



## **The Source**

Regulatory updates for government contractors



## Federal Acquisition Regulation (FAR)/Other Agencies/Supplements

### Final/Interim Rules/Notices

- [Defense FAR Supplement \(DFARS\) Final Rule; DFARS Case 2020-016; Modification of Determination Requirement for Certain Task- or Delivery-Order Contracts; 85 FR 60922; September 29, 2020](#)
  - [The Department of Defense \(DoD\)](#) is issuing a final rule amending the DFARS to implement section 816 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020. Section 816 amends 10 U.S.C. 2304a to permit the award of a DoD task- or delivery-order contract estimated to exceed \$100 million (including all options) to a single source without a written determination by the head of the agency, if the head of the agency made a written determination that other than competitive procedures were authorized for the award of such contract.
- [DFARS Final Rule; DFARS Case 2019-D029; Treatment of Certain Items as Commercial Items; 85 FR 60918; September 29, 2020](#)
  - DoD is issuing a final rule amending the DFARS to implement several sections of the NDAA for FY 2017 that address treatment of commingled items purchased by contractors and services provided by nontraditional defense contractors as commercial items.
  - The final rule provides that a contract for an item using FAR part 12 procedures shall serve as a prior commercial item determination, unless the appropriate official determines in writing that the use of such procedures was improper or that it is no longer appropriate to acquire the item using commercial item acquisition procedures.

- [DFARS Interim Rule; DFARS Case 2019-D041; Assessing Contractor Implementation of Cybersecurity Requirements; 85 FR 61505; September 29, 2020](#)
  - The Council of Economic Advisors estimates that malicious cyber activity cost the US economy between \$57 billion and \$109 billion in 2016. Over a ten-year period, that burden would equate to an estimated \$570 billion to \$1.09 trillion dollars in costs.
  - As part of multiple lines of effort focused on the security and resiliency of the Defense Industrial Base (DIB) sector, the DoD is working with industry to enhance the protection of unclassified information within the supply chain. Toward this end, DoD has developed the following assessment methodology and framework to assess contractor implementation of cybersecurity requirements:
    - NIST SP 800-171 DoD Assessment Methodology
      - The clause requires contractors to apply the security requirements of NIST SP 800-171 to “covered contractor information systems,” as defined in the clause, that are not part of an IT service or system operated on behalf of the Government. The NIST SP 800-171 DoD Assessment Methodology provides for the assessment of a contractor’s implementation of NIST SP 800-171 security requirements, as required by DFARS clause 252.204-7012.
    - Cybersecurity Maturity Model Certification Framework (CMMC)
      - Building upon the NIST SP 800-171 DoD Assessment Methodology, the CMMC framework adds a comprehensive and scalable certification element to verify the implementation of processes and practices associated with the achievement of a cybersecurity maturity level.
      - CMMC is designed to provide increased assurance to the Department that a DIB contractor can adequately protect sensitive unclassified information such as Federal Contract Information (FCI) and Controlled Unclassified Information (CUI) at a level commensurate with the risk, accounting for information flow down to its subcontractors in a multi-tier supply chain. A DIB contractor can achieve a specific CMMC level for its entire enterprise network or particular segment(s) or enclave(s), depending upon where the information to be protected is processed, stored, or transmitted.



- [FAR Interim Rule; FAR Case 2019-009; Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment; 85 FR 53126; August 27, 2020](#)
  - This rule reduces the information collection burden imposed on the public by making updates to the System for Award Management (SAM) to allow an offeror to represent annually, after conducting a reasonable inquiry, whether it uses covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services.
  - The burden to the public is reduced by allowing an offeror that responds “does not” in the annual representation at 52.204–26, Covered Telecommunications Equipment or Services—Representation, or in paragraph (v)(2)(ii) of 52.212–3, Offeror Representations and Certifications— Commercial Items, to skip the offer-by offer representation for paragraph (d)(2) within the provision at 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment. The provision at 52.204–26 requires that offerors review SAM prior to completing their required representations.
  - This rule applies to all acquisitions, including acquisitions at or below the simplified acquisition threshold and to acquisitions of commercial items, including commercially available off the-shelf items. It may have a significant economic impact on a substantial number of small entities. The final rule will implement a recommendation from the Defense Contract Management Agency (DCMA) to raise the contractor purchasing system review (CPSR) threshold at FAR 44.302(a) from \$25 million to \$50 million.
- [Department of Defense Grant and Agreement Regulations \(DoDGARS\) Final Rule; DOD-2016-OS-0048; Implementation of Governmentwide Guidance for Grants and Cooperative Agreements \(1 of 6\); 85 FR 51158; August 19, 2020](#)
  - This final rule establishes 2 CFR part 1104 to specify for DoD Components which portions of the DoDGARS apply to DoD grants and cooperative agreements for various preaward, time-of-award, and post-award purposes, pending completion of the remaining updates to the DoDGARS that are needed to fully implement the Office of Management and Budget (OMB) guidance.
  - It also removes the interim implementation of the guidance published in December 2014 at 2 CFR part 1103, as that implementation is superseded by this 2 CFR part 1104. 2 CFR part 1104 serves as the central hub to direct DoD Components’ use of the other ten new parts issued as final rules in the Federal Register in chapter XI of 2 CFR, as well as parts of the DoDGARS that will remain for the time being in subchapter C, chapter I of title 32 of the CFR.

- [DoDGARS Final Rule; DOD-2016-OS-0052; Award Format for DoD Grants and Cooperative Agreements \(2 of 6\); 85 FR 51161; August 19, 2020](#)
  - The overall purpose of the rule is to implement OMB guidance to Federal agencies on administrative requirements, cost principles, and audit requirements applicable to Federal grants, cooperative agreements, and other assistance instruments (2 CFR part 200).
  - This final rule does that by implementing provisions of the OMB guidance on the minimum content that Federal agencies' awards must include.
  - Another purpose of this rule is to provide greater uniformity in the content and organization of DoD grants and cooperative agreements.
  - It does so by:
    - Establishing requirements for uniform content, beyond the minimum identified in the OMB guidance; and
    - Specifying a standard format for organizing the content of DoD Component grants and cooperative agreements to all types of entities, including entities other than those addressed in the OMB guidance.
- [DoDGARS Final Rule; DOD-2016-OS-0054; Administrative Requirements Terms and Conditions for Cost-Type Grants and Cooperative Agreements to Nonprofit and Governmental Entities \(3 of 6\); 85 FR 51167; August 19, 2020](#)
  - This final rule establishes seven new DoDGARS parts that collectively govern a DoD Component's construction of the administrative requirements portion of its general terms and conditions for awards to institutions of higher education, nonprofit organizations, states, local governments, and Indian tribes.
  - In addition to addressing the purpose and applicability, the overview part describes what the subchapter's remaining six parts address and how they are organized.
  - Each of the subchapter's other six parts provides both:
    - Standard wording for articles of general terms and conditions specifying requirements for recipients and subrecipients within a given subject matter area; and
    - The associated direction to DoD Components on the use of the standard wording for those articles.
- [DoDGARS Final Rule; DOD-2016-OS-0053; National Policy Requirements: General Award Terms and Conditions \(4 of 6\); 85 FR 51223; August 19, 2020](#)
  - This rule supersedes the Appendix of 32 CFR part 21, moving it to 2 CFR part 1122. It provides an updated version of the National Policies that apply to all DoD financial assistance awards.

- [DoDGARS Final Rule; DOD-2016-OS-0051; Definitions for DoD Grant and Agreement Regulations \(5 of 6\); 85 FR 51229; August 19, 2020](#)
  - This final rule incorporates the OMB's guidance to Federal agencies on administrative requirements, cost principles, and audit requirements that apply to Federal grants, cooperative agreements, and other assistance instruments (2 CFR part 200). Additionally, this rule provides definitions of terms that are common to the DoDGARS and establishes a central regulatory location for each term.
- [DoDGARS Final Rule; DOD-2016-OS-0055; DoD Grant and Agreement Regulations \(6 of 6\); 85 FR 51238; August 19, 2020](#)
  - This final rule removes two of the eight DoDGARS parts currently located in subchapter C of chapter I of 32 CFR, revises four parts in that subchapter, and makes no changes to the other two parts.
  - Specifically, it:
    - o Removes existing DoDGARS parts 32 and 33 (32 CFR parts 32 and 33). Part 32 of the DoDGARS (32 CFR part 32) was the CFR part in which DoD implemented OMB Circular A-110, which governed the administrative requirements for grant and cooperative agreement awards to institutions of higher education, hospitals, and other nonprofit organizations. Part 33 was the part in which DoD adopted the Government-wide common rule implementing OMB Circular A 102, which governed the administrative requirements for grant and cooperative agreement awards to states, local governments, and Indian tribal governments.
    - o The removal of DoDGARS parts 32 and 33 from title 32 of the CFR resulting from this final rule precludes any apparent conflict between the administrative requirements in parts 32 and 33 and the administrative requirements in the new DoDGARS parts addressing general terms and conditions.
    - o Revises existing DoDGARS parts 21, 22, 34, and 37 (32 CFR parts 21, 22, 34, and 37). to update outdated references and eliminate internal inconsistencies between the portion of the DoDGARS that will remain in 32 CFR for an interim period and the new DoDGARS parts in chapter XI of 2 CFR that are included in the five final rules preceding this one in this Federal Register.
    - o Includes updates to references and language in 32 CFR parts 21, 22, 34, and 37) that are not related to the deletion of parts 32 and 33 or generally to the implementation of the guidance at 2 CFR part 200. Some of these changes are necessary to conform these parts of the DoDGARS in 32 CFR to statutes, regulations, or policy that were issued, revised, or repealed subsequent to the last revision of those parts.

## FAR/ Other Agencies/Supplements/

### Proposed Rules

- [DFARS Proposed Rule; DFARS Case 2020-D033; Commercial Item Determinations; 85 FR 74636; November 23, 2020](#)
  - The proposed rule seeks to further implement section 848 of the FY2018 NDAA because of substantial changes from the first proposed rule.
  - Section 848 modifies 10 U.S.C. 2380(b) to provide that a contract for an item using FAR part 12 procedures shall serve as a prior commercial item determination, unless the appropriate official determines in writing that the use of such procedures was improper or that it is no longer appropriate to acquire the item using commercial item acquisition procedures.
  - This rule also proposes to remove the procedures at DFARS subpart 212.70, established pursuant to section 856 of the NDAA for FY 2016, which apply to procurements of more than \$1 million previously procured under a prime contract using FAR part 12 procedures.
- [FAR Proposed Rule; FAR Case 2020-004; Application of Micro-Purchase Threshold to Task and Delivery Orders; 85 FR 67327; October 22, 2020](#)
  - This proposed rule seeks amend the FAR to implement section 826 of the NDAA for FY 2020, which increases the threshold for requiring fair opportunity on orders under multiple-award contracts from \$2,500 to the "micro-purchase threshold".
  - The fair opportunity to compete at FAR 16.505(b)(1) applies to orders over the threshold unless an exception at FAR 16.505(b)(2) applies.
  - The FAR threshold at 16.505 is currently \$3,500, as a result of inflation adjustments in accordance with FAR 1.109. This change applies the word-based threshold to ensure continued alignment with any future changes to the thresholds.
  - FAR Case 2018-004 was published July 2, 2020 (85 FR 40064) with an effective date of August 31, 2020. It raised the micro-purchase threshold, as defined at FAR 2.101, to \$10,000.
- [FAR Proposed Rule; FAR Case 2018-018; Revision of Definition of "Commercial Item"; 85 FR 65610; October 15, 2020](#)
  - This section separates the definition of "commercial item" at 41 U.S.C. 103 into the definitions of "commercial product" and "commercial service," at 41 U.S.C. 103 and 103a.
  - The Section 809 panel recommended the splitting of the definition of "commercial item" to better "reflect the significant roles services and commercial services play today in the DoD procurement budget."
  - This change resolves the issue the Section 809 Panel cites, which is that the "acquisition workforce has faced issues with inconsistent interpretations of policy, confusion over how to identify eligible commercial products and services".
  - Bifurcating the definition of "commercial item" into "commercial product" and "commercial service" is a way to provide clarity for the acquisition workforce, which may result in greater engagement with the commercial marketplace.

- [FAR Proposed Rule; FAR Case 2017-014; Use of Acquisition 360 To Encourage Vendor Feedback; 85 FR 57177; September 15, 2020](#)
  - This proposed rule seeks to amend FAR part 1, adding a new section at FAR 1.102-3, Evaluating agency acquisition processes, which encourages agencies to develop internal procedures to seek voluntary feedback from interested parties in the acquisition process.
  - Contracting officers are encouraged to use a new provision at 52.201-XX, Acquisition 360: Voluntary Survey, to solicit feedback from actual and potential offerors, in accordance with agency procedures.
- [FAR Proposed Rule; FAR Case 2019-016; Maximizing Use of American-Made Goods, Products, and Materials; 85 FR 56558; September 14, 2020](#)
  - On July 15, 2019, the President signed E.O. 13881, Maximizing Use of American-Made Goods, Products, and Materials (84 FR 34257, July 18, 2019). This E.O. changes FAR clauses implementing the Buy American statute by increasing the—
    - o Domestic content requirements; and
    - o Price preference for domestic products.





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

- [Memorandum for Regional Directors, DCAA: Guidance on the Contractor Information Survey \(CIS\); 20-PAS-005\(R\); September 29, 2020](#)
  - This memorandum provides guidance to assist auditors in using the CIS.
  - The CIS is a tool for obtaining information about contractors to assist the audit team in identifying potential areas where future audit effort may be warranted.
  - CIS is designed to assist the audit team in understanding the contractor's organizational structure and business, the overall design of the contractor's accounting system, and basic information related to internal control.
  - The CIS is not to be used as an integral part of the risk assessment process or as the basis for documenting an understanding of internal control for any particular audit assignment.
- [Memorandum for Regional Directors, DCAA: Audit Alert on Update to the Bipartisan Budget Act of 2013 \(BBA\) Contractor Compensation Caps – Calendar Years \(CY\) 2019 and 2020; 20-PSP-004\(R\); August 20, 2020](#)
  - The Office of Federal Procurement Policy (OFPP) has not published the CY 2019 and 2020 compensation cap amounts on its website.
  - The OFPP has published the formula for computing the cap amounts. This formula allows anyone to compute new cap amounts as soon as the Bureau of Labor Statistics (BLS) releases the applicable Employment Cost Index (ECI) table and prior to OFPP formally publishing the new cap amounts on its website.
  - Accordingly, this memorandum documents the calculation of the CY 2019 and 2020 compensation cap amounts.
- [DCAA, Frequently Asked Questions: COVID-19; July 31, 2020](#)
  - This document outlines frequently asked questions relating to implementation of Section 3610 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act.

## Government Publications/Reports/Press Releases

- [Office of the Under Secretary of Defense; Memorandum; Allowability of Contractor Costs – Donation of Unused Leave in Response to the COVID-19 National Emergency; October 14, 2020](#)
  - The Memorandum for Record (MFR) template is being distributed for the DoD Components (e.g., the Military Departments, Defense Agencies, and Defense Activities) Contracting Officers' use to document the files for contract actions resulting from contractor requests for reimbursement under the CARES Act, Section 3610.
  - DoD Components may tailor this template for their specific terminology and use.
- [Office of the Under Secretary of Defense; Class Deviation – CARES Act Section 3610 Implementation; DARS Tracking Number 2020-O0013, Revision 2; October 14, 2020](#)
  - This class deviation revised and superseded Class Deviation 2020-O0021, issued on August 17, 2020.
  - The purpose of this revision was to extend the date through which paid leave may be taken to be eligible for reimbursement under section 3610.
  - Where appropriate, the time period for which paid leave must be taken was changed from March 27, 2020, through September 30, 2020, to March 27, 2020, through December 11, 2020.
- [Cost Accounting Standards Board Staff Discussion Paper; Conformance of the Cost Accounting Standards to Generally Accepted Accounting Principles for Capitalization of Tangible Assets and Accounting for Acquisition Costs of Material; Case Number: CASB 2020-01; September 18, 2020](#)
  - The Cost Accounting Standards Board (CAS Board or the Board), is releasing this Staff Discussion Paper (SDP) to discuss the potential conformance of two cost accounting standards (CAS) to GAAP: CAS 404, Capitalization of Tangible Assets, and CAS 411, CAS Accounting for Acquisition Costs of Material.
  - CAS 404 and CAS 411 Compared with GAAP:
    - For each requirement in CAS 404 and CAS 411, the Board identified if a comparable requirement existed in GAAP, FAR or other Standard. The Board found corresponding requirements, primarily in GAAP, for nearly all of the requirements of CAS 404 and CAS 411.
- [United States Government Accountability Office \(GAO\); COVID-19 Contracting; Observations on Contractor Paid Leave Reimbursement Guidance and Use; GAO-20-662; September 2020](#)
  - The report describes (1) the extent to which section 3610 implementation guidance provided by selected federal agencies and OMB differs and (2) the extent to which selected federal agencies reported use of section 3610 authority through July 20, 2020.

- [United States GAO; Defense Science and Technology; Opportunities to Better Integrate Industry Independent Research and Development into DoD Planning; GAO-20-578; September 2020](#)
  - The report found that DoD does not know how contractors' independent R&D ("IR&D") projects fit into the department's technology goals and that DoD's IR&D projects database is not very useful for informing investment decisions.
  - GAO recommended that DoD collect additional information in the IR&D database, including:
    - o The IR&D project's linkage, if any, to DOD's modernization priorities;
    - o The allowable category (basic research, applied research, technology development, or concept study) to which the IR&D project belongs;
    - o The nature of the project as either potentially disruptive or potentially incremental research and development; and
    - o The actual IR&D project costs when the project is completed.
- [Defense Pricing and Contracting; Office of the Under Secretary of Defense \(Acquisition & Sustainment\); Implementation Guidance for Section 3610 of the Coronavirus Aid, Relief, and Economic Security \(CARES\) Act, Frequently Asked Questions; August 17, 2020](#)
  - This document outlines frequently asked questions relating to implementation guidance for Section 3610 of the CARES Act.
- [Office of the Under Secretary of Defense; Memorandum for Record Template for Contracting Officers for Coronavirus Aid, Relief and Economic Security Act Section 3610 Reimbursement; August 17, 2020](#)
  - This memorandum includes a template to be used by Contracting Officers to document the contract files for contract actions resulting from contractor requests for reimbursement under Section 3610 of the CARES Act as implemented by Class Deviation 2020-O0013.



## Court Rulings

- [Appeal of Northrop Grumman Corporation; Armed Services Board of Contract Appeals; ASBCA No. 61775; October 7, 2020](#)
  - Northrop Grumman Corporation (“NGC”) had submitted a \$74 million claim for its underfunded pension plan and the government denied the claim on the basis that the Company had allegedly used improper mortality rates in assessing the plan’s liabilities and incorrect methodologies in the accounting treatment for taxes owed on the plan’s income.
  - ASBCA granted NGC’s appeal of the government decision denying liability for the contractor’s underfunded pension plan, finding that NGC was CAS compliant in using different mortality tables and that the impact of the tax accounting methodology difference was immaterial.
- [Appeal of DynCorp International; Armed Services Board of Contract Appeals; ASBCA No. 61950; September 29, 2020](#)
  - DynCorp paid severance to a former employee on a basis derived from the employee’s salary (two times the salary and bonus target), which exceeded the compensation cap.
  - Severance was not treated as compensation by the contractor or Government.
  - Although there was no dispute in the methodology to calculate the cap (DCAA agreed the methodology was reasonable), ASBCA agreed with Government that the portion of severance derived from the salary above the compensation cap was unallowable.



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