*Panoptic Enterprises'*

# *FEDERAL CONTRACTS PERSPECTIVE*

Federal Acquisition Developments, Guidance, and Opinions

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## AGENCIES EXPEDITE ACTIONS TO PROTECT CONTRACTOR EMPLOYEES FROM COVID

**With a speed previously unknown in the federal government when it comes to acquisition matters, in October federal departments and agencies rushed to implement Executive Order (EO) 14042 of September 9, 2021, Ensuring Adequate COVID Safety Protocols for Federal Contractors (see the October 2021 *Federal Contracts Perspective* article "Biden Orders Federal Contractors to Protect Employees from COVID"), which directs the government to "ensure that contracts and contract-like instruments…include a clause that the contractor and any subcontractors (at any tier) shall…comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force…" The EO went on to require that the Federal Acquisition Regulation (FAR) be amended "to provide for inclusion in federal procurement solicitations and contracts subject to this order the clause described in this order, and shall, by October 8, 2021, take initial steps to implement appropriate policy direction to acquisition offices for use of the clause…"**

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On September 24, two weeks after EO 14042 was issued, the Safer Federal Workforce Task Force published its guidance (**https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf**). It stated that "covered contractors shall adhere to the requirements of this guidance" and strongly encouraged agencies "to incorporate a clause requiring compliance with this guidance". The guidance identified three workplace safety protocols and explained them: (1) vaccination of covered contractor employees; (2) requirements related to masking and physical distancing while in covered contractor workplaces; and (3) designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

Consequently, on September 30, the Civilian Agency Acquisition Council (CAAC) issued a letter "authorizing [civilian] agencies to issue a class deviation to implement Executive Order 14042…" The letter includes a clause, FAR 52.223-99, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, that agencies are required to include in the following:

- New contracts awarded on or after November 14, 2021, from solicitations issued before October 15, 2021 (including new orders awarded on or after November 14, 2021, from solicitations issued before October 15, 2021, under existing indefinite-delivery contracts);

- New solicitations issued on or after October 15, 2021, and contracts awarded pursuant to those solicitations (including new solicitations issued on or after October 15, 2021, for orders awarded pursuant to those solicitations under existing indefinite-delivery contracts);
- Extensions or renewals of existing contracts and orders awarded on or after October 15, 2021; and
- Options on existing contracts and orders exercised on or after October 15, 2021.

Then the October action began:

- On October 1, the Office of Federal Procurement Policy (OFPP) posted on its website a memorandum providing agencies that award contracts under the FAR "with initial direction for the incorporation of a clause into their solicitations and contracts to implement guidance issued by the Safer Federal Workforce Task Force (Task Force) pursuant to Executive Order 14042…" The memorandum includes FAR 52.223-99 for use by civilian agencies in the preparation of their deviations. The clause requires that contractors "comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at **https:/www.saferfederalworkforce.gov/contractors/**." The clause goes on to require contractors to "include the substance of this clause, including this paragraph…in subcontracts at any tier that exceed the simplified acquisition threshold" (SAT – currently $250,000).

- The General Services Administration (GSA) issued the first deviation citing the CAAC letter as authority. While the deviation mandates compliance with the CAAC letter, it applies the CAAC letter to additional, GSA-specific situations: leasehold interest in real property exceeding the simplified lease acquisition threshold (SLAT) (that is, exceeding $250,000 average annual amount of rent for the term of the lease); concessions; and contracts exceeding the SAT/SLAT in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public. Also, GSA prohibits the use of the new clause for micro-purchases (currently purchases less than $10,000); site acquisition; and sales of surplus real and personal property.

  The GSA deviation notes that "contractor employees working from home must be vaccinated but do not have to follow the CDC [Centers for Disease Control and Prevention] masking and social distancing protocols."

  GSA is requiring contracting officers to send to contractors with existing contracts a cover letter and modification request to add FAR 52.223-99 to the existing contracts. The text of the cover letter is attached to the deviation, and it states, "If you hold a GSA contract for services, construction, or a leasehold interest in property that exceeds the simplified

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acquisition threshold (SAT) or the simplified lease acquisition threshold (SLAT), GSA strongly encourages you to accept this contract modification at this time. The modification is ***mandatory*** before GSA will renew, extend the period of performance of your contract, or exercise an option. Acceptance of the contract modification is also ***mandatory*** for all Federal Supply Schedule contractors…For IDIQ [indefinite-delivery, indefinite-quantity] contracts, including all Federal Supply Schedule contracts, you must sign the modification by **November 14, 2021**, to be eligible for new orders. GSA may take interim actions if a signed modification is not returned to GSA by November 14, 2021, such as: (i) temporarily hiding contractor information on GSA websites and/or e-tools, [or] (ii) flagging contractors that have not accepted the modification. Once an IDIQ contract is modified, the clause applies to the exercise of options on all existing orders and to all future orders" (**emphasis** in original).

Finally, the GSA deviation includes specific guidance for the Federal Acquisition Service and the Public Buildings Service.

- In addition to GSA, 36 other civilian departments and agencies issued deviations citing the CAAC letter as authorization. The departments and agencies range from the Department of Homeland Security (DHS) and the Department of Energy (DOE) to the Court Service and Offender Supervision Agency and the Railroad Retirement Board. Almost all are identical to the CAAC letter; a few have adopted for their own use the GSA cover letter that is to be sent to contractors with existing contracts requesting them to add FAR 52.223-99 to their existing contracts.

- On October 1, the Department of Defense (DOD) issued its own deviation that practically duplicated the CAAC letter. However, instead of including the text of FAR 52.223-99, DOD designated the clause as "Defense FAR Supplement [DFARS] 252.223-7999, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (Deviation 2021-O0009)." The text of FAR 52.223-99 and DFARS 252.223-7999 are identical.

  In addition to the DOD deviation, DOD issued a memorandum applying the clause and deadlines to "other transaction agreements" for services, which are not covered by the FAR or DFARS.

  Finally, DOD issued a memorandum containing guidance for the reporting of use of DFARS 252.223-7999. The memorandum applies to both contracts and orders covered by the FAR and DFARS and other transaction agreements. DOD contracting officers are to enter "**EO14042**, exactly as shown, in the Description of Requirements field when submitting a contract action report (CAR) to the Federal Procurement Data System (FPDS) [**https://www.fpds.gov/**] for a contract action when that action is (1) a new award (contract or order) that includes clause 252.223-7999; (2) a modification to an existing award (contract or order) that specifically incorporates clause 252.223-7999 into the award; or (3) an Other Transaction Agreement action…when clause 'Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors' is included or added. Inclusion of 'EO14042' in the data field is in addition to an actual brief description of what the award is procuring" (**emphasis** in original). (**EDITOR'S NOTE:** The DOE issued a policy letter directing DOE contracting officers to enter "EO14042…at the beginning of the 'FPDS Description' field in STRIPES, which populates the FPDS description of requirements field in FPDS on the contract action report (CAR)." STRIPES (the Strategic Integrated Procurement Enterprise System) is DOE's contract writing, award, and administration system.

- DOE issued a policy letter providing guidance for implementing EO 14042 and the CAAC letter authorizing its deviation. While reiterating the requirements, recommendations, and deadlines in the CAAC letter, the policy letter provides additional actions to be taken by DOE contracting officers:

    - "Regarding existing contracts that are not up for renewal/extension or the exercise of an option, the EO does not required inclusion of the FAR clause. However, DOE senior management decided to direct the modification of existing contracts to include the clause and to give priority to modifying management and operating (M&O) contracts, major site/facility contracts, and onsite support service contract. See recently released DOE Order 350.5 [COVID Safety Protocols for Federal Contractors]. Contracting officers should make every effort to execute contract modifications within one week of the date of the Department's issuing its FAR class deviation or in a time frame consistent with the terms and conditions of the contract. The Department's policy is to work with its M&O contractors and major site and facility contractors that include DEAR 970.5204-2, Laws, Regulations, and DOE Directives, to incorporate the clause via bi-lateral modification or, if necessary, unilaterally via incorporating a DOE Directive and Contractor Requirements Document (CRD) for those contracts." (**EDITOR'S NOTE:** The CRD is Attachment 1 to DOE Order 350.5)

    - "Regarding possible requests for equitable adjustments, if the contractor is contemplating or has submitted one; work with cognizant program officials and the contractor to determine if one is appropriate; if so, begin the process of determining a fair and reasonable adjustment as soon as possible."

    - "There is the potential for contractor employees or their unions to initiate action to seek relief from compliance with the clause's mandate(s)…HCAs [heads of contracting activities] and contracting officers learning of impending contract litigation should coordinate with the local chief counsel over the contract or, for contracts under the authority of the HCA for Headquarters Procurement Operations, the Assistant General Counsel for Procurement and Financial Assistance. NNSA [National Nuclear Security Agency] contracting officers should coordinate with their local NNSA field office counsel and the NNSA Deputy General Counsel for Procurement, Intellectual Property and Technology Transfer."

- Finally, GSA extended the temporary moratorium on the enforcement of the minimum sales requirements of Federal Supply Schedule (FSS) clause I-FSS-639, Contract Sales Criteria, from September 30, 2021, to March 31, 2022, because of the economic impact COVID-19 has on GSA's FSS program industry partners.

  I-FSS-639 states, "a contract will not be awarded unless anticipated sales are expected to exceed $25,000 within the first 24 months following contract award and are expected to exceed $25,000 in sales each 12-month period thereafter. The government may cancel the contract in accordance with [GSA Acquisition Regulation] clause 552.238-79, Cancellation, unless reported sales are at the levels specified…above."

  This is the third extension of the moratorium. For more on the last extension, see "Extension of Moratorium on Enforcement of 'Contract Sales Criteria' Clause in Response to COVID-19" in the April 2021 ***Federal Contracts Perspective*** article "COVID Requires Extensions to Acquisition-Related Rules."

## DOD PROPOSES RULES ON PROTOTYPES, FIRMS USED IN AUDITS

Besides the actions taken by the Department of Defense (DOD) in response to the COVID pandemic (see preceding article), DOD approached Fiscal Year (FY) 2022 (which started on October 1, 2021) with caution, issuing only two proposed rules and two deviations.

■ **Contract Authority for Development and Demonstration of Prototypes:** This proposed rule would implement National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Public Law 116-283), Section 831, Contract Authority for Development and Demonstration of Initial or Additional Prototype Units, by amending DFARS 234.005-1, Competition [for major systems acquisitions], to expand the scope of contracts awarded in response to broad agency announcements (BAA). (**EDITOR'S NOTE:** FAR 2.101, Definitions, defines a BAA as "a general announcement of an agency's research interest including criteria for selecting proposals and soliciting the participation of all offerors capable of satisfying the government's needs." See FAR 35.016, Broad Agency Announcement, for more information.)

Title 10 of the U.S. Code, Section 2302e (10 USC 2302e), Contract Authority for Advanced Development of Initial or Additional Prototype Units, provided that "a contract initially awarded from the competitive selection of a proposal resulting from a general solicitation referred to in section 2302(2)(B) of this title [Definitions – "the competitive selection for award of science and technology proposals resulting from a general solicitation and the peer review or scientific review (as appropriate) of such proposals" – that is, a BAA] may contain a contract line item or contract option for the provision of advanced component development, prototype, or initial production of technology developed under the contract…"

Paragraph (a)(2) of Section 831 amends 10 USC 2302e to replace "provision of advanced component development, prototype" with "development and demonstration", so that it now reads "a contract initially awarded from the competitive selection of a proposal resulting from a general solicitation referred to in section 2302(2)(B) of this title may contain a contract line item or contract option for the ~~provision of advanced component development, prototype~~, *development and demonstration* or initial production of technology developed under the contract…" (deleted language ~~struckout~~; added language *italicized*). This revision provides a broader scope of effort and funding for which these contract line items and contract options can be awarded. As a result, when awarding a contract that results from the competitive selection of a proposal received in response to a BAA, contracting officers may now include a contract line item or contract option for the "development and demonstration" of technology developed under the contract.

To implement this change, DOD proposes to amend DFARS 234.005-1 by revising the introductory text, which reflects the unamended 10 USC 2302e, to replace "for the provision of advanced component development, prototype" with "using funds not limited to those identified in [DFARS] 235.016 [Broad Agency Announcement] for the development and demonstration".

In addition, paragraph (2) of DFARS 217.202, Use of Options, and paragraph (b) of DFARS 235.006-71, Competition [in research and development contracting] would be amended to add the following cross-reference: "For a contract that is initially awarded from the competitive selection of a proposal resulting from a broad agency announcement, see [DFARS] 234.005-1 for the use of contract options for the development and demonstration or initial production of technology developed under the contract or the delivery of initial or additional items."

Comments on this proposed rule must be submitted no later than December 28, 2021, identified as "DFARS Case 2021-D025," through the Federal eRulemaking Portal at **http://www.regulations.gov** or by email to **osd.dfars@mail.mil**.

■ **Requirement for Firms Used to Support Department of Defense Audits:** This proposed rule would amend DFARS 237.270, Acquisition of Audit Services, and add a new solicitation provision and a new contract clause to implement the NDAA for FY 2019 (Public Law 115-232), Section 1006, as amended by the NDAA for FY 2020 (Public Law 116-92), Section 1011, Transparency of Accounting Firms Used to Support Department of Defense Audit.

Section 1006 applies to accounting firms that provide financial statement auditing to DOD in support of the audit under 31 USC 3521, Audits by Agencies, or audit remediation services in support of plans described in 10 USC 240b, Financial Improvement and Audit Remediation Plan. Such firms, when responding to a solicitation or awarded a contract for the acquisition of covered services, must disclose to DOD before any contract action is taken (including renewals and modifications) the details of any disciplinary proceedings with respect to the accounting firm or its associated persons before any entity with the authority to enforce compliance with rules or laws applying to audit services offered by the accounting firm. Section 1011 amended Section 1006 to require any disclosures to be treated as confidential to the extent required by the court or agency in which the proceeding occurred and to be treated in a manner consistent with any protections or privileges established by any other provision of federal law.

To implement Sections 1006 and 1011, DOD proposes to amend DFARS 237.270 to add paragraph (d). Even though Section 1006 applies only to accounting firms, DOD notes in the introduction to the rule that "both accounting and non-accounting firms are able to bid on and perform this work." Therefore, "to have a level playing field for the competition", paragraph (d)(1) would state that paragraph (d) "extends the statutory requirement, as a matter of DOD policy, to firms other than accounting firms in order to ensure consistent availability of data for contracting officer evaluation and appropriate use."

Paragraph (d)(2) would specify that this requirement applies to solicitations and contracts for financial statement auditing required under paragraph (e) of 31 USC 3521 and would clarify that the covered audit remediation services are those in support of the Financial Improvement and Audit Remediation Plan described in 10 USC 240b. In addition, paragraph (d)(3) would clarify that the "associated persons" referred to in Section 1006 include principals and employees. (**EDITOR'S NOTE:** FAR 2.101, Definitions, defines "principals" as "an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity [*e.g.*, general manager; plant manager; head of a division or business segment; and similar positions].")

New paragraph (e)(3) of DFARS 237.270 would require the inclusion of new provision DFARS 252.237-70XX, Preaward Transparency Requirements for Firms Offering to Support Department of Defense Audits – Representation and Disclosure, in solicitations, including solicitations using the procedures in FAR part 12, Acquisition of Commercial Items, that include the new clause DFARS 252.237-70YY, Postaward Transparency Requirements for Firms that Support Department of Defense Audits. DFARS 252.237-70XX requires the offeror to represent whether it or any of its principals or employees have or have not been the subject of disciplinary proceedings before an entity with the authority to enforce compliance with rules or laws applying to audit services or audit remediation services offered by the offeror within the three-year period preceding the offer. If the offeror checks "have," the offeror would have to disclose, for each such proceeding: (1) the entity hearing the case; (2) the case or file number; and (3) the

allegation or conduct at issue and, if fully adjudicated or settled, a brief description of the outcome. Finally, the provision would provide assurance that the government will safeguard and treat as confidential all statements that are marked "confidential" or "proprietary" by the offeror or contractor. Statements so marked would not be released by the government to the public under the Freedom of Information Act (5 USC 552) without notification to the offeror or contractor and giving the offeror or contractor the opportunity to claim an exemption from release. (**EDITOR'S NOTE:** The introduction to the proposed rule states that "the provision will not be included in the annual representations and certifications because it affects very few offerors and requires update every time an offer is submitted.")

Finally, paragraph (e)(4) would require the inclusion of new clause DFARS 252.237-70YY in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures, that exceed the simplified acquisition threshold (currently $250,000) and are for the acquisition of covered financial statement auditing or audit remediation services. DFARS 252.237-70YY would require contractors to report any changes in previously reported proceedings and any newly initiated proceeding that has not yet been adjudicated or settled, or that has been fully adjudicated or settled against the contractor. The government would safeguard and treat as confidential all such statements.

Comments on this proposed rule must be submitted no later than December 28, 2021, identified as "DFARS Case 2019-D010," through the Federal eRulemaking Portal at **http://www.regulations.gov** or by email to **osd.dfars@mail.mil**.

■ **Deviation on the Threshold for Obtaining Certified Cost or Pricing Data for Subcontracts and Price Adjustments:** This deviation implements the NDAA for FY 2021 (Public Law 116-283), Section 814, Cost or Pricing Data Reporting Requirements for Department of Defense Contracts, which amended 10 USC 2306a, Cost or Pricing Data: Truth in Negotiations, to increase from $750,000 to $2,000,000 the threshold for obtaining certified cost or pricing data for the award of a subcontract, at any tier, or for a change or modification made to a prime contract or subcontract, at any tier. This deviation directs DOD contracting officers to use $2,000,000 instead of $750,000 cited in paragraph (a)(1) of FAR 15.403-4, Requiring Certified Cost or Pricing Data (10 USC 2306a and 41 USC chapter 35).

Because of this deviation, the following deviation clauses reflecting the $2,000,000 threshold are to be used in place of the corresponding FAR clauses:

- FAR 52.214-27, Price Reduction for Defective Certified Cost or Pricing Data – Modifications – Sealed Bidding (DEVIATION 2022-O0001)
- FAR 52.214-28, Subcontractor Certified Cost or Pricing Data – Modifications – Sealed Bidding (DEVIATION 2022-O0001)
- FAR 52.215-11, Price Reduction for Defective Certified Cost or Pricing Data – Modifications (DEVIATION 2022-O0001)
- FAR 52.215-12, Subcontractor Certified Cost or Pricing Data (DEVIATION 2022-O0001)
- FAR 52.215-13, Subcontractor Certified Cost or Pricing Data – Modifications (DEVIATION 2022-O0001)

Contracting officers are not to use Alternate I of FAR 52.214-28, Alternate I of FAR 52.215-12, or Alternate I of FAR 52.215-13 because they conflict with the deviation clauses.

Finally, "contracting officers shall, upon request of the contractor, modify existing contracts as soon as practicable, without requiring consideration, to incorporate as applicable one or more of these deviation clauses."

■ **Deviation on Payment in Local Currency (Afghanistan):** This deviation recognizes the "change in operations in Afghanistan" (that is, the evacuation of all American troops from Afghanistan) by prohibiting the implementation of DFARS subpart 232.72, Payment in Local Currency (Afghanistan), and the use of DFARS 252.232-7014, Notification of Payment in Local Currency (Afghanistan), in solicitations. "Payment to host nation vendors (Afghan) in Afghani (local currency) via electronic funds to a local (Afghan) banking institution is no longer required… The U.S. Treasury has placed the Taliban, the *de facto* government in Afghanistan, on the Office of Foreign Assets Control Sanction List. Therefore, payment cannot be made to an Afghan vendor in Afghani via electronic funds to an Afghan banking institution. Additional guidance on making payment under Afghan vendor contracts is available at **https://www.acq.osd.mil/dpap/ pacc/cc/resources.html**."

## CHANGES TO WOSB/EDWOSB CERTIFICATIONS PROPOSED

The FAR Council is proposing to amend FAR subpart 19.15, Women-Owned Small Business Program, to implement the NDAA for FY 2015 (Public Law 113-291), Section 825, Sole Source Contracts for Small Business Concerns Owned and Controlled by Women, which requires that women-owned small businesses (WOSBs) and economically disadvantaged women-owned small businesses (EDWOSB) be certified by the Small Business Administration (SBA), a federal agency, a state government, or a national certifying entity approved by SBA in the WOSB Program to be eligible for set-aside or sole-source awards.

Prior to the enactment of Section 825, 15 USC 637, Additional Powers [of the SBA], paragraph (m), Procurement Program for Women-Owned Small Business Concerns, provided that WOSBs and EDWOSBs could participate in the WOSB program if "each of the concerns (i) is certified by a federal agency, a state government, or a national certifying entity approved by the administrator [of SBA], as a small business concern owned and controlled by women; or (ii) certifies to the contracting officer that it is a small business concern owned and controlled by women and provides adequate documentation, in accordance with standards established by the [SBA], to support such certification." This is reflected in paragraph (b) of FAR 19.1503, Status [as WOSB or EDWOSB]: "The contracting officer shall verify that the offeror: (1) is registered in the System for Award Management (SAM) [**https://www.sam.gov**]; (2) is self-certified as an EDWOSB or WOSB concern in SAM; and (3) has submitted documents verifying its eligibility at the time of initial offer to the WOSB Program Repository. The contract shall not be awarded until all required documents are received.

Section 825 deleted the "self-certification" authority in subparagraph (ii) of 15 USC 637, thus requiring that all participants in the WOSB program be certified. In response, SBA amended its regulations at paragraph (a) of Title 13 of the Code of Federal Regulations, Section 127.300 (13 CFR 127.300), How is a concern certified as an WOSB or EDWOSB?, which addresses WOSB certifications, to state, "A concern may apply to SBA for WOSB certification…A concern may

submit evidence to SBA that it is a women-owned and controlled small business that is certified by the U.S. Department of Veterans Affairs Center for Verification and Evaluation as a service-disabled veteran-owned business or veteran-owned business…A concern may submit evidence that it has been certified as a WOSB by an approved third-party certifier…" Paragraph (b) of 13 CFR 127.300 addresses EDWOSB certification and is exactly the same as paragraph (a) except that it contains the following additional criterion: "A concern that is a certified participant in the 8(a) BD Program and owned and controlled by one or more women qualifies as an EDWOSB." (For more information on the SBA's rule implementing Section 825, see "Women-Owned Small Business and Economically Disadvantaged Women-Owned Small Business Certification" in the June 2020 ***Federal Contracts Perspective*** article "Two Socio-Economic Programs' Regulations Amended.")

To bring FAR subpart 19.15 (and related sections) into conformity with the SBA rule and Section 825, the following are the significant amendments being proposed:

■ The subdefinitions of EDWOSB and WOSB in the definition of "Women-Owned Small Business (WOSB) Program" in FAR 2.101, Definitions, would be amended to provide that, in addition to the eligibility requirements described in both subdefinitions, a small business must be "certified by SBA or an approved third-party certifier in accordance with 13 CFR 127.300" to be eligible to participate in the program.

■ Several changes would be made to FAR 19.308, Protesting a Firm's Status as an Economically Disadvantaged Women-Owned Small Business Concern or Women-Owned Small Business Concern Eligible Under the Women-Owned Small Business Program:

- Because only women who are United States citizens are eligible to participate as EDWOSBs, paragraph (d)(1)(ii) would be amended to state that "the protest presents evidence that the concern is not at least 51% owned and controlled by one or more economically disadvantaged women *who are United States citizens*, when it is in connection with an EDWOSB contract" (*emphasis* added). The parallel statement in paragraph (d)(1)(i) addressing protests against businesses claiming to be women-owned already contains the "United States citizens" requirement.

- Paragraph (d)(2), which requires the SBA to "consider protests by a contracting officer when the apparent successful offeror has failed to provide all of the required documents", would be deleted.

- In paragraph (i), which addresses what happens after the SBA renders its decision on WOSB or EDWOSB eligibility, subparagraph (i)(3), which addresses when the contracting officer awards the contract before the SBA's ruling is received, would be revised to state that "SBA will remove the concern's designation in the Dynamic Small Business Search (DSBS) [**https://web.sba.gov/pro-net/search/dsp_dsbs.cfm**]as an EDWOSB or WOSB concern eligible under the WOSB Program." The current paragraph (i)(3) states that "the concern must remove its designation in SAM [**https://www.sam.gov**] as an EDWOSB or WOSB concern eligible under the WOSB Program…" The same revisions would be made to subparagraph (i)(5), which addresses when the SBA's "OHA [Office of Hearings and Appeals] affirms the SBA Director for Government Contracting's determination finding the protested concern is ineligible…"

■ FAR 19.1501, Definition, would be removed because it consists of a definition for "WOSB Program Repository," but it ceased being the source for WOSB program eligibility on October 15, 2020.

■ Paragraph (b)(2) of FAR 19.1503, Status, would be amended to add the requirement for the contracting officer to verify the designation as a certified WOSB or EDWOSB small business in the DSBS. In addition, paragraphs (c) and (d) would be deleted. Paragraph (c) addresses the documents a WOSB or EDWOSB eligible under the WOSB Program must provide to the contracting officer. Paragraph (d) lists the conditions under which a contracting officer may accept a concern's self-certification as accurate. Section 825 eliminated the contracting officer from any participation in the certification process.

■ FAR 19.1505, Set-Aside Procedures, would be amended to allow an offeror to submit an offer while awaiting certification under the WOSB Program ("(d) An offer is eligible for consideration under an EDWOSB or WOSB set-aside when the offeror:…(2)(i) for an EDWOSB set-aside, is certified pursuant to 13 CFR 127.300 as an EDWOSB or has a pending application for EDWOSB certification in the DSBS (see 13 CFR 127.504(a) [What requirements must an EDWOSB or WOSB meet to be eligible for an EDWOSB or WOSB requirement?]), or (ii) for a WOSB set-aside, is certified pursuant to 13 CFR 127.300 as an EDWOSB or WOSB, or has a pending application for EDWOSB or WOSB certification in the DSBS (see 13 CFR 127.504(a))." In addition, FAR 19.1505 would be amended to provide the contracting officer with guidance if an apparent successful offeror's certification is pending under the WOSB Program.

■ FAR 19.1506, Women-Owned Small Business Program Sole-Source Awards, would be amended to state, "A contracting officer shall only award a sole-source contract to a concern that has been certified pursuant to 13 CFR 127.300 as an EDWOSB or WOSB eligible under the WOSB program. Contracting officers shall not request a status determination from SBA on pending certification applications for EDWOSB or WOSB sole-source awards."

■ FAR 52.212-3, Offeror Representations and Certifications – Commercial Items, and FAR 52.219-1, Small Business Program Representations, would be revised to remove the representation for WOSBs and EDWOSBs eligible under the WOSB Program.

■ FAR 52.219-28, Post-Award Small Business Program Rerepresentation, would be revised to remove the rerepresentation for WOSBs and EDWOSBs eligible under the WOSB Program.

■ FAR 52.219-29, Notice of Set-Aside for, or Sole-Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns, would be revised to delete the definition of WOSB Program Repository and to require that the EDWOSB is certified by SBA or an approved third-party certifier in accordance with 13 CFR 127.300. In addition, text that the contracting officer will ensure the successful offeror has provided all required documents to the now defunct WOSB Program Repository would be deleted. Furthermore, text would be added stating that for EDWOSB set-aside procurements, offers are solicited only from certified EDWOSBs or concerns with a pending certification application in DSBS. Finally, text would be added that, for EDWOSB sole-source awards, offers are solicited only from certified EDWOSBs.

■ FAR 52.219-30, Notice of Set-Aside for, or Sole-Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program, would be amended to make the same revisions as those in FAR 52.219-29, except that "WOSB" would replace "EDWOSB."

Comments on this proposed rule must be submitted no later than December 6, 2021, identified as "FAR Case 2020-013," through the Federal eRulemaking Portal at **http://www.regulations.gov**. If the comments cannot be submitted using **https://www.regulations.gov**, contact Malissa Jones at 703-605-2815 or by email to **Malissa.jones@gsa.gov**.

## COMMENTS SOUGHT ON MINIMIZING CLIMATE CHANGE

The FAR Council is seeking comments on a possible FAR amendment that would ensure major federal agency procurements minimize the risk of climate change.

EO 14030, Climate-Related Financial Risk, states that "the federal government should lead by example by appropriately prioritizing federal investments and conducting prudent fiscal management." Section 5(b)(ii) of the EO directs the FAR Council, in consultation with the Chair of the Council on Environmental Quality and the heads of other agencies as appropriate, to "consider amending the FAR to…ensure that major federal agency procurements minimize the risk of climate change, including requiring the social cost of greenhouse gas emissions to be considered in procurement decisions and, where appropriate and feasible, give preference to bids and proposals from suppliers with a lower social cost of greenhouse gas emissions."

During its consideration of a FAR amendment, the FAR Council is seeking comments on the following questions:

> "(a) How can greenhouse gas emissions, including the social cost of greenhouse gases, best be qualitatively and quantitatively considered in federal procurement decisions, both domestic and overseas? How might this vary across different sectors?
>
> "(b) What are usable and respected methodologies for measuring the greenhouse gases emissions over the lifecycle of the products procured or leased, or of the services performed?
>
> "(c) How can procurement and program officials of major federal agency procurements better incorporate and mitigate climate-related financial risk? How else might the federal government consider and minimize climate-related financial risks through procurement decisions, both domestic and overseas?
>
> "(d) How would (or how does) your organization provide greenhouse gas emission data for proposals and/or contract performance?
>
> "(e) How might the federal government best standardize greenhouse gas emission reporting methods? How might the government verify greenhouse gas emissions reporting?
>
> "(f) How might the federal government give preference to bids and proposals from suppliers, both domestic and overseas, to achieve reductions in greenhouse gas emissions or reduce the social cost of greenhouse gas emissions most effectively?

"(g) How might the government consider commitments by suppliers to reduce or mitigate greenhouse gas emissions?

"(h) What impact would consideration of the social cost of greenhouse gases in procurement decisions have on small businesses, including small disadvantaged businesses, women-owned small businesses, service-disabled veteran-owned small businesses, and Historically Underutilized Business Zone (HUBZone) small businesses? How should the FAR Council best align this objective with efforts to ensure opportunity for small businesses?"

Comments should be submitted no later than December 14, 2021, identified as "FAR Case 2021-015," through the Federal eRulemaking Portal at **http://www.regulations.gov**. If the comments cannot be submitted using **https://www.regulations.gov**, call or email Jennifer Hawes, at 202-969-7386 or by email at **jennifer.hawes@gsa.gov**.

## OMB ISSUES MORE GUIDANCE ON MADE IN AMERICA WAIVERS

The Office of Management and Budget (OMB) has issued a memorandum that provides more specific guidance on complying with EO 14005, Ensuring the Future is Made in All of America by All of America's Workers. EO 14005 directs agencies to take "a series of actions to enable the United States government to maximize its use of goods, products, and materials produced in, and services offered in, the United States. These actions include, among other things, requiring the OMB to establish the Made in America Office (MIAO). The MIAO will provide greater oversight of waivers from Made in America laws, thus increasing consistency and public transparency of such waivers."

In response to EO 14005, OMB issued an initial memorandum titled "Increasing Opportunities for Domestic Sourcing and Reducing the Need for Waivers from Made in America Laws." That memorandum identified information that agencies must report to establish nonavailability of domestically sourced products, including a description of the market research and the outreach conducted. (For more on EO 14005 and the initial OMB memorandum, see the July 2021 ***Federal Contracts Perspective*** article "Guidance on Reducing Made in America Waivers Issued.")

This memorandum builds upon the earlier memorandum by providing specific guidance to federal departments and agencies on the use of a digital waiver portal to submit proposed Made in America waivers to the MIAO. Proposed waivers will be posted to a new dedicated site, **https://www.MadeinAmerica.gov**, prior to agencies making awards, beginning with waivers for product nonavailability. Agencies will be required to submit proposed waivers after approval by their agency officials, proposing the acquisition of a foreign-made product due to the nonavailability of domestically made products. Centralized posting of proposed waivers will provide sellers of U.S.-made products with greater insight of the needs of the federal marketplace and help MIAO and agencies close gaps in U.S. domestic supply chains.

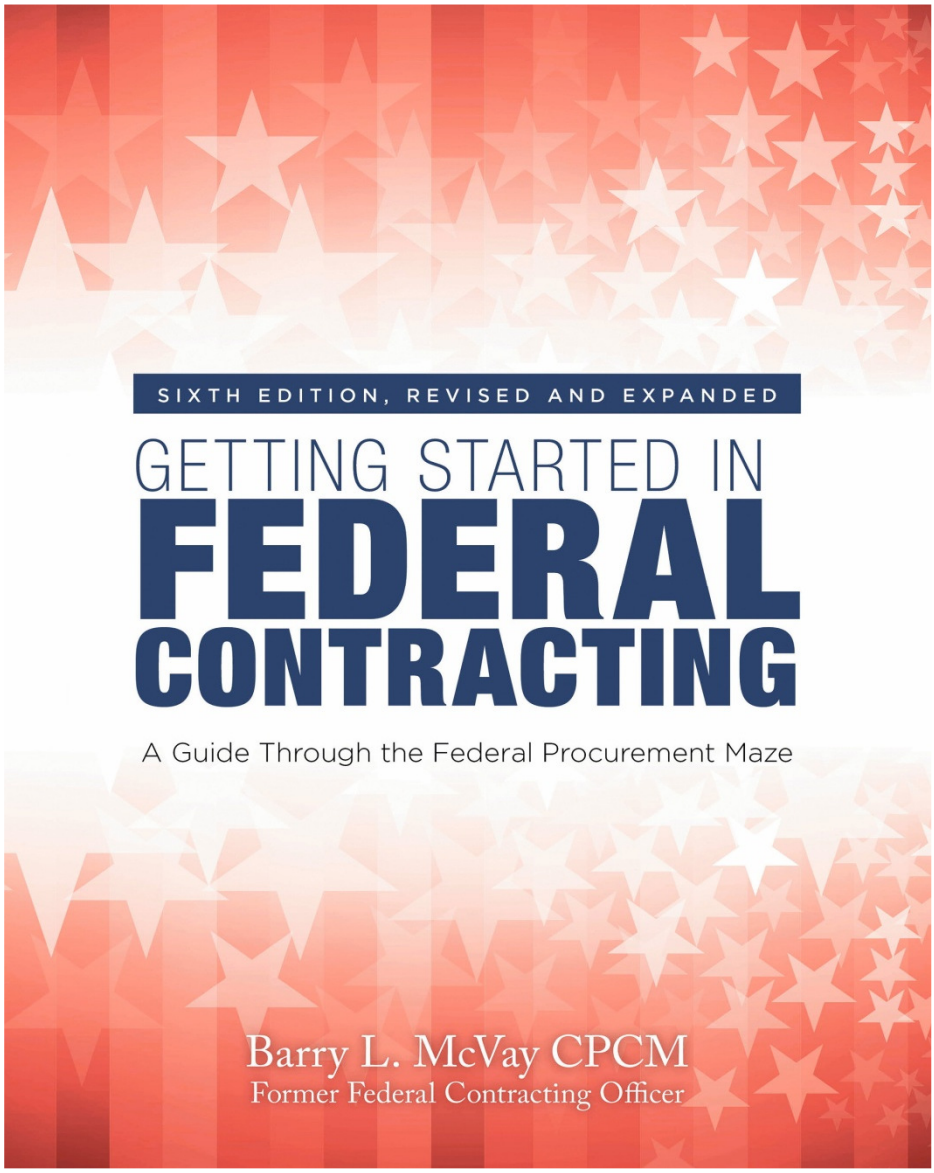
Beginning November 16, 2021, for agencies subject to the Chief Financial Officers Act (31 USC 901, Establishment of Agency Chief Financial Officers, covers all cabinet departments and other large agencies such as the General Services Administration [GSA], the National Aeronautics and Space Administration [NASA], and the Small Business Administration [SBA]),

and January 1, 2022, for all other agencies covered by EO 14005 (that is, all others except independent regulatory agencies), must submit the proposed waiver accessible on the System for Award Management (SAM – **https://www.sam.gov**) prior to issuing a waiver in accordance to paragraph (b) of FAR 25.103, Exceptions [to the Buy American statute], which covers nonavailability. Once submitted, certain information about the waiver will be available to the public on **MadeinAmerica.gov**. "The agency shall not make an award until it has received confirmation that MIAO has completed its review of the proposed waiver, MIAO has waived the requirement for a review, or an exception applies" (that is, urgency or other situations where the agency must act in an expedited manner, or nonavailability determinations based on class determinations).

"Agencies should carefully consider public input on proposed waivers that may help to reduce the need for future waivers and avoid unneeded technical specifications that may inadvertently disqualify domestic suppliers. SAOs [Senior Accountable Officials for Domestic Sourcing] are also encouraged to share helpful domestic sourcing information with MIAO and other agency SAOs that may have similar requirements."

"MIAO intends to work with the Office of Federal Procurement Policy (OFPP), the other member agencies of the Federal Acquisition Regulatory Council (FAR Council), and the Department of Commerce (DOC) to review the current list of nonavailable articles in FAR 25.104 [Nonavailable Articles] to determine if any items should be removed from the list… OFPP will review any future recommendations to add items to the list with MIAO and DOC, paying particular attention to economic analyses of relevant markets and available market research. This will be done to determine whether there is a reasonable basis to conclude that the article, material, and supply is not mined, produced, or manufactured in the U.S. in sufficient and reasonably available commercial quantities and of a satisfactory quality, and make the findings available to the other members of the FAR Council for consideration."

In addition, the memorandum says that OFPP will work with the FAR Council to consider appropriate FAR amendments; the MIAO is working with the Federal Acquisition Institute and the Defense Acquisition University on appropriate training; and the MIAO intends to phase in the use of **MadeinAmerica.gov** for other types of waivers to Made in America laws, including procurement, financial assistance, and maritime waivers.

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