*Panoptic Enterprises'*

# *FEDERAL CONTRACTS PERSPECTIVE*

Federal Acquisition Developments, Guidance, and Opinions

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## MORE GUIDANCE ON PROHIBITED TELECOMMUNICATIONS AND VIDEO SURVEILLANCE EQUIPMENT ISSUED

**On August 13, paragraph (a)(1)(B) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Public Law 115-232), Section 889, Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment, went into effect. Paragraph (a)(1)(B) prohibits agencies from entering into "into a contract (or extend or renew a contract) with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system."**

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Section 889 defines "covered telecommunications equipment or services" as: "(A) telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities); (B) for the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities); (C) telecommunications or video surveillance services provided by such entities or using such equipment; [or] (D) telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country."

There are two parts to Section 889:

– Paragraph (a)(1)(A) ("Part A") went into effect on August 13, 2019, and it prohibits agencies from procuring, obtaining, extending, or renewing a contract to procure or obtain any covered telecommunications equipment or services. FAC 2019-05 implemented Part A

(see the September 2019 ***Federal Contracts Perspective*** article "FAC 2019-05 Prohibits Acquisition of Chinese Telecommunications and Surveillance Equipment").

– Paragraph (a)(1)(B) ("Part B") went into effect on August 13, 2020, and it prohibits agencies from entering into a contract (or extending or renewing a contract) with an entity that uses any covered telecommunications equipment or services. FAC 2020-08 implemented Part B (see the August 2020 ***Federal Contracts Perspective*** article "Contractors with Chinese Telecommunications Prohibited"). (**EDITOR'S NOTE:** Paragraph (d)(2) of Section 889 authorizes the Director of National Intelligence to waive the effective dates of the Part A and Part B prohibitions until a later date if the Director determines the waiver is in the national security interests of the United States. Defense Under Secretary for Acquisition and Sustainment Ellen Lord has announced that Director of National Intelligence John Radcliffe has waived the Part B effective date until September 30, 2020 for noncritical weapons systems to avoid disruption of end-of-the-fiscal-year contracting activities. This waiver applies only to the DOD; all other federal agencies must comply with the August 13, 2020 effective date. Under Secretary Lord said that DOD would not seek any additional extensions to the Part B effective date.)

However, despite the issuance of FAC 2020-08, several agencies still perceived a need for additional guidance on "Part B" implementation.

■ **Department of Defense (DOD) Memorandum "Governmentwide Commercial Purchase Card Guidance Related to Implementation of the Section 889(a)(1)(B) Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment":** This memorandum, issued by Kim Herrington, Acting Principal Director, Department of Defense (DOD) Pricing and Contracting, states that the requirements placed on contracting officers in his July 2020 memorandum "Implementation of the Section 889(a)(1)(B) Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment" applies to micro-purchase purchase cardholders, contingency contracting cardholders, overseas simplified acquisition cardholders, and warranted contingency contracting cardholders. (For more on the July 2020 memorandum, see the August 2020 ***Federal Contracts Perspective*** article "Contractors with Chinese Telecommunications Prohibited.")

To comply with the July 2020 memorandum, cardholders must "seek a representation equivalent to that required at FAR 52.204-24(d)(2) [Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment] from eligible merchants (from a person who is authorized to bind the merchant)." The FAR 52.204-24(d)(2) representation was added by FAC 2020-08, and requires the contractor to represent "that it [ ] does, [ ] does not use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services." If the merchant

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represents "does not," the cardholder can rely on the representation and make the purchase. If a merchant represents "does," the cardholder shall not make the purchase. If the merchant declines or is unable to provide the representation, the cardholder shall not make the purchase.

■ **Department of Homeland Security (DHS) Revisions to Deviation Implementing FAR 52.204-25 Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment:** This revision to a deviation was issued by Soraya Correa, DHS Senior Procurement Officer, to add language from the FAC 2020-08 version of FAR 52.204-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment, to the DHS Deviation 20-05 version of FAR 52.204-25.

FAR 52.204-25(d) requires contractors to submit a report to the contracting officer if the contractor identifies covered equipment or services being used during contract performance, including by any subcontractor(s) at any tier or by any other source used by the contractor in performance of the contract. Paragraph (b) of FAR 4.2103, Procedures [for reporting use of covered equipment or services] directs contracting officers to follow agency procedures when a report is received. DHS determined that a report under FAR 52.204-25 is considered a security incident and should be treated as such. Consistent with policy in DHS 4300A, Sensitive Systems Handbook, incidents are required to be reported to the Enterprise Security Operations Center (SOC). Therefore, DHS Deviation 20-05, issued April 11, 2020, amended FAR 52.204-25(d) to require the contractor to report the incident concurrently to the contracting officer, the contracting officer's representative (COR), and the Enterprise SOC so DHS can quickly assess and mitigate the security incident.

On July 14, 2020, two months after the issuance of DHS Deviation 20-05, FAC 2020-08 was issued to implement Part B with an effective date of August 13, 2020. Therefore, Soraya Correa has issued a revision to DHS Deviation 20-05 to incorporate the additional FAC 2020-08 definitions and prohibitions into FAR 52.204-25 (DEVIATION 20-05, Revision 1). However, Ms. Correa notes that none of the changes made by DHS Deviation 20-05, Revision 1, change the text of the reporting requirements in FAR 52.204-25(d) (DEVIATION 20-05).

■ **General Services Administration (GSA) Memorandum "Workforce Guidance on FY2019 NDAA Section 889 'Part B'":** This memorandum, issued by Jeffrey Koses, GSA Senior Procurement Executive, provides instructions for the implementation of Part B and FAC 2020-08. The memorandum: stresses the importance of acquisition planning; stresses the importance of using the correct clauses in solicitations and orders; requires existing contracts to be modified to include the correct clauses; requires the contracting officer to submit a Supply Chain Event Report to the Supply Chain Risk Management (SCRM) Review Board if the apparent successful offeror confirms it will provide, use, or will use prohibited telecommunications; details waiver request procedures; and explains the workforce training that is being developed. In addition, the memorandum includes a list of resources and references, a provision and clause checklist, and "Sample Language Documenting Contract File for Ineligible Awardee/Extension/Termination/Cancellation Due To 889 Part B."

■ **GSA Regulation (GSAR) Deviation for Lease Acquisitions and Commercial Solution Opening Procurements (CSOs) – Prohibition on Contracting for Certain Telecommunications:** This deviation, issued by Jeffrey Koses, GSA Senior Procurement Executive, applies the FAR representations and reporting requirements (added by FAC 2019-05 and amended by FAC 2020-08) to GSA's leasing of real property (lease acquisitions) and

commercial solution opening procurements (CSOs), even though these are not FAR-based contracts. (**EDITOR'S NOTE:** CSOs were established by the NDAA for FY 2017 (Public Law 114-328, Section 880, Pilot Programs for Authority to Acquire Innovative Commercial Items Using General Solicitation Competitive Procedures. The CSO is "a competitive procedure for acquiring innovative commercial items, including products, technologies, and services through a competitive selection of solution briefs resulting from a general solicitation and peer review of such solution briefs." These are governed and conducted outside of the FAR. GSA Acquisition Manual (GSAM) part 571, Pilot Program for Innovative Commercial Items, provides guidance for the CSO procedure.)

The deviation requires that GSA lease acquisitions and CSOs follow the representation and reporting requirements as stated at FAR 4.2105, Solicitation Provisions and Contract Clause, which requires the inclusion of FAR 52.204-24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment; FAR 52.204-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment; and FAR 52.204-26, Covered Telecommunications Equipment or Services – Representation. In addition, this deviation requires GSA lease acquisitions and CSOs to follow the procedures in GSAM subpart 504.70, Supply Chain Risk Management.

■ **Date Change for GSA Virtual Webinar Regarding Implementation of Section 889 of the FY 2019 National Defense Authorization Act (NDAA):** The webinar GSA was planning to conduct on August 12, 2020, regarding its implementation of Section 889 has been changed to September 10, 2020, at 1:00 pm Eastern Standard Time.

The webinar will be held virtually. The call-in information will be made available to registrants. Industry partners wishing to virtually attend must register at: **https://gsa.zoomgov.com/webinar/register/WN_hQ6tHTRDR-mMNnRRxJy22Q**. Members of the press, in addition to registering for this event, must also RSVP to **press@gsa.gov** by Tuesday, September 8, 2020.

For more on the topics and scheduled panelists, see the August 2020 ***Federal Contracts Perspective*** article "Contractors with Chinese Telecommunications Prohibited."

■ **Federal Acquisition Circular (FAC) 2020-09, Prohibition on Contractors Using Certain Telecommunications Equipment:** Finally, FAC 2020-09 is a second interim rule that addresses Part B (the first being FAC 2020-08; see the August 2020 ***Federal Contracts Perspective*** article "Contractors with Chinese Telecommunications Prohibited").

FAC 2020-09 amends the introductory material of FAR 52.204-24 to direct offerors to skip the offer-by-offer representation in FAR 52.204-24(d)(2) if they represent in FAR 52.204-26(c)(2) or in paragraph (v)(2)(ii) of FAR 52.212-3, Offeror Representations and Certifications – Commercial Items, that they "do not *use* covered telecommunications equipment or services as a part of its offered products or services to the government in the performance of any contract, subcontract, or other contractual instrument" (*emphasis* added).

FAC 2020-09 is very similar to FAC 2020-03 (which amended the Part A implementation in FAC 2019-05; see the January 2020 ***Federal Contracts Perspective*** article "FAC 2020-03 Modifies Prohibition on Telecommunications") in that FAC 2020-03 amended FAR 52.204-24 to direct offerors to skip the offer-by-offer representation in FAR 52.204-24(d)(1) if they represent in FAR 52.204-26(c)(1) or in paragraph (v)(2)(ii) of FAR 52.212-3, Offeror Representations and Certifications – Commercial Items, that they "do not *provide* covered telecommunications equipment or services as a part of its offered products or services to the government in the

performance of any contract, subcontract, or other contractual instrument" (*emphasis* added).

Note the difference between the two: the Part A representation (FAC 2020-03) involves *providing* covered telecommunications equipment or services, and the Part B representation (FAC 2020-09) involves *using* covered telecommunications equipment or services.

## MORE COVID-19 GUIDANCE ISSUED

The COVID-19 pandemic continues with no end in sight, so the president has issued an executive order directing non-competitive procedures be used to acquire essential medicines produced in the United States, and the Department of Defense (DOD) issued four documents addressing implementation of Section 3610 of the Coronavirus Aid, Relief and Economic Security (CARES) Act (Public Law 116-136) and one addressing contracting personnel travelling overseas.

■ **Executive Order 13944, Combating Public Health Emergencies and Strengthening National Security by Ensuring Essential Medicines, Medical Countermeasures, and Critical Inputs Are Made in the United States:** "To protect our citizens, critical infrastructure, military forces, and economy against outbreaks of emerging infectious diseases [such as COVID-19] and chemical, biological, radiological, and nuclear (CBRN) threats," this executive order requires agencies, "to the maximum extent permitted by applicable law, and in consultation with the Commissioner of Food and Drugs (FDA Commissioner) with respect to critical inputs, use their respective authorities under Section 2304(c) of Title 10, United States Code [Contracts: Competition Requirements]; Section 3304(a) of Title 41, United States Code [Use of Noncompetitive Procedures]; and Subpart 6.3 of the Federal Acquisition Regulation, Title 48, Code of Federal Regulations [Other Than Full and Open Competition], to conduct the procurement of essential medicines, medical countermeasures, and critical inputs by: (i) using procedures to limit competition to only those essential medicines, medical countermeasures, and critical inputs that are produced in the United States; and (ii) dividing procurement requirements among two or more manufacturers located in the United States, as appropriate."

**EDITOR'S NOTE:** "Essential medicines" are defined by the executive order as those medicines deemed necessary for the United States as determined by the FDA Commissioner. "Medical countermeasures" are defined as items that meet the definition of "qualified countermeasure," "qualified pandemic or epidemic product, " or "security countermeasure" in Title 42 of the U.S. Code, The Public Health and Welfare; or personal protective equipment. "Critical inputs" are defined as "API [active pharmaceutical ingredient], API Starting Material, and other ingredients of drugs and components of medical devices that the FDA Commissioner determines to be critical in assessing the safety and effectiveness of essential medicines and medical countermeasures."

■ **Department of Defense (DOD) Memorandum "Force Health Protection Travel Guidance for Contractor Personnel":** This memorandum, issued by Kim Herrington, Acting Principal Director, Defense Pricing and Contracting, forwards the memorandum issued by Secretary of Defense Mark Esper which requires that "all military personnel and civilian employees scheduled for deployment outside the United States undergo a 14-day period of pre-

deployment restriction of movement, during which time they are continually monitored for evidence of the disease."

Along with forwarding Mr. Esper's memorandum, Mr. Herrington references the provisions of two recent Force Health Protection Guidance (FHPG) memoranda:

- FHPG Supplement 9, "which provides force health protection (FHP) deployment and redeployment guidance for service members and DOD civilian employees traveling within and outside the United States during the COVID-19 pandemic. While the guidance doesn't levy any requirements for contracting officers or contractor personnel, it states that if DOD contractor personnel do not complete the same pre-deployment screening and restriction of movement (ROM) as Service members and DOD civilian employees, they will not be allowed to travel with military and civilian risk-mitigated forces."

- FHPG Supplement 12 provides pre- and post-travel guidance for service members, DOD civilian employees, and DOD contractor personnel traveling for purposes other than deployment. "Most notably, FHPG (Supplement 12) directs DOD contracting officers to: ensure all contracts including performance outside the United States require DOD contractor personnel to complete a risk assessment of health status; and ensure all contracts including performance outside the United States require DOD contractor personnel to comply with the country entry requirements of the respective geographic combatant command (GCC) (which may include screening, ROM [restriction of movement], and testing), as reflected in the EFCG [Electronic Foreign Clearance Guide], and all applicable host nation procedures."

■ **CARES Act Section 3610:** DOD has issued four documents that address various aspects of the CARES Act (Public Law 116-136), Section 3610, Federal Contractor Authority, which authorizes, but does not require, contracting officers to modify contracts and other agreements, without consideration, to reimburse contractors for paid leave a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of government and contractor personnel during the COVID-19 public health emergency. "Such authority applies only to a contractor whose employees or subcontractors cannot perform work on a site that has been approved by the federal government, including a federally-owned or leased facility or site, due to facility closures or other restrictions, and who cannot telework because their job duties cannot be performed remotely during the public health emergency." (For more on the CARES Act, see the April 2020 ***Federal Contracts Perspective*** article "Coronavirus Overruns United States, Emergency Acquisition Authorities Invoked.")

- **Revision 1 to Deviation 2020-O0013 on CARES Act Section 3610 Implementation:** This revision to Deviation 2020-O0013, issued by Kim Herrington, reiterates the statement that reimbursements under Section 3610 are subject to the availability of funds, and changes the start date of the time period for which paid leave must be taken to be eligible for reimbursement under Section 3610.

  Paragraph (b)(7) is added to Defense FAR Supplement (DFARS 231.205-79, CARES Act Section 3610 – Implementation. Paragraph (b)(7) states, "The allowable amount is limited to the amount of funds specifically obligated on a separate line item that cites the purpose of the funds is for reimbursement under Section 3610 of the CARES Act."

DFARS 231.205-79(b)(5) had provided that the period during which paid leave is eligible for Section 3610 reimbursement was January 31, 2020, through September 30, 2020, the expiration date established in Section 3610. January 31, 2020, was the date the public health emergency for COVID-19 was declared. However, the CARES Act was enacted on March 27, 2020, and that is the date Section 3610 went into effect, so paragraph (b)(7) is amended to provide that the period during which paid leave eligible for Section 3610 reimbursement is March 27, 2020, through September 30, 2020.

– **Deviation 2020-O0021 on Section 3610 Reimbursement Requests:** This deviation, issued by Kim Herrington, forwards three checklists to provide the type of information the contracting officer may need to assess a contractor's Section 3610 reimbursement request. These checklists provide guidance for processing reimbursement requests and may be tailored to fit specific circumstances. The three checklists are:

  ○ *Abbreviated Reimbursement Checklist* – For use when the request applies only to reimbursement under a single contract of direct charged employees provided with paid leave, and the amount of reimbursement requested is below $2,000,000 in total.

  ○ *Multipurpose Reimbursement Checklist* – For use when the request applies to a single contract, when the Abbreviated Reimbursement Checklist is not applicable, or to multiple contracts when the Global Reimbursement Checklist is not being used.

  ○ *Global Reimbursement Checklist* – For use when the request seeks a global reimbursement at a business unit (or segment) level.

  In addition, this deviation requires that DFARS 252.243-7999, Section 3610 Reimbursement (DEVIATION 2020-O0021), be used when modifying contracts, task orders, or delivery orders to provide for the reimbursement of paid leave to an affected contractor under Section 3610.

– **Memorandum Providing Implementation Guidance for Section 3610 Reimbursement Requests on Other Transactions for Prototype Projects:** This memorandum, issued by Kim Herrington, applies Deviation 2020-O0013, Revision 1, and Deviation 2020-O0021 to "other transactions" (OTs) for prototype projects, even though OTs are generally not subject to the FAR or DFARS. "However, the principles provided in these class deviations and associated guidance may be used in considering requests for reimbursement under Section 3610 in an OT for Prototype Projects agreement authorized under 10 USC 2371b [Authority of the Department of Defense to Carry Out Certain Prototype Projects]."

  Section 3610 provides that "funds made available to an agency by this [CARES] Act or any other act may be used by such agency to modify the terms and conditions of a contract, or *other agreement*, without consideration…" (*emphasis* added). This includes OTs for prototype projects under 10 USC 2371b.

  **EDITOR'S NOTE:** OTs were originally authorized by Section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103-160), to encourage "nontraditional defense contractors" to share their expertise with DOD outside of FAR-

governed acquisitions. The OT authority have been codified in 10 USC 2371, Research Projects: Transactions Other Than Contracts and Grants (the name "other transactions" came from "Transactions Other Than…"). Subsequently, DOD was granted OT authority for prototype projects by the NDAA for FY 2016 (Public Law 114-92), Section 815, Amendments to Other Transaction Authority, which has been codified in 10 USC 2371b. The statute defines a "nontraditional defense contractor" as "an entity that is not currently performing and has not performed, for at least the one-year period preceding the solicitation of sources by the Department of Defense for the procurement or transaction, any contract or subcontract for the Department of Defense that is subject to full coverage under the cost accounting standards…"

– **Memorandum Forwarding Template for Contracting Officers to Record Section 3610 Reimbursement:** This memorandum, issued by Kim Herrington, distributes a Memorandum for Record (MFR) template to document the files for contract actions resulting from contractor requests for reimbursement under Section 3610. The template has the following sections: I, Purpose; II, Description of the Requirement; III, Affected Contractor; IV, Proposed Reimbursement; V, Evaluation; VI, Pricing and Reimbursable Amount; VII, Reliance on Contractor Representation; VIII, Funding; and IX, Modification Summary.

## DOD CRANKS UP THE DFARS CHANGES

The Department of Defense was *very* busy in August! Besides issuing the COVID-19 policies and procedures (see preceding article) and the guidance to micro-purchase cardholders on complying with the Chinese telecommunications prohibition (see first article), it issued three final rules, four proposed rules, one advanced notice of proposed rulemaking (ANPR), and three superseding deviations!

■ **Definition of "Micro-Purchase Threshold":** This final rule amends DFARS 202.101, Definitions, by removing the definition of "micro-purchase threshold."

DFARS 202.101 defined "micro-purchase as: "for DOD acquisition of supplies or services funded by DOD appropriations, in lieu of the definition at FAR 2.101 [Definitions], means $5,000 (10 USC 2338 [Micro-Purchase Threshold]), except…for DOD acquisition of supplies or services for basic research programs and for activities of the DOD science and technology reinvention laboratories, it means $10,000 (10 USC 2339 [Micro-Purchase Threshold for Basic Research Programs and Activities of the Department of Defense Science and Technology Reinvention Laboratories])."

The NDAA for FY 2019 (Public Law 115-232), Section 821, Increase in Micro-Purchase Threshold Applicable to Department of Defense, amended 10 USC 2338 by increasing the micro-purchase threshold for DOD from $5,000 to $10,000 and repealing 10 USC 2339. The Director of Defense Pricing/Defense Procurement and Acquisition Policy issued a deviation in August 2018 implementing Section 821, so this final rule merely catches DFARS 202.101 up with Section 821 and the deviation by removing the outdated "micro-purchase threshold" definition from DFARS 202.101. The "micro-purchase threshold" definition in FAR 2.101 now applies to DOD. (**EDITOR'S NOTE:** This action is separate from the increase of the micro-

purchase threshold in FAC 2020-07; see the August 2020 ***Federal Contracts Perspective*** article "FAC 2020-07 Increases Simplified Acquisition, Micro-Purchase Thresholds.")

For more on Section 821, see the see the September 2018 ***Federal Contracts Perspective*** article "$717 Billion Defense Authorization Act Addresses DOD Micro-Purchase Threshold, Commercial Items." For more on the DOD deviation implementing Section 821, see "Class Deviation on Micro-Purchase and Simplified Acquisition Thresholds, and Special Emergency Procurement Authority" in the October 2018 ***Federal Contracts Perspective*** article "DOD Continues Cleaning Up the DFARS."

■ **Repeal of "Ordering" Clause:** This final rule repeals DFARS 252.216-7006, Ordering, because it is redundant and no longer necessary.

DFARS 252.216-7006 was included in solicitations and contracts in place of FAR 52.216-18, Ordering, when a definite-quantity contract, a requirements contract, or an indefinite-quantity contract was contemplated. DFARS 252.216-7006 notified contractors of the ordering period for the contract, that orders are subject to the terms and conditions of the contract, and that an order is considered issued by the government if sent by facsimile (fax), U.S. mail, private delivery services, or electronic commerce.

FAR 52.216-18 is included in the same solicitations and contracts as DFARS 252.216-7006 and advises contractors of most of the information included in DFARS 252.216-7006. except that FAR 52.216-18 provides that "orders may be issued orally, by facsimile, or by electronic commerce methods only if authorized in the schedule."

FAC 2020-07 included a final rule that revised FAR 52.216-18 to authorize the government to use of fax and electronic commerce to issue orders (see "Orders Issued Via Fax or Electronic Commerce" under the August 2020 ***Federal Contracts Perspective*** article "FAC 2020-07 Increases Simplified Acquisition, Micro-Purchase Thresholds"). Since FAR 52.216-18 now includes the same information as DFARS 252.216-7006, DFARS 252.216-7006 is duplicative and no longer necessary, so it is removed.

■ **Use of Defense Logistics Agency (DLA) Energy as a Source of Fuel:** This final rule adds DFARS 251.101, Policy [on contractor use of government supply sources], to permit contracting officers to authorize contractors to use DLA Energy (**https://www.dla.mil/Energy/**) as a source of fuel in the performance of non-cost-reimbursement contracts when the fuel is funded by the Defense Working Capital Fund.

Paragraph (a)(1) of FAR 51.101, Policy, permits contracting officers to authorize contractors to use government supply sources in performing cost-reimbursement contracts. However, FAR 51.101 is inadequate for DOD's purposes. As explained in the rule's introduction: "DOD contractors provide supplies and services that require the use of ground, aviation, or marine fuels in performance of their contracts. In some instances, these supplies and services are required in locations where there are no commercial fuel sources available, the quality of fuel is degraded, or the commercial fuel supply is inadequate. As a result, the availability of reliable and quality fuel becomes critical for contract performance. DLA Energy has a worldwide bulk-fuel supply chain that can provide military specification fuels, as well as most commercial specification ground fuels (*e.g.*, gasoline, diesel, and heating fuel), on military bases."

The rule's introduction continues to explain why DFARS 251.101 is necessary: "The use of fixed-price contracts has increased as a result of statutory and policy acquisition requirements that attempt to reduce risk to the government. For example, 41 USC 3307(e)(4)(A)(i) [Preference

for Commercial Items] requires commercial supplies and services to be acquired via fixed-price or time-and-materials contracts. As a result, many of the requirements that need to use DLA Energy ground, aviation, or marine fuels are now being awarded as fixed-price contracts and, therefore, are not eligible to authorize the use government supply sources in performance of the contract, in accordance with FAR [subpart] 51.1 [Contractor Use of Government Supply Sources]…As a result, this rule intends to help stabilize contractor's fuel costs and supply chain for fuel, as well as reduce contract performance risk by providing contractors with an adequate and reliable source of fuel, when applicable and necessary."

The text of DFARS 251.101 is "Notwithstanding the restriction at FAR 51.101(a)(1), contracting officers may authorize contractors to use Defense Logistics Agency Energy as a source of fuel in performance of other than cost-reimbursement contracts, when the fuel is funded by the Defense Working Capital Fund. When providing this authorization to contractors, follow the procedures at PGI [Procedures, Guidance, and Information] 251.101."

This final rule adopts DEVIATION 2019-O0012, which was issued by Kim Herrington, Acting Principal Director, Defense Pricing and Contracting, in September 2019 to authorize DOD contracting officers to allow contractors to use DLA Energy. For more on the deviation, see "Deviation Authorizing Contractors to Use Defense Logistics Agency (DLA) Energy as a Source of Fuel" in the October 2019 ***Federal Contracts Perspective*** article "DOD Unleashes Deluge of DFARS Changes."

■ **Use of Supplier Performance Risk System (SPRS) Assessments:** This rule proposes to add DFARS subpart 204.7X, Supplier Performance Risk System, and DFARS 252.204-70XX, Notice to Prospective Suppliers on the Use of the Supplier Performance Risk System in Performance Evaluations, to update the policy and procedures for use of the SPRS.

SPRS (**https://www.sprs.csd.disa.mil/**) is DOD's single, authorized application for retrieval of suppliers' performance information. SPRS gathers, processes, and displays quality and delivery data from government systems to calculate "on time" delivery scores and quality classifications. DFARS subpart 213.1, Procedures [for simplified acquisitions], requires contracting officers to consider this data for supply contracts that are less than or equal to $1,000,000, including solicitations using the procedures in FAR part 12, Acquisition of Commercial Items. (**EDITOR'S NOTE:** Access to SPRS is exclusively through the DOD Procurement Integrated Enterprise Environment [PIEE] [**https://piee.eb.mil/piee-landing/**]).

This proposed rule would move coverage of the SPRS from DFARS 213.106-2, Evaluation of Quotations or Offer, to new DFARS subpart 204.7X, Supplier Performance Risk System, and expand SPRS coverage to include *all* acquisitions conducted under FAR part 13 (including FAR subpart 13.5, Simplified Procedures for Certain Commercial Items, which applies to acquisitions of commercial items not exceeding $7,000,000).

Also, the proposed rule would convert the clause DFARS 252.213-7000, Notice to Prospective Suppliers on Use of Supplier Performance Risk System in Past Performance Evaluations, into provision DFARS 252.204-70XX, Notice to Prospective Suppliers on Use of Supplier Performance Risk System in Performance Evaluations, to enhance the use of SPRS in the evaluation of a supplier's performance through the introduction of SPRS system-generated item, price, and supplier risk assessments.

This proposed rule would make the following changes:

– DFARS subpart 204.7X would be added. It would consist of:

- DFARS 204.7X01, Definitions, which would include definitions for the three risk assessments using the SPRS Evaluation Criteria and calculations at **https://www.sprs.csd.disa.mil/pdf/SPRS_DataEvaluationCriteria.pdf**:

  - "*Item risk* means the probability that a product or service, based on intended use, will introduce performance risk resulting in safety issues, mission degradation, or monetary loss.
  - "*Price risk* means the measure of whether a proposed price for a product or service is consistent with historical prices paid for that item or service.

  - "*Supplier risk* means the probability that an award made to a supplier may subject the procurement to the risk of unsuccessful performance or to supply chain risk (see [DFARS] 239.7301 [Definitions (for supply chain risk requirements)])."

- DFARS 204.7X02, Applicability, would provide that SPRS is required to be used to evaluate quotes and offers in response to all "acquisitions using FAR part 13 simplified acquisition procedures, including solicitations for supplies and services using FAR part 12 procedures for the acquisition of commercial items."

- DFARS 204.7X03, Procedures, would provide guidance to the contracting officer on how SPRS item, price, and supplier risk assessments shall be considered during award decisions, how to respond to the risk assessment ratings, and what mitigating strategies are to be considered for the risk assessments prior to award.

- DFARS 204.7X04 would prescribe the use of DFARS 252.204-70XX "in solicitations for supplies and services, including solicitations using FAR part 12 procedures for the acquisition of commercial items." (**EDITOR'S NOTE:** As written, the prescription requires that DFARS 252.204-70XX be included in *all* solicitations for supplies and services, not just "acquisitions using FAR part 13 simplified acquisition procedures," as stated in DFARS 204.7X02. This will need to be clarified in the final rule.)

– DFARS 209.105-1, Obtaining Information, would be amended to require contracting officers to use the supplier risk assessments available in SPRS as a factor in determining responsibility as required by DFARS 204.7X03.

– In paragraph (f) of DFARS 212.301, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items, DFARS 252.213-7000 would be removed from the list of clauses and provisions applicable to FAR part 12 acquisitions, and its replacement, DFARS 252.204-70XX, would be added.

– DFARS 213.106-2, Evaluation of Quotations or Offers, would be amended to remove the current language pertaining to the SPRS (which would be moved to DFARS subpart 204.7X). Revised DFARS 213.106-2 would require that SPRS data be used for evaluation of a supplier quote or offer for *all* solicitations for supplies and services using

FAR part 13 simplified acquisition procedures, including solicitations using FAR part 12 procedures for acquisition of commercial items. In addition, the revised DFARS 213.106-2 would require the contracting officer to evaluate suppliers using all SPRS data, not just past performance data, and require that the basis for award be based on an overall risk assessment, if applicable.

– DFARS 213.106-2-70, Solicitation Provision, which consists of the prescription for DFARS 252.213-7000, would be removed since DFARS 252.213-7000 is being removed.

– DFARS 252.204-70XX would provide the same definitions of the three SPRS risk assessments in DFARS 204.7X01, provide a notice that SPRS will be used in the evaluation of suppliers' performance, address how the SPRS risk assessments will be used by the contracting officer to evaluate quotes or offers received in response to the solicitation, add a link to the SPRS webpage; and provide links to the SPRS User's Guide and SPRS evaluation criteria.

– Finally, DFARS 252.213-7000 would be removed.

Comments on this proposed rule must be submitted no later than October 30, 2020, identified as "DFARS Case 2019-D009," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) email: **osd.dfars@mail.mil**; (3) fax: 571–372–6094; or (4) mail: Defense Acquisition Regulations System, Attn: Heather Kitchens, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

■ **Property Loss Reporting in the Procurement Integrated Enterprise Environment (PIEE):** This rule proposes to amend DFARS 252.245-7002, Reporting Loss of Government Property. to replace a reference to a legacy software application used to report the loss of government property – the Defense Contract Management Agency (DCMA) eTool (**https://www.dcma.mil/WBT/propertyloss/**) – with the DOD enterprise-wide eBusiness platform, Procurement Integrated Enterprise Environment (PIEE) (**https://piee.eb.mil/piee-landing/**).

The DCMA eTool is an application that has numerous limitations, including its inability to (1) share data with other internal or external DOD business systems, and (2) respond to changes in regulation, policies, and procedures. DOD developed the government-furnished property (GFP) module within the PIEE to address these limitations and to provide end-to-end accountability for all GFP transactions within a secure, single, integrated system. For example, contractors will not be required to enter the same data into multiple fields, as is the case with the DCMA eTool; the GFP module of the PIEE will automatically populate data fields throughout the process.

DFARS 252.245-7002 is required to be included in solicitations and contracts that include FAR 52.245-1, Government Property. DFARS 252.245-7002(b)(1) requires the reporting of lost government property to the DCMA eTool. This proposed rule would amend DFARS 252.245-7002(b)(1) to direct contractors to use the PIEE instead of the DCMA eTool when reporting loss of GFP. Revised (b)(1) would state, "The contractor shall use the property loss function in the Government-Furnished Property (GFP) module of the Procurement Integrated Enterprise Environment (PIEE) for reporting loss of government property. Reporting value shall be at unit

acquisition cost. Current PIEE users can access the GFP module by logging into their account. New users may register for access and obtain training on the PIEE home page at **https://wawf.eb.mil/piee-landing**." There are no changes to the data to be reported, just the application to which the data is to be submitted.

In addition, DFARS 245.102, Policy [regarding government property], paragraph (5), *Reporting Loss of Government Property*, requires the reporting of government property loss to the DCMA eTool. The proposed rule would substitute the following as paragraph (5): "The Government-Furnished Property module of the Procurement Integrated Enterprise Environment is the DOD data repository for reporting loss of government property in the possession of contractors. The requirements and procedures for reporting loss of government property to the Government-Furnished Property module are set forth in the clause at [DFARS] 252.245-7002..."

Comments on this proposed rule must be submitted no later than October 30, 2020, identified as "DFARS Case 2020-D005," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) email: **osd.dfars@mail.mil**; (3) fax: 571–372–6094; or (4) mail: Defense Acquisition Regulations System, Attn: Kimberly Ziegler, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

**EDITOR'S NOTE:** This proposed DFARS 252.245-7002(b)(2) and DFARS 245.102(5) are a duplicates of DFARS 252.245-7002 (DEVIATION 2020-O0004) and DFARS 245.102 (DEVIATION 2020-O0004), which were included in Deviation 2020-O0004 issued by Kim Herrington, Acting Principal Director, Defense Pricing and Contracting, in February 2020; see "Deviation on Reporting Loss of Government Property" in the March 2020 ***Federal Contracts Perspective*** article "Three Deviations Issued by DOD."

■ **Validation of Proprietary and Technical Data:** This rule proposes to amend DFARS 227.7103-13, Government Right to Review, Verify, Challenge, and Validate Asserted Restrictions, and DFARS 252.227-7037, Validation of Restrictive Markings on Technical Data, to implement the NDAA for FY 2019 (Public Law 115-232), Section 865, Validation of Proprietary and Technical Data, which repeals several years of congressional adjustments to the statutory presumption of development exclusively at private expense for commercial items in the validation procedures of paragraph (f) of 10 USC 2321, Validation of Proprietary Data Restrictions.

The presumption of development funding at private expense for commercial items was established by the Federal Acquisition Streamlining Act (FASA) of 1994 (Public Law 103-355), Section 8106, Presumption That Technical Data Under Contracts for Commercial Items are Developed Exclusively at Private Expense, which provided that "in the case of a contract for a commercial item, the item shall be presumed to be developed at private expense unless shown otherwise in accordance with Section [10 USC] 2321(f)."

Also, Section 8106 provided "In the case of a challenge to a use or release restriction that is asserted with respect to technical data of a contractor or subcontractor under a contract for commercial items, the contracting officer shall presume that the contractor or subcontractor has justified the restriction on the basis that the item was developed exclusively at private expense, whether or not the contractor or subcontractor submits a justification in response to the [challenge] notice…In such a case, the challenge to the use or release restriction may be sustained only if information provided by the Department of Defense demonstrates that the item was not developed exclusively at private expense."

This statutory presumption has been amended numerous times to require that contractors take certain steps to demonstrate that they paid for the development of commercial items if their restrictions on technical data are challenged, including by the NDAA for FY 2007 (Public Law 109-364), paragraph (b) of Section 802, Additional Requirements Relating to Technical Data Rights; the NDAA for FY 2008 (Public Law 110-181), paragraph (a)(2) of Section 815, Clarification of Rules Regarding the Procurement of Commercial Items; the NDAA for FY 2015 (Public Law 113-291), paragraph (a)(5) of Section 1071, Technical and Clerical Amendments; and the NDAA for FY 2016 (Public Law 114-92), paragraph (a) of Section 813, Rights in Technical Data.

Section 865 of the NDAA for FY 2019 repeals the amendments to 10 USC 2321(f) made by the NDAAs for FYs 2007 through 2016 (which are contained in paragraph (f)(2)), thus returning the presumption of development funding for commercial items to its original form, as established by Section 8106 of FASA.

DFARS 227.7103-13(c) and DFARS 252.227-7037(b) have evolved to track the statutory changes. DOD published an advance notice of proposed rulemaking (ANPR) seeking information from experts and interested parties in government and the private sector to assist in the development of a DFARS revision, particularly to DFARS 227.7103-13 and DFARS 252.227-7037. In addition, DOD held a public meeting on November 15, 2019, to obtain the views of interested parties (see "Validation of Proprietary and Technical Data" in the October 2019 ***Federal Contracts Perspective*** article "DOD Unleashes Deluge of DFARS Changes").

After analyzing the comments and provided information, DOD is proposing to make the following changes: to DFARS 227.7103-13 and DFARS 252.227-7037:

- In DFARS 227.7103-13(c)(1), *Requirements to Initiate a Challenge*, the third sentence would be removed ("The contracting officer shall not challenge a contractor's assertion that a commercial item was developed exclusively at private expense unless the Government can demonstrate that it contributed to development of that item.").

- DFARS 227.7103-13(c)(2), *Commercial Items – Presumption Regarding Development Exclusively at Private Expense*, would be revised to read as follows: "10 USC 2320(b)(1) [Rights in Technical Data] and [10 USC] 2321(f) establish a presumption and procedures regarding validation of asserted restrictions for technical data related to commercial items on the basis of development exclusively at private expense. Contracting officers shall presume that a commercial item was developed exclusively at private expense whether or not a contractor or subcontractor submits a justification in response to a challenge notice. The contracting officer shall not challenge a contractor's assertion that a commercial item was developed exclusively at private expense unless the government can specifically state the reasonable grounds to question the validity of the assertion. The challenge notice shall, to the maximum extent practicable, include sufficient information to reasonably demonstrate that the commercial item was not developed exclusively at private expense. In order to sustain the challenge, the contracting officer shall provide information demonstrating that the commercial item was not developed exclusively at private expense. A contractor's or subcontractor's failure to respond to the challenge notice cannot be the sole basis for issuing a final decision denying the validity of an asserted restriction."

– DFARS 252.227-7037(b), *Commercial Items – Presumption Regarding Development Exclusively at Private Expense*, would be revised to read as follows: "The contracting officer will presume that the contractor's or a subcontractor's asserted use or release restrictions with respect to a commercial item are justified on the basis that the item was developed exclusively at private expense. The contracting officer will not issue a challenge unless there are reasonable grounds to question the validity of the assertion that the commercial item was not developed exclusively at private expense."

– To DFARS 252.227-7037(e)(1)(i), *Challenge*, which currently states that a contracting officer's challenge shall "state the specific grounds for challenging the asserted restriction," would be added the following: "including, for commercial items, to the maximum extent practicable, sufficient information to reasonably demonstrate that the commercial item was not developed exclusively at private expense."

– DFARS 252.227-7037(f), *Final Decision When Contractor or Subcontractor Fails to Respond*, which currently states that the contracting officer will issue a final decision if the contractor or subcontractor fails to respond to the challenge notice, the following would be added: "In order to sustain the challenge for commercial items, the contracting officer will provide information demonstrating that the commercial item was not developed exclusively at private expense. This final decision will be issued as soon as possible…"

– To DFARS 252.227-7037(g)(2)(i), *Final Decision When Contractor or Subcontractor Responds*, which currently states that "if the contracting officer determines that the validity of the restrictive marking is not justified, the contracting officer shall issue a final decision to the contractor or subcontractor in accordance with the Disputes clause [FAR 52.233-1]" and provides instructions on issuing the final decision, would be added the following: "In order to sustain the challenge for commercial items, the contracting officer will provide information demonstrating that the commercial item was not developed exclusively at private expense."

Comments on this proposed rule must be submitted no later than October 30, 2020, identified as "DFARS Case 2018-D069," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) email: **osd.dfars@mail.mil**; (3) fax: 571–372–6094; or (4) mail: Defense Acquisition Regulations System, Attn: Jennifer Johnson, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

■ **Prohibition on Contracting with Persons Who Have Business Operations with the Nicolás Maduro Regime:** The rule proposes to add DFARS 225.7019, Prohibition on Contracting with the Maduro Regime, to implement the NDAA for FY 2020 (Public Law 116-92), Section 890, Prohibition on Contracting with Persons That Have Business Operations with the Maduro Regime, which prohibits contracts "for the procurement of goods and services with any person that has business operations with an authority of the government of Venezuela that is not recognized as the legitimate government of Venezuela by the United States government" (with a few exceptions: the contract is for providing humanitarian assistance or disaster relief, for conducting evacuations, or is vital to the United States' national security).

DFARS 225.7019 would consist of five subsections:

- DFARS 225.7019-1, Definitions, which would provide definitions for "agency or instrumentality," "business operations," "government of Venezuela," and "person."

- DFARS 225.7019-2, Prohibition, which would consist of the text of Section 890.

- DFARS 225.7019-3, Exceptions, which would list two exceptions: (1) a person who has a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury; or (2) the acquisition is related to the operation and maintenance of the United States government's consular office and diplomatic posts in Venezuela.

- DFARS 225.7019-4, Joint Determination, which would require the Secretary of Defense and the Secretary of State to jointly determine that an acquisition is exempt from the prohibition because it is for humanitarian assistance, etc.

- DFARS 225.7019-5, Solicitation Provision and Contract Clause, which would require the inclusion of DFARS 252.225-70XX, Representation Regarding Business Operations with the Maduro Regime, in solicitations that contain DFARS 252.225-70YY, Prohibition Regarding Business Operations with the Maduro Regime, including solicitations using the procedures in FAR part 12, Acquisition of Commercial Items, and below the simplified acquisition threshold ($250,000).

    - DFARS 252.225-70XX would include the requirements and restrictions of DFARS 225.7019 and the following representation: "By submission of its offer, the offeror represents that the offeror (1) does not have any business operations with an authority of the Maduro regime or the government of Venezuela that is not recognized as the legitimate government of Venezuela by the United States government; or (2) has a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury." This proposed provision is a duplicate of DFARS 252.225-7974, Representation Regarding Persons That Have Business Operations with the Maduro Regime (DEVIATION 2020-O0005), which was included in Deviation 2020-O0005 issued by Kim Herrington, Acting Principal Director, Defense Pricing and Contracting, in February 2020 (see "Deviation Prohibiting Contracting with Persons Who Have Business Operations with the Maduro Regime" in the March 2020 ***Federal Contracts Perspective*** article "Three Deviations Issued by DOD").

    - DFARS 252.225-70YY would include the requirements and restrictions of DFARS 225.7019 and the following paragraph (d): "The contractor shall insert the substance of this clause, including this paragraph (d), in all subcontracts, including subcontracts for the acquisition of commercial items."

Comments on this proposed rule must be submitted no later than October 30, 2020, identified as "DFARS Case 2020-D010," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) email: **osd.dfars@mail.mil**; (3) fax: 571–372–6094; or (4) mail: Defense Acquisition Regulations System, Attn: Kimberly Bass, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

■ **Small Business Innovation Research (SBIR) and Small Business Technology Transfer Program (STTR) Data Rights:** This advance notice of proposed rulemaking (ANPR) is seeking information that will assist in the development of a DFARS revision to implement the intellectual property (for example, data rights) portions of the Small Business Administration's (SBA) SBIR Program and STTR Program Policy Directive (see the May 2019 ***Federal Contracts Perspective*** article "SBA Issues Combined SBIR Program and STTR Program Policy Directive").

The SBIR and STTR programs are governed by 15 USC 638, Research and Development, which includes specialized coverage regarding intellectual property developed under those programs. Specifically, the law requires that the SBIR and STTR program policy directives allow a small business concern to "[retain] the rights to data generated by the concern in the performance of an SBIR [or STTR] award for a period of not less than 4 years." This retention of rights applies even in cases when the development work is being paid for entirely at government expense to meet the needs of the SBIR/STTR contract.

The SBIR/STTR Policy Directive includes several revisions affecting the data rights coverage, which require corresponding revisions to the DFARS. For example, the Policy Directive:

- Establishes a single, non-extendable, 20-year SBIR/STTR data protection period, rather than the 4-year period that could be extended indefinitely;
- Grants the government licensed use for government purposes after the expiration of the SBIR/STTR data protection period, rather than unlimited rights; and
- Establishes or revises several important definitions to harmonize the terminology used in the Policy Directive and the FAR and DFARS implementations, while allowing for agency-specific requirements (for example, agency-specific statutes).

DOD has developed a initial draft of proposed revisions to the DFARS to implement the SBA's SBIR/STTR Policy Directive. It is available at **https://www.acq.osd.mil/dpap/dars/change_notices.html** under "DFARS Case 2019-D043." DOD is seeking comments on the proposed revisions, particularly in the following areas:

- The SBIR/STTR data protection period
- U.S. government rights at the expiration of the SBIR/STTR data protection period
- Definitions
- Omission of required restrictive markings
- Applicability and flowdown of SBIR/STTR clauses
- STTR-specific coverage
- Prototypes
- Prohibition on preaward negotiation
- Any additional administrative or technical revisions

– Comments on any increase or decrease in burden and costs

Comments on this proposed rule must be submitted no later than October 30, 2020, identified as "DFARS Case 2019-D043," by any of the following methods: (1) the Federal eRulemaking Portal: **http://www.regulations.gov**; (2) email: **osd.dfars@mail.mil**; (3) fax: 571–372–6094; or (4) mail: Defense Acquisition Regulations System, Attn: Jennifer Johnson, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

■ **Superseding Deviation Prohibiting Providing Funds to the Enemy and Authorization of Additional Access to Records:** This deviation, issued by Kim Herrington, Acting Principal Director, Defense Pricing and Contracting, implements the NDAA for FY 2015 (Public Law 113-291), Section 841, Prohibition on Providing Funds to the Enemy, and Section 842, Additional Access to Records, by requiring DFARS 252.225-7993, Prohibition on Providing Funds to the Enemy (DEVIATION 2020-O0022), and DFARS 252.225-7975, Additional Access to Contractor and Subcontractor Records (DEVIATION 2020-O0022), to be included "in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, with an estimated value in excess of $50,000 that will be performed outside the United States and its outlying areas in support of a contingency operation in which members of the Armed Forces are actively engaged in hostilities." Also, the deviation includes procedures for the heads of contracting activities (HCAs) when exercising these authorities.

Section 841 grants HCAs the authority to terminate or void contracts and to restrict future awards directly or indirectly to any person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities. Section 842 grants the authority for additional access to contractor and subcontractor records to the extent necessary to ensure that funds available under covered contracts are not provided directly or indirectly to any person or entity that is actively opposing United States or coalition forces involved in a contingency operation in which members of the Armed Forces are actively engaged in hostilities.

Deviation 2020-O0001, which was issued on November 25, 2019, had included these two clauses and provided that they were to remain in effect until December 31, 2021. However, the NDAA for FY 2020 (Public Law 116-92), was enacted a month later, on December 22, 2019, and its Section 822, Extension of Never Contract with the Enemy, extended the effective date of Section 841 until December 31, 2023. Therefore, this deviation supersedes Deviation 2020-O0001 and extends the effective date of the two clauses.

■ **Superseding Deviation on Section 890 Pilot Program to Accelerate Contracting and Pricing Processes:** This deviation, issued by Kim Herrington, Acting Principal Director, Defense Pricing and Contracting, supersedes Deviation 2019-O0008, which required the inclusion of DFARS 252.215-7998, Pilot Program to Accelerate Contracting and Pricing Processes (DEVIATION 2019-O0008), in solicitations and resulting contracts approved by the Principle Director, Defense Pricing and Contracting, to participate in the "Section 890 Pilot Program."

The NDAA for FY 2019 (Public Law 115-232), Section 890, Pilot Program to Accelerate Contracting and Pricing Processes, authorized the Secretary of Defense to conduct a pilot program with no more than 10 contracts that exceed $50,000,000 (excluding those that are part of a major defense acquisition program), by "basing price reasonableness determinations on actual cost and pricing data for purchases of the same or similar items for the Department of

Defense, and reducing the cost and pricing data to be submitted..." The program was to expire January 2, 2021.

Deviation 2019-O008 required that DFARS 252.215-7998 (DEVIATION 2019-O0008) be included in solicitations and the resulting contracts that have been approved by the Director, Defense Pricing and Contracting (DPC)/Pricing and Contracting Initiatives, to participate in the pilot program. The clause described the pilot program, the purpose of the program, and required the contractor, as a condition of participating in the pilot program, to "submit verifiable data documenting any savings (time and money) achieved as a result of this pilot program within 3 months after award or modification of this contract."

The NDAA for FY 2020 (Public Law 116-92), enacted December 21, 2019, includes Section 825, Pilot Program to Accelerate Contracting and Pricing Processes, which removed the 10 contracts limitation on the Section 890 pilot program and extended the program until January 2, 2023.

This superseding Deviation 2020-O0020 includes a six-page application template for contracting officers seeking approval for a contract to participate in the Section 890 pilot program. Mr. Herrington suggests that "contract actions best suited for the pilot program are those of a recurring nature, for which there is reliable, historical actual cost data. It is preferable to conduct these pilots with companies that have approved business systems. Additionally, while not a condition for participation, use of a fixed-price-incentive contract type can reduce the cost risk for the participating parties and provide measurable results at the conclusion of the acquisition in relation to a target cost."

In addition to DFARS 252.215-7998, Pilot Program to Accelerate Contracting and Pricing Processes (DEVIATION 2020-O0020), Deviation 2020-O0020 requires contracting officers to include the following in contracts approved for the Section 890 pilot program by the Director, DPC/PCI (as appropriate):

- DFARS 252.215-7010, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data (DEVIATION 2020-O0020) ("the contracting officer shall list the specific cost or pricing data deemed necessary to establish price reasonableness for this acquisition, and describe the required submission format for each type of data"); and

- DFARS 252.215-7997, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data – Modifications – Section 890 Pilot Program (DEVIATION 2020-O0020) (to be used in place of FAR 52.215-21, Requirements for Certified Cost of Pricing Data and Data Other Than Certified Cost or Pricing Data – Modifications).

For more on Deviation 2019-O008, see "Deviation Authorizing Section 890 Pilot Program to Accelerate Contracting and Pricing Processes" in the May 2019 ***Federal Contracts Perspective*** article "DOD Shakes Up the DFARS."

■ **Revision to Deviation on the United States-Mexico-Canada Agreement:** This Revision 1 to Deviation 2020-O0019, Implementation of the United States-Mexico-Canada Agreement (USMCA), issued by Kim Herrington, Acting Principal Director, Defense Pricing and Contracting, is necessary to make the deviation to FAR 52.222-19, Child Labor – Cooperation with Authorities and Remedies (DEVIATION 2020-O0019) applicable when used in conjunction

with FAR 52.213-4, Terms and Conditions-Simplified Acquisitions (Other Than Commercial Items).

Revision 1 modifies the prescription to FAR 52.222-19 (DEVIATION 2020-O0019) to add the following: "When using the clause at FAR 52.213-4, Terms and Conditions – Simplified Acquisitions (Other than Commercial Items)…in lieu of incorporating by reference…[FAR] 52.222-19, Child Labor – Cooperation with Authorities and Remedies, insert the following clause in full text in contracts for supplies exceeding the micro-purchase threshold." Everything else in Deviation 2020-O0019 remains unchanged.

For more on the USMCA and Deviation 2020-O0019, see the August 2020 ***Federal Contracts Perspective*** article "United States-Mexico-Canada Agreement in Effect."

**EDITOR'S NOTE:** The USMCA went into effect on July 1, 2020, and the Civilian Agency Acquisition Council (CAAC) issued a memorandum authorizing civilian agencies to issue class deviations from the FAR to implement the USMCA (DOD is not a member of the CAAC, so it issued Deviation 2020-O0019 on its own). So far, four civilian agencies have issued deviations from the FAR to implement the USMCA: the departments of Commerce, Homeland Security, and the Treasury, and the Small Business Administration (SBA).

## MULTIPLE AWARD SCHEDULE CONSOLIDATION IN FINAL PHASE

The General Services Administration (GSA) announced on August 3 the beginning of Phase 3 of its Multiple Award Schedule (MAS) consolidation. Phase 3 requires all current contractors with more than one contract to consolidate their offerings down to one contract. GSA will be working hand-in-hand with affected contractors to put together their consolidation plans in FY 2021. GSA expects Phase 3 to take five to ten years to reach completion.

In Phase 1, GSA consolidated its 24 MAS into a single solicitation for products, services, and solutions (see the November 2019 ***Federal Contracts Perspective*** article "GSA Consolidating Schedules, Retiring FedBizOpps"). In Phase 2, current contracts were modified to update and streamline terms and conditions for the new solicitation. Phase 2 ended on July 31, 2020, with 99% of contractors signing the "mass modification."

Under the MAS (also referred to as the GSA Schedule and Federal Supply Schedule), GSA establishes long-term, governmentwide contracts with commercial firms offering more than 10 million commercial supplies and services that federal, state, and local agencies order directly from MAS contractors, or through the GSA Advantage!® online shopping and ordering system (**https://www.gsaadvantage.gov**). Approximately $33 billion dollars is spent through the MAS each year.

## PURCHASE CARD LIMITS UNCHANGED BY THRESHOLD INCREASES

The Department of Energy (DOE) has announced that "notwithstanding the Federal Acquisition Regulation finalization that increases the micro-purchase threshold for supplies from $3,500 to $10,000 and the simplified acquisition threshold from $150,000 to $250,000, existing purchase card limits are not raised. Furthermore, new cardholders must not receive these higher limits." (**EDITOR'S NOTE:** The "FAR finalization" referenced in the DOE announcement is in Federal Acquisition Circular (FAC) 2020-07; see the August 2020 ***Federal Contracts Perspective*** article "FAC 2020-07 Increases Simplified Acquisition, Micro-Purchase Thresholds.")

# ASTRO PROGRAM IDIQ SOLICITATION ISSUED

On August 24 the General Services Administration (GSA) issued the long-awaited solicitation for the ASTRO program (Request for Proposals [RFP] 47QFCA20R0026). The ASTRO solicitation is expected to establish a family of ten individual multiple award (MA) indefinite-delivery/indefinite-quantity (IDIQ) contracts that encompass operations, maintenance, readiness, research, development, systems integration, and support for manned, unmanned, and optionally manned platforms and/or robotics sponsored by the Department of Defense (DOD), as well as the services that support those platforms and robotics. The ASTRO MA-IDIQ contracts will be awarded and administered by GSA's Federal Systems Integration and Management Center (FEDSIM). (**EDITOR'S NOTE:** FEDSIM [**https://fedsim.gsa.gov**] provides acquisition support for information technology and professional services to other government agencies for a fee. Orders under the ASTRO MA-IDIQs must be made through FEDSIM unless a contracting officer requests a delegation of procurement authority (DPA) and FEDSIM grants the DPA.)

The 10 MA-IDIQ "pools" under the ASTRO master contract are:

- **Data Operations Pool: A**ll data collection, processing, exploitation, and dissemination activities associated with manned, unmanned, and optionally manned platforms and robotics supporting mission performance.
- **Mission Operations Pool:** Performance of operational services not included in Data Operations associated with manned, unmanned, and optionally manned platforms and robotics supporting mission performance.
- **Aviation Pool:** Maintenance, repair, and overhaul of manned, optionally manned, and unmanned aircraft.
- **Ground Pool:** Maintenance, repair, and overhaul of manned, optionally manned, and unmanned ground platforms and industrial machinery.
- **Space Pool:** Maintenance, repair, and overhaul of manned, optionally manned, and unmanned space platforms.
- **Maritime Pool:** Maintenance, repair, and overhaul of manned, optionally manned, and unmanned maritime platforms.
- **Development/Systems Integration Pool:** Systems integration, improvement, and/or engineering associated with manned, unmanned, and optionally manned platforms.
- **Research and Development (R&D) Pool:** All R&D associated with manned, unmanned, optionally manned, and counter unmanned systems platforms.
- **Support Pool:** All support services (except training) required for successful execution of a product, program, project, or process regarding platforms and robotics for land, air, sea, or space; the planning necessary to support operational missions; and the analysis of the results of an operational mission.
- **Training Pool:** All training services required for successful execution of a product, program, project, or process regarding platforms and/or robotics for land, air, sea, or space.

Each pool is expected to have 45 awards of IDIQ task order contracts, for a total of 450 contract awards. The total number of contractors within any given pool may fluctuate over time due to novation agreements, acquisitions, and mergers, or the government's exercise of the "off-ramp" process (termination, debarment, suspension, allow the contract to expire, etc.). Offerors may compete for more than one pool; however, each offeror may only submit *one* proposal per pool.

Offerors will be evaluated based on relevant experience and past performance, but not cost or price. Section B.7 of the RFP, Task Order Pricing/Tasks, states, "The Master Contract does not establish prices for any supply or service at the task order level; therefore, the OCO [ordering contracting officer] shall establish cost and price reasonableness for each task order using the policies and methods in FAR subpart 15.4 [Contract Pricing], internal policies, and other applicable regulatory supplements."

Each pool is designed to be a total solution vehicle for services solicited and awarded at the task order level. "Total solution" is defined as any combination of support that is integral and necessary to the service-based requirements within the scope of the contract and task order award. For example, a total solution may include any combination of contract types and labor associated with continental U.S. (CONUS) labor, outside CONUS (OCONUS) labor, specialized labor, construction wage rate requirements, professional labor, service contract labor standards, and other costs such as subcontracts, travel, supplies, materials, equipment, special test equipment, and special tooling.

All contract types at the task order level will be permitted, including all types of fixed-price contracts, all types of cost-reimbursement contracts, all types of incentive contracts, time-and-materials (T&M), and labor-hour (LH). Individual task orders may combine more than one contract type and include multi-year or option periods, performance-based procedures, classified and/or unclassified, and commercial and/or non-commercial items.

The ordering period for each contract will be five years, and each will have a five-year option period, which if exercised would make the total contract term ten years in length. Paragraph (e) of FAR 17.204, Contracts [with options], states that "unless otherwise approved in accordance with agency procedures, the total of the basic and option periods shall not exceed 5 years in the case of services, and the total of the basic and option quantities shall not exceed the requirement for 5 years in the case of supplies." To implement the 10-year total contract period, GSA issued a deviation authorized by Jeffrey Koses, GSA Senior Procurement Executive, approving the total contract term of ten years.

In addition, paragraph (a)(ii)(4) of FAR 16.504, Indefinite-Quantity Contracts, requires that each indefinite-quantity contract "specify the total minimum and maximum quantity of supplies or services the government will acquire under the contract…" Since the intent of the ASTRO solicitation is to result in IDIQ task order contracts without a maximum quantity limitation, Jeffrey Koses issued a deviation striking the maximum limitation requirement in FAR 16.504(a)(ii)(4) for the ASTRO program.

While no estimated value of the ASTRO program has been published, the ASTRO program is expected to generate billions of dollars worth of orders over ten years since it is sponsored by the DOD.

Proposals are due no later than 4:00 pm Central Daylight Time on October 30, 2020. Proposals must be submitted electronically via **https://astro.app.cloud.gov**.

# VETS FIRST PROGRAM PREFERENCE CLARIFIED

With the enactment of the Department of Veterans Affairs Contracting Preference Consistency Act of 2020 (Public Law 116-155), the conflict between the Veterans First Contracting Program and the AbilityOne Program has been resolved in favor of the Veterans First Contracting Program.

The AbilityOne Program (**https://www.abilityone.gov**) is one of the largest sources of employment for people who are blind or have significant disabilities. It was created by Congress in 1938 (the Javits-Wagner-O'Day Act) to require the federal government to give a preference to non-profit companies that employ individuals who are blind or severely disabled when contracting for certain products and services including office and medical supplies, clothing items, janitorial work, and call center staffing. These products and services are listed on the Procurement List ("a list of supplies and services that…are suitable for purchase by the government") maintained by the Committee for Purchase from People Who Are Blind or Severely Disabled (operating as the U.S. AbilityOne Commission®) (see FAR 8.002, Priorities for Use of Mandatory Government Sources). FAR subpart 8.7, Acquisition from Nonprofit Agencies Employing People Who Are Blind or Severely Disabled, provides policies and procedures for implementing the AbilityOne Program.

The Veterans First Contracting Program was created by Congress with the Veterans Benefits, Health Care, and Information Technology Act of 2006 (Public Law 109-461) to require the Department of Veterans Affairs (VA) to give a preference to service-disabled veteran-owned small businesses (SDVOSB) and veteran-owned small businesses (VOSB) when awarding contracts (Section 502, Department of Veterans Affairs Goals for Participation by Small Businesses Owned and Controlled by Veterans in Procurement Contracts, and Section 503, Department of Veterans Affairs Contracting Priority for Veteran-Owned Small Businesses). The Veterans Affairs Acquisition Regulation (VAAR) subpart 819.70, Service-Disabled Veteran-Owned and Veteran-Owned and Operated Small Businesses, addresses the Veterans First Contracting Program

Earlier legislation that addressed VA contracting specifically exempted products and services on the AbilityOne Program's Procurement List, but the 2006 legislation did not. As a result, Veterans First and AbilityOne have come into conflict in a series of contract protests and court cases over the last several years.

To resolve this conflict, Congress enacted the VA Contracting Preference Consistency Act on August 8, 2020. The law preserves the AbilityOne Program with respect to products and services VA was purchasing before the Veterans First Program was created in 2006, and the Veterans First Program applies to all other products and services.

This law requires a VA contracting officer to procure covered products and services on the Procurement List through the AbilityOne Program, as a priority mandatory government source. The legislation also provides an exception when a covered product or service was procured from an eligible SDVOSB or VOSB as a result of a VA Rule of Two determination between the period after December 22, 2006 (the day the Veterans Benefits, Health Care, and Information Technology Act of 2006 was enacted) and August 7, 2020 (the day before the enactment of the VA Contracting Preference Consistency Act of 2020). (**EDITOR'S NOTE:** The "VA Rule of Two" is the process by which a VA contracting officer awards contracts on the basis of competition restricted to SDVOSBs and VOSBs if the contracting officer has a reasonable expectation that two or more SDVOSBs or VOSBs will submit offers and that the award can be

made at a fair and reasonable price that offers best value. See Veterans Affairs Acquisition Regulation (VAAR) 819.7005, VA Service-Disabled Veteran-Owned Small Business Set-Aside Procedures, and VAAR 819.7006, VA Veteran-Owned Small Business Set-Aside Procedures.)

On August 14, the VA issued a deviation to VAAR 808.002, Priorities for Use of Mandatory Government Sources, to implement the VA Contracting Preference Consistency Act of 2020. The deviation amends paragraph (a)(1)(iv), which addresses products that are on the Procurement List, and paragraph (a)(2), which addresses services that are on the Procurement List. The deviation provides that the VA contracting officer shall procure products or services that are on the Procurement List through the AbilityOne program – this is essentially the same as VAAR 808.002. However, the deviation adds "exceptions for covered products [or services] previously awarded to SDVOSBs/VOSBs" (paragraphs (a)(1)(iv)(B) and (a)(2)(iii)). The exception states, "If a contract for a covered product [or service] was previously awarded to a VIP-listed SDVOSB or VOSB after December 22, 2006 and in effect August 7, 2020, the requirement shall continue to be procured as a SDVOSB/VOSB set-aside provided (1) the contracting officer makes a determination that two or more VIP-listed SDVOSBs or VOSBs will submit offers for the same or similar product [or service], in accordance with 38 USC 8127 [Small Business Concerns Owned and Controlled by Veterans: Contracting Goals and Preferences] and [VAAR] subpart 819.70; and (2) the award can be made at a fair and reasonable price that offers the best value to the United States." (**EDITOR'S NOTE:** "VIP" stands for "Vendor Information Pages," which is a database at **https://www.vip.vetbiz.gov** that lists businesses the VA has determined are eligible for the Veterans First Contracting Program.)

In addition, the deviation provides that in the event a contract for a covered product or service previously awarded under the Veterans First Contracting Program is terminated or expires, the products or services may not be procured under the AbilityOne Program unless the Head of the Contracting Activity makes a determination that a reasonable expectation no longer exists that two or more SDVOSBs/VOSBs will submit offers, and that an award can be made at a fair and reasonable price that offers best value to the United States.

## FEDERAL MINIMUM WAGE INCREASED TO $10.95/HOUR FOR 2021

The Department of Labor (DOL) has announced that the applicable minimum wage rate to be paid to workers performing work on or in connection with federal contracts covered by Executive Order 13658, Establishing a Minimum Wage for Contractors, beginning January 1, 2021, is increased from $10.80 to $10.95 per hour.

Executive Order 13658 was signed by President Obama on February 12, 2014 (see the March 2014 ***Federal Contracts Perspective*** article "President Issues Executive Order Mandating $10.10/Hour Minimum Wage"), which raised the hourly minimum wage paid by contractors to workers performing work on covered federal contracts to $10.10 per hour, beginning January 1, 2015. Further, the executive order stated that the Department of Labor (DOL) would adjust the minimum wage annually (beginning January 1, 2016) to reflect inflation during the year as reflected in the Consumer Price Index (CPI) for Urban Wage Earners and Clerical Workers.

In 2015, the DOL determined that the CPI increased by 0.345% in 2015, so the minimum wage became $10.15 per hour beginning January 1, 2016 (see the October 2015 ***Federal Contracts Perspective*** article "Federal Minimum Wage Increased to $10.15/Hour for 2016").

In 2016, the DOL determined that the CPI increased by 0.278% in 2016, so the minimum wage became $10.20 per hour beginning January 1, 2017 (see the October 2016 ***Federal Contracts Perspective*** article "Federal Minimum Wage Increased to $10.20/Hour for 2017").

In 2017, the DOL determined that the CPI increased by 1.691% in 2017, so the minimum wage became $10.35 per hour beginning January 1, 2018 (see the October 2017 ***Federal Contracts Perspective*** article "Federal Minimum Wage Increased to $10.35/Hour For 2018").

In 2018, the DOL determined that the CPI increased by 2.337% in 2018, so the minimum wage became $10.60 per hour effective January 1, 2019 (see the October 2018 ***Federal Contracts Perspective*** article "Federal Minimum Wage Increased to $10.60/Hour for 2019").

In 2019, the DOL determined that the CPI increased by 2.036% in 2019, so the minimum wage became $10.80 per hour effective January 1, 2020 (see the October 2019 ***Federal Contracts Perspective*** article "Federal Minimum Wage Increased to $10.80/Hour for 2020").

Now, the DOL has determined that the CPI index increased by 1.432% in 2020, and this produces a minimum wage of $10.95 per hour effective January 1, 2021.

In addition, the required minimum cash wage that must be paid to tipped employees performing work on or in connection with covered contracts is increased from $7.55 to $7.65 per hour.

## PRESIDENT ORDERS REVIEW OF FOREIGN LABOR ON CONTRACTS

President Trump has issued Executive Order 13940, Aligning Federal Contracting and Hiring Practices with the Interests of American Workers, to direct each agency head to review "performance of contracts (including subcontracts) awarded by the agency in fiscal years 2018 and 2019 to assess: (i) whether contractors (including subcontractors) used temporary foreign labor for contracts performed in the United States, and, if so, the nature of the work performed by temporary foreign labor on such contracts; whether opportunities for United States workers were affected by such hiring; and any potential effects on the national security caused by such hiring; and (ii) whether contractors (including subcontractors) performed in foreign countries services previously performed in the United States, and, if so, whether opportunities for United States workers were affected by such offshoring; whether affected United States workers were eligible for assistance…; and any potential effects on the national security caused by such offshoring."

The president goes on to direct each agency head to "assess any negative impact of contractors' and subcontractors' temporary foreign labor hiring practices or offshoring practices on the economy and efficiency of federal procurement and on the national security, and propose action…to improve the economy and efficiency of federal procurement and protect the national security."


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## FY 2019 SPENDING UP 6% TO $590 BILLION

Federal contracting spending in Fiscal Year (FY) 2019 increased to $589.8 billion, up 6.2% from the $555.3 billion spending level in FY 2018.

The big dollar increase winner was the Department of Defense (DOD), which saw its contract spending increase 7%, from $359.0 billion to $383.8 billion. The biggest percentage increase winner was the Smithsonian Institution, which saw its spending more than double, from $299 million to $605 million. The biggest dollar decrease loser was the Department of Homeland Security, which saw its spending decrease 3.5%, from $18.2 billion to $17.6 billion. The biggest percentage decrease loser was the Office of Personnel Management, which saw its spending decrease 20%, from $1.2 billion to $968 million.

The following are the largest agencies' FY 2019 spending versus their FY 2018 spending:

| Department/Agency | FY 2019 Spending | FY 2018 Spending |
|---|---|---|
| Defense | $383,835,264,897 | $358,990,696,967 |
| Energy | 33,301,917,354 | 31,959,016,541 |
| Veterans Affairs | 28,436,117,807 | 27,128,144,020 |
| Health and Human Services | 26,530,826,471 | 24,622,561,872 |
| National Aeronautics and Space Admin | 18,152,949,028 | 18,029,293,806 |
| Homeland Security | 17,628,251,773 | 18,238,165,383 |
| General Services Administration | 16,145,237,030 | 13,826,637,029 |
| State | 9,486,907,494 | 9,945,166,817 |
| Justice | 8,492,951,332 | 8,191,887,303 |
| Agriculture | 7,506,919,830 | 6,514,957,295 |
| Transportation | 6,797,527,737 | 7,009,472,845 |
| Commerce | 5,501,181,203 | 3,767,969,523 |
| Agency for International Development | 5,448,480,224 | 4,975,883,369 |
| Treasury | 4,659,202,404 | 4,690,447,167 |
| Interior | 3,934,300,049 | 4,382,944,995 |
| Education | 2,889,979,064 | 2,760,191,790 |
| Labor | 2,054,838,083 | 1,914,632,524 |
| Social Security Administration | 1,696,321,446 | 1,638,091,320 |
| Environmental Protection Agency | 1,215,702,736 | 1,243,909,515 |
| Housing and Urban Development | 1,124,979,369 | 845,858,230 |
| Office of Personnel Management | 968,141,682 | 1,207,032,774 |
| Smithsonian Institution | 605,070,370 | 299,266,244 |
| National Science Foundation | 515,480,058 | 466,257,721 |
| Securities and Exchange Commission | 458,536,704 | 421,242,086 |
| Pension Benefit Guaranty Corporation | 337,802,899 | 309,160,080 |
| Federal Communications Commission | 189,835,114 | 116,754,777 |
| Others | 1,852,529,771 | 1,848,591,695 |
| **TOTAL** | **$589,767,251,929** | **$555,344,233,688** |

In addition, the Small Business Administration (SBA) announced that the federal government exceeded its small business federal contracting goal of 23% by awarding 26.5% of prime contract dollars to small businesses in FY 2019 ($132.9 billion), an increase of more than $12

billion from FY 2018. In addition, $90.7 billion in subcontracts were awarded to small businesses under federal contracts.

Other goals that were exceeded in FY 2019 are: small disadvantaged businesses, 10.29% – $51.6 billion (exceeding the 5% goal); services-disabled veteran-owned small businesses, 4.39% – $22 billion (exceeding the 3% goal); and women-owned small businesses, 5.19% – $26 billion (exceeding the 5% goal). The only category that did not meet its goal was the Historically Underutilized Business Zone (HUBZone) program small businesses, which fell short of its 3% with 2.3% awarded ($11.4 billion).

Finally, the reports function of the Federal Procurement Data System (**https://www.fpds.gov**), which compiles the statistics on federal contract awards (including the SBA's small business contract awards statistics), is being transitioned into the System for Award Management (**https://beta.SAM.gov/**) on October 17, 2020. At that time, **beta.SAM.gov** will be the only place to create and run contract data reports, and the reports module in FPDS.gov will be retired.

## NONMANUFACTURER WAIVER PROPOSED FOR SURGICAL BEDS

The Small Business Administration (SBA) is proposing to issue a nonmanufacturer rule waiver for surgical beds under Product Service Code (PSC) 6515, Office Information System Equipment, North American Industry Classification System (NAICS) code 339113, Electronic Computer Manufacturing.

SBA is inviting the public to comment on this proposed waiver or to provide information on potential small business sources on any small business manufacturers of this class of products that are available to participate in the federal market by September 10, 2020, to the Federal Rulemaking Portal at **https://www.regulations.gov**.

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

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

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

## FAR TO REQUIRE ANALYSIS OF EQUIPMENT ACQUISITIONS

The FAA [Federal Aviation Administration] Reauthorization Act of 2018 (Public Law 115-254), Section 555, Cost-Effectiveness Analysis of Equipment Rental, requires the head of each agency to acquire equipment using the method of acquisition most advantageous to the government based on a case-by-case analysis of comparative costs and other factors, including purchase, short-term rental or lease, long-term rental or lease, interagency acquisition, and acquisition agreements with a state or local government.

To implement Section 555, the FAR Council has published a proposed rule that would revise FAR subpart 7.4, Equipment Lease or Purchase (which would be retitled "Equipment Acquisition"), to facilitate an analysis and a decision on whether it is in the best interest of the government to purchase a piece of equipment as opposed to obtaining the equipment through any other non-purchase method.

The rule proposes to make the following changes to FAR subpart 7.4:

- The word "lease" would be replaced by "rental or lease agreement," and the word "leasing" would be replaced by "rental or leasing" throughout the subpart.
- FAR 7.400, Scope of Subpart, would be amended to add that FAR subpart 7.4 implements Section 555.
- FAR 7.401, Acquisition Considerations, would be amended to add "The methods of acquisition to be compared in the analysis shall include, at a minimum: (i) purchase; (ii) short-term rental or lease; (iii) long-term rental or lease; (iv) interagency acquisition (see [FAR] 2.101 [Definitions]); and (v) agency acquisition agreements, if applicable, with a state or local government."

  While the required factors to be compared in the analysis would remain unchanged, the additional factors that should be considered would be amended to add the following:

  – Cancellation, extension, and early return conditions and fees;

  – Ability to swap out or exchange equipment;

  – Available warranties; and

  – Insurance, environmental, or licensing requirements.

  Finally, it would add the exceptions to the required analysis that were included in Section 555: (1) When the president has issued an emergency declaration or a major disaster declaration pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 USC 5121 *et seq*.); (2) in other emergency situations if the agency head makes a determination that obtaining such equipment is necessary in order to protect human life or property; or (3) when otherwise authorized by law."
- FAR 7.403, General Services Administration Assistance, would be retitled "General Services Administration Assistance and OMB Guidance," and paragraph (b) would be revised to provide the following information: "For additional GSA assistance and guidance, agencies may: (1) request information from the GSA FAS [Federal Acquisition Service] National Customer Service Center by phone at 1-800-488-3111 or by email at

**ncsccustomer.service@gsa.gov**; and (2) see GSA website, Schedule 51 V Hardware Superstore-Equipment Rental…" (**EDITOR'S NOTE:** Schedule 51 V no longer exists because GSA has consolidated all its Multiple Award Schedules into a single schedule. This will have to be corrected in the final rule. See "Multiple Award Schedule Consolidation in Final Phase" above.)

In addition, the following Office of Management and Budget (OMB) guidance would be added: "(1) Section 13, Special Guidance for Lease-Purchase Analysis, and paragraph 8.c.(2), Lease-Purchase Analysis, of OMB Circular A-94, Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs, (**https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A94/a094.pdf**); and (2) Appendix B, Budgetary Treatment of Lease-Purchases and Leases of Capital Assets, of OMB Circular A-11, Preparation, Submission, and Execution of the Budget, (**https://www.whitehouse.gov/wp-content/uploads/2018/06/app_b.pdf**)."

Comments on this proposed rule must be submitted no later than October 23, 2020, identified as "FAR Case 2019-001," through the Federal eRulemaking Portal: **http://www.regulations.gov**.

## GSA TAKES ON TASK-ORDERS

The General Services Administration (GSA) was very busy in August as well! Besides issuing instructions and deviations on the Chinese telecommunications prohibition (see first article), announcing Phase 3 of the Multiple Award Schedule (MAS) consolidation (see above article), and releasing the ASTRO Program solicitation (see above article), GSA issued a rule amending the GSA Acquisition Regulation (GSAR) to remove text that is duplicated in the FAR, and two documents addressing the implementation of a section of the NDAA for FY 2019.

■ **Task-Order and Delivery-Order Ombudsman Update:** This direct final rule removes GSAR 552.216-74, GSA Task-Order and Delivery-Order Ombudsman. and GSAR 552.216-76, Ordering Agency Task-Order and Delivery-Order Ombudsman, because they duplicate text in the FAR.

FAC 2019-04 added FAR 52.216-32, Task-Order and Delivery-Order Ombudsman, to standardize the identification of the task-order and delivery-order ombudsman. FAR 52.216-32 explains the purpose of the ombudsman, the ombudsman's duties, and provides a blank line for the contracting officer to insert name, address, telephone number, and email address for the agency ombudsman or provide the Internet address where this information may be found.

These FAR rendered GSAR 552.216-74 and GSAR 552.216-76 duplicative, so those two provisions are removed. Since paragraph (b) of GSAR 516.506, Solicitation Provisions and Contract Clauses [for indefinite-delivery contracts], consists of the prescription for GSAR 552.216-74, and GSAR 516.506(d) consists of the prescription for GSAR 552.216-76, these two paragraphs are removed as well.

This direct final rule goes into effect on October 19, 2020 unless adverse comments are received by September 18, 2020. If GSA receives adverse comments, GSA will withdraw the rule. Adverse comments must be submitted through the Federal eRulemaking portal at **https://www.regulations.gov** by searching for "GSAR Case 2020-G526."

For more on FAC 2019-04, see the September 2019 ***Federal Contracts Perspective*** article "FAC 2019-04 Provides Info on Task Order Ombudsmen."

■ **Implementation of Section 876 of the NDAA for FY 2019:** GSA issued separate documents addressing the two parts of the NDAA for FY 2019 (Public Law 115-232), Section 876, Increasing Competition at the Task Order Level, which permits agencies, including GSA, to *not* consider cost or price as an evaluation factor for the award to qualifying offerors of certain (1) indefinite-delivery, indefinite-quantity (IDIQ) multiple-award contracts and (2) certain Federal Supply Schedule (FSS) contracts.

There are two conditions to this authority: the agency must intend to award one or more contracts for services to be acquired on an hourly rate basis; and the agency must intend to make a contract award to each "qualifying offeror." Section 876 defines a "qualifying offeror" as "an offeror that (A) is determined to be a responsible source; (B) submits a proposal that conforms to the requirements of the solicitation; (C) meets all technical requirements; and (D) is otherwise eligible for award."

(1) **Deviation Enhancing Competition at the Order Level for Certain IDIQ Multiple-Award Contracts:** This deviation, issued by Jeffrey Koss, Senior Procurement Executive (SPE), implements the first part of Section 876: the authority *not* to consider price as an evaluation factor for the award of certain IDIQ multiple-award contracts for services acquired on an hourly rate basis. Mr. Koss makes clear that this deviation "does not implement the authority…for FSS contracts." The deviation is limited to new acquisitions that are approved by the SPE (Mr. Koss).

To implement this portion of Section 876 for GSA, the deviation makes the following changes to the FAR:

– In FAR 4.1005-2, Exceptions [to data elements for line items and subline items], paragraph (a)(2)(ii) provides that "multiple-award IDIQ contracts awarded using the procedures at [FAR] 13.106-1(a)(2)(iv)(A) [Soliciting Competition (for simplified acquisitions)] or [FAR] 15.304(c)(1)(ii)(A) [Evaluation Factors and Significant Subfactors (for negotiated acquisitions)], may omit price or cost at the line item or subline item level for the contract award…" The deviation deletes this and substitutes the following: "Multiple-award IDIQ contracts awarded using the price evaluation exception provided at [FAR] 16.501-3 [Exception to Consideration of Price as an Evaluation Factor] may omit price or cost at the line item or subline item level for the contract award."

– To FAR 13.106-1 and FAR 15.304 are added cross-references to FAR 16.501-3.

– Amending FAR subpart 16.5 to implement the exception provided by 41 USC 3306(c)(3) [Planning and Solicitation Requirements] for certain IDIQ multiple-award contracts.

– To paragraph (c) of FAR 16.501-2, General [information regarding indefinite-delivery contracts], which states that "indefinite-delivery contracts may provide for any appropriate cost or pricing arrangement under [FAR] part 16 [Types of Contracts]," is added the following: "Cost or pricing arrangements may be established at the order level for certain indefinite-delivery, indefinite-quantity multiple-award contracts, see [FAR] 16.501-3."

– FAR 16.501-3, Exception to Consideration of Price as an Evaluation Factor, is added. It states that "a contracting officer need not consider price as an evaluation factor for

award as required by [FAR] 13.106-1(a)(2) and [FAR] 15.304(c)(1) when all of the following conditions exist: (1) the solicitation is to establish multiple-award indefinite-delivery, indefinite-quantity contracts for services to be acquired on an hourly rate basis; (2) the solicitation states the government intends to make award to each qualifying offeror and defines the criteria for what constitutes a qualifying offeror; (3) the resultant contracts will feature individually competed task or delivery orders based on hourly rates; and (4) cost or price shall be considered in conjunction with the issuance of any task or delivery order issued under any contract resulting from the solicitation (see [FAR] 16.505(b) [Ordering (under multiple award contracts)]." It goes on to provide the Section 876 definition of "qualifying offeror," specifies what must be included in the solicitation, and how to price orders "when pricing for services to be acquired on an hourly rate basis is not established by the contract and the resultant order is to include such pricing…"

– To FAR 16.505, paragraph (b)(2), *Exceptions to the Fair Opportunity Process* [for orders under multiple award contracts], and paragraph (b)(3), *Pricing Orders* [for orders under multiple award contracts], cross-references to FAR 16.501-3 are added.

(2) **Increasing Order Level Competition for Federal Supply Schedules (FSS):** This advance notice of proposed rulemaking (ANPR) is seeking comments on the implementation of the second part of Section 876: the authority *not* to consider price as an evaluation factor for the award of certain FSS contracts for services acquired on an hourly rate basis.

Currently, offerors responding to solicitations for award of FSS contracts are required to submit commercial sales practice data, or other cost or price information with their proposals. "Because of the length of the contracts, reach of the program, and unique statutory environment, GSA anticipates that implementing this authority will be more complex for the FSS program than for other IDIQs," states the ANPR. "GSA expects that complete implementation will require substantial retraining and communication efforts and may require a number of changes to both the FAR and the GSAR….This ANPR poses a number of questions to help GSA think through the authority."

Among the questions GSA is posing are:

– Does Section 876 restrict the use of this authority to labor-hour or time-and-material type contracts?

– "GSA welcomes the public's insight into the potential impact to the GSAR in relation to the FSS program as a result of implementation of this authority. The following are areas of particular interest in terms of impact: (a) price reductions, (b) transactional data reporting, (c) evaluation and use of options, (d) economic price adjustment, (e) price list, and (f) others."

– "GSA would appreciate any thoughts about the potential impact to FSS solicitation and ordering requirements and what changes should be made in FSS solicitations, instructions, ordering guidance, and training."

– What are the type of employees (for example, accountants and program managers) and number of employees that would be used to develop and prepare cost or price information in response to a solicitation seeking to award a FSS contract, a

solicitation seeking to award a task/delivery order under a FSS contract, and requests where cost or pricing information is required/requested under the FSS program?

Comments on this ANPR must be submitted no later than September 18, 2020, identified as "GSAR Case 2020-G502," through the Federal eRulemaking Portal: **http://www.regulations.gov**.

**EDITOR'S NOTE:** FAC 2020-07 contained a rule that applies only to the Department of Defense, the National Aeronautics and Space Administration (NASA), and the Coast Guard, but is very similar to Section 876. The FAC 2020-07 rule amended the FAR to implement the NDAA for FY 2017 (Public Law 114-328), Section 825, Exception to Requirement to Include Cost or Price to the Government as a Factor in the Evaluation of Proposals for Certain Multiple-Award Task or Delivery Order Contracts.

Section 825 and Section 876 are much alike: "If the head of an agency issues a solicitation for multiple task or delivery order contracts…for the same or similar services and intends to make a contract award to each qualifying offeror: (i) cost or price to the federal government need not, at the government's discretion, be considered…as an evaluation factor for the contract award; and (ii) if…cost or price to the federal government is not considered as an evaluation factor for the contract award…cost or price to the federal government shall be considered in conjunction with the issuance…of a task or delivery order under any contract resulting from the solicitation." It goes on to define a "qualifying offeror" as "an offeror that (i) is determined to be a responsible source; (ii) submits a proposal that conforms to the requirements of the solicitation; and (iii) the contracting officer has no reason to believe would likely offer other than fair and reasonable pricing."

To implement Section 825, FAC 2020-07 amended FAR 4.1005-2, FAR 13.106-1, FAR 15.304, and FAR 16.505 in much the same way as the GSA deviation.

For more on this rule in FAC 2020-07, see "Evaluation Factors for Multiple-Award Contracts" in the August 2020 ***Federal Contracts Perspective*** article "FAC 2020-07 Increases Simplified Acquisition, Micro-Purchase Thresholds."

## SBA AMENDS SBIR/STTR POLICY DIRECTIVE

The Small Business Administration is amending the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs' Policy Directive to clarify that successor-in-interest entities are eligible to receive Phase III awards.

Both the SBIR and STTR programs use a phased process to solicit proposals and award funding agreements for research and research and development (R&D) to meet stated agency needs or missions: Phase I, Experimental or Theoretical Research; Phase II, Development of the Research Conducted in Phase I; and Phase III, Commercial Application of the Research Developed in Phase II.

The SBIR program requires all agencies with R&D budgets of more than $100,000,000 to set aside 3.2% of their R&D budgets for small businesses; approximately $1.7 billion is awarded to small businesses through the SBIR program each year. The STTR program requires all agencies with R&D budgets of more than $1 billion to set aside 0.45% of their R&D budgets for small businesses; approximately $200,000,000 is awarded to small businesses through the STTR program each year. The primary difference between the SBIR and the STTR programs is that

small businesses must have a single nonprofit research institution as a partner to participate in the STTR program. The nonprofit research institution must be located in the U.S. and must be either: (1) a nonprofit college or university; (2) a domestic nonprofit research organization; or (3) a federally funded research and development center (FFRDC).

In the Directive is Section 6, Eligibility and Application (Proposal) Requirements, and paragraph (a)(5) specifically relates to the eligibility of entities that have received a novated award, a similarly-revised award, or are successor-in-interest entities. It has been pointed out to the SBA that the language in Section 6(a)(5) requires clarification to confirm for agencies and applicants that successor-in-interest entities are eligible to receive Phase III SBIR/STTR awards.

The first two sentences of Section 6(a)(5) state, "An SBIR/STTR awardee may include, and SBIR/STTR work may be performed by, those identified via a 'novated' or 'successor-in-interest' or similarly-revised funding agreement. For example, in order to receive a Phase III award, the awardee must have either received a prior Phase I or Phase II award or been novated a Phase I or Phase II award (or received a revised Phase I or Phase II award if a grant or cooperative grant)." To clarify that entities may be eligible to receive a Phase III award as a successor-in-interest without novation, SBA is revising the second of these two sentences to read as follows: "For example, a Phase III awardee may have either received a prior Phase I or Phase II award or been novated a Phase I or Phase II award (or received a revised Phase I or Phase II award if a grant or cooperative grant) or be a successor-in-interest entity." (**EDITOR'S NOTE:** The second sentence is edited as follows (~~strikethrough~~ text is removed and *italicized* text is added): "For example, ~~in order to receive~~ a Phase III ~~award, the~~ awardee ~~must~~ *may* have either received a prior Phase I or Phase II award or been novated a Phase I or Phase II award (or received a revised Phase I or Phase II award if a grant or cooperative grant) *or be a successor-in-interest entity.*")

For more on the SBIR/STTR Policy Directive, see the May 2019 ***Federal Contracts Perspective*** article "SBA Issues Combined SBIR Program and STTR Program Policy Directive."

## EPAAR ADDRESSES OPEN SOURCE SOFTWARE REQUIREMENTS

The Environmental Protection Agency (EPA) has amended the EPA Acquisition Regulation (EPAAR) to add EPAAR 1552.239-71, Open Source Software, to address open source software requirements in accordance with Office of Management and Budget's (OMB) Memorandum M-16-21, Federal Source Code Policy: Achieving Efficiency, Transparency, and Innovation Through Reusable and Open Source Software.

This final rule creates EPAAR part 1539, Acquisition of Information Technology, which consists of EPAAR Subpart 1539.2, Open Source Software, which in turn consists of EPAAR 1539.2071, Contract Clause. EPAAR 1539.2071 consists of the prescription for use of EPAAR 1552.239-71, Open Source Software, in all procurements where open-source software development/custom development of software will be required, "including, but not limited to, multi-agency contracts, Federal Supply Schedule orders, governmentwide acquisition contracts, interagency agreements, cooperative agreements, and student services contracts." Also, EPAAR 1539.2071 states that "in addition to clause [EPAAR] 1552.239-71, contracting officers must also select the appropriate version* of Federal Acquisition Regulation (FAR) clause 52.227-14, Rights in Data – General, to include in the subject procurement in accordance with FAR 27.409 [Solicitation Provisions and Contract Clauses (for rights in data and copyrights)]. (*Important

note: Alternate IV of clause [FAR] 52.227-14 is NOT suitable for open-source software procurement use because it gives the contractor blanket permission to assert copyright.)" (**EDITOR'S NOTE:** The "important note" identified by the * is part of EPAAR 1539.2071.)

The other part of the final rule is the addition of EPAAR 1552.239-71, Open Source Software, which consists of the following:

■ Definitions of "custom-developed code," "open source software (OSS)," "software," and "source code."

■ EPA policy: "It is the EPA policy that new custom-developed code be made broadly available for reuse across the federal government…The EPA also supports the Office of Management and Budget's (OMB) Federal Source Code Policy provided in OMB Memorandum M-16-21, Federal Source Code Policy: Achieving Efficiency, Transparency, and Innovation through Reusable and Open Source Software, by: (i) providing an enterprise code inventory (*e.g.*, code.json file) that lists new and applicable custom-developed code for, or by, the EPA; (ii) indicating whether the code is available for federal reuse; or (iii) indicating if the code is available publicly as OSS." Exceptions to this policy are identified.

■ "The contractor shall deliver to the contracting officer (CO) or contracting officer's representative (COR) the underlying source code, license file, related files, build instructions, software user's guides, automated test suites, and other associated documentation as applicable."

■ "In accordance with OMB Memorandum M-16-21, the government asserts its unlimited rights – including rights to reproduction, reuse, modification and distribution of the custom source code, associated documentation, and related files – for reuse across the federal government and as open source software for the public."

■ "The contractor is prohibited from reselling code developed under this contract without express written consent of the EPA contracting officer."

■ "Technical guidance for EPA's OSS Policy should conform with the 'EPA's Open Source Code Guidance' that will be maintained by the Office of Mission Support (OMS) at **https://developer.epa.gov/guide/open-source-code/** or equivalent."

■ It provides directions to the contractor on how to identify all deliverables and asserted restrictions.

■ It provides directions to the contractor on compliance with software and data rights requirements and requires the delivery of all licenses for software dependencies.

## NASA MANDATES AVOIDANCE OF COUNTERFEIT PARTS

The National Aeronautics and Space Administration (NASA) is amending the NASA FAR Supplement (NFS) to add NFS subpart 1846.70, Counterfeit Electronic Part Detection and Avoidance, and NFS 1852.246-74, Contractor Counterfeit Electronic Part Detection and Avoidance. This final rule implements the National Aeronautics and Space Administration Transition Authorization Act of 2017 (Public Law 115-10), Section 823, Detection and

Avoidance of Counterfeit Parts, which requires covered contractors and subcontractors (those that supply "an electronic part, or a product that contains an electronic part, to NASA") to use electronic parts that are currently in production and purchased from the original manufacturers of the parts, their authorized dealers, or suppliers who obtain such parts exclusively from the original manufacturers or their authorized dealers.

The following are added to the NFS to implement Section 823:

■ NFS 1831.205-70, Costs Related to Counterfeit Electronic Parts and Suspect Counterfeit Electronic Parts, which provides that "the costs of counterfeit electronic parts, suspect counterfeit electronic parts, and any corrective action that may be required to remedy the use or inclusion of such parts are unallowable, unless the covered contractor…has an operational system to detect and avoid counterfeit electronic parts and suspect counterfeit electronic parts that has been reviewed and approved by NASA or the Department of Defense…"

■ NFS subpart 1846.70, Counterfeit Electronic Part Detection and Avoidance, which consists of four sections:

- NFS 1846.7000, Scope of Subpart, which states that the subpart "prescribes policy and procedures for preventing counterfeit electronic parts and suspect counterfeit electronic parts from entering the supply chain when procuring electronic parts or end items, components, parts, or assemblies that contain electronic parts; and applies to electronic parts when their presence in the NASA supply chain poses a danger to United States government astronauts, crew, and other personnel and a risk to the agency overall."

- NFS 1846.7001, Definitions, which provides definitions for "authentic part," "authentication," "authorized aftermarket manufacturer," "authorized supplier," "contract manufacturer," "contractor-approved supplier," "covered contractor," "counterfeit electronic part," "electronic part," "original component manufacturer," "original equipment manufacturer," "original manufacturer," and "suspect counterfeit electronic part."

- NFS 1846.7002, Policy, which requires that "the covered contractor and subcontractors at all tiers shall obtain electronic parts that are in production or currently available in stock from: (1) the original manufacturers of the parts; (2) their authorized dealers; or (3) suppliers who obtain such parts exclusively from the original manufacturers of the parts or their authorized dealers." The section continues by providing directions to covered contractors should electronic parts not in production or currently available in stock from suppliers.

- NFS 1846.7003, Contract Clause, requires that acquisitions with covered contractors include NFS 1852.246-74, Contractor Counterfeit Electronic Part Detection and Avoidance, in solicitations and contracts when procuring: (a) electronic parts; (b) end items, components, parts, or assemblies containing electronic parts; or (c) services, if the covered contractor will supply electronic parts or components, parts, or assemblies containing electronic parts as part of the service.

■ NFS 1852.246-74, Contractor Counterfeit Electronic Part Detection and Avoidance, contains the definitions in NFS 1846.7001; the requirements and directions in NFS 1846.7002; the statement from NFS 1831.205-70 that the costs of counterfeit electronic parts are unallowable (with exceptions); the requirement that covered contractors include the clause in covered subcontracts; and corrective actions covered contractors are to take if it supplies a counterfeit electronic part to NASA.

**EDITOR'S NOTE:** NASA's final rule is a companion to the FAC 2020-02 final rule that requires contractors and subcontractors to report to the Government-Industry Data Exchange Program (**https://www.gidep.org/**) a broader spectrum of counterfeit or suspect counterfeit parts and certain major or critical nonconformances. While both rules pertain to counterfeit parts and suspected counterfeit parts, there are discernible differences since they implement different acts (FAC 2020-02 implements the NDAA for FY 2012 [Public Law 112-81], Section 818, Detection and Avoidance of Counterfeit Electronic Parts. For more on the FAC 2020-02 rule, see the December 2019 ***Federal Contracts Perspective*** article "FAC 2020-02 Requires Contractors to Report Counterfeit Parts to GIDEP.org."


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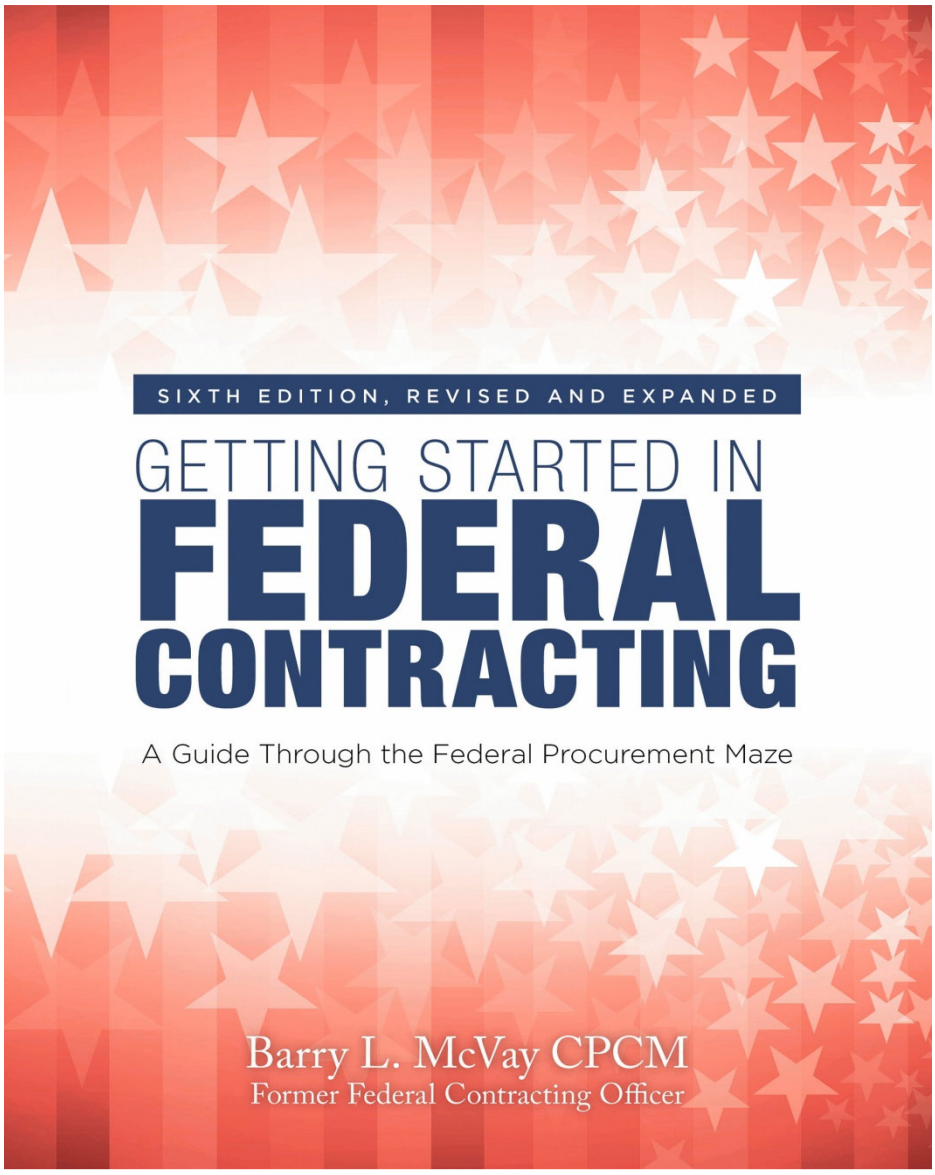


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