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¶ 249 FEATURE COMMENT: Separating The Wheat From The Chaff In The FAR Council's Fall Harvest

The Federal Acquisition Regulatory Council picked a fitting season for its second harvest. On Sept. 18, 2026, it rolled out four more Revolutionary FAR Overhaul proposed rules. FAR Case 2026-003 covers Parts 8, 12, 13, 15, 38, 44 and 51 (91 Fed. Reg. 59406 [2026-19162]). FAR Case 2026-006 covers Parts 16, 17 and 35 (91 Fed. Reg. 59476 [2026-19160]). FAR Case 2026-010 takes Parts 14, 28 and 36 (91 Fed. Reg. 59534 [2026-19158]), and FAR Case 2026-011 takes Parts 9, 27 and 47 (91 Fed. Reg. 59584 [2026-19159]). Comments on all four are due Oct. 19, 2026. That is the same month-long window the first batch got in June, except this one straddles fiscal year-end closeout, when nobody in a contracts shop has a free hand.

You know the backstory. Executive Order 14275 (April 15, 2025) told the Council to strip the FAR down to what statute requires and sound procurement needs, and Office of Management and Budget Memorandum M-25-26 split the job in two. Phase one, launched in fiscal year 2025, gave us the model class deviations agencies adopted part by part. Phase two is notice-and-comment rulemaking. All four preambles tell that story in nearly the same words (91 Fed. Reg. at 59406-07, 59476-77, 59534-35, 59584-85), and the deviations stay put until final rules replace them. Eight of the 12 promised rules are now out.

The September rules fill 274 printed pages of the *Federal Register*. Most of it is plain-language rewriting the Council says is not meant to change existing requirements, and mostly we take the Council at its word. But a handful of proposals would shift risk, change how competitions are run, change what a contract vehicle is worth and, in Part 27, change how much of a contractor's technical data the Government takes home. That is where we spend our time. One thing up front. Every clause prescription in these rules now says outright whether the clause reaches commercial products and commercial services, and the preambles table the Council's calls on commercially available-off-the-shelf items too. That sounds like filing. Paired with the new Part 12, it decides what goes into a commercial contract.

The Light Load First (Parts 14, 28 and 36)—Most of FAR Case 2026-010 is leaf blowing. Part 14 loses its pre-bid conference text and some duplicative material, with no stated change in substance. Part 28 gets administrative corrections. Part 36 is reorganized to split construction from architect-engineer coverage, and a handful of provisions and clauses go away, including 52.236-19 (Organization and Direction of the Work), 52.236-27 (Site Visit (Construction)), 52.236-28 (Preparation of Proposals-Construction) and 52.236-1 (Performance of Work by the Contractor). 91 Fed. Reg. at 59535-36.

General contractors should notice that last one. The Council says a self-performance requirement restricts competition on fixed-price construction work, because not every prime performs every scope itself. *Id.* at 59535–36. As we read it, an agency could still write a self-performance percentage into a solicitation, but the default is gone. If you have been counting on that clause, plan to ask for the requirement by name.

Part 8 and the Required-Use Mandate—The biggest pumpkin in this patch is proposed FAR 8.104(b)(1). When a commercial product or service that meets an agency’s need is available on an existing contract or blanket purchase agreement awarded for Governmentwide use, the agency must use that vehicle if the Office of Federal Procurement Policy (OFPP) has designated it “required use.” The escape hatch is an exception from the Senior Procurement Executive (SPE), and the reasons the rule gives for one (terms and conditions, scope or a performance period that do not fit) are examples, not a closed list. 91 Fed. Reg. at 59420. Failing a required-use vehicle, the agency must consider an OFPP “best in class” vehicle, and then any existing Governmentwide vehicle, before it builds a new contract. *Id.* The preamble ties all this to EO 14240 and says OFPP will set the criteria and name the vehicles. *Id.* at 59407.

The model deviation went further. The Council’s own “You Said, We Did” page [<https://www.acquisition.gov/far-overhaul/you-said-we-did>] on Acquisition.gov says the deviation made best-in-class vehicles mandatory too. After commenters warned about the hit to small business participation and competition, the proposed rule knocked best in class down to a prioritized consideration. Required use stayed mandatory.

Here is the rub. OFPP keeps the list outside the FAR, and nothing in the proposal calls for notice and comment on designations. A company selling through agency-specific indefinite-delivery, indefinite-quantity contracts or open-market buys could wake up after one designation to find much of its federal demand in a product line rerouted to a vehicle it does not hold. And because the exception belongs to the SPE, a program office that wants to buy elsewhere has to make its case well up the chain. Many will not bother.

The other Part 8 change worth your time is that the FAR’s schedule ordering procedures disappear. Part 38 goes away on the theory that it duplicates the General Services Acquisition Regulation. 91 Fed. Reg. at 59413. The rewrite of subpart 8.4 also drops the ordering rules at FAR 8.405-1 through 8.405-3, and proposed FAR 8.401(b) just tells agencies to follow GSA’s procedures at 48 CFR 538.71. *Id.* at 59421. GSA has been running schedule ordering under a GSAR class deviation to that subpart since 2025, and on September 22 it proposed to make the subpart permanent, with comments due October 22. GSAR Case 2026-G501, 91 Fed. Reg. 60063 [[2026-19331](#)] (Sept. 22, 2026).

Some will worry that schedule orders get harder to protest once the rules live in the GSAR. We doubt it. The Government Accountability Office decides protests concerning “an alleged violation of a procurement statute or regulation,” 31 USCA § 3552(a), and the Court of Federal Claims hears claims of “any alleged violation of statute or regulation in connection with a procurement,” 28 USCA § 1491(b)(1). The GSAR is a procurement regulation by any yardstick. What changes is who holds the pen. GSA could rewrite the ordering rules for every agency’s schedule buys without the FAR Council. And proposed GSAR 538.7102(f) carries forward the special ordering authority now in FAR 8.403(b), but extends it from the schedule down to the category and special item number (SIN) level, with those procedures identified in the schedule, category or SIN itself and, unless otherwise stated, taking precedence over the general ones. 91 Fed. Reg. at 60066. Schedule holders belong in the GSAR docket at least as much as the FAR docket.

Part 51 folds into Part 8, and agencies could let contractors use Government supply sources under any contract not awarded by sealed bidding. 91 Fed. Reg. at 59408, 59420.

Goodbye, 52.212-5 (Part 12)—Anyone who sells commercial items to the Government has squinted at the checkboxes in 52.212-5 and its companion, 52.212-3. Both head for the compost pile. 91 Fed. Reg. at 59409. Under proposed FAR 12.205, the contracting officer (or, as the preamble puts it, the agency’s clause logic system) goes by the individual prescriptions instead. The Comptroller General re-

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cords paragraph in 52.212-5(d) survives by moving into 52.212-4(t). *Id.* at 59410.

The bigger change is to the CO's discretion. Under current FAR 12.301(e), a CO may add other FAR provisions and clauses to a commercial contract by addendum when their use squares with the limits in 12.302. (The preamble cites 12.301(d), but the discretionary authority sits in paragraph (e).) Proposed 12.205 flips that. A provision or clause prescribed elsewhere in the FAR goes into a commercial solicitation or contract only if its prescription expressly reaches commercial products or services. Anything else takes an individual or class deviation under Part 1. Proposed FAR 12.205(a)(3), (b)(2), (c)(2), 91 Fed. Reg. at 59425–26. The preamble says straight out that this shifts the job of sorting out which clauses apply from the contractor to the Government. *Id.* at 59410.

Commercial sellers should cheer, with a caveat. The whole benefit rides on the prescription tables, which are being rewritten across 12 separate rules. If a prescription that ought to reach commercial buys does not say so, the CO needs a deviation to include the clause, and what happens if no one gets one is an open question. Under *G. L. Christian & Assocs. v. U.S.*, 312 F.2d 418 (Ct. Cl. 1963), a clause required by a regulation having the force of law can be read into a contract that leaves it out, and the Federal Circuit has confined that doctrine to clauses expressing a significant or deeply rooted strand of procurement policy. *Gen. Eng'g & Mach. Works v. O'Keefe*, 991 F.2d 775 (Fed. Cir. 1993). But the doctrine has always worked on clauses a regulation required. Here the regulation would be telling the CO to leave the clause out. We would not want to be the test case in either direction.

Agencies that dislike the result will reach for class deviations, which the rule plainly contemplates, so watch agency deviation lists as closely as the FAR. Proposed 12.205(c)(1) also lets agencies waive or tailor any commercial provision or clause that does not implement a statute or executive order and that the CO finds out of step with commercial practice, with the head of the contracting activity signing individual waivers and the SPE signing class waivers. 91 Fed. Reg. at 59426. Expect fewer clauses at the baseline and more variety from agency to agency.

Part 12 also takes over the simplified procedures for commercial buys up to \$9 million (\$15 million for specified emergencies and contingencies) from current subpart 13.5, leaving Part 13 to noncommercial buys at or below the simplified acquisition threshold. *Id.* at 59409–10. The rule also builds out the Part 12 machinery for buying construction as a commercial service, which hinges on the Part 2 definition change proposed in FAR Case 2026-001. The CO would first have to find that the services are of a type sold competitively in substantial quantities in the commercial marketplace on catalog or market prices, and Part 36 would still apply. *Id.* at 59410.

A Cold Front Moves Through Part 15—Part 15 is where source selection would change most, and nearly all of it runs through definitions. Proposed FAR 15.001 defines a clarification as a communication that lets an offeror resolve minor or administrative errors or clarify parts of its proposal, without a chance to revise it. A negotiation is one that opens the door to a revision. The competitive range becomes the group of evaluated proposals the CO finds “best suited for negotiation,” not all of the most highly rated. And a deficiency becomes any part of a proposal that does not conform to a material term of the RFP, meaning a term that affects price, quantity, quality or delivery, or a prerequisite the RFP requires at submission. 91 Fed. Reg. at 59429. The current second prong, under which a pile of significant weaknesses can add up to a deficiency, is gone.

Clarifications get roomier. Under proposed 15.202(a)(2), they may address ambiguities, perceived deficiencies, weaknesses, errors, omissions and mistakes, the relevance of past performance, and adverse past performance the offeror has not had a chance to answer. The CO may ask for more information or documents so long as the answer does not change cost, price or another material element or cure a material omission. Clarifications may happen any time from receipt of proposals through award, whether or not the agency plans to negotiate, and clarifying with one offeror creates no duty to clarify with anyone else. *Id.* at 59436. The pre-competitive-range communications in FAR 15.306(b) go away, and with them the requirement

to let an offeror answer adverse past performance before it gets cut. That becomes optional.

Negotiations get lopsided on purpose. Proposed 15.204-2(b) still makes the CO negotiate with every offeror in the range and, at a minimum, raise each offeror's deficiencies or significant weaknesses. Then it allows more rounds with one offeror without owing the others anything. Proposed 15.204-2(c) also lets the CO drop a proposal any time it concludes the offeror is unlikely to win, a test that turns on the offeror's prospects rather than, as today, on whether it is still among the most highly rated. *Id.* at 59437. The counterweight is proposed 15.201(d), which keeps the familiar bar on conduct that favors one offeror over another or reveals a competitor's technical solution or price. *Id.* at 59436. And when negotiations end, everyone left in the range gets a common cutoff or an equal amount of time to revise. *Id.* at 59437.

The old "late is late" rule picks up a barn-door exception. Current FAR 15.208(b)(1) lets a late proposal in through three narrow doors, covering certain electronic submissions, proposals that were under the Government's control before the deadline, and the only proposal received. Proposed 15.106(b)(1) swaps all three for one test, whether taking it is in the Government's best interest and would not unduly delay the acquisition. 91 Fed. Reg. at 59432. The rule also formally recognizes highest-technically-rated-with-a-fair-and-reasonable-price as a best-value method and blesses phased evaluations and down-selects. *Id.* at 59412.

The statutes underneath have not budged. 41 USCA § 3703(a)(1) and 10 USCA § 3303(a)(1) still require discussions with all responsible offerors in the competitive range before an award after discussions, and subsection (b) of each still allows narrowing the range for efficiency. What moves is the scaffolding. Nearly 30 years of GAO and COFC decisions on meaningful, equal and non-misleading discussions rest on the text of FAR 15.306, which dates to the Part 15 Rewrite, 62 Fed. Reg. 51224 (Sept. 30, 1997). Much of that law will have to be re-argued from the statutes and the new definitions, and the preamble makes no secret that the Council views the clarification-discussion line as a protest generator. 91 Fed. Reg. at 59411–12.

We suspect the statutes will keep that line alive anyway, at least in one setting. When an agency awards without discussions, both statutes still allow only "discussions conducted for the purpose of minor clarification." 41 USCA § 3703(a)(2); 10 USCA § 3303(a)(2). A "clarification" under the new 15.202 that lets one offeror explain away a perceived deficiency, when nobody else got the same chance, will draw the argument that it was not minor and was really a discussion. The Council can redefine its own words, but not the statute's. Even so, the room for unequal treatment gets a good deal bigger, and the offeror left out in the cold will have a harder time showing prejudice.

The narrower definition of deficiency cuts both ways. Miss a material submission-time prerequisite and you are deficient, period. A stack of significant weaknesses, on the other hand, is no longer a deficiency just because it is a stack, though weaknesses and risk still get evaluated and can still cost you your place in the range. What changes is the label, the minimum the agency has to tell you in negotiations, and the theory of any later protest.

Fixed Price by Default, and Seats That Come and Go (Part 16)—The Part 16 rule writes EO 14402, Promoting Efficiency, Accountability, and Performance in Federal Contracting (April 30, 2026), into the regulation. Agencies have seen it before, in Part 16 deviation text the Council posted at the start of July with the same thresholds. Proposed 16.102(b) makes fixed-price types "the default and preferred contract types" and, where fixed price will not work for the whole job, tells the CO to look for a piece that can be priced that way. 91 Fed. Reg. at 59488.

The teeth are in proposed 16.104. A "covered contract or order" is one that is other than fixed price, is a firm-fixed-price level-of-effort term contract, or is a hybrid that includes either. Before using one at or above the applicable threshold, the head of the agency must approve a written justification with the 16.103 contract-type documentation and any determinations and findings the chosen type requires. The thresholds are \$100 million for the Department of Defense, \$35 million for NASA, \$25 million for the Department of Homeland Security and \$10 million for everybody else. A hybrid is

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covered when its other-than-fixed-price or level-of-effort portion alone hits the number, and a single-award IDIQ when its known and forecasted covered orders do. Approval can be delegated only to the chief acquisition officer or another non-career Senior Executive Service (SES) official. 91 Fed. Reg. at 59489.

The exceptions matter as much as the rule. Multiple-award contracts (MACs) are exempt at the base level, but task orders, delivery orders and BPAs under them are not. Contracts supporting an emergency, major disaster or contingency operation are exempt, as are research and development contracts and orders under Part 35 and pre-production development for a major system under Part 34. *Id.*

Cost-type and time and materials (T&M) work over these lines will need a signature from the agency head or a non-career SES delegate, and program offices will walk a long way around to avoid asking for one. Expect work once scoped cost-plus to come out fixed price with performance metrics, and expect to carry estimating risk you never carried before. The \$10 million line will catch a fair share of professional services orders, and since orders under MACs are covered even when the base contract is not, the MAC exception is narrower than it looks. There is some good news. The rule makes contract-type selection permissive rather than restrictive, so agencies may use types the FAR does not list when the type serves the Government's interest and no statute forbids it, and a new Alternate I to 52.216-1 lets offerors propose a different type. *Id.* at 59477. Proposed 16.202-2(b) also treats metered, consumption-based pricing in fixed-price units as firm fixed price. *Id.* at 59478, 59489.

The other Part 16 story is on-ramps and off-ramps. Proposed 16.604-4 lets a MAC provide for adding contractors and raising the ceiling during open seasons, and for removing a contractor for underperformance, for failing to actively participate in order competitions, for other reasons the contract defines, or at the contractor's own request. *Id.* at 59498. Where the ordering period runs past five years, proposed 16.604-5(h)(3) requires on-ramps unless the CO documents that they are not

in the Government's best interest. *Id.* at 59499. Two new alternates to 52.216-22 handle the exits. Under Alternate I either party may cancel on notice, and a contractor that cancels gives up reimbursement of the minimum guarantee. Under Alternate II the Government may cancel, while a contractor may only ask, and the CO can say no. The notice period can be set anywhere from 15 to 90 days. *Id.* at 59499, 59527.

Now add the end of the non-statutory five-year cap on contract duration in current FAR 17.204(e) (already waivable under agency procedures), replaced by an instruction to follow whatever statutory or regulatory limits apply. *Id.* at 59479. The result is longer vehicles, periodic open seasons and an express right to cull holders who stop competing. Some vehicles already run on-ramps, but a seat on a big IDIQ has been worth a lot because seats were hard to get and rarely lost, and under this design a seat looks more like a seasonal lease. Holding one while sitting out order competitions, which the rule names as a ground for removal, stops being a plan.

A few more odds and ends. BPAs could be set up under MACs that allow it, as under the schedules. Losing competitors for orders between the simplified acquisition threshold and \$7.5 million could ask in writing, within three days of the award notice, for a brief explanation. Clause 52.217-8, renamed Option to Extend, could extend ordering periods for supplies as well as services, and 52.217-8 and 52.217-9 would let the parties toll an option window that closes during a lapse in appropriations. And the incurred-cost submission in 52.216-7 gets trimmed, including the IRS Form 941 payroll reconciliation. *Id.* at 59478–80, 59501. The Council also asks about renumbering every FAR provision and clause into a new subpart 52.4. *Id.* at 59481. Whoever keeps your clause library should read that paragraph sitting down.

Part 27 and a Defense FAR Supplement Transplant—For companies with technology to protect, this is the one to read twice. FAR Case 2026-011 would delete FAR subpart 27.4, Rights in Data and Copyrights, along with its clauses, and replace them with coverage drawn from DFARS subparts 227.71 and 227.72. A rewritten 27.4 would govern noncommercial technical data and software,

and a new 27.5 would govern commercial. 91 Fed. Reg. at 59585–86, 59593. The clauses at 52.227-14 through 52.227-21 and 52.227-23 would give way to a new series starting at 52.227-26, *id.* at 59593, including a Validation of Asserted Restrictions clause at 52.227-35 and a Government right to review, verify, challenge and validate asserted restrictions at proposed 27.402-13. None of this was in the Part 27 model deviation, which kept the existing civilian framework.

The Council offers a number. The Government would hold unlimited rights in 11 categories of data and software, up from four under the current FAR. *Id.* at 59591. The list at proposed 27.402-5(a) runs from the expected (data related to items developed exclusively with Government funds, software developed the same way, and form, fit and function data) to the easy to miss (studies, analyses and test data the contract calls for, data needed for installation, operation, maintenance or training other than detailed manufacturing or process data, and the software documentation you are required to deliver). *Id.* at 59621. Do not read too much into the count, though. Today's 52.227-14(b)(1) already gives the Government unlimited rights in data first produced in performance and in all other delivered data that is not limited rights data or restricted computer software. The real shift is to a DFARS-style test that turns on who paid for the development.

That test cuts both ways. The FAR has no Government purpose rights category, and the Council says the gap often leads to uncertainty or inadequate data rights for mixed-funding development. 91 Fed. Reg. at 59591. Under proposed 27.402-5(b), mixed-funding data and software would carry Government purpose rights for a negotiable period, nominally five years, after which the Government's rights become unlimited. Source of funds would be decided at a granular level, so a privately funded component inside a Government-funded system can still be protected. *Id.* at 59621. Small Business Innovation Research and Small Business Technology Transfer data would get a 20-year protection period from award, followed by Government purpose rights that never expire, to track the SBA policy directive. *Id.* at 59586, 59591. The preamble calls that period “non-extendable,”

but proposed 27.403-2(a)(2)(i), which mirrors DFARS 227.7104-2, still lets the agency and the contractor negotiate a different period after award. *Id.* at 59628. As we read it, “non-extendable” means later contracts and redeliveries do not restart the clock, not that the parties are barred from agreeing to something longer.

The bill comes due in compliance. Civilian contractors would inherit, all at once, what defense contractors have lived with for decades, from pre-award assertions and prescribed legends to written marking procedures and supporting records under proposed 27.402-11, plus a formal challenge process. It also means a presumption that unmarked data came in with unlimited rights. There is a way back from a missed legend, but it is a long walk. Under proposed 27.402-10(b)(2), a contractor has six months from delivery (longer if the CO approves an extension) to get the CO a request for permission to add markings at its own expense, must show the omission was inadvertent, and must acknowledge in writing that the Government has no liability for any use or disclosure before the markings went on. *Id.* at 59624–25. The Council says requirements with no DFARS analogue, such as those in 52.227-17, Rights in Data-Special Works, drop out, *id.* at 59592, though proposed 27.405 still requires special works contracts to address the Government's rights. *Id.* at 59629.

Elsewhere in that rule, Part 9 would add noncompliance with the forthcoming FAR clause implementing EO 14398 on DEI-related discrimination to the causes for debarment and suspension at 9.406-2 and 9.407-2. *Id.* at 59585. Part 47 sheds 33 provisions and clauses with no stated change in substance. *Id.* at 59586, 59591.

What the Preambles Do Not Say—Three gaps belong in nearly every comment. None of the four preambles says when the Council expects final rules or when they would take effect. None addresses transition. Contracts awarded under the deviations carry clauses that sometimes differ materially from these proposals, and nothing says whether those contracts get modified, grandfathered or left alone. And none of the preambles compares the proposed text with the deviation text agencies have used for a year. The “You Said, We

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Did” page helps, but by its own description it highlights examples rather than every change. When we checked it in early October it listed no changes at all for Parts 9, 27 or 47, saying only that feedback on Parts 9 and 27 had been “sufficiently addressed in the policy.” Nothing about the DFARS transplant. It is not a redline.

One more word about the record. Each rule’s Regulatory Flexibility Act analysis recites that the rule may have a significant economic impact on a substantial number of small entities, then generally concludes the changes add little or no new burden. 91 Fed. Reg. at 59417–18, 59486, 59540–41, 59591–92. For Part 27, that sits awkwardly beside the Council’s admission that the rule alters compliance requirements, and small businesses with real implementation costs should put them in the docket. Each rule also has a severability clause, so do not count on one weak provision pulling the rest down with it.

Ten Practical Takeaways for Contractors—

1. Calendar Oct. 19, 2026 and pick your dockets this week. Comments that quote a proposed section and offer replacement language carry more weight than general objections.
2. If OFPP designates a required-use vehicle in your product or service line, that vehicle becomes the front door for federal buyers in that line. Get on it, or onto a holder’s team, before the final rule.
3. Read GSAR Case 2026-G501 alongside FAR Case 2026-003. Its docket closes October 22, and proposed 538.7102(f), which extends special ordering procedures down to the category and SIN level, deserves a comment of its own.
4. Build a clause map keyed to the new prescription tables and watch agency deviation lists. A clause an agency adds by deviation is a negotiating point. A statutory clause the tables leave out is a question to raise before award.
5. Rework your proposal compliance checklist around the new definition of deficiency. Missing a material submission-time prerequisite is now a deficiency by definition, and in an award without negotiations that can end your day.
6. Assume a competitor may get more negotiation rounds than you, and that you may be dropped from the range without further negotiation. Lead with your best offer, ask questions before closing, and write down every exchange the day it happens. If an agency “clarifies” away a competitor’s deficiency in a no-discussions award, look hard at whether that was really a discussion.
7. Run your pipeline against the EO 14402 thresholds at the order level, since orders under MACs are covered even though the base contract is not. Where cost-type or T&M work would cross the line, have a fixed-price or consumption-based structure ready, and price the risk you are taking on.
8. Expect open seasons in any multiple-award vehicle with an ordering period longer than five years, where the rule requires on-ramps unless the CO documents otherwise, and expect off-ramps in plenty of others. Compete for orders, and read any Alternate I or II to 52.216-22 closely, including what happens to your minimum guarantee if you are the one who walks.
9. If you sell technology to civilian agencies, start a DFARS-style data rights program now. Track development funding at the component level, build assertion tables, adopt written marking procedures and train the people who ship deliverables. The six-month fix for a missed legend comes with a written acknowledgment that the Government owes you nothing for whatever happened before you caught it.
10. Ask the Council, in every docket you file in, for an effective date, a transition rule for contracts awarded under the deviations, and a redline against the deviation text.

The harvest is not in yet. Still to come are FAR Cases 2026-004 (Parts 19, 22, 23 and 25), 2026-008

(Parts 11, 43, 45, 46 and 50), 2026-009 (Parts 30, 31 and 32) and 2026-012 (Parts 34, 42 and 48), and the small business, labor and cost principle coverage will likely draw a bigger crowd. But this second crop is where risk and revenue start to move. The gate closes October 19 for the FAR dockets and October 22 for GSA's.



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