

# Government Contracts Regulatory and Legislative Update November 2019

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Our monthly edition of the “[Government Contracts](#) Regulatory and Legislative Update” offers a summary of and insight into the relevant industry developments that occurred during the previous month.

## Regulations

### The FAR Council Issues Proposed Rule Increasing the Threshold for Cost and Pricing Data Reporting

On October 2, 2019, the FAR Council issued a [proposed rule](#) to increase the threshold for requesting certified cost or pricing data from \$750,000 to \$2 million for contracts entered into after June 30, 2018. In cases in which a change or modification is made to a prime contract that was entered into before July 1, 2018, the threshold for obtaining certified cost or pricing data will remain \$750,000, with one exception. A contractor that was required to submit certified cost or pricing data in connection with a prime contract entered into before July 1, 2018 may request that the contracting officer modify the contract without requiring consideration to reflect a \$2 million threshold for obtaining certified cost or pricing data from subcontractors. Comments are due by December 2, 2019.

### The FAR Council Issues Proposed Rule Increasing the Micro-Purchase Threshold and the Simplified Acquisition Threshold

On October 2, 2019, the FAR Council issued a [proposed rule](#) to increase the micro-purchase threshold for acquisitions from institutions of higher education or related or affiliated nonprofit entities, or from nonprofit research organizations or independent research institutes, from \$3,500 to \$10,000, or a higher amount as determined appropriate by the head of the agency and consistent with clean audit findings, an internal institutional risk assessment, or State law. The proposed rule also

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increases the simplified acquisition threshold to \$250,000 and increases the micro-purchase threshold to \$10,000. The proposed rule, which implements various sections of the FY 2017 and FY 2018 NDAA, makes these changes through amendments to FAR parts 3, 9, 13, 16, 19, 22, 25, and 52. Comments are due by December 2, 2019.

## **The FAR Council Issues Proposed Rule Limiting the Use of the Lowest Price Technically Acceptable Source Selection Process**

On October 2, 2019, the FAR Council issued a [proposed rule](#) to amend the FAR to limit the use of Lowest Price Technically Acceptable (LPTA) source selection criteria in circumstances that would deny the Government the benefits of cost and technical tradeoffs in the source selection process. Under the proposed rule, LPTA source selection criteria may only be used in solicitations when:

- (1) An executive agency is able to comprehensively and clearly describe the minimum requirements expressed in terms of performance objectives, measures, and standards that will be used to determine acceptability of offers;
- (2) the executive agency would realize no, or minimal, value from a contract proposal exceeding the minimum technical or performance requirements set forth in the request for proposal;
- (3) the proposed technical approaches will require no, or minimal, subjective judgment by the source selection authority as to the desirability of one offeror's proposal versus a competing proposal;
- (4) the executive agency has a high degree of confidence that a review of technical proposals of offerors other than the lowest bidder would not result in the identification of factors that could provide value or benefit to the executive agency;
- (5) the contracting officer has included a justification for the use of an LPTA evaluation methodology in the contract file; and
- (6) the executive agency has determined that the lowest price reflects total costs, including for operations and support.

In addition, the proposed rule requires that the use of LPTA source selection criteria be avoided, to the maximum extent practicable, in procurements that are predominantly for the acquisition of the following services and supplies: information technology services; cybersecurity services; systems engineering and technical assistance services; advanced electronic testing; audit or audit readiness services; health care services and records; telecommunications devices and services; or other knowledge-based professional services; personal protective equipment; or knowledge-based training or logistics services in contingency operations or other operations outside the United States, including in Afghanistan or Iraq. The proposed rule does not apply to the Federal Supply Schedule Program or to DoD, which has its own similar rule. Comments are due by December 2, 2019.

## **The FAR Council Issues Final Rule Expanding the Definition of a “Commercial Item”**

On October 10, 2019, the FAR Council issued a [final rule](#) to amend the definition of commercial item in FAR Part 2 to reflect the statutory change made to the definition in section 847 of the NDAA for FY 2018. Section 847 amends the definition of “commercial item” at 41 U.S.C. 103(8) to expand the

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universe of non-developmental items (NDIs) that qualify as commercial items to include items sold in substantial quantities on a competitive basis to multiple foreign governments. The final rule implements this change by adding the phrase “or to multiple foreign governments” at the end of paragraph (8) of the definition of “commercial item” in FAR 2.101. The rule will broaden the definition in the FAR to allow certain additional items developed exclusively at private expense to qualify for the benefits associated with commercial item classification. The rule is effective on November 12, 2019.

## **EPA Issues Proposed Rule to Address Open Source Software Requirements**

On October 18, 2019, the Environmental Protection Agency (EPA) issued a [proposed rule](#) to add a new EPA Acquisition Regulation (EPAAR) clause to address open source software requirements at EPA. The proposed rule will allow the EPA to share custom-developed code as open source code development under its procurements. The proposed rule amends EPAAR Part 1539, Acquisition of Information Technology, by adding Subpart 1539.2, Open Source Software, and section 1539.2071, Contract Clause. The rule will also amend EPAAR Subpart 1552.2, Texts of Provisions and Clauses, by adding EPAAR section 1552.239-71, Open Source Software. The proposed rule is issued in accordance with Office of Management and Budget’s (OMB) Memorandum M-16-21, *Federal Source Code Policy: Achieving Efficiency, Transparency, and Innovation through Reusable and Open Source Software*. In meeting the requirements of Memorandum M-16-21, the EPA plans to provide an enterprise code inventory indicating if the new code (source code or code) was custom-developed for, or by, the agency; if the code is available for Federal reuse; if the code is available publicly as open source code; or if the code cannot be made available due to specific exceptions. Comments are due by December 17, 2019.

## **The FAR Council Issues Proposed Rule to Exempt Certain Recreational Services on Federal Land from Contractor Minimum Wage Requirements**

On October 21, 2019, the FAR Council issued a proposed rule to amend the FAR to implement a [Department of Labor \(DOL\) Rule](#) that exempts certain contracts for seasonal recreational services or seasonal recreational equipment rental for the general public on Federal lands from the minimum wage requirements of Executive Order 13658. The proposed rule will amend FAR 22.1903(b)(2) and FAR 52.222-55(c)(2) to conform to the DOL rule. . Lodging and food services are not exempted. The rule will also add a definition of “seasonal recreational services” at FAR 22.1901 and 52.222-55, Minimum Wages. Comments are due by December 20, 2019.

## **DoD Issues Final Rule to Require Reliability and Maintainability in Weapon System Design**

On October 31, 2019, DoD issued a [final rule](#) to amend 10 U.S.C. to add section 2443, Sustainment factors in weapon design. The final rule requires program managers, or comparable officials exercising program management responsibilities, to ensure that reliability and maintainability are included in the performance parameters on sustainment during the development of capabilities requirements for major weapon systems and contracts for: (1) the engineering and manufacturing development of a weapon system, including embedded software; or (2) protection of a weapon system, including embedded software.

## **DoD Issues Proposed Rule Modifying Requirements for Notification of Anticipated Contract Termination or Reduction**

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On October 31, 2019, DoD issued a [proposed rule](#) amending DFARS 252.249-7002, Notification of Anticipated Contract Termination or Reduction, which is included in all contracts under a major defense program and implements the requirements of 10 U.S.C. § 2501. The rule proposes to: (1) update legal and DFARS citations in the clause; (2) remove text that is no longer necessary to implement 10 U.S.C. § 2501; and (3) conform the clause text to the current DFARS convention for referencing dollar thresholds in a clause. This rule also proposes to amend the DFARS clause to cite the Workforce Innovation and Opportunity Act and to conform the clause with 10 U.S.C. § 2501 note by removing the specification of available services to employees based on the results of the termination or reduction notification. Comments are due by December 30, 2019.

## **DoD Issues Final Rule Applying Non-manufacturer Rule to All 8(a) Contracts**

On October 31, 2019, DoD issued a [final rule](#) amending DFARS 252.219-7010 to replace the outdated text regarding the non-manufacturer rule and implement regulatory changes made by the Small Business Administration (“SBA”) in 2016. The 2016 SBA Rule revised and standardized the limitations on subcontracting and the non-manufacturer rule that apply to small business concerns, including 8(a) Program participants, under procurements conducted pursuant to FAR part 19. To align with the SBA rule, DoD has removed the exemption from the non-manufacturer rule found in DFARS 252.219-7010 for 8(a) participants with contracts valued at or below \$25,000 and awarded under the simplified acquisition procedures. The rule makes the non-manufacturer rule applicable to 8(a) contracts at any dollar value, and 8(a) participants that are non-manufacturers will be required to offer end items manufactured, processed, or produced by small business concerns in the U.S. or its outlying areas (as defined in FAR 2.101).

## **DoD Issues Proposed Rule Clarifying Payment for Subline Items Not Separately Priced**

On October 31, 2019, DoD issued a [proposed rule](#) to modify DFARS 252.204-7002, Payment for Subline Items Not Separately Priced. DFARS 252.204-7002 is included in solicitations and contracts when the value of a not separately priced (NSP) contract line or subline item is included in the price of another contract line or subline item, and it is necessary to withhold payment on the priced contract line or subline item until the related NSP item has been delivered. The clause prohibits contractors from billing the Government for a priced item that contains the values of a NSP item until the related NSP items have also been delivered to and accepted by the Government. Currently, the clause can be read to prohibit the contractor from billing for any portion of a contract line or subline item that is associated with an NSP item until all of the NSP items have also been delivered to and accepted by the Government. This rule seeks to simplify the text and clarify that a contractor can bill the Government for the individual unit price of a delivered item, once the NSP item associated with the individual priced item has also been delivered and accepted by the Government. The proposed rule also adds a prescription for the DFARS clause in the applicable section of DFARS 204.71. Comments are due by December 30, 2019.

## **DoD Issues Final Rule Consolidating Provisions Related to Disclosure of Information for Litigation Support**

On October 31, 2019, DoD issued a [final rule](#) amending the DFARS to remove DFARS 252.204-7013, Limitations on Disclosure of Information by Litigation Support Contractors, which includes a representation that the offeror agrees to handle and protect all litigation information and documentation, indemnify the Government from any liability or claim that arises from the offeror's

misuse of the litigation information, and ensure its employees are subject to the same use and nondisclosure obligations prior to accessing any litigation information. DFARS 252.204-7014 permits DoD to disclose information to a litigation support contractor if the disclosure is for the sole purpose of providing administrative, technical or professional services to DoD in anticipation of or during litigation. This provision also requires that the contractor agree to and acknowledge specific terms and conditions as a basis for termination of the litigation support contract. Because DFARS 252.204-7014 is included in all solicitations and contracts that involve litigation support services and contains all of the information in DFARS 252.204-7013, DFARS 252.204-7013 is redundant. The rule eliminates DFARS 252.204-2013, the associated prescription at DFARS 204.7403, and related text at DFARS 209.505-4(b)(ii) and DFARS 212.301.

## **DoD Issues Final Rule Updating References to the Current TEMPEST Standard**

On October 31, 2019, DoD issued a [final rule](#) amending DFARS 252.239-7000, Protection against Compromising Emanations, which is included in solicitations and contracts involving information technology that requires protection against compromising emanations. DFARS 252.239-7000 requires contractors to provide or use only information technology that has been accredited to meet the appropriate information assurance requirements of the National Security Agency National TEMPEST standards or other standards specified by the contract. NSTISSAM TEMPEST 1-92, Compromising Emanations Laboratory Test Requirements, Electromagnetics (U) is the most current TEMPEST standard and supersedes the other NACSEM standards previously identified in the clause.

## **DoD Issues Proposed Rule Modifying Provisions on Advanced Payment Agreements**

On October 31, 2019, DoD issued a [proposed rule](#) to amend DFARS 252.232-7000, Advance Payment Pool, which is included in all contracts that will be subject to an advance payment pool agreement with a nonprofit organization or educational institution. The DFARS clause supplements the FAR by notifying contractors that advance payments will be made in accordance with the findings, determinations, and authorization for advance payment and the terms and conditions of the advance payment pool agreement. Comments are due by December 30, 2019.

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