

FEDERAL CONTRACTS PERSPECTIVE

Federal Acquisition Developments, Guidance, and Opinions

Vol. XXII, No. 4

April 2021

BIDEN ADMINISTRATION WITHDRAWS FOUR PROPOSED FAR RULES

In its first foray into federal acquisition policy, the Biden administration has withdrawn four rules that proposed to amend the Federal Acquisition Regulation (FAR). In addition, the Biden Administration issued its first Federal Acquisition Circular (FAC) – FAC 2021-05 – consisting of a technical amendment to the FAR.

The following are the four proposed rules that are withdrawn:

■ **Extension of Limitations on Contractor Employee Personal Conflicts of Interest:**

This rule, published on April 2, 2014, proposed to extend the limitations on contractor employee personal conflicts of interest (COIs) at FAR subpart 3.11, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, to the performance of all functions that are closely associated with inherently governmental functions and contracts for personal services. This rule was prepared in response to the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Public Law 112-239), Section 829, Extension of Contractor Conflict of Interest Limitations, which required the Secretary of Defense to review the guidance on personal conflicts of interest for contractor employees in FAR subpart 3.11 and FAR 52.203-16, Preventing Personal Conflicts of Interest, to determine whether it would be in the best interest of DOD and the taxpayers to extend such guidance to personal COIs by contractor personnel performing any of the following: (1) functions other than acquisition functions that are closely associated with inherently governmental functions; (2) personal services contracts; or (3) contracts for staff augmentation services. After conducting the review, the Secretary of Defense concluded that extension of the FAR personal conflicts of interest regulations to additional functions and contract types might be in the best interest of DOD and the taxpayers.

However, a decision was made not to proceed with finalization of the proposed rule because of the passage of time since 2014 and the fact that Section 829 did not require any changes to the FAR. The FAR Council believes further consideration of any amendments related to limitations on contractor employee personal conflicts of interest should be accomplished under a new FAR case. Accordingly, the proposed rule is withdrawn.

For more on the proposed rule, see the May 2014 *Federal Contracts Perspective* article “Proposal Would Extend Contractor Employee Conflict of Interest Limits.”

CONTENTS	
Biden Admin Withdraws Four Proposed FAR Rules	1
COVID Requires Extensions to Acquisition-Related Rules.....	3
DOD Tidies Up a Bit.....	8

■ **Organizational Conflicts of Interest:** This rule, published April 26, 2011, proposed to amend FAR subpart 9.5, Organizational and Consultant Conflicts of Interest, to provide revised regulatory coverage on organizational conflicts of interest (OCIs), provide additional coverage regarding contractor access to nonpublic information, and add related provisions and clauses.

Given the amount of time that has passed since the 2011 publication of the proposed rule and potential changed circumstances, a decision has been made not to proceed with finalization of the FAR rule.

For more on the proposed rule, see the May 2011 *Federal Contracts Perspective* article “Organizational Conflicts of Interest Changes Proposed.”

■ **Small Business Set Asides for Research and Development Contracts:** This rule, published August 10, 2012, proposed to amend FAR 19.502-2, Total Small Business Set-Asides, to clarify that contracting officers shall set aside acquisitions for research and development (R&D) in excess of the simplified acquisition threshold (then \$150,000, now \$250,000) when market research conducted in accordance with FAR part 10, Market Research, indicates there are small businesses capable of providing the best scientific and technological approaches.

The Small Business Administration (SBA) asked that the last sentence in FAR 19.502-2(b)(2) be reviewed: “In making R&D small business set-asides, there must also be a reasonable expectation of obtaining from small businesses the best scientific and technological sources consistent with the demands of the proposed acquisition for the best mix of cost, performances, and schedules.” The SBA stated that this language has been interpreted as an additional and unique condition that must be met before a contracting officer can proceed with a small business set-aside for R&D.

The proposed rule would revise the last sentence to read: “[the contracting officer shall set aside any acquisition over the simplified acquisition threshold for small business participation when there is a reasonable expectation]...when considering research and development small business set-asides, as a result of the market research performed in accordance with [FAR] part 10, that there are small businesses capable of providing the best scientific and technological approaches.”

A decision was made not to proceed with finalization of the proposed rule because of the passage of time since 2012, and input from respondents indicating that the proposed changes were, on balance, unnecessary or unhelpful. Accordingly, the proposed rule is withdrawn.

For more on the proposed rule, see “Small Business Set Asides for Research and Development Contracts” in the September 2012 *Federal Contracts Perspective* article “Two FAR Changes Proposed.”

■ **Protecting Life in Global Health Assistance:** This rule, published September 14, 2020, proposed to amend FAR subpart 25.10, Additional Foreign Acquisition Regulations, to add FAR 25.100X, Protecting Life in Global Health Assistance, which would implement the “Protecting

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.

Life in Global Health Assistance” policy contained in the presidential memorandum “The Mexico City Policy,” dated January 23, 2017.

The Mexico City Policy was first issued by President Reagan in 1984, and it required foreign nongovernmental organizations (NGOs) to agree, as a condition of receiving U.S. Agency for International Development (USAID) family planning assistance, not to perform or actively promote abortion as a method of family planning with any source of funds. Under the Mexico City Policy, U.S. NGOs did not have to agree that they would not perform or actively promote abortion as a method of family planning, but they were required to flow down the policy’s requirements to foreign NGOs receiving family planning assistance under their awards. The Mexico City Policy was rescinded by President Clinton in 1993, reinstated by President Bush in 2001, rescinded by President Obama in 2009, and reinstated by President Trump in 2017.

The proposed FAR rule would have revised FAR subpart 25.10 to reflect the reinstatement of the Mexico City Policy. However, on January 28, 2021, President Biden issued the “Memorandum on Protecting Women’s Health at Home and Abroad,” and it revoked President Trump’s presidential memorandum, so the proposed rule is withdrawn.

For more on the proposed rule, see the “Protecting Life in Global Health Assistance” in the October 2020 *Federal Contracts Perspective* article “Three Rule Changes Proposed for the FAR.”

In addition to these four rule withdrawals, the Biden administration issued FAC 2021-05, which amends FAR 4.402, General [for safeguarding classified information within industry], and FAR 52.204-2, Security Requirements, to reflect the codification of the National Industrial Security Program Operating Manual (NISPOM – DOD 5220.22-M) as Title 32 of the Code of Federal Regulations (CFR), part 117 (32 CFR part 117), National Industrial Security Program Operating Manual. DOD will no longer publish the DOD 5220.22-M as a DOD policy issuance.

The NISPOM establishes requirements for the protection of classified information disclosed to or developed by contractors, licensees, grantees, or certificate holders to prevent unauthorized disclosure.

FAC 2021-05 amends FAR 4.402 to replace “DOD 5220-22.M” with “32 CFR part 117,” and “Chapter 10 of the NISPOM” [International Security Requirements] with “32 CFR 117.19” [International Security Requirements]; and amends FAR 52.204-2 to replace “DOD 5220-22.M” with “32 CFR part 117.”

COVID REQUIRES EXTENSIONS TO ACQUISITION-RELATED RULES

On March 13, 2020, President Trump declared the COVID pandemic a “national emergency” and invoked emergency powers and authorized federal agencies to exercise powers provided in a number of laws (see the April 2020 *Federal Contracts Perspective* article “Coronavirus Overruns United States, Emergency Acquisition Authorities Invoked”). Since the COVID pandemic has lasted for an entire year, many of these emergency powers are expiring and are being extended. Among the acquisition-related rules that were invoked and are now being extended are the following:

General Services Administration (GSA)

■ **Further Extension of Purchase Exceptions from the AbilityOne Program in Response to COVID-19:** On April 29, 2020, GSA issued a memorandum providing a list of items on the AbilityOne Procurement List for which AbilityOne (<https://www.abilityone.gov/>) has granted temporary purchase exceptions (PEs) because nonprofit agencies (NPAs) could not meet GSA's requirements within needed timeframes during the COVID-19 pandemic. "These purchase exceptions allow contracting officers to fill requirements utilizing non-Procurement List items (supplies or services) designated by the AbilityOne Commission as Essentially the Same (ETS) as those on the Procurement List." The items covered by these PEs include towelettes, hand sanitizer, lotion hand soap, disposable gloves, and utility pails.

The PEs were originally set to expire on July 31, 2020. However, it has been extended four previous times, and this fifth extension revises the PEs expiration date from March 31, 2021, to September 31, 2021.

For more on the original PEs, see "GSA Memorandum on Purchase Exceptions From the AbilityOne Program in Response to COVID-19" in the June 2020 *Federal Contracts Perspective* article "Running Out of Actions to Take Against COVID-19."

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

I-FSS-639 states:

"(a) A contract will not be awarded unless anticipated sales are expected to exceed \$25,000 within the first 24 months following contract award, and are expected to exceed \$25,000 in sales each 12-month period thereafter.

"(b) The government may cancel the contract in accordance with [GSA Acquisition Regulation] clause 552.238-79, Cancellation, unless reported sales are at the levels specified in paragraph (a) above."

The moratorium was scheduled to end on September 30, 2020, but it was extended to March 31, 2021, by Supplement 1 to the acquisition letter (see "Extension of Moratorium on Enforcement of 'Contract Sales Criteria' Clause in Response to COVID-19" in the October 2020 *Federal Contracts Perspective* article "GSA Does Some Extending"). This Supplement 2 extends the moratorium so that no FSS contractor will have its FSS contract cancelled for failing to meet the sales levels specified in I-FSS-639(a) through September 30, 2021.

For more on the original acquisition letter, see "Moratorium on Enforcement of "Contract Sales Criteria" Clause in Response to COVID-19" in the July 2020 *Federal Contracts Perspective* article "GSA Takes Two COVID-19 Related Actions."

■ **Extension of Determination for Exception for Non-Availability for Trade Agreements and Buy American Statute Clauses:** On April 3, 2020, GSA issued the original non-availability exception to the Trade Agreements and the Buy American statute clauses for several Federal

Supply Classes (FSC) to support America’s response to COVID-19. The items covered by this exception are: N95 masks (Federal Supply Classification [FSC] code 4240, Safety and Rescue Equipment); sodium hypochlorite (bleach) (FSC 6810, Chemicals); disinfectants including cleaners, sprays and wipes (FSC 6840, Pest Control Agents and Disinfectants); cleaners, including sanitizing surface and floor cleaners (FSC 7930, Cleaning and Polishing Compounds and Preparations); and hand sanitizers, soaps, and dispensers (FSC 8520, Personal Toiletry Articles).

This exception determines that certain supplies are temporarily unavailable in sufficient quantity or satisfactory quality, and that these supplies are exempt from the trade agreements (see paragraph (c) of FAR 25.403, World Trade Organization Government Procurement Agreement and Free Trade Agreements) and the Buy American Act (see paragraph (b) of FAR 25.103, Exceptions [to the Buy American Act]).

The exception was originally set to expire on July 31, 2020. However, it has been extended four previous times, and this fifth extension revises the exception expiration date from March 31, 2021, to April 30, 2021.

For more on the original determination, see “General Services Administration (GSA) Regulation (GSAR) Non-Availability Exception for Trade Agreements and Buy American Statute Clauses” in the May 2020 *Federal Contracts Perspective* article “Acquisition Community Fighting COVID-19 On a Multitude of Fronts.”

■ **Supplement to Clarify Waiver of Experience Requirements Under the Multiple Award Schedule Solicitation for COVID-19:** On February 24, 2021, GSA issued an acquisition letter temporarily waiving the minimum corporate experience, relevant project experience, and annual financial statement requirements in Multiple Award Schedule (MAS) solicitation provision SCP-FSS-001, Instructions Applicable to All Offerors, to facilitate America’s response to the COVID-19 pandemic.

SCP-FSS-001 requires offerors to have a minimum of two (2) years of corporate experience (paragraph (j)(2)(i)(A)); one relevant project experience per Special Item Number (SIN) (paragraph (j)(2)(iv)); and to submit annual financial statements for the previous two years for purposes of being considered for award (paragraph (j)(1)(v)). GSA determined there is a need to temporarily waive these SCP-FSS-001 solicitation requirements to support America’s response to COVID-19.

“Since then, we have heard from the MAS community as well as industry regarding the need for additional clarity and guidance to support its implementation,” states this supplement to the acquisition letter. “This letter authorizes MAS contracting officers to award MAS contracts to new companies and to modify existing MAS contracts to add service SINs that directly support our country’s response to the COVID-19 pandemic. This letter does not diminish a MAS Contracting Officer’s overarching responsibilities, such as determining fair and reasonable pricing, ensuring an offeror’s compliance with solicitation requirements, and making a responsibility determination in accordance with FAR subpart 9.1 [Responsible Prospective Contractors]. This letter provides an opportunity for companies to propose products, services, and solutions that directly support our country’s response to the COVID-19 pandemic. Companies seeking to use this streamlined solicitation approach must submit a statement and an explanation which reflects that the offered products, services, and solutions directly support COVID-19 efforts. This letter does not apply to non-COVID-19 related offerings.”

For more on the original acquisition letter, see the March 2021 *Federal Contracts Perspective* article “GSA Waives MAS Experience, Financial Requirements.”

■ **Waiver of Certain Federal Travel Regulation (FTR) Provisions During the COVID-19 Pandemic:** On March 15, 2021, GSA published FTR Bulletin 21-04 to inform agencies that certain provisions of the FTR governing official relocation travel and renewal agreement travel (RAT) may continue to be temporarily waived for the period of time stated in the bulletin.

“GSA allowed agencies to determine whether to implement waivers of time limits established by the FTR for completion of all aspects of relocation, temporary storage of household goods (HHG) shipments, house hunting trips (HHT), and time remaining in a second tour of duty upon return from RAT [renewal agreement travel]...The COVID-19 outbreak has continued to produce uncertainty and create difficulties for individuals attempting to complete their relocation within one year or complete their RAT entitlements. For example, added restrictions are delaying employees’ HHG shipments, which may mean they require more days of temporary storage than are permitted in the FTR. Employees are also having difficulties finding a suitable permanent residence and completing real estate selling/purchasing transactions because of state and local COVID restrictions. In addition, employees on HHT or RAT are encountering last minute airline flight cancellations due to the volatility of the airline industry, various travel advisories issued by U.S. agencies and foreign countries, and required COVID testing. Therefore, each agency may determine whether to apply the waivers set forth in this bulletin to employees’ relocation travel impacted by COVID-19.”

Small Business Administration (SBA)

■ **Fiscal Year 2021 Subcontract Reporting Extensions:** On March 5, 2021, SBA issued a letter to federal agencies (FA) and federal contractors (FC) notifying that subcontract reporting requirements have been extended Fiscal Year (FY) 2021. “FAs and FCs are continuing to work through challenges and have the added burden of working through how the pandemic’s progress, strength, or recurrence in different geographies impacts their recovery strategies, states SBA in the letter. “Amidst this uncertainty, the steps for working remotely, reopening, and reinvention remain unchanged. Thus, to lessen the burden upon FAs and FCs, SBA is providing a subcontract reporting extension for FY 2021. These extensions do not change the subcontract reporting periods. However, they allow FCs, including lower-tier subcontractors, to rectify any internal issues they encountered during the 2020 reporting period. The extension further accommodates FAs’ time needed for reviewing the reports. This extension will be the final subcontract reporting extension provided, barring any unforeseen circumstances. The timeframe for FCs to submit a revision to a rejected report remains unchanged.”

The extensions provided are:

- A fifteen-day (15) extension is provided to the FC’s report submission due dates and to the FA’s review periods for the FY 2021 Individual Subcontract Reports (ISRs) and Summary Subcontract Reports (SSRs).
- FCs must submit the ISR and SSR forty-five (45) days after the end of the reporting period and forty-five (45) days after contract completion, if applicable.
- FAs will have seventy-five (75) days from the reports’ ending dates to acknowledge receipt or reject the initial reports.

- FCs must revise any report rejected by the contracting officer within 30 days of the rejection notice per paragraph (l) of FAR 52.219-9, Small Business Subcontracting Plan.
- FAs must review the revised report within 30 days of submittal.

The extended dates for FY 2021 are:

Mid-Year ISR:

Reporting Period Ending Date: March 31, 2021

Report's Official Due Date: April 30, 2021

Extended Due Date that Contractor Must Submit Report No Later Than: May 15, 2021

Government Must Review and Acknowledge Receipt or Reject Report No Later Than:
June 14, 2021

End-Year ISR & SSR

Reporting Period Ending Date: September 30, 2021

Report's Official Due Date: October 30, 2021

Extended Due Date that Contractor Must Submit Report No Later Than: November 14, 2021

Government Must Review and Acknowledge Receipt or Reject Report No Later Than:
December 14, 2021

See paragraph (a)(10)(iv) of FAR 19.704, Subcontracting Plan Requirements, for standard submittal and processing times.

Public Law 117-2, American Rescue Plan Act of 2021

The \$2.2 trillion American Rescue Plan Act (Public Law 117-2) was signed by President Biden on March 11, 2021. It contains Section 4015, Extension of Reimbursement Authority for Federal Contractors, which extends the expiration date of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Public Law 116-136), Section 3610, Federal Contractor Authority, from September 30, 2020, to September 30, 2021. Section 3610 gives agencies the discretion to modify the terms and conditions of the contract to reimburse paid leave where contractor employees could not access work sites or telework but actions were needed to keep such employees in a ready state.

Department of Energy (DOE)

■ **Guidance for Continuing to Use DOE’s Clauses Developed to Implement Section 3610 of the CARES Act:** On April 15, 2020, DOE issued Policy Flash 2020-22 which provided two DOE-developed clauses authorized for use in cost reimbursement-type contracts and fixed-price/time-and-materials type contracts, both titled “Paid Leave Under Section 3610 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) to Maintain Employees and Subcontractors in a Ready State.” Policy Flash 2020-22 authorized the use of these clauses until September 30, 2020. The expiration date of this authority has been extended several times, and Policy Flash 2021-25 extends the expiration date from March 31, 2021, to September 30, 2021.

For more on Policy Flash 2020-22, see “DOE Policy Flashes on Providing Guidance for Using DOE’s Clauses Developed to implement Section 3610 of the CARES Act” in the May 2020 *Federal Contracts Perspective* article “Acquisition Community Fighting COVID-19 On a Multitude of Fronts.”

DOD TIDIES UP A BIT

The Department of Defense (DOD) took it easy in March, not issuing any proposed rules or final rules! Instead, DOD conducted some housekeeping chores, such as providing instructions and directions to contracting officers, revising email addresses, updating lists of items, and seeking industry comments on proposed renewal of an international agreement.

■ **Section 890 Reporting Requirements in the National Defense Authorization Act for FY 2021:** The National Defense Authorization Act for Fiscal Year (FY) 2021 (Public Law 116-283), Section 890, Identification of Certain Contracts Relating to Construction or Maintenance of a Border Wall, requires DOD to identify contract actions in the Federal Procurement Data System (FPDS – <https://www.fpds.gov>) related to the construction or maintenance of a barrier along the international border between the United States and Mexico when the value of the award has an estimated value equal to or greater than \$7,000,000.

John M. Tenaglia, the Principal Director of Defense Pricing and Contracting, has forwarded a memorandum to each service’s deputy assistant secretary for procurement directing contracting officer to “enter **890Border** (exactly as shown) in the ‘Description of Requirements’ data field of contract action reports for actions dated January 1, 2021, or later for products or services related to the construction or maintenance of a barrier along the international border between the United States and Mexico. This applies to the following instrument types as indicated:

“(1) New contracts, including indefinite-delivery contracts (IDC), for these products or services with an estimated total value greater than or equal to \$7,000,000;

“(2) New task/delivery orders with an estimated total value greater than or equal to \$7,000,000 for these products or services, regardless of whether the ordering instrument itself is identified;

“(3) New task/delivery orders, regardless of dollar value, issued under an IDC that is identified under (1) above;

“(4) Modifications, regardless of dollar value, against awards identified under (1) or (2) above; and

“(5) Modifications against existing awards to add these products or services that increased the estimated dollar value of the award by \$7,000,000 or more.”

For more on Public Law 116-283, see the February 2021 *Federal Contracts Perspective* article “2021 National Defense Authorization Act Passed Over Presidential Veto.”

■ **Revision to Deviation on Verification of Eligibility for the Women-Owned Small Business Program:** On December 17, 2020, DOD issued a deviation from FAR 19.1503, Status [as a Women-Owned Small Business (WOSB) and Economically Disadvantaged Women-Owned Small Business (EDWOSB)], to implement the Small Business Administration (SBA) rule that revised Title 13 of the Code of Federal Regulations (CFR), Part 127 Women-Owned Small Business Federal Contract Program (13 CFR Part 127). The SBA rule implemented a requirement in the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 (Public Law 113-291), Section 825, Sole Source Contracts for Small Business Concerns Owned and Controlled by Women, that WOSBs and EDWOSBs participating in the Women-Owned Small Business Contract Program have their eligibility verified and certified.

FAR 19.1503(b), (c), and (d) address actions contracting officers must take to verify the status of an offeror as a WOSB or EDWOSB eligible to participate in the WOSB program. FAR 19.1503(b) requires that the contracting officer “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.” FAR 19.1503(c) addresses WOSB and EDWOSB certification by a third-party certifier. FAR 19.1503(d) states that “a contracting officer may accept a concern’s self-certification as accurate for a specific procurement reserved for award [to a WOSB or EDWOSB under certain conditions].”

Section 825 amended Title 15 of the U.S. Code, Section 637 (15 USC 637), Additional Powers, to require that offerors seeking to participate in an acquisition restricted to WOSBs must “be certified by a federal agency, a state government, the administrator [of the SBA], or a national certifying entity approved by the administrator as a small business concern owned and controlled by women.” This eliminates the ability of a firm to self-certify its status as a WOSB or EDWOSB.

In addition, the WOSB Program Repository is no longer the source for WOSB and EDWOSB representation status. Instead, SBA (or an approved third-party certifier) certifies a WOSB or EDWOSB as eligible for the WOSB contract program. The original deviation directed contracting officers to follow its procedures instead of those in FAR 19.1503(b), (c), and (d), and to “notify the SBA’s Director of Government Contracting by email at wosbprotest@sba.gov, who will ensure priority review of the application by either the SBA or the third-party certifier...”

DOD has issued a supplement to the original deviation that provides an updated email address for contracting officers to use to contact the SBA to verify the eligibility of the apparently successful offeror for a procurement set aside under the WOSB Program. That email address is WOSBpendingcertification@sba.gov.

For more on the SBA final rule, 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.” For more on Section 825 of the NDAA for FY 2015, see the January 2015 *Federal Contracts Perspective* article “Authority to Use Simplified Procedures for Commercial Items Up to \$6,500,000 Made Permanent.”

■ **Updated List of Federal Supply Classification (FSC) Codes to be Competed When Purchasing from Federal Prison Industries (FPI):** Section 827 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181) requires that DOD publish annually a list of product categories for which the FPI’s share of the DOD market is greater than 5%. Products on the list must be procured using competitive (or fair opportunity) procedures (see DFARS 208.602-70, Acquisition of Items for Which FPI Has a Significant Market Share). In conducting such a competition, DOD contracting officers must consider a timely offer from FPI for any of the products on the list. In addition, FPI must be included in the process even if the procurement otherwise would have been set aside in accordance with FAR part 19, Small Business Programs. When the FPI item is determined to provide the best value as a result of FPI’s response to a competitive solicitation, contracting officers are to follow the ordering procedures at <http://www.unicor.gov>.

John M. Tenaglia, the Principal Director of Defense Pricing and Contracting, has forwarded a memorandum to each service’s deputy assistant secretary for procurement that contains a list of such product categories, by Federal Supply Classification (FSC) codes, effective April 1, 2021. The following is the list of products:

<u>FSC</u>	<u>Description</u>
7110	Office Furniture
7125	Cabinets, Lockers, Bins, and Shelving
7210	Household Furnishings
8405	Outerwear, Men’s
8415	Clothing, Special Purpose
8420	Underwear and Nightwear, Men’s

This list consists of the same FSCs as last year – see “Updated List of Supplies to be Competed When Purchasing from Federal Prison Industries (FPI)” in the April 2020 *Federal Contracts Perspective* article “DOD Issues Two Deviations, One Memo.”

■ **Disclosure of Information:** This memorandum reminds “contracting officers to respond promptly to contractor requests for written approval to disclose information pursuant to DFARS 252.204-7000, Disclosure of Information. For the purpose of consistency across the department, contracting officers are specifically encouraged to provide a prompt, affirmative approval when a contractor requests approval to disclose information to United States government agencies, such as the Department of Justice and the Federal Trade Commission as part of a review under the

Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 USC 18a)” [Premerger Notification and Waiting Period].

■ **Negotiation of a Renewal of the Reciprocal Defense Procurement Memorandum of Understanding with the Ministry of Defense of Japan:** On June 4, 2016, the U.S. Secretary of Defense signed a Reciprocal Defense Procurement Memorandum of Understanding (RDP MOU) with Japan. Now DOD is contemplating the renewal of the RDP MOU with the Ministry of Defense of Japan, and it is requesting that industry provide comments regarding its experience in public defense procurements conducted by or on behalf of the Japanese Ministry of Defense or Armed Forces.

DOD has entered into RDP MOUs with 27 “qualifying countries,” primarily European Union countries, NATO countries, and other allies such as Australia, Egypt, and Israel (see DFARS 225.003, Definitions). The purpose of RDP MOUs is to promote rationalization, standardization, and interoperability of conventional defense equipment with allies and other friendly governments.

RDP MOUs generally include language by which the parties agree that their defense procurements will be conducted in accordance with certain implementing procedures. These procedures relate to: (1) publication of notices of proposed purchases; (2) the content and availability of solicitations for proposed purchases; (3) notification to each unsuccessful offeror; (4) feedback, upon request, to unsuccessful offerors concerning the reasons they were not allowed to participate in a procurement or were not awarded a contract; and (5) provision for the hearing and review of complaints arising in connection with any phase of the procurement process to ensure that, to the extent possible, complaints are equitably and expeditiously resolved.

Based on the RDP MOU, each country affords the other country certain benefits on a reciprocal basis consistent with national laws and regulations. The benefits that the United States accords to the products of qualifying countries include: (1) evaluating offers of qualifying country end products without applying the price differentials required by the Buy American statute and the Balance of Payments Program; and (2) customs, taxes, and duties are waived for qualifying country end products and components of defense procurements.

If DOD renews the RDP MOU with the Ministry of Defense of Japan, then Japan would continue to be listed as one of the “qualifying countries” in DFARS 225.003 and the following clauses: DFARS 252.225-7001, Buy American and Balance of Payments Program; DFARS 252.225-7002, Qualifying Country Sources as Subcontractors; DFARS 252.225-7012, Preference for Certain Domestic Commodities; DFARS 252.225-7017, Photovoltaic Devices; DFARS 252.225-7021, Trade Agreements; and DFARS 252.225-7036, Buy American – Free Trade Agreements – Balance of Payments Program. This would mean that offers of products of Japan or that contain components from Japan would be afforded the benefits available to all qualifying countries, and U.S. products would be exempt from any analogous “Buy Japan” laws or policies applicable to procurements by the Japan Ministry of Defense or Armed Forces.

While DOD is evaluating Japan’s laws and regulations in this area, DOD would benefit from U.S. industry’s experience in participating in Japan’s public defense procurements. Therefore, DOD is asking U.S. firms that have participated or attempted to participate in procurements by or on behalf of Japan’s Ministry of Defense or Armed Forces to let DOD know if the procurements were conducted with transparency, integrity, fairness, and due process in accordance with published procedures; if not, to explain the nature of the problems encountered.

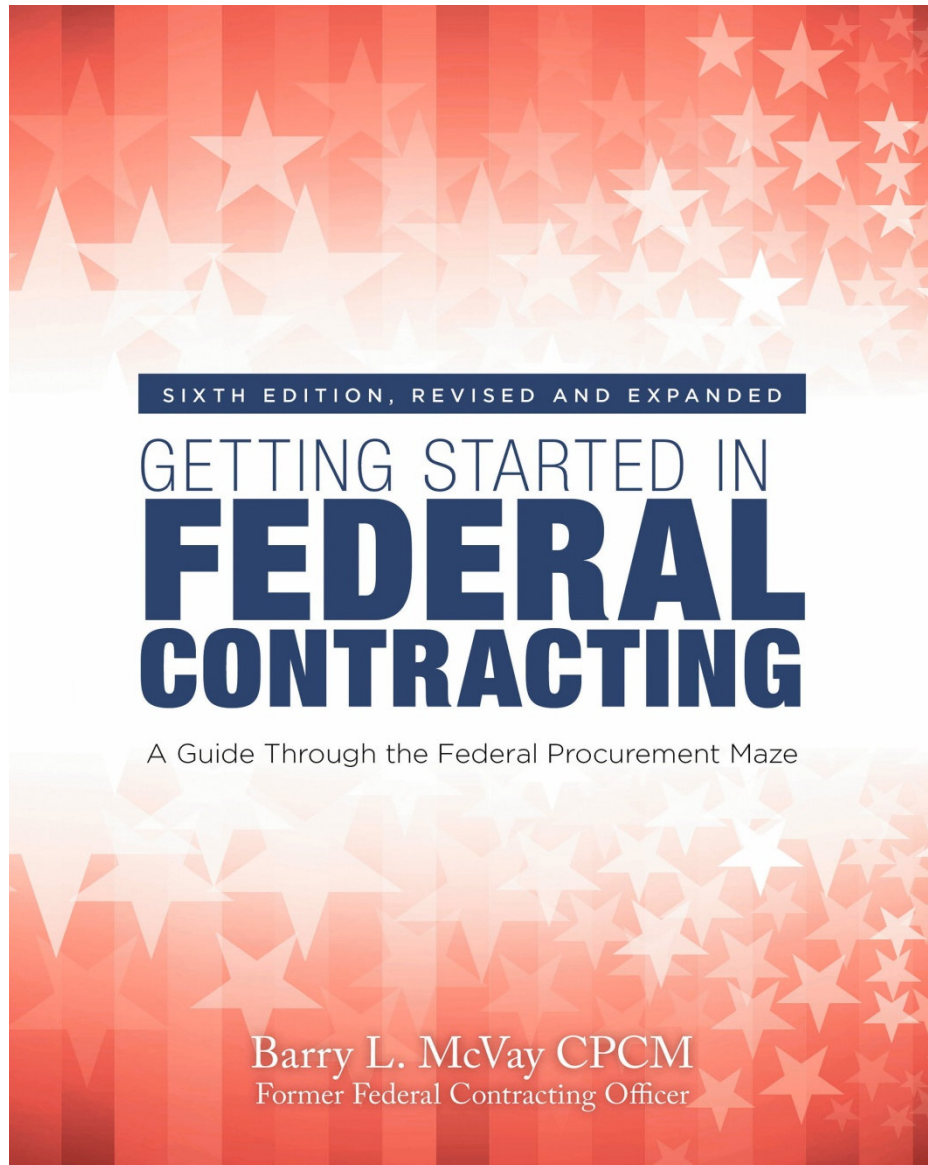
Also, DOD is interested in comments relating to the degree of reciprocity that exists between the U.S. and Japan when it comes to the openness of defense procurements to offers of products from the other country.

Written comments must be submitted no later than April 30, 2021, by either: (1) mail to: Defense Pricing and Contracting, Attn: Gregory D. Snyder, 3060 Defense Pentagon, Room 3B938, Washington, DC 20301-3060; or (2) email to: gregory.d.snyder.civ@mail.mil.

For more on the original RDP MOU with Japan, see “New Qualifying Countries – Japan and Slovenia” in the September 2016 *Federal Contracts Perspective* article “DOD Issues Rules on Counterfeit Electronic Parts.”

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

***for more information on the rapidly-changing world
of federal contracting!***



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