

Government Contracts Legislative and Regulatory Update - July

July 15, 2020

Our July edition of “Government Contracts Legislative and Regulatory Update” offers a summary of the relevant changes that took place during the month of June.

This update will also be available in *Contract Management Magazine*, which is published monthly by the National Contract Management Association (NCMA).

Legislative Update

- Paycheck Protection Program Flexibility Act of 2020

Regulatory Update

- FAR Council Publishes Proposed Rule Regarding Inflation Adjustment of Acquisition-Related Thresholds
- FAR Council Publishes Proposed Rule Regarding SBA's Policy on Joint Ventures
- FAR Council Publishes Proposed Rule on Good Faith in Small Business Subcontracting
- DoD Issues Final Rule Regarding Market Research and Value Analysis
- DoD Issues Final Rule On Justification and Approval Threshold for 8(a) Contracts

Legislative Update

Paycheck Protection Program Flexibility Act of 2020

On June 5, Congress passed new legislation, the Paycheck Protection Program Flexibility Act (the “Act”) of 2020 (H.R. 7010), which revises key elements of the Paycheck Protection Program (“PPP”) under the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act signed into law on March 27, 2020. The PPP provides aid to eligible small businesses suffering from economic effects due to the coronavirus pandemic and potentially allows the entire loan amount qualified borrowers receive to be forgiven subject to certain conditions.

The Paycheck Protection Program Flexibility Act provides an extension of time that borrowers have to spend PPP loans after origination from eight (8) weeks to 24 weeks or December 31, 2020, whichever is earlier. Further, the Act provides a reduction in the amount of loan proceeds that must be dedicated toward payroll costs from 75% to 60%. Other revisions include the following:

- Borrowers now qualify for tax credit to defer payroll costs.
- Borrowers may rehire fewer employees without penalty if borrowers in good faith document that employees let go after February 15, 2020 refuse offer of rehire and no other qualified candidates are available by December 31, 2020; or the business is unable to return to former levels of business activity due to COVID-19 related restrictions such as social distancing requirements.
- Borrowers may apply for loan forgiveness within 10 months of the last day of the covered period (covered period meaning 24 weeks after loan origination or December 31, 2020).
- Repayment may be deferred until the date on which the amount of forgiveness is determined under the CARES Act is remitted to the lender.
- An increase for the maturity date of the PPP loan to a minimum of 5 years and a maximum of 10 years from 2 years.

[Back to top](#)

Regulatory Update

FAR Council Publishes Proposed Rule Regarding Inflation Adjustment of Acquisition-Related Thresholds

On June 30, 2020, the Department of Defense (“DoD”), General Services Administration (“GSA”), and the National Aeronautics Space Administration (“NASA”) (collectively the “FAR Council”) published a proposed rule to further implement 41 U.S.C. § 1908. Pursuant to Section 1908, an adjustment to acquisition-related thresholds must occur every five years using the Consumer Price Index (“CPI”) for all urban consumers, except for the Construction Wage Rate Requirements statute (Davis-Bacon Act), Service Contract Labor Standards statute, and trade agreements thresholds. The proposed rule provides the following changes to heavily-used thresholds found in the Federal Acquisition Regulations (“FAR”) using a projected CPI of 258.6 for March 2020.

- Because the micro-purchase threshold at FAR 2.101 was raised to \$10,000 by statute, the proposed rule proposes no further increase to the basic threshold be made at this time. However, paragraph 3(ii) of the definition, for acquisitions to support contingency operations or to facilitate defense against certain attacks, is proposed to increase from \$30,000 to \$35,000.
- Because the simplified acquisition threshold was changed to \$250,000 by statute, no further increase in the basic threshold is proposed. However, paragraph (1)(i) of the definition for acquisitions to support contingency operations or to facilitate defense against certain attacks, is proposed to increase from \$750,000 to \$800,000.
- The pre-award and post-award notices (FAR Part 5) remain at \$25,000 due to trade agreements.
- The requirements for limiting competition (FAR Part 6) to eligible 8(a) awards over \$22 million is increased to \$25 million.
- The simplified procedures for certain commercial items ceiling (FAR 13.500) will increase from \$7 million to \$7.5 million. For acquisitions described at 13.500(c), the ceiling will increase from \$13.5 million to \$15 million.
- As the cost or pricing data threshold (FAR 15.403-4) was increased by statute from \$750,000 to \$2 million (see FAR Case 2018-005) the rule proposes no further increase.
- The prime contractor subcontracting plan (FAR 19.702) floor will increase from \$700,000 to \$750,000, but the

construction threshold of \$1.5 million will not change. Standard Form 294 at General Instruction 3 has a reference to \$700,000, which will be changed.

- The threshold for reporting first-tier subcontract information including executive compensation will not change (FAR subpart 4.14 and 52.204-10).

As provided in the proposed use, if the actual CPI for March 2020 is higher than 258.6, then, although not included in the proposed rule, additional statutory thresholds may be subject to escalation in the forthcoming final rule.

Comments on the proposed rule are due by August 31, 2020. (85 Fed. Reg. 39,146, June 30, 2020).

[Back to top](#)

FAR Council Publishes Proposed Rule Regarding SBA's Policy on Joint Ventures

On June 5, 2020, the FAR Council published a proposed rule to revise the FAR to implement statutory and regulatory changes made by the Small Business Administration ("SBA") regarding the treatment of joint ventures under SBA contracts. Specifically, the SBA issued regulatory changes allowing a joint venture comprised of a protégé and its mentor to qualify as a small business or under a socioeconomic program for which the protégé qualifies, such as the SBA's 8(a) program. Pursuant to SBA regulations, a joint venture may satisfy the following to participate in SBA programs: (1) a joint venture may qualify as a small business concern when each of the parties to the joint venture qualifies as small for the specific size standard within a solicitation and (2) a joint venture may qualify under a SBA socioeconomic program when at least one party to the joint venture qualifies under a socioeconomic program, and the joint venture meets the applicable joint venture requirements specified in the SBA regulations.

In response to the SBA's regulatory changes, the FAR Council proposed rule amends the FAR to require contracting officers to consider, regardless of size status, the past performance of the joint venture, and to consider the past performance of each party to the joint venture if the joint venture does not demonstrate past performance. Further, the proposed rule amends the FAR to clarify 8(a) joint ventures are not certified into the 8(a) program and that 8(a) joint venture agreements need only be approved by the SBA prior to contract award in order to prevent the improper elimination of 8(a) joint venture proposals that are not "certified."

Comments on the proposed rule are due by August 4, 2020. (85 Fed. Reg. 34,561, June 5 2020).

[Back to top](#)

FAR Council Publishes Proposed Rule on Good Faith in Small Business Subcontracting

On June 3, 2020, the FAR Council published a proposed rule to implement Section 1821 of the National Defense Authorization Act ("NDAA") for Fiscal Year ("FY") 2017. Under Section 1821 the SBA is required to amend SBA regulations to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. In response to Section 1821, on November 29, 2019, the SBA issued a final rule at 84 Fed. Reg. 65,647 amending the SBA regulation at 13 C.F.R. Part 125.3(d) (3), providing guidance on evaluating whether a prime contractor made a good faith effort to comply with its small business subcontracting plan and a list of examples of activities reflective of a failure to make a good faith effort. The SBA also amended the regulation at 13 C.F.R. Part 125.3(c)(1)(iv) to require that prime contractors with commercial subcontracting plans include indirect costs in their subcontracting goals.

Under the FAR, prime contractors are required to submit small business subcontracting plans as laid out in FAR subpart 19.704 when a contract is expected to exceed \$700,000 (\$1.5 million for construction) and has subcontracting

possibilities. Prime contractors who fail to make a good faith effort to comply with their plan may have an assessment of liquidated damages per FAR 52.219-16, Liquidated Damages—Subcontracting Plan. In response to the SBA's regulatory changes requiring the inclusion of indirect cost in subcontractor goals, the proposed rule amends FAR subpart 19.704, Subcontracting Plan Requirements, and the clause at 52.219-9, Small Business Subcontracting Plan, to require that all indirect costs, with certain exceptions, are included in commercial plans and summary subcontract reports ("SSRs").

Comments on the proposed rule are due by August 3, 2020 (85 Fed. Reg. 34,155, June 3, 2020).

[Back to top](#)

DoD Issues Final Rule Regarding Market Research and Value Analysis

On June 5, 2020, the DoD issued a final rule, effective immediately, implementing Sections 871 and 827 of the NDAA for FY 2017. Section 871 modifies 10 U.S.C. § 2377, which addresses how contracting officers have the discretion to require an offeror to submit relevant information to support market research for price analysis in the acquisition of commercial items. Section 872 modifies 10 U.S.C. § 2379, which allows an offeror to submit information or analysis relating to the value of a commercial item.

The final rule amends the Defense Federal Acquisition Regulation Supplement ("DFARS") to add direct reference to 10 U.S.C. § 2377, directing contracting officers to use information submitted under DFARS 234.7002(d) when acquiring major weapon systems as commercial items in accordance with 10 U.S.C. 2379; or, in the case of other items, other relevant information as described in DFARS 212.209. DFARS 234.7002(d) provides guidance on the relevant information needed to help contracting officers make a determination of price reasonableness.

The final rule deletes the proposed rule's discussion of "value analysis" at DFARS 234.7001(d)(5) and the associated definition of "value analysis" at DFARS 234.7001 finding that the proposed change are not necessary for the implementation of the statute. (85 Fed. Reg. 34,530, June 5, 2020)

[Back to top](#)

DoD Issues Final Rule On Justification and Approval Threshold for 8(a) Contracts

On June 5, 2020, the DoD issued a final rule, effective immediately, implementing Section 823 of the NDAA for FY 2020. Section 823 increases the threshold for requiring a justification and approval to award a sole source contract to a participant in the 8(a) program from \$22 million to \$100 million and designates the head of the procuring activity as the approval authority. DoD implements Section 823 by adding DFARS subparts 206.303-1, Requirements, and 206.304, Approval of the Justification. (85 Fed. Reg. 34,528, June 5, 2020)

[Back to top](#)

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