional reporting requirements and guidance regarding exceptions to cost or pricing data requirements were implemented in paragraphs (c)(3)(B) and (c)(4)(B) of DFARS 215.403-1, Prohibition on Obtaining Certified Cost or Pricing Data (10 USC 2306a and 41 USC chapter 35). To comply with Section 1051, this rule removes the Congressional reporting requirements and guidance in DFARS 215.403-1(c)(3)(B) and (c)(4)(B).

■ **Market Research and Consideration of Value for the Determination of Price:** This finalizes, with changes, the rule that proposed to amend: (1) DFARS 212.209, Determination of Price Reasonableness [for commercial items], to implement the NDAA for FY 2017 (Public Law 114-328), Section 871, Market Research for Determination of Price Reasonableness in Acquisition of Commercial Items, which modifies 10 USC 2377, Preference for Acquisition of Commercial Items, to address how a contracting officer may require the offeror to submit relevant information to support market research for price analysis for the acquisition of commercial items; and (2) DFARS 234.7002, Policy [on acquisition of major weapons systems as commercial items], to implement the NDAA for FY 2017 Section 872, Value Analysis for the Determination of Price Reasonableness, which modifies 10 USC 2379, Requirement for Determination by Secretary of Defense and Notification to Congress Before Procurement of Major Weapon Systems as Commercial Items, to allow an offeror to submit information or analysis relating to the value of a commercial item.

DFARS 212.209(a) stated, "Market research shall be used, where appropriate, to inform price reasonableness determinations." To implement Section 871, the rule proposed to amend DFARS 212.209(a) to add a reference to 10 USC 2377 and direct contracting officers to use the information submitted under paragraph (d) of DFARS 234.7002 ("Relevant Information") when acquiring major weapon systems as commercial items in accordance with 10 USC 2379 or, in the case of other items, other relevant information.

DFARS 234.7002(d) addresses the relevant information necessary to make a determination of price reasonableness of major weapons systems acquired as commercial items. To implement Section 872, the rule proposed a new paragraph (d)(5) which would allow (not require) an offeror to submit information or analysis relating to the value of a commercial item, to aid in the determination of the reasonableness of the price of such item. New paragraph (d)(5) would continue by stating that a contracting officer may consider such information or analysis in addition to the information identified elsewhere in DFARS 234.7002(d). Finally, to assist in understanding value analysis, a definition of "value analysis" would be added to DFARS 234.7001, Definition ("a systematic and objective evaluation of the function of a product and its related costs, whose purpose is to ensure optimum value").

One respondent submitted comments on the proposed rule, and in response the final rule deletes the discussion of the use of value analysis in DFARS 234.7002(d)(5) and the associated definition in DFARS 234.7001. The discussion and definition are not necessary for implementation of Section 872, which provides that an offeror may submit information or analysis relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item, and that the contracting officer may consider such information or analysis in addition to other submitted information.

For more information on the proposed rule, see the October 2019 ***Federal Contracts Perspective*** article "DOD Unleashes Deluge of DFARS Changes."

■ **Justification and Approval Threshold for 8(a) Contracts:** This final rule implements the NDAA for FY 2020 (Public Law 116-92), Section 823, Modification of Justification and Approval Requirement for Certain Department of Defense Contracts, which increases the DOD threshold for requiring a justification and approval (J&A) to award a sole source 8(a) contract from $22 million (see paragraph (b) of FAR 6.303-1, Requirements [for justifications]), to $100 million. Also, Section 823 designates the head of the procuring activity as the approval authority for sole source 8(a) contracts over $100 million.

To implement Section 823, DFARS 206.303-1, Requirements, is added, which states, "In accordance with Section 823 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92), no justification and approval is required for a sole-source contract under the 8(a) authority (15 USC 637(a)) for an amount not exceeding $100 million." Also, it incorporates the language in FAR 6.303-1(b) regarding J&A approvals for sole source 8(a) contracts exceeding the $22 million threshold that applies to the rest of the government, except that it requires that the justification be approved in accordance with new paragraph (a)(S-71) of DFARS 206.304, Approval of the Justification, which states that "the head of the procuring activity is the approval authority for a proposed sole-source 8(a) contract exceeding $100 million."

This final rule supersedes the deviation that authorized DOD contracting officers to use the $100 million threshold in place of the $22 million threshold in paragraph (b)(4) of FAR 6.302-5, [Other Than Full and Open Competition] Authorized or Required by Statute; FAR 6.303-1(b); paragraph (d) of FAR 6.303-2, Contents [of justifications]; and paragraph (a) of FAR 19.808-1, Sole Source [negotiations under 8(a) program]. For more on the deviation, see the April 2020 ***Federal Contracts Perspective*** article "DOD Issues Two Deviations, One Memo."

For more on Section 823, see the January 2020 ***Federal Contracts Perspective*** article "2020 Defense Authorization Act Extends DOD Mentor-Protégé Program."

■ **Qualifications Requirements for Contracting Positions:** This final rule amends DFARS 201.603-2, Selection [of contracting officers], to implement the NDAA for FY 2019 (Public Law 116-92), Section 861, Defense Acquisition Workforce Certification, Education, and Career Fields, which amends the NDAA for FY 2001 (Public Law 106-398), Section 808, Qualifications Required for Employment and Assignment in Contracting Positions, by removing the requirement for contracting professionals to have completed at least 24 semester credit hours (or equivalent) of study from an accredited institution of higher education in the areas of accounting, business, finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, and organization, and management from DFARS 201.603-2(1)(iii)(B).

In addition, the words "and 24 semester credit hours of business related courses" are removed from paragraph (1) of DFARS 218.201, Contingency Operation: "Contracting officer qualification requirements pertaining to a baccalaureate degree *and 24 semester credit hours of business related courses* do not apply to DOD employees or members of the armed forces who are in a contingency contracting force" (*emphasis* added).

For more on Section 861, see the January 2020 ***Federal Contracts Perspective*** article "2020 Defense Authorization Act Extends DOD Mentor-Protégé Program."

■ **Data Collection and Inventory for Services Contracts:** This rule proposes to add DFARS subpart 204.17, Service Contracts Inventory, and DFARS 252.204-70XX, Reporting Requirements for Contracted Services, to implement 10 USC 2330a, Procurement of Services: Tracking of Purchases, which requires the collection of data on certain DOD service contracts.

10 USC 2330a required DOD to establish a data collection system that provides management information on each purchase of services by the DOD that exceeds the simplified acquisition threshold (currently $250,000).

NDAA for FY 2008 (Public Law 110-181), Section 807, Inventories and Reviews of Contracts for Services, required DOD to collect additional information on each covered purchase of services and to submit this inventory to Congress annually. In 2014, DOD published a proposed rule to implement Section 807. The proposed rule required contractors to enter the contract data required by 10 USC 2330a into a DOD-unique database, the Enterprise Contractor Manpower Reporting Application (ECMRA) (see "Service Contract Reporting" in the July 2014 ***Federal Contracts Perspective*** article "DOD Undertakes Housekeeping, NDAA Implementation").

Before the proposed rule could be finalized, NDAA for FY 2017 (Public Law 114-328), Section 812, Amendments Relating to Inventory and Tracking of Purchases of Services, amended 10 USC 2330a to narrow the scope of contracts to which the data collection requirement applies to contracts that exceed $3,000,000 for (1) logistics management services; (2) equipment related services; (3) knowledge-based services; and (4) electronics and communications services. Therefore, the proposed rule implementing Section 807 was withdrawn and has been combined with this new proposed rule that implements Section 807 of NDAA for FY 2008 and Section 812 of NDAA for FY 2017.

Under a similar but different statute (the Consolidated Appropriations Act, 2010 [Public Law 111-117], Section 743, Service Contract Inventory Requirement), federal agencies (except DOD) are required to report annually on activities performed by service contractors. Section 743 was implemented with the addition of FAR subpart 4.17, Service Contracts Inventory (see "Service Contracts Reporting Requirements" in the January 2014 ***Federal Contracts Perspective*** article "FAC 2005-72 Revises Trade Agreements Thresholds"). DOD has decided to adopt the approach used by other federal agencies to collect the required service contract data. The approach uses the Federal Procurement Data System (FPDS – **https://www.fpds.gov**) to provide a majority of the information required by 10 USC 2330a. The data that is not available in FPDS is entered annually by the contractor into the System for Award Management (SAM – **https://www.sam.gov**). By DOD adopting this governmentwide approach to collecting service contract data, the administrative burden for both industry and DOD will be reduced, data integrity and accuracy is expected to improve, and DOD's business practices would be reformed for greater performance and affordability. In doing so, ECRMA is no longer needed and was decommissioned June 19, 2020.

This proposed rule would implement Section 807 and Section 812 by adding the following:

- DFARS subpart 204.17, Service Contracts Inventory:
  - DFARS 204.1703, Reporting Requirements, which would require a service contractor to report the information required in SAM when a contract or order has a total estimated value, including options, that exceeds $3,000,000 and is for services in the following service acquisition portfolio groups: (1) logistics management services; (2) equipment related services; (3) knowledge-based services; or (4) electronics and communications services. By October 31, the contractor would be required to report on the services performed under the contract or order, including any subcontracts, during the preceding fiscal year. For indefinite-delivery contracts, basic ordering agreements, and blanket purchase agreements, the contractor would be required to report on each order issued under the contract or agreement that exceeds $3,000,000 and is in one of the covered service acquisition portfolio groups.
  - DFARS 204.1705, Contract Clauses, which would require the use of DFARS 252.204-70XX, Reporting Requirements for Contracted Services, in solicitations, contracts, agreements, and orders, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that exceed $3,000,000 and are in one of the covered service acquisition portfolio groups. The basic clause is to be included in solicitations and contracts, except solicitations and resultant awards of indefinite-delivery contracts, and orders placed under non-DOD contracts that meet the $3,000,000/service acquisition portfolio groups criteria. Alternate I is to be included in solicitations and resultant awards of indefinite-delivery contracts, basic ordering agreements, and blanket purchase agreements, when one or more of the orders under the contract or agreement are expected to meet the $3,000,000/service acquisition portfolio groups.
- DFARS 252.204-70XX, Reporting Requirements for Contracted Services, which would require the contractor to report by October 31 on SAM the services performed under this contract or order, including any subcontracts, during the preceding government fiscal year (October 1-September 30). It would require the contractor to report the following information for the contract or order: (1) the total dollar amount invoiced for services performed during the preceding government fiscal year under the contract or order; and (2) the number of contractor direct labor hours, to include subcontractor direct labor hours, as applicable, expended on the services performed under the order or contract during the previous government fiscal year. The clause would go on to state that "the government will review contractor reported information for reasonableness and consistency with available contract information. In the event the government believes that revisions to the contractor reported information are warranted, the government will notify the contractor. Upon notification, the contractor shall revise the reported information or provide the government with a supporting rationale for the information."

  Alternate I would substitute "contract or agreement for each order" in place of "contract or order" in the basic clause, and substitute "order" in place of "contract or order" in the basic clause.

Comments on this proposed rule must be submitted no later than August 4, 2020, identified as "DFARS Case 2018-D063" by any of the following methods: (1) through the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) by email: **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.

■ **Repeal of the "Tariff Information" Clause:** This rule proposes to remove DFARS 252.239-7006, Tariff Information, and its prescription in paragraph (a)(3) of DFARS 239.7411, Contract Clauses [for telecommunications services]. The clause, which is required to be included in solicitations, contracts, and basic agreements for telecommunications services, requires the contractor to provide the contracting officer with the following information: a copy of the contractor's existing tariffs; a copy of any application to be made to a regulatory agency that requests new or changes to rates, charges, services, or regulations related to any tariff or to any of the facilities or services furnished primarily to the government; all supporting documentation prepared in connection with any application to a regulatory agency; and notice of any application that anyone other than the contractor files with a regulatory body which affects or will affect the rate or conditions of services under the agreement or contract.

DFARS 252.239-7006 was added to the DFARS in 1991 to implement a standardized approach across DOD for addressing critical issues associated with the acquisition of telecommunication services. Since its implementation, online databases and tools have been created to track and monitor changes in telecommunications tariffs, prices, and services. In addition, 47 CFR 42.10, Public Availability of Information Concerning Interexchange Services, requires telecommunications carriers to make tariff and non-tariff information available to the public online at the carrier's internet website and to update the information regularly. Therefore, this clause is unnecessary and proposed for removal (along with its prescription at DFARS 239.7411(a)(3)).

Comments on this proposed rule must be submitted no later than August 4, 2020, identified as "DFARS Case 2018-D044" by any of the following methods: (1) through the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) by email: **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.

■ **Deviation on the Acquisition of Dinnerware and Stainless Steel Flatware:** This deviation implements the NDAA for FY 2020 (Public Law 116-92), Section 854, Addition of Domestically Produced Stainless Steel Flatware and Dinnerware to the Berry Amendment, which adds dinnerware and stainless steel flatware to the list of covered items in 10 USC 2533a, Requirement to Buy Certain Articles from American Sources; Exceptions (commonly called the "Berry Amendment" – see DFARS 225.7002, Restrictions on Food, Clothing, Fabrics, Hand or Measuring Tools, and Flags). With some exceptions, items under the Berry Amendment may not be procured if the items are not grown, reprocessed, reused, or produced in the United States.

This deviation requires DOD contracting officers to include DFARS 252.225-7969, Acquisition of Dinnerware and Stainless Steel Flatware. (DEVIATION 2020-O0017), in solicitations and contracts that are for the acquisition of dinnerware or stainless steel flatware with an estimated value exceeding the simplified acquisition threshold (currently $250,000), if the contract is to be awarded after December 20, 2020 (that is, one year after enactment of Public

Law 116-92), and before September 23, 2023 (the expiration date imposed by Section 854), unless the dinnerware or stainless steel flatware is for: (a) acquisitions outside the United States in support of combat operations; (b) acquisitions by vessels in foreign waters; (c) emergency acquisitions by activities located outside the United States for the personnel of such activities; or (d) commissary resale. This applies to solicitations and contract that use FAR part 12 procedures for the acquisition of commercial items.

DFARS 252.225-7976 (DEVIATION 2020-O0017) mandates that "any dinnerware or stainless steel flatware delivered under this contract shall be produced in the United States, consistent with the requirements at 10 USC 2533a (commonly known as the 'Berry Amendment')." Also, it requires the contractor to include the substance of the clause in subcontracts, including subcontracts for commercial items, that are for the acquisition of dinnerware or stainless steel flatware.

■ **Standard Operating Procedure for Records Retention and Destruction in the Procurement Integrated Enterprise Environment (PIEE):** This memorandum, issued June 19, 2020, by Kim Herrington, Acting Principal Director, Defense Pricing and Contracting, forwards to the DOD acquisition community a phased PIEE (**https://wawf.eb.mil/piee-landing/**) records retention and destruction schedule and the standard operating procedure (SOP) for that records retention and destruction. This is necessary because "the legacy and new applications within PIEE have generated over 200 million records created and stored within the suite of systems." This enables compliance with the records retention requirements of FAR 4.805, Storage, Handling, and Contract Files; DFARS 204.804, Closeout of Contract Files; the DOD Financial Management Regulation (FMR), Volume 1, Chapter 9, Financial Records Retention; and National Archives and Records Administration regulations.

PIEE includes applications spanning the procurement process from the creation of a purchase request through contract closeout, and stores documents and data on solicitations, awards, invoicing, payment, government property, closeout, and other procurement processes for contracts, grants, and miscellaneous payments.

The retention and destruction schedule is:

Phase	Records Retention Threshold	Target Destruction Date
Phase 1	Records retention start date of September 30, 2003, and prior that are past their records retention period	July 31, 2020
Phase 2	Records retention start date of October 1, 2003 - September 30, 2009, that are past their records retention period	August 31, 2020
Phase 3	Records retention start date of October 1, 2009 - June 30, 2014, that are past their records retention period	September 30, 2020
Phase 4	Fully automated records retention occurs on a rolling basis once the records destruction date has passed	January 1, 2021

The SOP addresses records retention and destruction for documents and data within PIEE for award files (including contracts, orders, grants, and other assistance files), micro-purchase card receiving reports (not associated with an award), miscellaneous payments, government-to-government property transfers, cancelled solicitations, transportation documents, and purchase requests.

For more on the PIEE applications, see the Defense Pricing & Contracting website **https://www.acq.osd.mil/dpap/pdi/eb/PIEE.html**.

GSA TAKES TWO COVID-19 RELATED ACTIONS

Though the government has taken most of the acquisition-related actions it can to combat the Coronavirus (or COVID-19) (see the April 2020 ***Federal Contracts Perspective*** article "Coronavirus Overruns United States, Emergency Acquisition Authorities Invoked," the May 2020 ***Federal Contracts Perspective*** article "Acquisition Community Fighting COVID-19 on a Multitude of Fronts," and the June 2020 ***Federal Contracts Perspective*** article "Running Out of Actions to Take Against COVID-19"), the General Services Administration (GSA) still found two actions it could take. In addition to these two COVID-related actions, GSA issued a final rule updating several website addresses (URLs – Uniform Resource Locators) in the GSAR that are outdated.

■ **Moratorium on Enforcement of "Contract Sales Criteria" Clause in Response to COVID-19:** On June 18, 2020, Jeffrey Koses, GSA Senior Procurement Executive, issued an acquisition letter that placed a temporary moratorium on the enforcement of the minimum sales requirements of Federal Supply Schedule (FSS) clause I-FSS-639, Contract Sales Criteria, because of the economic impact COVID-19 has on GSA's FSS program industry partners.

I-FSS-639 states:

> "(a) A contract will not be awarded unless anticipated sales are expected to exceed $25,000 within the first 24 months following contract award, and are expected to exceed $25,000 in sales each 12-month period thereafter.
>
> "(b) The government may cancel the contract in accordance with [GSA Acquisition Regulation] clause 552.238-73, Cancellation, unless reported sales are at the levels specified in paragraph (a) above."

This moratorium will be in effect through September 30, 2020, unless extended. That means no FSS contractor will have its FSS contract cancelled for failing to meet the sales levels specified in I-FSS-639(a).

■ **Extension of the National Interest Action code for COVID-19 (P20C):** GSA has extended the end date for the National Interest Action (NIA) Code P20C established in the Federal Procurement Data System (FPDS – **https://www.fpds.gov**) to track the acquisition costs of the federal agencies involved in the response to COVID-19. The end date is extended from July 1, 2020, to September 30, 2020.

For more on the assignment of NIA Code P20C to track COVID-19 expenditures, see "Department of Defense (DOD) Memorandum 'Reporting COVID-19 Related Actions to the Federal Procurement Data System'" under the May 2020 ***Federal Contracts Perspective*** article "Acquisition Community Fighting COVID-19 On a Multitude of Fronts."

■ **Update of Website Addresses:** This final rule updates several website addresses (Uniform Resource Locators [URLs]) in the GSAR that are outdated. The update to these URLs in some cases require additional corresponding editorial changes.

The following are the sections containing the updated website addresses or editorial changes:

– In paragraph (a) of GSAR 504.1103, Procedures [for System for Award Management (SAM)], "Data Universal Number System (DUNS) number or DUNS+4 number" is removed and replaced with "unique entity identifier". In addition, the sentence "The SAM information can be accessed through the SAM website (**www.sam.gov**) by creating a user account" is removed.

– GSAR 522.804-2, [Affirmative action programs for] Construction, which provides information on goals for the employment and women in the construction industry, is replaced with the following: "Construction contractors and subcontractors are required to set trade participation goals for minorities and women based on percentages established by the Director, Office of Federal Contract Compliance Programs (OFCCP), Department of Labor. The goals can be found on OFCCP's website at **https://www.dol.gov/agencies/ofccp/construction**."

– In GSAR 522.805, Procedures [for equal employment opportunity], paragraph (b) is amended by replacing the obsolete URL for the list of Office of Federal Contract Compliance Programs (OFCCP) offices (http://www.dol.gov/ofccp/contracts/ofnation2.htm) with the current URL (**https://ofccp.dol-esa.gov/preaward/pa_reg.html**); and paragraph (c), which provides instructions for obtaining the Equal Employment Opportunity (EEO) poster, is amended by replacing the obsolete URL (http://www.dol.gov/ofccp/ regs/compliance/posters/ofccpost.htm) with the current URL (**https://www.dol.gov/agencies/ofccp/posters**). In addition, the following sentence is removed from paragraph (c): "In addition to providing this poster to each non-exempt contractor, the contracting officer shall advise contractors to complete the Employer Information Report (EEO-1) at http://www.eeoc.gov/eeo1survey/index.htm." This URL for the EEO-1 report is obsolete. The current URL for the EEO-1 is **https://www.eeoc.gov/employers/eeo-1-survey**.

– Paragraph (b)(2) of GSAR 552.238-80, Industrial Funding Fee and Sales Reporting, which provides direction on the imposition of the industrial funding fee (IFF) on federal supply schedule (FSS) sales, is amended by replacing the obsolete URL for the current IFF rate (https://72a.gsa.gov/) with the current URL (**https://srp.fas.gsa.gov/**).

– In paragraph (a) of GSAR 570.106 Advertising, Publicizing, and Notifications to Congress [of a leasehold interest in real property], the URL for the obsolete Federal Business Opportunity (FBO or FedBizOpps) website for synopses (http://www.FBO.gov)

is replaced with "the Governmentwide Point of Entry (GPE) at **https://beta.sam.gov** or successor system." In addition, "http://www.FBO.gov" is replaced by "the GPE" in paragraphs (b), (c), (d), and (f). (**EDITOR'S NOTE:** In November 2019, the FBO website was transitioned to the System for Acquisition Management (SAM – **https://beta.sam.gov**), the website that has been consolidating all governmentwide acquisition systems into a single unified system. For more on the retirement of FBO and the transition to SAM, see "FedBizOpps to Be Retired, Transitioned to beta.SAM.gov" in the November 2019 ***Federal Contracts Perspective*** article "GSA Consolidating Schedules, Retiring FedBizOpps.")

– In paragraphs (a), (b)(2)(ii), and (c) of GSAR 570.106-1, Synopsis of Lease Awards; "http://www.FBO.gov" is replaced by "the GPE".

– In paragraph (c)(4) of GSAR 570.306, Evaluating Offers [of solicitations for offers (SFO) for leasehold interests in real property over the simplified lease acquisition threshold]. the obsolete "Past Performance Information Retrieval System (PPIRS) at http://www.ppirs.gov" is replaced with "Contractor Performance Assessment Reporting System at **https://www.cpars.gov/**, or successor system". (**EDITOR'S NOTE:** PPIRS was retired on January 15, 2019, and all data from PPIRS has been merged into CPARS. For more on the changes made to the FAR to reflect this merger, see "Update to Contractor Performance Assessment Reporting System (CPARS) " in the October 2019 ***Federal Contracts Perspective*** article "FAC 2019-06 Bans Kaspersky Lab Products, Reflects CPARS/PPIRS Merger."

VAAR CLEANUP CONTINUES

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

In June, VA issued a final rule revising VAAR part 804, Administrative Matters; VAAR part 805, Publicizing Contract Actions; and VAAR part 849, Termination of Contracts; and corresponding clauses and provisions. In addition, VA issued two proposed rules: one to remove VAAR part 825, Foreign Acquisition, and the other to remove VAAR subpart 871.1, Loan Guaranty and Direct Loan Programs.

■ **Administrative Matters, Publicizing Contract Actions; and Termination of Contracts:** This final rule amends the following three VAAR parts:

– VAAR part 804, Administrative Matters: VAAR subpart 804.1, Contract Execution, and VAAR 804.101, Contracting Officer's Signature, are removed because they duplicate coverage in the FAR. In addition, the information in VAAR 804.1102, Vendor

Information Pages (VIP) Database, is being moved to VAAR part 819, Small Business Programs.

VAAR subpart 804.13, Personal Identity Verification, consisting of VAAR 804.1303, Contract Clause, is added to prescribe new clause VAAR 852.204-70, Personal Identity Verification of Contractor Personnel.

- VAAR part 805, Publicizing Contract Actions: VAAR part 805 is removed. It consisted of VAAR 805.202, Exceptions [to synopsis requirements], which is duplicative of FAR 6.302-5, Authorized or Required by Statute; VAAR 805.205, Special Situations [authorizing procurement of paid advertizing to synopsize in a daily newspaper or professional journal], which duplicates the coverage in paragraph (b) of FAR 5.101, Methods of Disseminating Information, and paragraph (a) of FAR 5.502, Authority [to approve publication of paid advertisements in newspapers and other media]; and VAAR 805.207, Preparation and Transmittal of Synopses, because the guidance it provides is outdated.

- VAAR Part 849, Termination of Contracts: VAAR subpart 849.1, General Principles, is removed. It consisted of VAAR 849.101, Authorities and Responsibilities, and VAAR 849.106, Fraud or Other Criminal Conduct, which contain internal procedures that will be addressed in the VA Acquisition Manual (VAAM); and VAAR 849.811, Review of Proposed Settlements, VAAR 849.111-70, Required Review, and VAAR 849.111-71, Submission of Information, which contain outdated information and internal procedures that will be updated and addressed in the VAAM.

  VAAR subpart 849.5, Contract Termination Clauses, is added. It consists of VAAR 849.504-70, Termination of Mortuary Services, which contains the prescription to new clause VAAR 852.249-70, Termination for Default – Supplement for Mortuary Services.

- VAAR Part 852, Solicitation Provisions and Contract Clauses: VAAR 852.204-70, Personal Identity Verification of Contractor Personnel, is added to require contractor compliance with Department of Veterans Affairs policy for personal identity verification of all employees performing under a contract that requires frequent and continuing access to VA facilities or information systems. In addition, VAAR 852.249-70, Termination for Default – Supplement for Mortuary Services, is added to supplement FAR 52.249-8, Default (Fixed-Price Supply and Service), to identify specific circumstances in which the government may terminate for default in contracts for mortuary services.

■ **Foreign Acquisition:** This proposed rule would remove VAAR part 825, Foreign Acquisition, because much of its information is internal and procedural in nature. Each of the VAAR part 825 subparts would be removed for the following reasons:

- VAAR subpart 825.1, Buy American Act – Supplies, consists of VAAR 825.103, Exceptions [to the Buy American Act], which would be removed and moved to the VAAM because the information in it is internal and procedural in nature; and VAAR 825.104, Nonavailable Articles, which would be removed because the items listed on the nonavailable list (lead glass and human insulin) are now available from domestic sources.

- VAAR subpart 825.6, Trade Sanctions, consists of VAAR 825.602, Exceptions [to trade sanctions], which would be removed as the information in it is no longer relevant. The corresponding FAR subpart 25.6 is entitled "American Recovery and Reinvestment Act – Buy American Statute – Construction Materials." VAAR subpart 825.6 and VAAR 825.602 predate the American Recovery and Reinvestment Act, so they should be removed since they do not implement or supplement the current FAR subpart 25.6.

- VAAR subpart 825.8, Other International Agreements and Coordination, consists of VAAR 825.870, Technical Assistance, which would be removed and moved to the VAAM because it provides procedural guidance regarding whom to contact with questions regarding international contracts.

- VAAR 825.9, Customs and Duties, consists of VAAR 825.902-70, Technical Assistance, which would be removed because it provides outdated procedural guidance directing contracting officers to contact the U.S. Customs and Border Protection for technical assistance for clearing items through customs.

- VAAR subpart 825.10, Additional Foreign Acquisition Regulations, consists of VAAR 825.1001, Waiver of Right to Examination of Records, which would be removed and moved to the VAAM because it provides procedural guidance.

Comments on this proposed rule must be submitted no later than August 10, 2020, identified as "RIN 2900-AQ79 – VA Acquisition Regulation: Foreign Acquisition," through any of these methods: (1) the Federal eRulemaking Portal at **http://www.regulations.gov**; (2) mail or hand-delivery to: Director, Office of Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue NW, Room 1064, Washington, DC 20420; or (3) by fax: 202-273-9026.

■ **Loan Guaranty and Vocational Rehabilitation and Employment Programs:** This proposed rule would remove VAAR subpart 871.1, Loan Guaranty and Direct Loan Programs, because its contents are outdated. VA no longer contracts with numerous contractors on a case-by-case basis for the repair and preservation of properties acquired under 38 USC chapter 37, Housing and Small Business Loans. VA has awarded a national property management contract that is government by the FAR and other provisions of the VAAR. Because VAAR subpart 871.1 is obsolete, it would be removed, and VAAR part 871, Loan Guaranty and Vocational Rehabilitation and Employment Programs, would be retitled as "Vocational Rehabilitation and Employment Programs."

In addition, VAAR subpart 871.2, Vocational Rehabilitation and Employment Service, would be amended to remove the following because they are either (1) more related to matters of program management than acquisition, or (2) duplicate coverage in the FAR: VAAR 871.201-2, Requirements When Contracts Are Not Required [for tuition, fees, and charges for books, supplies, or services necessary to train or educate]; VAAR 871.201-3, Medical Services [provided to trainees]; VAAR 871.201-4, Letter contracts [with educational institutions]; VAAR 871.202, Marking and Release of Supplies [that are property of the trainee]; VAAR 871.203, Renewals or Supplements to Contracts; and VAAR 871.204, [Prohibition against] Guaranteed Payment.

VAAR 871.210, Correspondence Courses, would be retitled "Prohibition on Advertising – Training of Veterans," and all programmatic language would be removed, but the text prohibiting use of the training facilities in any way to advertise the institution would be retained. It would read: "The training of persons under a VA contract or the fact that the United States is using the facilities of the institution for training veterans must not be used in any way to advertise the institution. References in the advertising media or correspondence of the institution shall be limited to a list of courses under 38 USC chapter 31 [Training and Rehabilitation for Veterans with Service-Connected Disabilities], and must not be directed or pointed specifically to veterans."

VAAR 871.211, Information Concerning Correspondence Courses, would be removed because it also consists of programmatic information not relevant to acquisition: "Specific questions on correspondence courses as to the content of courses, academic credit, and entrance requirements for courses included in VA contracts may be directed to the institutions offering the courses."

Finally, VAAR 852.271-75, Extension of Contract Period [for vocational rehabilitation and employment services], would be removed since it duplicates FAR coverage, particularly FAR subpart 17.2, Options, and FAR part 43, Contract Modifications.

Comments on this proposed rule must be submitted no later than August 31, 2020, identified as "RIN 2900-AQ76 VA Acquisition Regulation: Loan Guaranty and Vocational Rehabilitation and Employment Programs," through any of these methods: (1) the Federal eRulemaking Portal at **http://www.regulations.gov**; (2) mail or hand-delivery to: Director, Office of Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue NW, Room 1064, Washington, DC 20420; or (3) by fax: 202-273-9026.

LABOR REVISES FLUCTUATING WORKWEEK OVERTIME RULES

The Department of Labor (DOL) is revising its regulation for computing overtime compensation of salaried nonexempt employees who work hours that vary each week (called a "fluctuating workweek") under the Fair Labor Standards Act (FLSA), which is codified in 29 USC Chapter 8, Fair Labor Standards, and consists of Sections 201 through 219. The FLSA guarantees a minimum wage for all hours worked and limits to 40 the number of hours per week a covered nonexempt employee can work without additional compensation (paragraph (a)(1) of 29 USC 207, Maximum Hours). (**EDITOR'S NOTE:** The FLSA is addressed in FAR part 22, Application of Labor Laws to Government Acquisitions, particularly FAR subpart 22.10, Service Contract Labor Standards.)

DOL's regulations implementing 29 USC Chapter 8 are in 29 CFR part 778, Overtime Compensation. 29 CFR 778.114, Fixed Salary for Fluctuating Hours, permits an employer to use the "fluctuating workweek method" to compute overtime compensation if the employee works fluctuating hours from week to week and "there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period…" Because the employee's hours of work fluctuate from week to week, the regular rate must be determined separately each week based on the number of hours actually worked each week.

However, the payment of additional bonus and premium payments on top of the fixed salary to employees compensated under the fluctuating workweek method has presented challenges to employers and the courts alike. This rule clarifies that bonus payments, premium payments, and other additional pay are consistent with using the fluctuating workweek method of compensation, and that such payments must be included in the calculation of the regular rate (unless the payment is excluded, such as gifts, rewards paid in recognition of services performed, etc. – see 29 USC 207(e)(1) through (e)(8)).

DOL believes that this rule will allow employers and employees to better utilize flexible work schedules. This is especially important as workers return to work following the COVID-19 pandemic. Some employers are likely to promote social distancing in the workplace by having their employees adopt variable work schedules, possibly staggering their start and end times for the day. This rule will make it easier for employers and employees to agree to unique scheduling arrangements while allowing employees to retain access to the bonuses and premiums they would otherwise earn.

The following are the changes DOL is making to 29 CFR 778.114:

- The title of 29 CFR 778.114 is changed from "Fixed Salary for Fluctuating Hours" to "Fluctuating Workweek Method of Computing Overtime."

- 29 CFR 778.114(a) states that "an employer may use the fluctuating workweek method to properly compute overtime compensation based on the regular rate for a nonexempt employee…", then lists the five circumstances which, if all are met, enable an employer to use the fluctuating workweek method to properly compute the regular rate and overtime pay owed under the FLSA:

  "(1) The employee works hours that fluctuate from week to week.

  "(2) The employee receives a fixed salary that does not vary with the number of hours worked in the workweek, whether few or many.

  "(3) The amount of the employee's fixed salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours the employee works is greatest.

  "(4) The employee and the employer have a clear and mutual understanding that the fixed salary is compensation (apart from overtime premiums and any bonuses, premium payments, commissions, hazard pay, or other additional pay of any kind not excludable from the regular rate under section 7(e)(l) through (8) of the [Fair Labor Standards] Act [29 USC 207(e)(1) through (e)(8)] for the total hours worked each workweek regardless of the number of hours, although the clear and mutual understanding does not need to extend to the specific method used to calculate overtime pay.

  "(5) The employee receives overtime compensation, in addition to such fixed salary and any bonuses, premium payments, commissions, hazard pay, and additional pay of any kind, for all overtime hours worked at a rate of not less than one-half the employee's regular

rate of pay for that workweek. Since the salary is fixed, the regular rate of the employee will vary from week to week and is determined by dividing the amount of the salary and any non-excludable additional pay received each workweek by the number of hours worked in the workweek. Payment for overtime hours at not less than one-half such rate satisfies the overtime pay requirement because such hours have already been compensated at the straight time rate by payment of the fixed salary and non-excludable additional pay. Payment of any bonuses, premium payments, commissions, hazard pay, and additional pay of any kind is compatible with the fluctuating workweek method of overtime payment, and such payments must be included in the calculation of the regular rate unless excludable under section 7(e)(1) through (8) of the [Fair Labor Standards] Act [29 USC 207(e)(1) through (e)(8)]."

- 29 CFR 778.114(b) provides three examples illustrating the fluctuating workweek method of calculating overtime when an employee is paid: (1) a nightshift differential; (2) a productivity bonus in addition to a fixed salary; and (3) premium pay for weekend work.

- 29 CFR 778.114(c) is amended to remove text that duplicates that which is now in paragraphs (a) and (b). It now reads: "Typically, such fixed salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where the conditions for the use of the fluctuating workweek method of overtime payment are present, the [Fair Labor Standards] Act, in requiring that "not less than" the prescribed premium of 50% for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for overtime hours at a rate no greater than that which the employee receives for non-overtime hours, compliance with the [Fair Labor Standards] Act cannot be rested on any application of the fluctuating workweek overtime formula."

- DOL has decided that it would be helpful to the public to expressly incorporate into this regulation its longstanding interpretation that employers using the fluctuating workweek method may take occasional disciplinary deductions from an employee's salary. Therefore, 29 CFR 778.114(d) is added, which states: "The fixed salary…does not vary with the number of hours worked in the workweek, whether few or many. However, employers using the fluctuating workweek method of overtime payment may take occasional disciplinary deductions from the employee's salary for willful absences or tardiness or for infractions of major work rules, provided that the deductions do not cut into the minimum wage or overtime pay required by the [Fair Labor Standards] Act."

EDITOR'S NOTE: The fluctuating workweek method described in 29 CFR 778.114 is not the only method where additional overtime compensation is computed as one-half the regular rate:

- 29 CFR 778.110, Hourly Rate Employee, concerns employees who are paid an hourly wage.

- 29 CFR 778.111, Pieceworker, concerns employees who are paid on a piece rate basis plus an hourly premium for time spent waiting.

- 29 CFR 778.112, Day Rates and Job Rates, concerns employees who are paid a flat amount for a day's work or a specific job, regardless of how many hours were actually worked on a particular day or for a particular job.

- 29 CFR 778.113, Salaried Employees – General, concerns employees who are paid a salary for a specific number of hours each week.

- 29 CFR 778.115, Employees Working at Two or More Rates, concerns employees who receives straight-time pay at multiple different rates in the same workweek.

GSA AWARDS THREE E-MARKETPLACE PLATFORM CONTRACTS

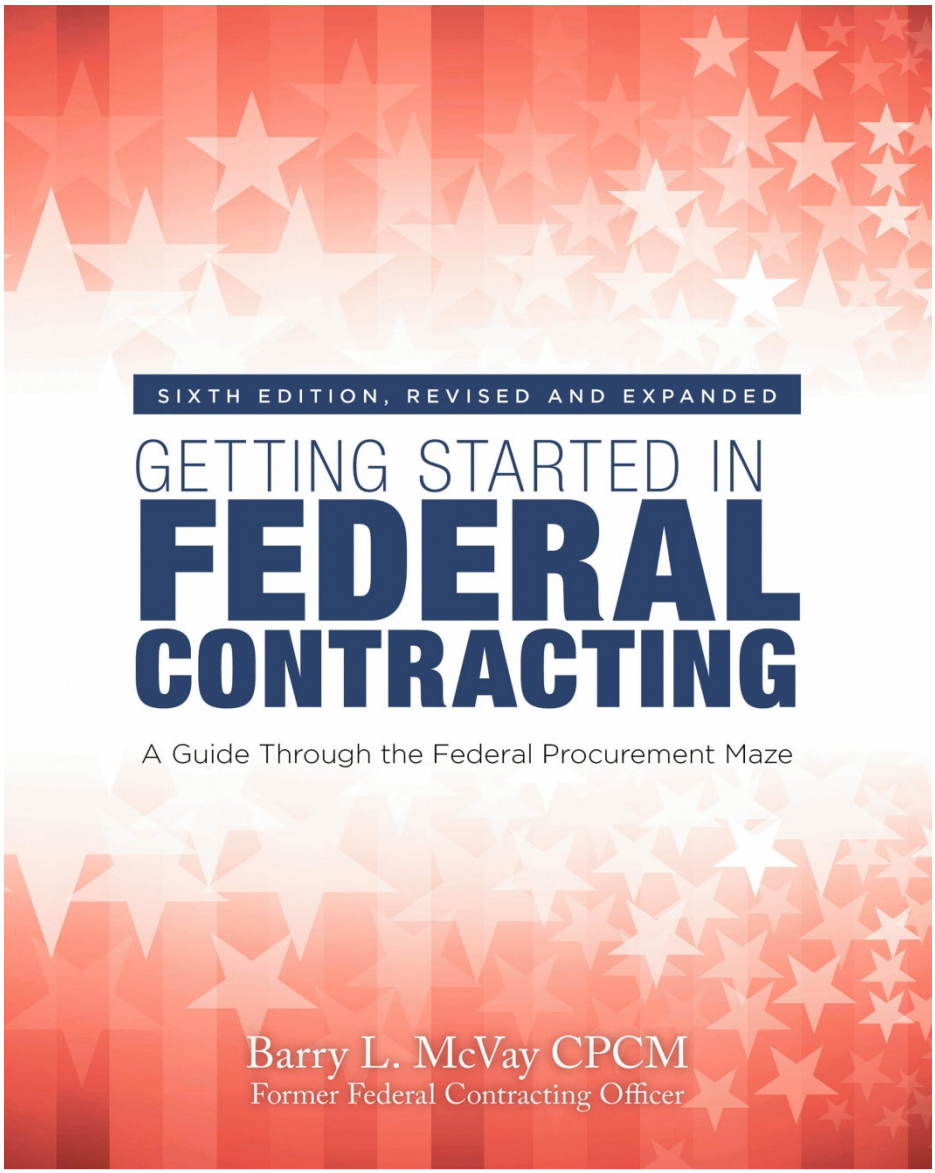
The General Services Administration (GSA) announced it has awarded contracts to three e-marketplace platform providers as authorized by the NDAA for FY 2018 (Public Law 115-91), Section 846, Procurement Through Commercial E-Commerce Portals, which requires GSA to "establish a program to procure commercial products through commercial e-commerce portals for purposes of enhancing competition, expediting procurement, enabling market research, and ensuring reasonable pricing of commercial products. The administrator [of GSA] shall carry out the program…through multiple contracts with multiple commercial e-commerce portal providers, and shall design the program to be implemented in phases with the objective of enabling governmentwide use of such portals...The head of a department or agency may procure, as appropriate, commercial products for the department or agency using the program."

GSA issued a solicitation in October 2019 requesting proposals from e-marketplace portal providers for commercial e-marketplace platforms that can provide business-to-business (B2B) e-commerce capabilities for federal agencies using the Government Purchase Card (GPC) for the purchase of commercial off-the-shelf (COTS) items. The solicitation was expected to result in two or more no-cost contracts with commercial e-marketplace providers for initial proof-of-concept, each with a period of performance of one-year with two one-year option years. However, the solicitation stated that GSA reserved the right to award as many contracts as determined appropriate by the contracting officer. (For more on the solicitation, see "Solicitation Issued for Participation in the Commercial e-Commerce Portals Implementation" under the November 2019 ***Federal Contracts Perspective*** article "GSA Consolidating Schedules, Retiring FedBizOpps.")

GSA decided to award no-cost contracts to Amazon Business, Fisher Scientific, and Overstock.com. Contracts to these three will allow GSA to test the use of commercial e-commerce portals for purchases below the micro-purchase threshold ($10,000) using a proof-of-concept for up to three years.

These contracts and platforms will be available to federal agencies as part of an effort to modernize the buying experience for agencies and help them gain insights into their open-market online spending that occurs outside of existing contracts. It is estimated that open market purchases on government purchase cards represent approximately $6 billion a year.

GSA anticipates the e-marketplace platforms will be available for use within the next 30 days.



468 pages, 2017, ISBN: 978-0-912481-27-2, $39.95
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