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### Regulatory updates for government contractors

#### **Federal Acquisition Regulation (FAR)/ Other Agencies/Supplements Final/Interim Rules/Notices**

- [DFARS Final Rule; DFARS Case 2017-D040; Brand Name or Equal; 84 FR 25190; May 31, 2019](#)
  - The Department of Defense (DoD) is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act (NDAA) for Fiscal Year 2017 that requires the use of brand name or equal descriptions, or proprietary specifications or standards, in solicitations to be justified and approved.
- [DFARS Final Rule; DFARS Case 2018-D020; Foreign Commercial Satellite Services and Certain Items on the Commerce Control List; 84 FR 25188; May 31, 2019](#)
  - DoD has adopted as final, without change, an interim rule amending DFARS to implement sections of the NDAA for Fiscal Years 2017 and 2018.
  - Portions of the rule impose additional prohibitions with regard to acquisition of certain foreign commercial satellite services, such as:
    - Cybersecurity risk
    - Source of satellites
    - Launch vehicles used to provide the foreign commercial satellite services

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- The rule also expands the definition of “covered foreign country” to include Russia.
  - Another section prohibits purchase of items originating in the People’s Republic of China that meet the definition of goods and services controlled as munitions items when moved to the Commerce Control List of the Export Administration Regulations of the Department of Commerce.
  - [DFARS Final Rule; DFARS Case 2018-D023; Applicability of Inflation Adjustment of Acquisition Related Thresholds; 84 FR 25186; May 31, 2019](#)
    - This rule amends 41 U.S.C. 1908(d) to require inflation adjustments of statutory acquisition-related thresholds under 41 U.S.C. 1908 apply to existing contracts and subcontracts in effect on the date of the adjustment.
    - Section 821 adds the words “and shall apply, in the case of the procurement of property or services by contract, to a contract, and any subcontract at any tier under the contract, in effect on that date without regard to the date of award of the contract or subcontract” at the end of 41 U.S.C. 1908(d).
  - [DFARS Final Rule; DFARS Case 2019-D026; Repeal of DFARS Clause “Ordering Limitation”; 84 FR 25194; May 31, 2019](#)
    - DoD is amending the DFARS to remove DFARS clause 252.247–7012, Ordering Limitation, and the associated prescription at DFARS 247.271–3(g) because it determined that FAR clause 52.216–19, Ordering Limitations, adequately meets DoD needs.
    - Accordingly, this DFARS clause is no longer necessary and can be removed.
  - [FAR Final Rule; FAR Case 2017-0006; Exception From Certified Cost or Pricing Data Requirements – Adequate Price Competition; 84 FR 27494; June 12, 2019](#)
    - DoD, the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) are issuing a final rule amending the FAR to provide guidance to DoD, NASA, and the Coast Guard, consistent with a section of the NDAA for Fiscal Year 2017, that addresses the exception from certified cost or pricing data requirements when price is based on adequate price competition.
    - Section 822 excludes from the standard for adequate price competition the situation in which there was an expectation of competition, but only one offer is received. The standard of adequate price competition that is based on a reasonable expectation of competition is now applicable only to agencies other than DoD, NASA, and the Coast Guard.
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- [DFARS Final Rule; DFARS Case 2017-D009; Only One Offer; 84 FR 30947; June 28, 2019](#)
    - DoD is issuing a final rule amending the DFARS to partially implement a section of the NDAA for Fiscal Year 2017 that addresses the requirement for additional cost or pricing data when only one offer is received in response to a competitive solicitation.
    - In addition, the rule makes prime contractors responsible for determining whether a subcontract qualifies for an exception from the requirement for submission of certified cost based on adequate price competition.
  - [DFARS Final Rule; DFARS Case 2018-D008; Undefined Contract Actions; 84 FR 39204; August 9, 2019](#)
    - DoD is issuing a final rule amending the DFARS to implement sections of the NDAA for Fiscal Years 2017 and 2018. This rule revises requirements for definitizing undefinitized contract actions.
    - Section 811 of the NDAA modifies restrictions on undefinitized contractual actions (UCA) regarding risk-based profit, time for definitization, and Foreign Military Sales. Section 815 establishes limitations on unilateral definitizations of UCAs over \$50 million.
  - [DFARS Final Rule; DFARS Case 2018-D016; Preference for Certain Commercial Services; 84 FR 39203; August 9, 2019](#)
    - DoD is issuing a final rule amending the DFARS to partially implement a section of the NDAA for Fiscal Year 2017 that provides a preference for the acquisition of certain commercial services in contracts that exceed the simplified acquisition threshold. The statute provides for a two-tier approval process, depending on value of the acquisition, if no commercial items are suitable.
    - The new rule allows for a preference for certain commercial services, unless the appropriate official determines in writing that no commercial items are suitable to meet the agency's needs.
    - Different approval levels are provided for contracts in excess of \$10 million and contracts that exceed the simplified acquisition threshold but do not exceed \$10 million.
    - This rule addresses facilities-related services, knowledge-based services (except engineering services), medical services, and transportation services (construction services are being addressed under DFARS Case 2019-D034).
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- [DFARS Final Rule; DFARS Case 2019-D011; Modification of DFARS Clauses Related to the Display of Hotline Posters; 84 FR 39201; August 9, 2019](#)
  - DoD is amending the DFARS to update the DoD hotline poster online address included in DFARS clause 252.203–7004, Display of Hotline Posters, and to update the DoD Office of the Inspector General (OIG) contact information in DFARS clause 252.203– 7003, Agency Office of the Inspector General.
  - DFARS clause 252.203–7004 is included in noncommercial solicitations and contracts with an estimated value exceeding \$5 million, in lieu of the clause at FAR 52.203–14, Display of Hotline Posters. The DFARS clause requires contractors to display DoD hotline posters when contract performance is in the United States or overseas and provides contractors with an online address to use to obtain the current DoD hotline poster. This rule updates the DoD hotline poster online address in the clause, which is no longer accurate.

## **FAR/ Other Agencies/Supplements/ Proposed Rules**

- [FAR Proposed Rule; FAR Case 2018-008; Definition of “Commercial Item”, 84 FR 20607; May 10, 2019](#)
  - DoD, GSA and NASA are proposing to amend the FAR to implement a section of the NDAA for Fiscal Year 2018 to revise the definition of a “commercial item.”
  - The purpose is to have the regulatory definition conform to statutory changes made to the definition by section 847 of the NDAA for Fiscal Year 2018 (Pub. L. 115–91, enacted December 12, 2017).
  - The rule would broaden the definition to allow certain additional items developed exclusively at private expense to qualify for the benefits associated with being treated as a commercial item.
- [DFARS Proposed Rule; DFARS Case 2017-D024; Use of Fixed-Price Contracts; 84 FR 24734; May 29, 2019](#)
  - DoD is proposing to amend the DFARS to implement sections of the NDAA for Fiscal Year 2017 that require review and approval for certain cost-reimbursement contract types at specified thresholds and established time periods and the use of firm-fixed-price contract types for foreign military sales unless an exception or waiver applies.
  - Section 829 requires contracting officers to first consider fixed-price contracts, to include fixed-price incentive contracts, when determining contract type and to obtain approval from the head of the contracting activity for:

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- Cost-reimbursement contracts in excess of \$50 million that were awarded after October 1, 2018, and before October 1, 2019; and
  - Cost-reimbursement contracts in excess of \$25 million to be awarded on or after October 1, 2019.
- Section 830 provides requirements, exceptions, and waiver authority for the use of firm-fixed-price contracts for foreign military sales. It requires contracting officers to use firm-fixed-price contracts unless specified exceptions or a waiver applies.
- [DFARS Final Rule; DFARS Case 2018-D068; Prompt Payments of Small Business Contractors; 84 FR 25225; May 31, 2019](#)
  - DoD is proposing to amend the DFARS to implement a section of the NDAA for Fiscal Year 2019 that provides for accelerated payments to small business contractors and subcontractors.
  - Section 852 requires DoD—to the fullest extent permitted by law—to establish an accelerated payment date for small business contractors, with a goal of 15 days after receipt of a proper invoice, if a specific payment date is not established by contract.
  - For contractors that subcontract with small businesses, section 852 requires DoD—to the fullest extent permitted by law—to establish an accelerated payment date, with a goal of 15 days after receipt of a proper invoice, if:
    - A specific payment date is not established by contract, and
    - The contractor agrees to make accelerated payments to the subcontractor without any further consideration from, or fees charged to, the subcontractor.
- [DFARS Proposed Rule; DFARS Case 2017-D038; Contractor Purchasing System Review Threshold; 84 FR 25228; May 31, 2019](#)
  - DoD is proposing to amend the DFARS to establish a DoD contractor purchasing system review (CPSR) dollar threshold that provides a regulatory basis for allowing DoD personnel to support other essential priorities and missions of greater contractual risk, while reducing regulatory impact on contractors.
  - This proposed rule implements a recommendation from the Defense Contract Management Agency (DCMA) to raise the CPSR threshold at FAR 44.302(a) from \$25 million to \$50 million. Currently, FAR 44.302(a) requires the administrative contracting officer (ACO) to determine whether a contractor's sales to the government are expected to exceed \$25 million during the next 12 months and, if so, perform a review to determine if a CPSR is needed.

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- [DFARS Notice; Indirect Cost Rates, Predetermined Indirect Cost Rates, and Bankruptcy Notifications; 84 FR 25277; May 31, 2019](#)
    - In accordance with the Paperwork Reduction Act of 1995 and the Office of Management and Budget (OMB) regulations, the FAR Council invites the public to comment upon a renewal concerning indirect cost rates, predetermined indirect cost rates, and bankruptcy notifications.
    - The purpose of the proposed rule is the FAR Council is in the process of combining OMB Control Numbers for the FAR by FAR part to the maximum practicable extent. This consolidation is expected to improve industry's ability to easily and efficiently identify all burdens associated with a given FAR part. The review of the information collections by FAR part allows improved oversight to ensure there is no redundant or unaccounted for burden placed on industry.
    - Combining information collections in a given FAR part is also expected to reduce the administrative burden associated with processing multiple information collections.
  - [FAR Proposed Rule; FAR Case 2015-002; Requirements for DD Form 254, Contract Security Classification Specification; 84 FR 33201; July 12, 2019](#)
    - DoD, GSA, and NASA are proposing to amend the FAR to require electronic submission of the DD Form 254, Contract Security Classification Specification.
    - The rule will streamline the submission process for the existing DD Form 254 and enable business to submit an electronic form once, instead of repeated paper submissions.
  - [DFARS Proposed Rule; DFARS Case 2018-D015; Management of Should-Cost Review Process; 84 FR 39254; August 9, 2019](#)
    - Section 837 of the 2018 NDAA requires an amendment to the DFARS to provide for the appropriate use of the should-cost review process of a major weapon system in a manner that is transparent, objective, and provides for the efficiency of the systems acquisition process in the DoD.
    - At a minimum, DoD is required to address the following:
      - A description of the features of the should-cost review process.
      - Establishment of a process for communicating with the prime contractor on the program elements of a proposed should-cost review.
      - A method for ensuring that identified should-cost savings opportunities are based on accurate, complete, and current information and can be quantified and tracked.
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- A description of the training, skills, and experience that DoD and contractor officials carrying out a should-cost review should possess.
  - A method for ensuring appropriate collaboration with the contractor throughout the review process.
  - Establishment of review process requirements that provide for sufficient analysis and minimize any impact on program schedule.
- [FAR Proposed Rule; FAR Case 2018-022; Orders Issued via Fax or Electronic Commerce; 84 FR 44270; August 23, 2019](#)
    - DoD, GSA, and NASA are proposing to amend the FAR to update a clause to permit the issuance of task or delivery orders via fax or electronic commerce, and to clarify when an order is considered to be “issued” when using these methods.

## **Defense Contract Audit Agency (DCAA) and DCMA Audit Alert/Guidance/Programs**

- [Defense Contract Audit Agency Memorandum for Regional Directors \(MRD\) 19-PAC-002\(R\) – Audit Alert on Identifying Expressly Unallowable Costs; May 14, 2019](#)
    - This audit alert revises previous guidance on identifying expressly unallowable costs due to recent court cases. This guidance includes an updated listing of FAR 31 and DFARS 231 cost principles that meet the definition of expressly unallowable costs. If an audit team questions a cost that is on this list, it generally should treat the questioned cost as expressly unallowable and subject to penalties.
    - The audit alert states that in order for a cost to be expressly unallowable, the cost principle must state in direct terms that the costs are unallowable, or leaves little room for interpretation or differences of opinion as to whether the particular cost meets the allowability criteria. The Government must show that it was unreasonable, under all the circumstances, for a person in the contractor’s position to conclude that the costs were allowable.
  - [Defense Contract Audit Agency MRD 19-PAC-003\(R\) - Audit Guidance on Using Materiality in Incurred Cost Audits; July 19, 2019](#)
    - The audit guidance establishes audit policy for applying materiality in incurred cost audits. The newly implemented materiality guidance applies to incurred cost audits that are initiated after July 19, 2019, and can be found at Defense Contract Audit Manual (CAM) 6-107.
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- The incurred cost audit programs have been updated to reflect the materiality guidance so that materiality concepts are consistently applied across the DCAA.

## **Government Publications/Reports/Press Releases**

- [Under Secretary of Defense Memorandum, Class Deviation – Quick-Closeout Procedures Threshold; May 3, 2019](#)
    - Contracting officers shall deviate from the quick-closeout procedures in FAR 42.708(a) for cost reimbursement, time and material, labor hour, fixed-price incentive, and fixed-price redeterminable contracts, task orders, and delivery orders. Contracting officers shall consider cost amounts to be relatively insignificant when the total unsettled direct and indirect costs to be allocated to any one contract, task order, or delivery order do not exceed \$2 million.
    - DCMA ACOs are further authorized to deviate from FAR 42.708(a)(2) and negotiate the settlement of direct and indirect costs for a specific contract, task order, or delivery order to be closed in advance of the determination of final direct costs and indirect rates set forth in FAR 42.705 regardless of the dollar value or percent of unsettled direct or indirect costs allocable to the contract.
    - This class deviation supersedes and incorporates the DCMA Quick-Closeout Procedure Class Deviation (DCMA 17-142).
  - [Office of the Under Secretary of Defense for Acquisition and Sustainment - Draft Cybersecurity Maturity Model Certification \(CMMC\) Rev. 0.4 Release & Request for Feedback; September 2019](#)
    - Draft CMMC aims to be a unified cybersecurity standard for DoD acquisitions to reduce exfiltration of Controlled Unclassified Information (CUI) from the Defense Industrial Base (DIB).
    - CMMC combines various cybersecurity standards and “leading practices” and maps these practices and processes across several maturity levels that range from basic cyber hygiene to advanced.
    - The CMMC effort builds upon existing regulation (DFARS 252.204-7012) that is based on trust by adding a verification component with respect to cybersecurity requirements.
    - A CMMC goal is be cost-effective and affordable for small businesses to implement at the lower CMMC levels.
    - Final version of the model will be released in January 2020.
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## Court Rulings

- [\*United States ex. rel. Markus v. Aerojet Rocketdyne Holdings, Inc.\*; United States District Court for the Eastern District of California; No. 2:15-cv-2245; May 8, 2019 \(no link available\)](#)
  - The lawsuit alleged that the defendant fraudulently entered into contracts with the government despite knowing the Company's computer systems did not meet the minimum cybersecurity standards required to be awarded a government contract.
  - The District Court for the Eastern District of California allowed a relator's False Claims Act (FCA) lawsuit against Aerojet Rocketdyne to proceed, implying that cybersecurity violations are potentially actionable under the False Claims Act.
- [\*The Boeing Company v. The United States\*; United States Court of Federal Claims; No. 17-10969C; May 29, 2019](#)
  - Boeing claimed that FAR 30.606, which went into effect on April 8, 2005, violates the Cost Accounting Standards (CAS) statute.
  - The Court held that Boeing had waived its right to challenge the conflict between FAR 30.606 and the CAS statute when it entered into the representative contract with the Government after the FAR 30.606 effective date without challenging this regulation in any type of pre-award protest or negotiation with the government.
- [\*Secretary of the Army v. Kellogg Brown & Root Services, Inc. \(KBR\)\*; United States Court of Appeals for the Federal Circuit; 2018-1022; July 9, 2019](#)
  - The Court of Appeals for the Federal Circuit affirmed the Armed Services Board of Contract Appeals (ASBCA)'s decision to award KBR breach of contract damages for costs incurred for private security forces necessary for KBR to perform the contract due to lack of security provided in Iraq.
  - The Court determined that the ASBCA properly exercised jurisdiction over KBR's affirmative defense of prior material breach and did not err in awarding Contract Disputes Act interest.

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