

# FEDERAL CONTRACTS PERSPECTIVE

Federal Acquisition Developments, Guidance, and Opinions

Vol. XXII, No. 1

January 2021

## OFCCP ISSUES INSTRUCTIONS ON COMPLYING WITH THE EQUAL OPPORTUNITY CLAUSE'S RELIGIOUS EXEMPTION

The Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) has finalized amendments to its regulations to clarify the scope and application of the religious exception in Executive Order 11246, Equal Employment Opportunity, as amended. These clarifications to the religious exemption are intended to help organizations with federal contracts and subcontracts better understand their obligations, and to encourage the full and equal participation of religious organizations as federal contractors.

In 1964, President Lyndon Johnson signed the Civil Rights Act of 1964 (Public Law 88-352). Title VII of the statute, “Equal Employment Opportunity,” makes it an unlawful employment practice for an employer to discriminate because of an individual’s “race, color, religion, sex, or national origin” (see Section 703 of the statute). Title VII also provides an accommodation for religious employers and religious educational institutions: “This title shall not apply...to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities...” (see Section 702).

In 1965, President Johnson signed Executive Order 11246, Equal Employment Opportunity, which requires equal employment opportunity in federal government contracting. The order mandates that all government contracts include a provision stating that “the contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin” (see Section 202). In 1967, President Johnson issued Executive Order 11375, Amending Executive Order No. 11246, Relating to Equal Employment Opportunity, which expands Executive Order 11246 to prohibit discrimination on the bases of sex and religion (see paragraph (2)). Executive Order 11246, as amended, is implemented by Federal Acquisition Regulation (FAR) subpart 22.8, Equal Employment Opportunity, and all solicitations and contracts (with limited exceptions) are required to include FAR 52.222-26, Equal Opportunity.

In 1972, Congress enacted the Equal Employment Opportunity Act of 1972 (Public Law 92-261), which expanded the religious exemption in Title VII’s Section 702 by adding educational institutions to the list of those eligible for exemption. In addition, Congress broadened the scope of the Section 702 exemption to cover not just religious activities, but all activities of a religious organization: “This title shall not apply...to a religious corporation, association, *educational institution*, or society with respect to the employment of individuals of a particular religion to

CONTENTS	
OFCCP Issues Instruction on Religious Exemption.....	1
FAR Guidance on Reverse Auctions Proposed .....	4
OFCCP Issues Revised Small Business Guide .....	7
Number of Protests Decline in FY 2020.....	7

perform work connected with the carrying on by such corporation, association, *educational institution*, or society of its ~~religious~~ activities” (*italics* indicate added language; ~~strikeout~~ indicates deleted language) (see Section 3).

In 2002, President George W. Bush issued Executive Order 13279, Equal Protection of the Laws for Faith-Based and Community Organizations, which amended Executive Order 11246 by expressly importing Title VII’s exemption for religious organizations (“Section 202 of this order [Executive Order 11246, as amended by Executive Order 11375] shall not apply to a government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities”). This statement is in paragraph (c)(1) of FAR 52.222-26.

There have been various interpretations among federal circuit courts of the scope and application of the Title VII religious exemption, many of them predating recent Supreme Court decisions, such as *Burwell, Secretary of Health and Human Services v. Hobby Lobby Stores, Inc.* (2014) (holding the Religious Freedom Restoration Act of 1993 [Public Law 103-141] applies to federal regulation of the activities of for-profit closely held corporations), and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018) (holding the government violates the Free Exercise Clause of the First Amendment when its decisions are based on hostility to religion or a religious viewpoint). So the OFCCP decided to propose amending its regulations in Title 41 of the Code of Federal Regulations (CFR), Chapter 60, Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor, Part 60-1, Obligations of Contractors and Subcontractors (41 CFR 60-1) “to provide clarity regarding the scope and application of the religious exemption...this proposal is intended to make clear that the Executive Order 11246 religious exemption covers not just churches but employers that are organized for a religious purpose, hold themselves out to the public as carrying out a religious purpose, and engage in exercise of religion consistent with, and in furtherance of, a religious purpose. It is also intended to make clear that religious employers can condition employment on acceptance of or adherence to religious tenets without sanction by the federal government, provided that they do not discriminate based on other protected bases” (from the preamble of the proposed rule).

The OFCCP proposed to amend 41 CFR 60-1.3, Definitions, by adding the following five definitions:

“***Exercise of religion***” means any exercise of religion, whether or not compelled by, or central to, a system of religious belief. An exercise of religion need only be sincere.

“***Particular religion***” means the religion of a particular individual, corporation, association, educational institution, society, school, college, university, or institution of learning, including acceptance of or adherence to religious tenets as understood by the employer as a condition of employment, whether or not the particular religion of an individual employee or

Vivina McVay, Editor-in Chief

©2021 by Panoptic Enterprises. All rights reserved. Reproduction, photocopying, storage, or transmission by any means is prohibited by law without the express written permission of Panoptic Enterprises. Under no circumstances should the information contained in *Federal Contracts Perspective* be construed as legal or accounting advice. If a reader feels expert assistance is required, the services of a professional counselor should be retained.

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

applicant is the same as the particular religion of his or her employer or prospective employer.

“**Religion**” includes all aspects of religious observance and practice, as well as belief.

“**Religious corporation, association, educational institution, or society**” means a corporation, association, educational institution, society, school, college, university, or institution of learning that is organized for a religious purpose; holds itself out to the public as carrying out a religious purpose; and engages in exercise of religion consistent with, and in furtherance of, a religious purpose. To qualify as religious a corporation, association, educational institution, society, school, college, university, or institution of learning may, or may not: have a mosque, church, synagogue, temple, or other house of worship; be nonprofit; or be supported by, be affiliated with, identify with, or be composed of individuals sharing, any single religion, sect, denomination, or other religious tradition.

“**Sincere**” means sincere under the law applied by the courts of the United States when ascertaining the sincerity of a party’s religious exercise or belief.

In addition, the OFCCP proposed to amend 41 CFR 60-1.5, Exemptions, to add the following paragraph: “(e) **Broad interpretation**. This subpart shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the United States Constitution and law, including the Religious Freedom Restoration Act of 1993, as amended, 42 USC 2000bb *et seq.* [Religious Freedom Restoration].”

OFCCP received 109,726 comments in response to the proposed rule, over 90,000 of which were generated by organized comment-writing efforts. Comments came from individuals and from a wide variety of organizations, including religious organizations, universities, civil rights and advocacy organizations, contractor associations, legal organizations, labor organizations, and members of Congress. In the preamble to the final rule, OFCCP took 45 pages to address common themes among the comments. As a result, OFCCP has finalized the rule with the following changes to the definitions in 41 CFR 60-1.3 (*italicized* text is added, and ~~struckout~~ text is deleted):

- In the definition of “particular religion,” the phrase “including acceptance of or adherence to religious tenets as understood by the employer” is modified to add “sincere” before “religious tenets,” so that it now reads “including acceptance of or adherence to *sincere* religious tenets as understood by the employer...”.
- In the definition of “religious corporation, association, educational institution, or society,” the phrase “engages in exercise of religion consistent with, and in furtherance of, a religious purpose” is modified to read as follows: “engages in ~~exercise of religion~~ *activity* consistent with, and in furtherance of, *a that* religious purpose; *and operates on a not-for-profit basis; or presents other strong evidence that its purpose is substantially religious. Whether an organization's engagement in activity is consistent with, and in furtherance of, its religious purpose is determined by reference to the organization's own sincere understanding of its religious tenet.*”

- The definition of “exercise of religion” is deleted. “Exercise of religion” was used only in the definition of “religious corporation, association, educational institution, or society,” and since “exercise of religion” was replaced by the word “activity” in that definition, there is no need for a definition of “exercise of religion.”

At the end of 41 CFR 60-1.3, after the definitions, is added the following separate paragraph: “(a) **Severability**. Should a court of competent jurisdiction hold any provision(s) of this section to be invalid, such action will not affect any other provision of this section.” This same paragraph is added to 41 CFR 60-1.5 as paragraph (f).

For more on the proposed rule, see the September 2019 *Federal Contracts Perspective* article “OFCCP Clarifies Religious Exemption.”

## FAR GUIDANCE ON USE OF REVERSE AUCTIONS PROPOSED

The FAR Council has decided to propose amending FAR part 17, Special Contracting Methods, to provide regulations and guidance on the use of reverse auctions by adding FAR subpart 17.8, Reverse Auctions.

Reverse auctions are similar to traditional auctions except that the sellers compete against each other to sell their products or services to the buyer. Unlike a traditional auction, in which multiple buyers bid against one another to push the price up, reverse auctions enable a buyer to evaluate proposals submitted from multiple sellers, in which sellers compete against one another to provide the lowest price or highest-value offer. After considering all offers, the buyer selects the winning proposal, often at a reduced price.

Prior to 1997, the FAR prohibited reverse auctions. FAR 15.610, Written or Oral Discussion, contained the following language in paragraphs (e)(2)(ii) and (iii): “(e) The following conduct may constitute prohibited conduct...to which civil and criminal penalties and administrative remedies apply:...(2) Auction techniques, such as...(ii) advising an offer of its price standing relative to another offeror...and (iii) otherwise furnishing information about other offerors’ prices.”

In 1997, the rewrite of FAR part 15, Contracting by Negotiations, removed these prohibitions as part of an overall effort to make the source selection process more innovative, simplify the process, and facilitate a best value acquisition approach. However, the FAR was never amended to specifically address reverse auctions, and there is a lack of comprehensive governmentwide guidance. The Government Accountability Office (GAO), the part of the legislative branch that investigates all matters related to the use of public funds and provides Congress with reports that are objective, fact-based, nonpartisan, and nonideological, issued two reports to Congress on reverse auctions: *Reverse Auctions: Guidance Is Needed to Maximize Competition and Achieve Cost Savings* (December 2013); and *Reverse Auctions: Additional Guidance Could Help Increase Benefits and Reduce Fees* (July 2018). GAO found that confusion exists because of a lack of documentation on reverse auctions, and that the potential benefits of reverse auctions are not being maximized. In addition, in June 2015, the Office of Federal Procurement Policy (OFPP), part of the Office of Management and Budget (OMB), issued a memorandum to all departments’ and agencies’ chief acquisition officers and senior procurement executives that reviewed the benefits of reverse auctions and offered a set of reminders to help contracting offices maximize the value of reverse auctions. In light of these GAO reports and the OFPP

memorandum, the FAR Council has decided it is time to propose amending the FAR to address reverse auctions and utilizing providers of electronic commerce services for the conduct of reverse auctions, especially since the government spends billions of dollars through the conduct of tens of thousands of reverse auctions each year.

The proposed rule would add the reverse auction regulations and guidance to FAR part 17, Special Contracting Methods, in new FAR subpart 17.8, Reverse Auctions, which would consist of the following:

- FAR 17.801, Definition, would consist of a definition for “reverse auction service provider”:  
“a commercial or government entity that provides a means for conducting reverse auctions when acquiring supplies or services to be used by the government.”
- FAR 17.802, Policy, would address when the use of reverse auctions may be appropriate, what agencies and contracting officers must do when acquiring services from a commercial reverse auction service provider, and what reverse auction service providers must agree to do and not do.
- FAR 17.803, Applicability, would state that reverse auctions shall not be used for design-build construction contracts (see FAR subpart 36.3, Two-Phase Design-Build Selection Procedures), sealed bids (see FAR part 14, Sealed Bidding), or the acquisition of personal protective equipment (PPE).
- FAR 17.804, Procedures, would explain what the contracting officer must do when: (1) considering whether to use a reverse auction service provider; (2) conducting a reverse auction; (3) using the services of a reverse auction service provider; and (4) only one offeror participates in an auction.
- FAR 17.805, Solicitation Provision and Contract Clauses, would provide the prescriptions the following:
  - FAR 52.217-XX, Reverse Auction, which is to be included in solicitations when the contracting officer is utilizing a reverse auction to award a contract or blanket purchase agreement. This provision would notify offerors that by submission of a quote or proposal, they agree to participate in the reverse auction and agree that the government may reveal to all offerors the offered price(s), but without revealing any offeror’s identity, except for the awardee’s identity subsequent to an award resulting from the auction. Also, the provision reserves the government’s right to cancel the auction in the event only one offer is received, specifies that the government may use the services of a reverse auction service provider to conduct the auction, and notifies offerors how to withdraw from further participation in the auction.
  - FAR 52.217-YY, Reverse Auction – Orders or Calls, which would be included in solicitations and contracts for a multiple award indefinite-delivery/indefinite-quantity (IDIQ) contract or blanket purchase agreement (BPA), and a reverse auction may be used to place orders or calls under the basic contract or blanket purchase agreement. The clause would provide BPA holders and IDIQ contractors with a notification similar to that of

FAR 52.217-XX, but applies the notice to delivery orders, task orders, or calls to be made under the basic IDIQ contract or BPA.

- FAR 52.217-ZZ, Reverse Auction Services, which would be included in all solicitations and contracts for the purchase of reverse auction services, would specify requirements for reverse auction service providers that provide reverse auction services to the government.

In addition, the following amendments would be made elsewhere in the FAR to implement reverse auction guidance:

- To FAR 2.101, Definitions, would be added the following definition for “reverse auction”: “the process for obtaining pricing, usually supported by an electronic tool, where offerors see competing offerors' price(s), without disclosure of the competing offerors' identity, and have the opportunity to submit lower priced offers until the close of the auction.”
- In FAR 3.104-4, Disclosure, Protection, and Marking of Contractor Bid or Proposal Information and Source Selection Information, paragraph (e)(1) currently states that a contractor is not restricted or prohibited from disclosing its own bid or proposal information or the recipient from receiving that information. To that would be added the following: “During reverse auctions, agencies may reveal to all offerors the offered price(s), but may not reveal any offeror’s identity except for the awardee’s identity subsequent to an award resulting from the auction (see [FAR] subpart 17.8).”
- In FAR 7.105, Contents of Written Acquisition Plans, paragraph (b)(4) currently states that the acquisition plan is to “discuss the source selection procedures for the acquisition, including the timing for submission and evaluation of proposals, and the relationship of evaluation factors to the attainment of the acquisition objectives.” The proposed rule would add “the basis for using a reverse auction (when applicable),” after the word “including”.
- In FAR 13.104, Promoting Competition, paragraph (e) addresses “limits on exchanges,” and subparagraph (e)(3) prohibits government personnel from revealing an offeror’s price without that offeror’s permission. The proposed rule would add a new sentence: “When using reverse auction procedures (see [FAR] subpart 17.8), it is also permissible to reveal to all offerors the offered price(s), without revealing any offeror's identity.”
- FAR 17.000, Scope of Part, paragraph (d) would be added to include reverse auctions to the list of special contracting methods in FAR part 17.

Comments on this proposed rule must be submitted by February 5, 2021, identified as “FAR Case 2015-038” and submitted to the Federal eRulemaking Portal at <https://www.regulations.gov>.

**Visit <http://www.FedGovContracts.com>**

## OFCCP ISSUES REVISED SMALL CONTRACTOR GUIDE

The Officer of Federal Contract Compliance Programs (OFCCP) has issued a revised “*Small Federal Contractor Technical Assistance Guide*” to provide basic guidelines on what a contractor has to do to comply with the laws that are enforced and administered by OFCCP: Executive Order 11246, Equal Employment Opportunity, as amended (see above article and FAR subpart 22.8, Equal Employment Opportunity); Section 503 of the Rehabilitation Act of 1973, as amended (see FAR subpart 22.14, Employment of Workers with Disabilities); and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended (see FAR subpart 22.13, Equal Opportunity for Veterans). The OFCCP’s regulations for these three acts are in 41 CFR part 60, Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.

The guide provides the following summary of the legislation and OFCCP’s regulations:

1. Do not discriminate against applicants or employees based on any of the categories protected by the laws (race, color, religion, sex, sexual orientation, gender identity, national origin, protected veterans status, or disability).
2. Take affirmative action to (1) ensure equal employment opportunity without regard to race, color, religion sex, sexual orientation, gender identity, or national origin; and (2) to employ and advance in employment qualified individuals with disabilities and qualified protected veterans.

The guide is available at [https://www.dol.gov/sites/dolgov/files/OFCCP/CAGuides/files/SmallContractorsGuide-508\\_1222020.pdf](https://www.dol.gov/sites/dolgov/files/OFCCP/CAGuides/files/SmallContractorsGuide-508_1222020.pdf).

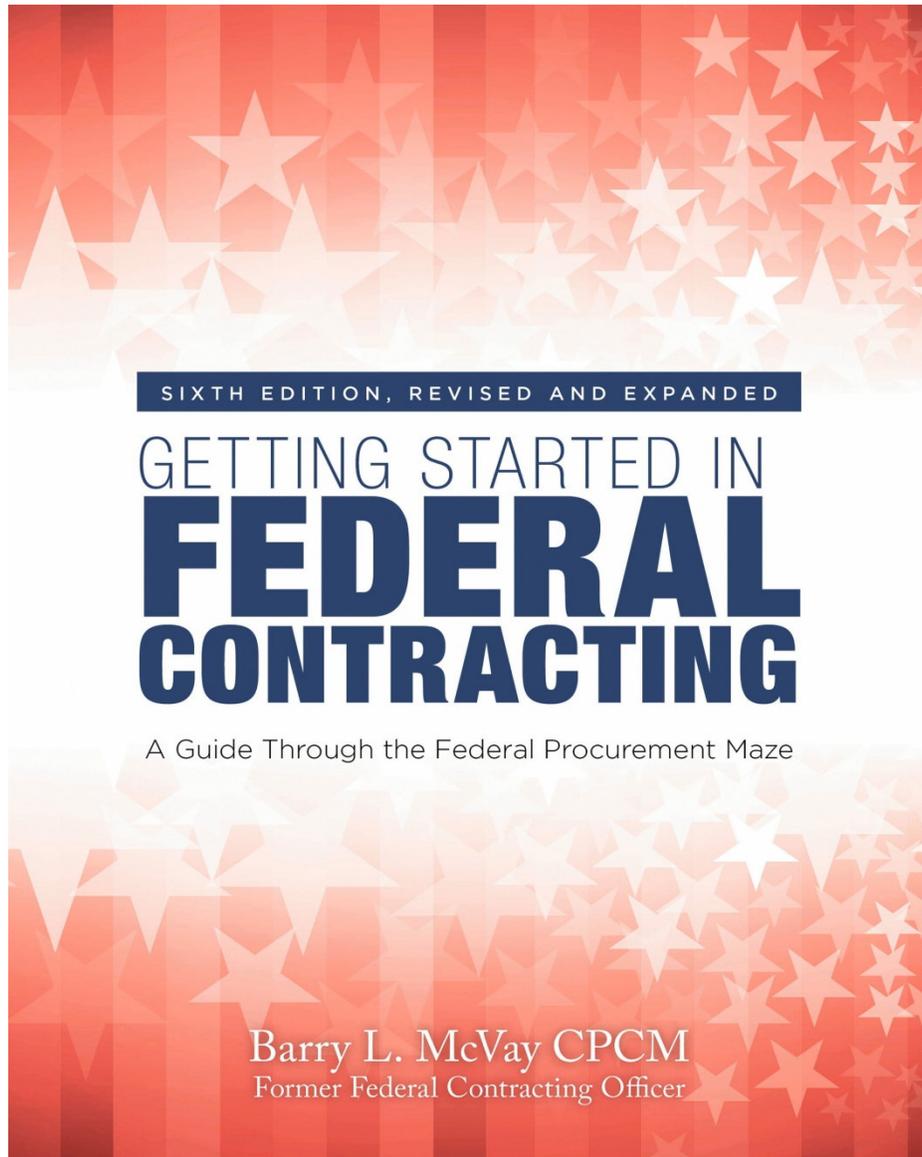
## NUMBER OF PROTESTS DECLINE IN FY 2020

The Government Accountability Office (GAO) issued its annual letter on bid protests to various Congressional committees, in which it reported that 2,149 protests, cost claims, and requests for reconsideration were filed in Fiscal Year (FY) 2020, a 2% decrease from the 2,198 filed in FY 2019. Of the 2,149 FY 2020 cases, 2,052 were protests against contract award, 56 were cost claims, and 41 were requests for reconsideration.

In addition, GAO closed 2,137 cases in FY 2020, an almost 3% decrease from the 2,200 cases closed in FY 2019. Of these 2,137 closed cases, 417 were attributable to GAO’s bid protest jurisdiction over task or delivery orders placed under indefinite-delivery/indefinite-quantity (IDIQ) contracts.

The FY 2020 protest sustain rate (the number of GAO decisions in favor of the protestor versus the number of all protests) was 15%, compared to the 13% sustain rate for FY 2019. The 51% effectiveness rate (the protestor obtained some form of relief from the agency either as a result of voluntary corrective action by the agency or a GAO decision sustaining the protest) was considerably higher than the 44% effectiveness rate for FY 2019.

GAO’s review of its decisions shows the most prevalent reasons for sustaining protests during FY 2020 were: (1) unreasonable technical evaluation; (2) flawed solicitation; (3) unreasonable cost or price evaluation; and (4) unreasonable past performance evaluation. In comparison, the most prevalent reasons for sustaining protests during FY 2019 were: (1) unreasonable technical evaluation; (2) inadequate documentation of the record; (3) flawed selection decision; (4) unequal treatment; and (5) unreasonable cost or price evaluation.



**468 pages, 2017, ISBN: 978-0-912481-27-2, \$39.95  
from Panoptic Enterprises (<http://www.FedGovContracts.com>) and  
from Amazon.com**

**To see: Table of Contents, go to <http://www.FedGovContracts.com/Contents.pdf>  
Index, go to <http://www.FedGovContracts.com/Index.pdf>**

**Sample Chapters:**

**Chapter 11, Small Business Programs, go to  
<http://www.FedGovContracts.com/Chap11.pdf>  
Chapter 13, Federal Supply Schedules, go to  
<http://www.FedGovContracts.com/Chap13.pdf>**