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LABOR PROPOSES RULE TO INCREASE MINIMUM WAGE FOR FEDERAL CONTRACTORS

The Department of Labor has developed and proposed a rule that would implement Executive Order 14026, Increasing the Minimum Wage for Federal Contractors, which mandates that "workers working on or in connection with a federal government contract" be paid a minimum wage of $15.00 per hour. The $15.00 rate will go into effect January 30, 2022, and will apply to federal contractors and their subcontractors (for more on Executive Order 14026, see the May 2021 *Federal Contracts Perspective* article "Biden Orders $15/Hour Minimum Wage on Federal Contracts").

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Executive Order 14026 is an extension and update of Executive Order 13658, Establishing a Minimum Wage for Contractors, which was issued by President Obama in 2014 (when Joe Biden was vice president) (see the March 2014 ***Federal Contracts Perspective*** article "President Issues Executive Order Mandating $10.10/Hour Minimum Wage"). Executive Order 14026 increases the minimum wage applicable to federal contracts from $10.95 per hour, a 37% increase (see the September 2020 ***Federal Contracts Perspective*** article "Federal Minimum Wage Increased to $10.95/Hour for 2021").

The proposed rule would amend the Code of Federal Regulations (CFR) by adding to Title 29, Labor, a new Part 23, Increasing the Minimum Wage for Federal Contractors (29 CFR part 23). The following are some of the significant provisions of 29 CFR part 23:

■ 29 CFR 23.10, Purpose and Scope, provides the policy of Executive Order 14026: "[T]he federal government's procurement interests in economy and efficiency are promoted when the federal government contracts with sources that adequately compensate their workers…[R]aising the minimum wage enhances worker productivity and generates higher-quality work by boosting workers' health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory and training costs."

■ 29 CFR 23.20, Definitions, includes definitions to terms used in the part. Most of the definitions in the proposed rule are based on those in Executive Order 14026, Executive Order 13658, Federal Acquisition Regulation (FAR) 2.101, Definitions, or relevant terms in the statutory text or implementing regulations of the Fair Labor Standards Act of 1938 (Title 29 of the U.S. Code, Part 201 *et seq*. [29 USC part 201 *et seq.*]), the Service Contract Act (41 USC 6701 *et seq.*), or the Davis-Bacon Act (40 USC 3141 *et seq*.). (**EDITOR'S NOTE:** The

introduction to the proposed rule states that "the department [of Labor] recognizes that the FAR has been amended to refer to the Service Contract Act as the "Service Contract Labor Standards" statute and the Davis-Bacon Act as the "Wage Rate Requirements [Construction]" statute… Consistent with the text of Executive Order 14026, as well as with Executive Order 13658 and its implementing regulations, the department refers to these laws in this rule as the Service Contract Act and the Davis-Bacon Act, respectively.")

■ 29 CFR 23.30, Coverage, identifies the types of contract actions that are covered by Executive Order 14026 and the proposed regulations: (1) contracts that exceed $2,000 for construction covered by the Davis-Bacon Act; (2) contracts that exceed $2,500 for services covered by the Service Contract Act; (3) contracts for concessions; contracts entered into with the federal government in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public; and (4) contracts over the micro-purchase threshold (currently $10,000) where workers' wages are governed by the Fair Labor Standards Act (which establishes $7.25/hour as the national minimum wage and mandates overtime pay at a rate not less than one and a half times the regular rate of pay after 40 hours of work in a workweek). Only contracts that are performed in whole or in part in the U.S. are subject to the proposed regulations, and then only the portions performed in whole or in part in the U.S. are subject to the proposed regulations. Finally, it states that contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the federal government, including those that are subject to the Walsh-Healey Public Contracts Act (41 USC 6501 *et seq*.) are *not* covered by the proposed rule.

■ 29 CFR 23.40, Exclusions, states that the proposed regulations do *not* apply to: (1) grants; (2) construction contracts that are excluded from coverage of the Davis-Bacon Act; (3) service contracts that are exempt from coverage under the Service Contract Act; (4) employees who are exempt from the minimum wage requirements of the Fair Labor Standards Act (that is, learners, apprentices, or messengers; students; individuals employed in a *bona fide* executive, administrative, or professional capacity); (5) workers who perform less than 20% of their work hours in a given workweek on contracts subject to the Fair Labor Standards Act (this exclusion is inapplicable to covered workers directly engaged in performing the specific work called for by the contract); and (6) contracts that result from a solicitation issued before January 30, 2022, and that are entered into on or between January 30, 2022, and March 30, 2022 (the deadline for federal agencies to include the minimum wage into new contracts).

■ 29 CFR 23.50, Minimum Wage for Federal Contractors and Subcontractors, sets forth the minimum hourly wage rate required to be paid to workers performing on or in connection with a covered contract: $15.00 per hour beginning January 30, 2022; and annually beginning January 1, 2023, an amount determined by taking the minimum hourly wage in effect, increasing such amount by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (United States city average, all items, not seasonally adjusted), and

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rounding to the nearest 5¢. The Secretary of Labor is to determine the applicable minimum wage rate to be paid to workers performing on or in connection with covered contracts at least 90 days before any new minimum wage is to take effect.

■ 29 CFR 23.110, Contracting Agency Requirements, requires that contracts not covered by the FAR include the contract clause in Appendix A to 29 CFR part 23. For contracts covered by the FAR, "contracting agencies must use the clause set forth in the FAR developed to implement this section." If the Department of Labor determines a contractor is not complying with the applicable clause by paying the mandated minimum wage, the contracting officer may withhold from the contractor "so much of the accrued payments or advances as may be considered necessary to pay workers the full amount of wages required by the executive order." In addition, "any failure to comply with the requirements of Executive Order 14026 may be grounds for termination of the right to proceed with the contract work...[and] charging the contractor in default with any additional cost."

■ 29 CFR 23.220, Rate of Pay, prohibits contractors from "discharge[ing] any part of its minimum wage obligation under the executive order by furnishing fringe benefits or, with respect to workers whose wages are governed by the Service Contract Act, the cash equivalent thereof."

■ 29 CFR 23.280, Tipped Employees, requires that tipped employees (that is, employees engaged in an occupation in which the employee customarily and regularly receives more than $30 a month in tips) be paid $10.50 an hour beginning on January 30, 2022; beginning January 1, 2023, 85% of the adjusted minimum wage in effect, rounded to the nearest 5¢; and beginning January 1, 2024, and for each subsequent year, 100% of the adjusted minimum wage in effect.

In addition, there are further provisions on enforcement and administrative proceeding (that is, disputes, debarment proceedings, proceedings of Administrative Law Judges, and proceedings of the Administrative Review Board).

Comments on this proposed rule must be submitted no later than August 23, 2021, identified as Regulatory Information Number (RIN) 1235-AA41, through the Federal eRulemaking Portal at **http://www.regulations.gov**.

PROMPT PAYMENT INTEREST RATE SET AT 1 1/8%

The Treasury Department has established 1 1/8% (1.125%) as the interest rate for the computation of payments made between July 1, 2021, through December 31, 2021, under the Prompt Payment Act and the Contracts Disputes Act. This rate is also used in facilities capital cost of money calculations.

The interest rate for the prior six-month period (January 1, 2021, through June 30, 2021) was 7/8% (0.875%). The interest rate for July 1, 2020, through December 31, 2020, was 1 1/8% (1.125%).

All prompt payment interest rates since 1980 (in six-month increments) are available at **https://www.fiscal.treasury.gov/prompt-payment/rates.html**.

Federal Acquisition Regulation (FAR) subpart 32.9, Prompt Payment; FAR subpart 33.2, Disputes and Appeals; FAR 31.205-10, Cost of Money; and Cost Accounting Standard (CAS) 9904.414, Cost of Money as an Element of the Cost of Facilities Capital, are affected by this interest rate.

PROPOSED FAR RULE WOULD STRENGTHEN BUY AMERICAN ACT

To implement Section 8 of Executive Order 14005, Ensuring the Future is Made in All of America by All of America's Workers, a proposed rule has been developed that would amend the Buy American Act Requirements in FAR part 25, Foreign Acquisitions, particularly FAR subpart 25.1, Buy American – Supplies, and FAR subpart 25.2, Buy American – Construction Materials. (For more on Executive Order 14005, see the February 2021 ***Federal Contracts Perspective*** article "FAC 2021-04 Maximizes Use of American-Made Products" and the July 2021 ***Federal Contracts Perspective*** article "Guidance on Reducing Made in America Waivers Issued.")

Section 8 of the executive order requires that the FAR Council consider proposing, within 180 days of the executive order (180 days after January 25, 2021, is July 24, 2021), amendments to the FAR that would "(i) replace the 'component test' in Part 25 of the FAR that is used to identify domestic end products and domestic construction materials with a test under which domestic content is measured by the value that is added to the product through U.S.-based production or U.S. job-supporting economic activity; (ii) increase the numerical threshold for domestic content requirements for end products and construction materials; and (iii) increase the price preferences for domestic end products and domestic construction materials."

To implement Section 8, this rule proposes three sets of changes to the FAR's implementation of the Buy American Act: (1) an increase to the domestic content threshold required to be met for a product to be defined as "domestic," and a schedule for future increases; (2) a framework for application of an enhanced price preference for a domestic product that is considered a critical product or made up of critical components; and (3) a postaward domestic content reporting requirement for contractors. Therefore, this proposed rule would amend the FAR as follows:

- FAR 25.003, Definitions [applicable to foreign acquisitions], would be amended to:
  - Add this definition for "critical component": "a component that is mined, produced, or manufactured in the United States and deemed critical to the U.S. supply chain. The list of critical components is at [FAR] 25.105."
  - Add this definition for "critical item": a domestic construction material or domestic end product that is deemed critical to the U.S. supply chain. The list of critical items is at [FAR] 25.105."
  - Revise the first sentence in paragraph (1)(i)(B)(*1*) of the "domestic construction material" definition and the first sentence in paragraph (1)(ii)(A) of the "domestic end product" definition to "The cost of the components mined, produced, or manufactured in the United States exceeds 60% of the cost of all its components, except that the percentage will be 65% for items delivered in calendar years 2024 through 2028, and 75% for items delivered starting in calendar year 2029." The current first sentences state "The cost of the components mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components." Paragraph (1)(ii) of the definition retains the provisions pertaining to "construction material that consists wholly or predominantly of iron or steel or a combination of both," which requires that for iron or steel to be

considered a construction material manufactured in the U.S., "the cost of foreign iron and steel constitutes less than 5% of the cost of all the components used in such construction material."

■ FAR 25.105, Critical Components and Critical Items, would be added (current FAR 25.105, Determining Reasonableness of Cost, would be redesignated as FAR 25.106). It would contain a list of articles determined to be critical components or critical items and their respective preference factors, and it would state that the list "will be published in the ***Federal Register*** for public comment no less frequently than once every four years." However, the proposed rule does not contain any such list yet because the Office of Management and Budget (OMB) will lead an assessment to distill the list of products designated critical to those products for which procurement is likely to make a meaningful difference toward strengthening U.S. supply chains. The products that will be placed on the list will be determined in a separate rulemaking, then they will be subject to review and public comment every four years so changes can be made to the list.

■ Paragraph (c) of FAR 25.106, Determining Reasonableness of Cost (currently FAR 25.105), would be added to address the evaluation of end products that are critical items or contain critical components (current paragraph (c) of current FAR 25.105 would be redesignated as FAR 25.106(b)(ii)). Current FAR 25.105(b) states that "if there is a domestic offer that is not the low offer…the contracting officer must determine the reasonableness of the cost of the domestic offer by adding to the price of the low offer, inclusive of duty: (1) 20% if the lowest domestic offer is from a large business concern; or (2) 30% if the lowest domestic offer is from a small business concern." New FAR 25.106(c) would require, for end products that are critical items or contain critical components, that "if there is a domestic offer that is not the low offer…the contracting officer shall determine the reasonableness of the cost of the domestic offer by adding to the price of the low offer, inclusive of duty: (A) 20%, *plus the additional preference factor identified for the critical item or end product containing critical components listed at* [FAR] *25.105,* if the lowest domestic offer is from a large business concern; or (B) 30%, *plus the additional preference factor identified for the critical item or end product containing critical components listed at* [FAR] *25.105*, if the lowest domestic offer is from a small business concern" (*emphasis* added).

■ FAR subpart 25.2, Buy American – Construction Supplies, would be amended to reflect the changes made to FAR subpart 25.1 except that construction material that consists wholly or predominantly of iron or steel or a combination of both are exempt from the amended provisions of FAR subpart 25.2; see proposed revision to the definition of "domestic construction material" in FAR 25.003.

■ The definitions for "critical component" and "critical item" would be added to, and the definition of "domestic construction material" would be amended in FAR 52.225-1, Buy American – Supplies, FAR 52.225-2, Buy American Certificate, FAR 52.225-3, Buy American – Free Trade Agreements – Israeli Trade Act, FAR 52.225-9, Buy American – Construction Materials, and FAR 52.225-11, Buy American – Construction Materials Under Trade Agreements.

■ FAR 52.225-XX, Domestic Content Reporting Requirement – Supplies, and FAR 52.225-YY, Domestic Content Reporting Requirement – Construction Materials, would be added. FAR 52.225-XX would be included in solicitations and contracts that include FAR 52.225-1, Buy American – Supplies, and FAR 52.225-3, Buy American – Free Trade Agreements – Israeli Trade Act. FAR 52.225-YY would be included in solicitations that include FAR 552.225-9, Buy American – Construction Materials, and FAR 52.225-11, Buy American – Construction Materials Under Trade Agreements. The clauses are applicable to acquisitions at or below the simplified acquisition threshold (currently $250,000) and to acquisitions for commercial items, excluding commercial off-the-shelf (COTS) items. They require offerors and contractors to provide the amount of domestic content in each critical item, and the amount of domestic content in each domestic end product (or domestic construction material) containing a critical component.

Comments on this proposed rule must be submitted no later than September 28, 2021, identified as "FAR Case 2021-008," through the Federal eRulemaking Portal at **http://www.regulations.gov**.

The FAR Council is seeking written comments on these specific questions:

(1) Do products you make or sell to the federal government currently meet the proposed increased domestic content thresholds of 60%, 65%, or 75%?

(a) Would you be willing and able to adjust your supply chain to meet the proposed new thresholds given the scheduled phase-in? Why or why not? Discuss any obstacles that might interfere with, or opportunities – including actions by the federal government – that might support, your ability to meet the proposed increases in domestic content thresholds.

(b) If you are willing to make supply chain adjustments, provide an overview of associated costs and benefits to making these changes. Explain to what extent any costs may be offset by increased federal government sales or price preferences. If relevant, provide an overview of expected increased economic activity through the increased use of domestic suppliers and domestic labor.

(2) Comment on the effectiveness of current price preference levels at promoting domestic economic activity and employment and strengthening domestic supply chains for critical items. Address whether increased price preferences would be more, less, or equally as effective, and, if more effective, at what level.

(3) Comment on the anticipated effectiveness of providing enhanced price preferences to strengthen the domestic supply chains for items and components deemed "critical." In particular:

(a) Which specific items or components or combination thereof, if any, should receive an enhanced price preference and why?

(b) What process should OMB use to determine which of the critical items identified through the critical supply chain review under Executive Order 14017, America's Supply Chains, are likely to make a meaningful difference toward strengthening domestic supply chains such that an enhanced preference is merited? In addition to national and economic security, should the process identify items and components that are critical to other factors such as national public health and sustainability? Should the process consider the effect on the creation of well-paying jobs in identifying critical items or components?

(c) Is four years a reasonable interval for updating the critical components or item list? Why or why not?

(d) How should enhanced price preferences be applied? For example, if a finished product includes multiple critical components, what is the most effective way to apply an enhanced price preference (for example, a single time, once per component)?

(e) Address whether and how enhanced price preferences should be considered for commercial items that have been identified as critical and currently are subject to either a full statutory Buy American waiver (in the case of information technology) or a partial regulatory Buy American waiver (in the case of COTS items) and the reasons for your response.

(f) If particular vendors can supply products that exceed the minimum domestic content threshold by significant margins, should the federal government consider whether and how to incentivize such practices to maximize the use of taxpayer dollars on domestic content?

(4) Section 8(i) of Executive Order 14005 directs the FAR Council to consider replacing the "component test" in FAR part 25 with a test under which domestic content is measured by a "value added" calculation. Comment on: (a) how such "value" could be calculated to promote U.S.-based production or U.S. job-supporting economic activity; (b) whether a "value added" calculation would be superior to the current approach and why or why not; and (c) whether approaches other than a "value added" calculation should be employed to achieve the goals of the executive order (for example, should the definition of "cost of components" in FAR 25.003 be changed).

(5) Will the proposed requirement to report on the actual level of domestic content included in designated critical products sold to the federal government provide greater compliance with Made in America laws? Why or why not?

(a) Will the requirement negatively affect small or disadvantaged businesses, such as those who are resellers or distributors? How can these be mitigated?

(b) What other procedures can the federal government employ to better monitor compliance with Made in America laws?

(6) What specific steps should the federal government consider to maximize opportunities for small and disadvantaged businesses and avoid unintended barriers to entry as it works to strengthen the impact of Made in America laws, diversify domestic supplier bases, and create new opportunities for U.S. firms and workers?

Finally, the Made in America Office (MIAO) (which Executive Order 14005 directed the OMB to establish) and the FAR Council are co-hosting a virtual public meeting to obtain the views of experts and interested parties in the private sector regarding implementation of Section 8 and other sections of the executive order. The meeting will take place on August 26, 2021, from 9:00 am to 3:00 pm, Eastern Standard Time. For more details on the public meeting, such as the agenda, visit **https://www.acquisition.gov/publicmeeting_FAR_proposedrule-2021-008_BuyAmericanAct**.

Individuals wishing to participate in the virtual meeting must register at **https://gsa.zoomgov.com/webinar/register/WN_HXrvVS0hS1-pksKSNrEKIA**. The meeting will be limited to 3,000 attendees and registration will be on a first-come, first-served basis. Members of the press must respond to **press@gsa.gov** by August 16, 2021. For any questions regarding registration, email **gsaombudsman@gsa.gov**.

For those wishing to make a presentation, instructions for submitting presentations will be posted at **https://www.acquisition.gov/publicmeeting_FAR_proposedrule-2021-008_BuyAmericanAct**.

In addition to the questions on the proposed rule for which the FAR Council is seeking written comments, the MIAO and the FAR Council are seeking responses during the meeting (verbally or by presentation) to the following questions pertaining to other aspects of Executive Order 14005:

(1) Acquisitions of commercial information technology (IT) are exempt by statute from the requirements of the Buy American statute (see paragraph (e) of FAR 25.103, Exceptions). Section 10 of the executive order requires a review of the effect of this exception, which has been in effect for more than 15 years. The FAR Council seeks information on the extent to which the original purpose of the exception, or other goals of the exception, remain relevant. Under what situations, if any, do current marketplace conditions support narrowing or lifting the statutory waiver? Be specific in your description, which might identify market segments or specific items, anticipated benefits and drawbacks of the rollback, and steps the FAR Council or other government agencies might take to mitigate potential unintended consequences.

(2) In 2009, the Office of Federal Procurement Policy (OFPP) waived the component test of the Buy American statute for acquisition of COTS items. In making the decision, OFPP concluded that manufacturers' component purchasing decisions are based on factors such as cost, quality, availability, and maintaining the state of the art, not the country of origin, making it difficult for a manufacturer to guarantee the source of its components over the term of a contract. OFPP further concluded that continued application of the content requirement created a barrier to entry which may limit the government's ability to purchase products already in the commercial distribution systems. OFPP and the other members of the FAR Council seek to understand the extent to which the original purpose of the waiver remains relevant.

(a) How has the application of the COTS waiver since 2009 been consistent or inconsistent with its stated purpose? For example, has the use of COTS expanded (or narrowed) since 2009 in ways that may not have been originally contemplated? If applicable, provide specific examples of the application of the COTS waiver that demonstrate inconsistency with its original purpose.

(b) Has the COTS waiver benefitted domestic firms and their employees? Why or why not?

(c) Under what situations, if any, do current marketplace conditions support narrowing or lifting the partial waiver? Be specific in your description, which might identify critical industries, specific market segments, or specific items. Discuss anticipated benefits and drawbacks of a rollback, including impacts on small and disadvantaged business enterprises, and steps the FAR Council or other Federal entities could take to mitigate potential unintended consequences.

(d) Regardless of any other changes to the COTS waiver, should the federal government gather data on the domestic content of all COTS items, some COTS items, or categories of COTS items to inform future policy making? If so, what items or categories should be addressed? How might this be accomplished consistent with the intent of the COTS waiver to reduce administrative burdens?

(e) Provide any recommendations to maintain and increase domestic production of COTS items (both manufacturing of the end product and its components) in critical industries.

(3) How can the federal government promote the use of Made in America services? What standards or methodologies might be considered that could be easily adapted by commercial sellers? Are there critical services that should be accorded price preferences, and if so, why?

(4) Because of the World Trade Organization – Government Procurement Agreement (WTO GPA) and the Trade Agreements Act (TAA), domestic content rules do not currently apply to most non-DOD goods acquisitions over $182,000. Thus, the newly proposed domestic content threshold will not apply to many purchases that the government makes. Under the TAA, a purchase is treated as U.S.-made if it is mined, produced, or manufactured in the United States or substantially transformed in the United States, even if it is made of 100% foreign content. As a result, a substantially transformed U.S.-made product may have far less domestic content when compared to a domestic end product acquired under the Buy American statute. While U.S. trade obligations are beyond the scope of this rulemaking, the MIAO and the FAR Council seek to understand more about the impact of the substantial transformation test and potential lost opportunities for American workers.

(a) To the best of your knowledge, what specific types of products are sold to the federal government that count as being made in America under the Trade Agreements Act ("U.S.-made end product"), but contain less than the current 55% U.S. content threshold

required under the Buy American statute? Do the differing standards provide a benefit to domestic firms?

(b) Is "substantial transformation" a useful tool to promote good domestic jobs and domestic manufacturing? Why or why not?

(c) What steps could the federal government take, consistent with its trade obligations, to acquire useful information about the content of goods procured pursuant to trade obligations, including in critical supply chains? Useful information might include the percentage of domestic content and country of origin for certain components identified by the agency.

(d) Provide any recommendations to maintain and increase domestic production in critical industries in acquisitions subject to trade obligations.

(5) Provide any additional recommendations for:

(a) Strengthening content standards under the Buy American statute, including recommendations for how content is calculated and whether and why certain products or categories of products should have more stringent content standards than others.

(b) The use of waivers and exceptions to the Buy American statute, including proposals to narrow or expand the scope of existing waivers; ensure appropriate interpretation of existing waivers; and policies or practices to ensure that unnecessary waivers are not granted.

(c) Improving the federal government's ability to enforce the content standards in the Buy American statute, including by verifying domestic content levels.

OMB SEEKS COMMENTS ON PROPOSED 2022 NAICS

The Office of Management and Budget (OMB) is seeking comments on the advisability of adopting the recommendations of its Economic Classification Policy Committee (ECPC) on updating the North American Industry Classification System (NAICS) for 2022. The ECPC, which is comprised of representatives of the Bureau of Economic Analysis, Bureau of Labor Statistics, Census Bureau, and other federal agencies recommends an update of the industry classification system to clarify existing industry definitions and content, recognize new and emerging industries, combine industries, and correct errors and omissions in the 2017 version of the NAICS.

The NAICS is a system for classifying individual business locations (establishments) by type of economic activity. Its purposes are to: (1) provide a consistent framework for the collection, tabulation, presentation, and analysis of data relating to establishments, and (2) promote uniformity and comparability in the presentation and analysis of statistical data describing the North American economy. Mexico and Canada have collaborated on the NAICS with the ECPC to make the industry statistics produced by the three countries comparable.

In February 2020, OMB solicited proposals on changes to the structure and content of the NAICS for inclusion in a potential 2022 revision. OMB sought proposals/comments in six areas: (1) new and emerging industries; (2) the treatment of electronic shopping in NAICS Subsector 454, Nonstore Retailers, which does not present a clear picture of all online retail trade activity because it does not include online sales of store retailers; (3) the concept of internet publishing and broadcasting; (4) a proposed update to OMB's Statistical Policy Directive No. 8, Standard Industrial Classification of Establishments, which mandates the use of the Standard Industrial Classification Manual, 1972, for the classification of establishments by type of industrial activity; (5) the advisability of eliminating OMB Statistical Policy Directive No. 9, Standard Industrial Classification of Enterprises, which has not been updated since 1974; and (6) corrections of errors and omissions in NAICS.

Sixty-three individual submissions were submitted in response to the February 2020 solicitation, and OMB has now published ECPC's recommendations on proposed revisions to NAICS 2022. The recommendations have been concentrated in Wholesale Trade (Sector 42), Retail Trade (Sector 45), and Information (Sector 51). In addition, ECPC recommends updating Statistical Policy Directive No. 8, and eliminating Statistical Policy Directive No. 9. Also, the names of 31 industry sectors and subsectors are proposed to be changed for clarity and consistency. Finally, ECPC recommends content revisions to 141 subsectors. The proposed changes are listed in two tables: one lists, in NAICS 2017 order, the disposition of all industries that the ECPC recommends for change and their resulting relationship to NAICS United States 2022 proposed industries; the other lists, in NAICS 2022 order, the ECPC recommended NAICS 2022 changes cross-walked to their NAICS 2017 content.

Comments on the proposed NAICS 2022 changes must be submitted no later than August 16, 2021, identified as "USBC-2021-0004,," through the Federal eRulemaking Portal at **http://www.regulations.gov**. Include the phrase "North American Industry Classification System (NAICS) – Updates for 2022" at the beginning of the comments.

DOD FINALIZES SERVICE CONTRACTS DATA COLLECTION RULE

The Department of Defense (DOD) is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to add DFARS subpart 204.17, Service Contracts Inventory, and DFARS 252.204-7023, Reporting Requirements for Contracted Services, to implement 10 USC 2330a, Procurement of Services: Tracking of Purchases, as amended by the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Public Law 114-328), Section 812, Amendments Relating to Inventory and Tracking of Purchases of Services, which requires DOD to establish a data collection system to provide management information on contracts and task orders in excess of $3,000,000 for logistics management services, equipment-related services, knowledge-based services, and electronics and communications services.

DOD published a proposed rule in June 2020 to implement NDAA for FY 2008 (Public Law 110-181), Section 807, Inventories and Reviews of Contracts for Services, and Section 812 of NDAA for FY 2017 (see "Data Collection and Inventory for Services Contracts" in the July 2020 ***Federal Contracts Perspective*** article "DOD Revs Up the Regulation Changes"). The rule proposed to add DFARS subpart 204.17, and DFARS 252.204-7023.

■ DFARS 204.1703, Reporting Requirements, would require a service contractor to report the required information on the services performed under the covered contracts and orders, including any subcontracts, during the preceding fiscal year (October 1 – September 30) into the System for Award Management (SAM –**https://www.SAM.gov**) by October 31.

■ DFARS 252.204-7023, Reporting Requirements for Contracted Services, would require the contractor to report by October 31 to SAM.gov the services performed under the contract or order, including any subcontracts, during the preceding fiscal year. It would require the contractor to report the following information for the contract or order: (1) the total dollar amount invoiced for services performed during the preceding government fiscal year under the contract or order; and (2) the number of contractor direct labor hours, to include subcontractor direct labor hours, as applicable, expended on the services performed under the order or contract during the previous government fiscal year. The clause would go on to state that "the government will review contractor reported information for reasonableness and consistency with available contract information. In the event the government believes that revisions to the contractor reported information are warranted, the government will notify the contractor. Upon notification, the contractor shall revise the reported information or provide the government with a supporting rationale for the information."

Three respondents submitted comments on the proposed rule, and among the comments was a request to clarify the requirement to report data on subcontracts, specifically whether contractors are to report direct labor hours and costs for all subcontracts that support the contract or just those subcontracts awarded to directly perform services under the contract ("first-tier subcontracts"). Since the intent of the rule is to require contractors to report the direct labor hours for subcontracts the contractor directly awarded for acquiring services related to the performance of the prime contract, the following definition is added to new DFARS 204.1701, Definitions, and DFARS 252.204-7023: "*First-tier subcontract*> means a subcontract awarded directly by the contractor for the purpose of acquiring services for performance of a prime contract. It does not include the contractor's supplier agreements with vendors, such as long-term arrangements for materials or supplies or services that benefit multiple contracts and/or the costs of which are normally applied to a contractor's general and administrative expenses or indirect costs."

REVERSE AUCTIONS FOR CONSTRUCTION SERVICES PROHIBITED

Congress has passed, and President Biden has signed, the Construction Consensus Procurement Improvement Act of 2021 (Public Law 117-28). The new law replaces Section 402 of the Consolidated Appropriations Act, 2021 (Public Law 116-260), which prohibited "the use of reverse auctions for awarding contracts for design and construction services."

Public Law 117-28 renames Section 402 as "Prohibition on Use of a Reverse Auction for the Award of a Contract for Complex, Specialized, or Substantial Design and Construction Services", and further defines the services that may not be acquired through reverse auctions.

The law defines a "reverse auction" as "a real-time auction generally conducted through an electronic medium among two or more offerors who compete by submitting bids for a supply or service contract, or a delivery order, task order, or purchase order under the contract, with the

ability to submit revised lower bids at any time before the closing of the auction." It prohibits the use of reverse auctions on acquisitions of "complex, specialized, or substantial design and construction services" above the simplified acquisition threshold (SAT) (currently $250,000).

Public Law 117-28 mandates that the FAR being amended not later than 180 days after the date of enactment to include "a definition of complex, specialized, or substantial design and construction services, which shall include: (1) site planning and landscape design; (2) architectural and engineering services (as defined in section 1102 of title 40, United States Code [Definitions (applicable to the selection of architects and engineers)]); (3) interior design; (4) performance of substantial construction work for facility, infrastructure, and environmental restoration projects; and (5) construction or substantial alteration of public buildings or public works." (**EDITOR'S NOTE:** Public Law 117-28 was signed into law on July 26, 2021, so the 180-day deadline is January 22, 2022.)

GSA SEEKING PARTICIPANTS FOR SAM.GOV TESTING

The General Services Administration (GSA) "is looking for people who use our systems to participate in SAM.gov [System for Award Management] usability testing. We want to hear from the diverse individuals and organizations who use SAM.gov."

Volunteers will join staff members of the Integrated Award Environment (IAE), which is part of GSA and develops and maintains SAM.gov, "to walk through a specific feature being improved." Input and feedback will help show IAE how users respond to the site.

"By testing with us, you'll get a preview of some of the site improvements that are being planned for release in the coming 12-18 months. Your test results and comments will go directly to the teams that develop and design the SAM.gov feature you tested."

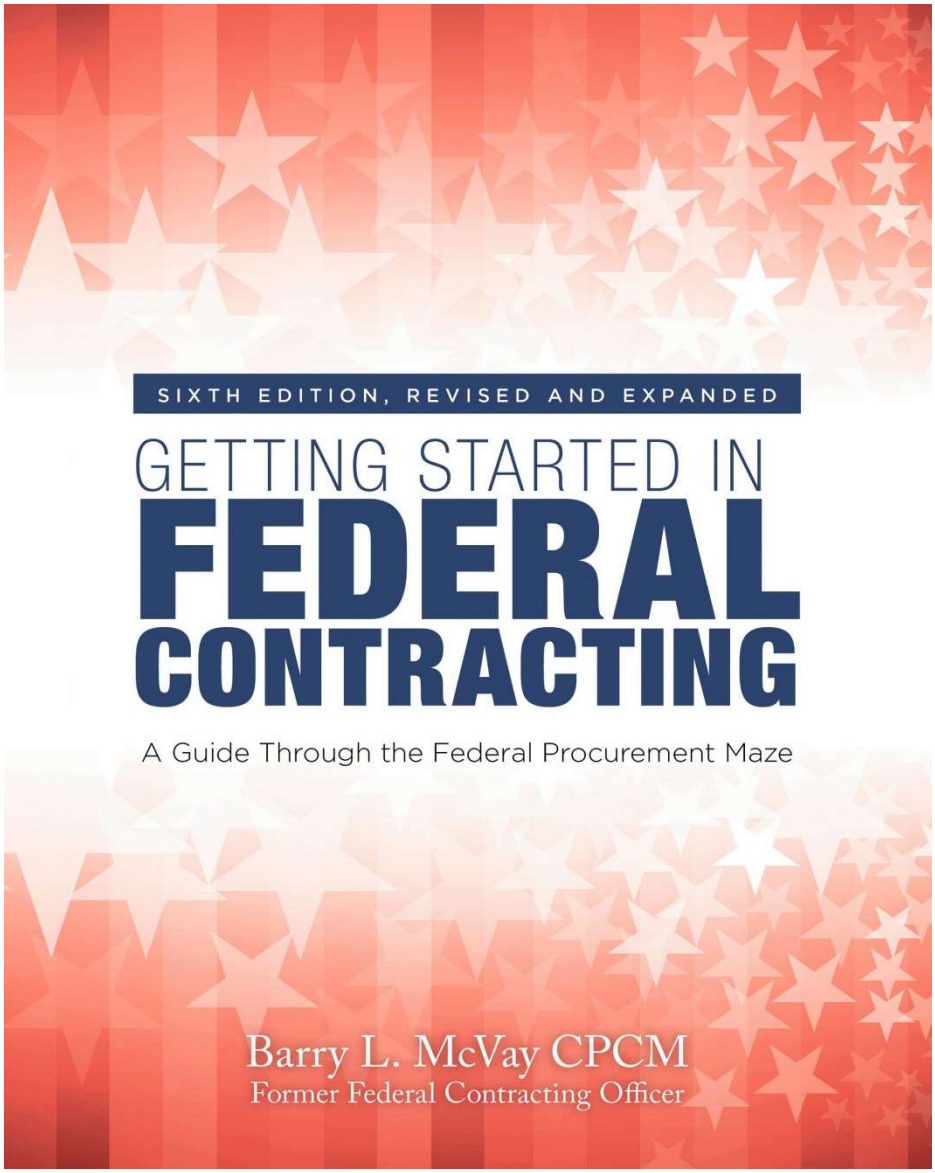
According to GSA, tests usually take 30 minutes or less and are "conducted via a casual web call." Those interested in participating must register at **https://www.eventbrite.com/e/usability-tester-sign-up-tickets-162431622355** and "provide your name, contact information, and tell us a bit about how you use IAE systems."

In a related development, the IAE has announced that on April 4, 2022, the U.S. government will switch from using Dun & Bradstreet's proprietary 9-digit DUNS number (Data Universal Number System), the current unique identifier the government uses to verify an entity, to a new 12-digit alphanumeric Unique Entity ID (UEI).

IAE systems such as SAM.gov, FPDS (Federal Procurement Data System – **https://www.fpds.gov**), eSRS (Electronic Subcontracting Reporting System – **https://www.esrs.gov/**), FSRS (Federal Funding Subaward Reporting System – **https://www.fsrs.gov**) , FAPIIS (Federal Awardee Performance and Integrity Information System – **https://www.fapiis.gov**), and CPARS (Contractor Performance Assessment Reporting System – **https://www.cpars gov**) will require the use of a UEI after April 4, 2022.

Entities registered in SAM.gov have already been assigned a new UEI (it is viewable in the entity's SAM.gov registration record). Entities seeking to register in SAM.gov prior to April 4, 2022, must obtain a DUNS number to register in SAM.gov. The entity will then be assigned a UEI as a part of the SAM.gov registration process.

For more on the transition to the UEI, see the April 2019 ***Federal Contracts Perspective*** article "GSA Announces Award for Entity Validation Services."



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