

# FEDERAL CONTRACTS PERSPECTIVE

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## HURRICANES GENERATE INCREASED THRESHOLDS, EMERGENCY PROCUREMENT AUTHORITIES, EEO WAIVERS

A series of hurricanes hit the United States in late August and September – Harvey (Texas), Irma (Florida), and Maria (Puerto Rico), causing billions of dollars of damage and untold suffering. In response, the Trump administration has taken several actions to ameliorate the damage and suffering caused by the hurricanes, including implementing special emergency procurement authorities, making major disaster declarations, and exempting contractors involved in hurricane relief from preparing affirmative action programs.

### ■ Special Emergency Procurement

**Authorities:** Section 816 of the National Defense Authorization Act for Fiscal Year (FY) 2017 (Public Law 114-328), expands the special emergency procurement authorities to cover defense against or recovery from cyber attack, provide international disaster assistance under the Foreign Assistance Act of 1961, and support for an emergency or major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

An amendment to the Federal Acquisition Regulation (FAR) is being prepared to implement Section 816. However, William Clark, Civilian Agency Acquisition Council (CAAC) chair, sent a memorandum to all civilian agencies, stating “in the wake of the emergency and major disaster declaration made by the president for Hurricane Harvey, many agencies’ contracting officers may be called on to aid in response and/or recovery efforts. Thus, pending publication of the amendment to the FAR...agencies may authorize a class deviation to implement Pub. L. 114-328.” Attached to the memorandum is the text of the proposed FAR amendment, with additions and deletions identified (primarily the addition of definitions for “emergency” and “major disaster” in FAR 2.101, Definitions; amendments to FAR part 18, Emergency Acquisitions; and amendments to FAR subpart 26.2, Major Disaster or Emergency Assistance Activities).

In response to the CAAC memorandum, the Departments of Defense (DOD) and Energy (DOE) and the General Services Administration (GSA) issued class deviations and alerted their contracting offices of their existence for use in hurricane relief efforts.

■ **Major Disaster Declarations:** President Trump declared Hurricanes Harvey, Irma, and Maria major disasters (see the Federal Emergency Management Agency [FEMA] Disaster Declarations webpage at <https://www.fema.gov/disasters>). In doing so, the president invoked

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Section 816 of Public Law 114-328 and the CAAC class deviation (see above), thus increasing the micro-purchase threshold from \$3,500 to \$20,000 for hurricane relief contracts (the \$2,000 Davis-Bacon Act micro-purchase threshold and the \$2,500 Service Contract Act micro-purchase threshold are not changed), and increasing the simplified acquisition threshold from \$150,000 to \$750,000 (\$13,000,000 for commercial items) for hurricane relief contracts. DOE and GSA issued memoranda to their contracting offices alerting them of these declarations, and to remind them that the flexibilities in FAR subpart 18.2, Emergency Acquisition Flexibilities, are available for hurricane relief efforts.

■ **Exemption from Requirement to Prepare Written Affirmative Action Programs:** The Office of Federal Contract Compliance Programs (OFCCP) enforces Executive Order 11246 (EO 11246) (implemented by FAR subpart 22.8, Equal Employment Opportunity); Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) (implemented by FAR subpart 22.13, Equal Opportunity for Veterans); and Section 503 of the Rehabilitation Act (Section 503) (implemented by FAR subpart 22.14, Employment of Workers with Disabilities), all of which require that federal agencies include an equal employment opportunity (EEO) clause in all covered supply, service, and construction contracts.

Thomas Dowd, the deputy director of OFCCP, issued three memoranda to "all contracting agencies of the federal government" allowing them to exempt contractors providing hurricane relief from the requirement to develop and have on file affirmative action programs (for example, FAR 22.804, Affirmative Action Programs). The three memoranda, one for each hurricane, contain essentially the same provisions:

- At the end of FAR 52.222-26, Equal Opportunity, the following may be added: "Notwithstanding the provisions of this section, the contractor will not be obligated to develop the written affirmative action program required under the regulations implementing EO 11246."
- At the end of FAR 52.222-35, Equal Opportunity for Veterans, the following may be added: "Notwithstanding the provisions of this section, the contractor will not be obligated to develop the written affirmative action program required under the regulations implementing VEVRAA."
- At the end of FAR 52.222-36, Equal Opportunity for Workers with Disabilities, the following may be added: "Notwithstanding the provisions of this section, the contractor will not be obligated to develop the written affirmative action program required under the regulations implementing Section 503 of the Rehabilitation Act of 1973, as amended."

However, contractors providing hurricane relief will continue to be subject to the nondiscrimination requirements of EO 11246, VEVRAA, and Section 503, and to the following FAR requirements:

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- Posting of the “Equal Opportunity is the Law” notice under all three laws;
- Recordkeeping and record retention requirements under all three laws; and
- Employment listings with the appropriate employment service delivery system as required under VEVRAA.

The Hurricane Harvey memorandum is in effect from September 1, 2017, to December 1, 2017; the Hurricane Irma memorandum is in effect from September 8, 2017, to December 8, 2017; and the Hurricane Maria memorandum is in effect from September 21, 2017, to December 21, 2017 “subject to an extension should special circumstances in the national interest so require.”

In response to the OFCCP memoranda, DOD and DOE issued memoranda alerting their contracting offices of the OFCCP exemption.

## **FEDERAL MINIMUM WAGE INCREASED TO \$10.35/HOUR FOR 2018**

The Department of Labor has announced that the applicable minimum wage rate to be paid to workers performing work on or in connection with federal contracts covered by Executive Order 13658, beginning January 1, 2018, is increased from \$10.20 to \$10.35 per hour.

Executive Order 13658, Establishing a Minimum Wage for Contractors, was signed by President Obama on February 12, 2014 (see the March 2014 *Federal Contracts Perspective* article “President Issues Executive Order Mandating \$10.10/Hour Minimum Wage”), which raised the hourly minimum wage paid by contractors to workers performing work on covered federal contracts to \$10.10 per hour, beginning January 1, 2015. Further, the executive order stated that the Department of Labor (DOL) would adjust the minimum wage annually (beginning January 1, 2016) to reflect inflation during the year as reflected in the Consumer Price Index (CPI) for Urban Wage Earners and Clerical Workers.

In 2015, the DOL determined that the CPI increased by 0.345% in 2015, so the minimum wage would be \$10.15 per hour beginning January 1, 2016 (see the October 2015 *Federal Contracts Perspective* article “Federal Minimum Wage Increased to \$10.15/Hour for 2016”).

In 2016, the DOL determined that the CPI increased by 0.278% in 2016, so the minimum wage would be \$10.20 per hour beginning January 1, 2017 (see the October 2016 *Federal Contracts Perspective* article “Federal Minimum Wage Increased to \$10.20/Hour for 2017”).

Now, the DOL has determined that the CPI index increased by 1.691% in 2017, and this produces a minimum wage of \$10.35 per hour, which will go into effect on January 1, 2018.

The required minimum cash wage that must be paid to tipped employees performing work on or in connection with covered contracts is increased from \$6.80 to \$7.25 per hour (\$4.90 per hour was the original minimum cash wage for tipped employees established in the executive order).

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## SBA PROPOSES NONMANUFACTURER RULE WAIVER

The Small Business Administration (SBA) is proposing to issue a nonmanufacturer rule waiver for positive airway pressure devices and supplies manufacturing under Product Service Code (PSC) 6515, Medical and Surgical Instruments, Equipment, and Supplies, North American Industry Classification System (NAICS) codes 333912, Surgical and Medical Instrument Manufacturing, and NAICS code 339113, Surgical Appliance and Supplies Manufacturing.

SBA is inviting the public to comment on this proposed waiver or to provide information on potential small business sources on any small business manufacturers of this class of products that are available to participate in the federal market by October 18, 2017, to the Federal Rulemaking Portal at <https://www.regulations.gov> under Docket ID SBA-2017-0006.

**EDITOR'S NOTE:** Public Law 100-656, enacted November 15, 1988, requires those with federal contracts that are set-aside for small businesses or awarded through the 8(a) program to provide the product of a small business manufacturer or processor if the recipient is not the actual manufacturer or processor (see paragraph (f) of FAR 19.102, Size Standards). This is called the “nonmanufacturer rule.” However, SBA may waive this requirement if there are no small business manufacturers or processors.

The SBA regulation on the nonmanufacturer rule is in Title 13 of the Code of Federal Regulations (CFR), Business and Credit Administration; part 121, Small Business Size Standards; under paragraph (b) of 121.406, How does a small business concern qualify to provide manufactured products or other supply items under a small business set-aside, service-disabled veteran-owned small business set-aside, WOSB [women-owned small business] or EDWOSB [economically disadvantaged women-owned small business] set-aside, or 8(a) contract? The SBA regulation on the waiver of the nonmanufacturer rule is 13 CFR 121.1202, When Will a Waiver of the Nonmanufacturer Rule Be Granted for a Class of Products? A complete list of products for which the nonmanufacturer rule has been waived is available at <https://www.sba.gov/contracting/contracting-officials/non-manufacturer-rule/class-waivers>.

## SBA ADOPTS NAICS 2017 FOR SIZE STANDARDS

The SBA is adopting, without change, the Office of Management and Budget's (OMB) North American Industry Classification System (NAICS) revision for 2017 (NAICS 2017) into its table of small business size standards effective October 1, 2017, the beginning of the 2018 fiscal year.

NAICS 2017 created 21 new industries by reclassifying, combining, or splitting 29 existing industries under changes made to NAICS in 2012 (NAICS 2012) (see the September 2016 *Federal Contracts Perspective* article “OMB Issues 2017 Version of the NAICS”). Most of the changes involved industries in petroleum and natural gas extraction, mining, major household appliance manufacturing, electronic shopping and mail-order houses, and research and development in nanotechnology.

Of the 21 new industries, five were created by merging two or more of thirteen NAICS 2012 industries, while three were created by combining part of one industry with another industry. Three new industries were created by splitting two industries to two parts each with one part of each industry defined as a separate industry and other parts of the two industries combined to form a separate new industry. One new industry was formed by designating part of one industry

as a separate industry. OMB also changed 6-digit NAICS codes for eight industries without changing their definitions and titles and amended the title of one industry without changing its 6-digit code.

These 21 new industries require small business size standards. SBA's proposed size standards for these 21 new industries (see the May 2017 *Federal Contracts Perspective* article "SBA Proposes to Adopt NAICS 2017 for Size Standards") would increase the size standards for six of the NAICS 2012 industries and part of one industry, decrease to size standards for two, change the size standards measure from average annual receipts to number of employees for one, and leave unchanged the size standards for twenty industries and part of one industry.

Three respondents submitted comments on the proposed size standards. Two of the respondents submitted comments on NAICS codes that were not changed in the NAICS 2017 (so were outside the scope of the proposed rule), and the other respondent suggested revising the size standard for one industry, but that suggestion was not adopted. Therefore, SBA has adopted, without changes, the proposed size standards for the new industries created by NAICS 2017.

## DOD ISSUES FOUR ADDITIONAL CLASS DEVIATIONS

Besides the two deviations the Department of Defense (DOD) issued pertaining to hurricane relief (the deviation on OFCCP waiver and the deviation on special emergency procurement authorities – see the article above), DOD issued four additional class deviations on miscellaneous issues. In addition, DOD issued guidance on the implementation of National Institute of Standards and Technology (NIST) Special Publication (SP) 800-171, Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations.

■ **Products and Services Produced in Countries Along a Major Supply Route to Afghanistan:** This deviation implements Section 1212 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328) by extending from December 31, 2016, to December 31, 2018, the authority for contracting officers to provide a preference for products (other than small arms) or services (including construction) from Afghanistan, a Central Asian state (defined as "the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan, or the Republic of Uzbekistan"); or (2) limiting competition to products or services from Afghanistan, a Central Asian state, Pakistan, or the South Caucasus.

For more on this authority, see the January 2016 *Federal Contracts Perspective* article "DOD Addresses Acquisition Policies Outside the U.S."

■ **Independent Research and Development Technical Interchange:** This deviation prohibits contracting officers from requiring major contractors to engage or document a technical interchange as part of the criteria for determining whether a contractor's annual independent research and development (IR&D) costs are allowable.

Paragraph (c)(iii)(C)(4) of DFARS 231.205-18, Independent Research and Development and Bid and Proposal Costs, applies to IR&D projects initiated in the contractor's FY 2017 and later. It requires a major contractor (as defined in DFARS 231.205-18(a)(iii)) to: (1) engage in a technical interchange with a technical or operational DOD government employee prior to the generation of IR&D costs; and (2) document the technical interchange on the online input form for IR&D projects reported to the Defense Technical Information Center.

The deviation removes DFARS 231.205-18(c)(iii)(C)(4) from the criteria a contracting officer must consider when determining the allowability of a major contractor's IR&D costs.

■ **Products and Services from the African Host Nation Djibouti:** This deviation implements Section 899A of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328), which provides enhanced authority to limit competition to products or services from a “host nation” (“a nation that allows the Armed Forces and supplies of the United States to be located on, to operate in, or to be transported through its territory”), or provide a preference for products or services from a host nation or a covered African country (“a country in Africa that has signed a long-term agreement with the United States related to the basing or operational needs of the United States Armed Forces”).

This deviation supersedes the previous deviation which required contracting officers to limit competition to, or provide a preference for, products or services of Djibouti before considering other sourcing options for procurements in support of DOD operations in the Republic of Djibouti (see the March 2016 *Federal Contracts Perspective* article “DFARS Revised to Conform to FAR PIINs”). This deviation expands the contracting officers’ authority to cover host nations and covered African countries. The deviation specifically identifies Djibouti as a “covered African country,” and provides a contract provision and two clauses that are specific to Djibouti: DFARS 252.225-7985, Preference for Products or Services from the African Host Nation – Djibouti (DEVIATION 2017-O0009); DFARS 252.225-7986, Requirement for Products or Services from the African Host Nation – Djibouti (DEVIATION 2017-O0009); and DFARS 252.225-7977, Acquisition Restricted to Products or Services from the African Host Nation – Djibouti (DEVIATION 2017-O0009). No other African nation is addressed in the deviation.

■ **Contractor Personnel Performing in U.S. Central Command Area of Responsibility:** This deviation supersedes Class Deviation 2015-O0009, which required the use of DFARS 252.225-7995, Contractor Personnel Performing in the United States Central Command Area of Responsibility (DEVIATION 2015-O0009), instead of DFARS 252.225-7040, Contractor Personnel Supporting U.S. Armed Forces Deployed Outside the United States, in solicitations and contracts that require contractor personnel to perform in the United States Central Command (USCENTCOM) Area of Responsibility (AOR).

This deviation requires the use of DFARS 252.225-7995, Contractor Personnel Performing in the United States Central Command Area of Responsibility (DEVIATION 2017-O0004), which differs from the earlier deviation in that it includes changes in paragraph (g) to require contractors to account for all contractor personnel in the Synchronized Predeployment and Operations Tracker (SPOT) regardless of contract value or length of performance (the title of paragraph (g) is changed from “Personnel Data” to “Contractor Accountability and Personnel Data”).

For more on the superseded class deviation, see the February 2015 *Federal Contracts Perspective* article “Defense FAR Supplement Changes Abound.”

■ **Safeguarding Covered Defense Information and Cyber Incident Reporting:** This guidance is for contracting officers in anticipation of the December 31, 2017, deadline for contractors to implement National Institute of Standards and Technology (NIST) Special Publication (SP) 800-171, Protecting Controlled Unclassified Information in Nonfederal

Information Systems and Organizations, to safeguard covered defense information that is processed or stored on their internal information system or network. This requirement is contained in DFARS 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting, and the deadline is in paragraph (b)(2)(ii)(A) of the clause (for more on this requirement, see the November 2016 *Federal Contracts Perspective* article “DOD Finalizes Network Penetration Reporting Rule”).

The guidance provides a brief overview of NIST 800-171 requirements; NIST 800-171 implementation requirements; documentation of a contractor’s implementation; the role of the system security plan and plans of action in contract formulation, administration, and source selection; and additional resources for the contracting officer.

## **NASA PROPOSES REVISED INVOICE SUBMISSION PROCESS**

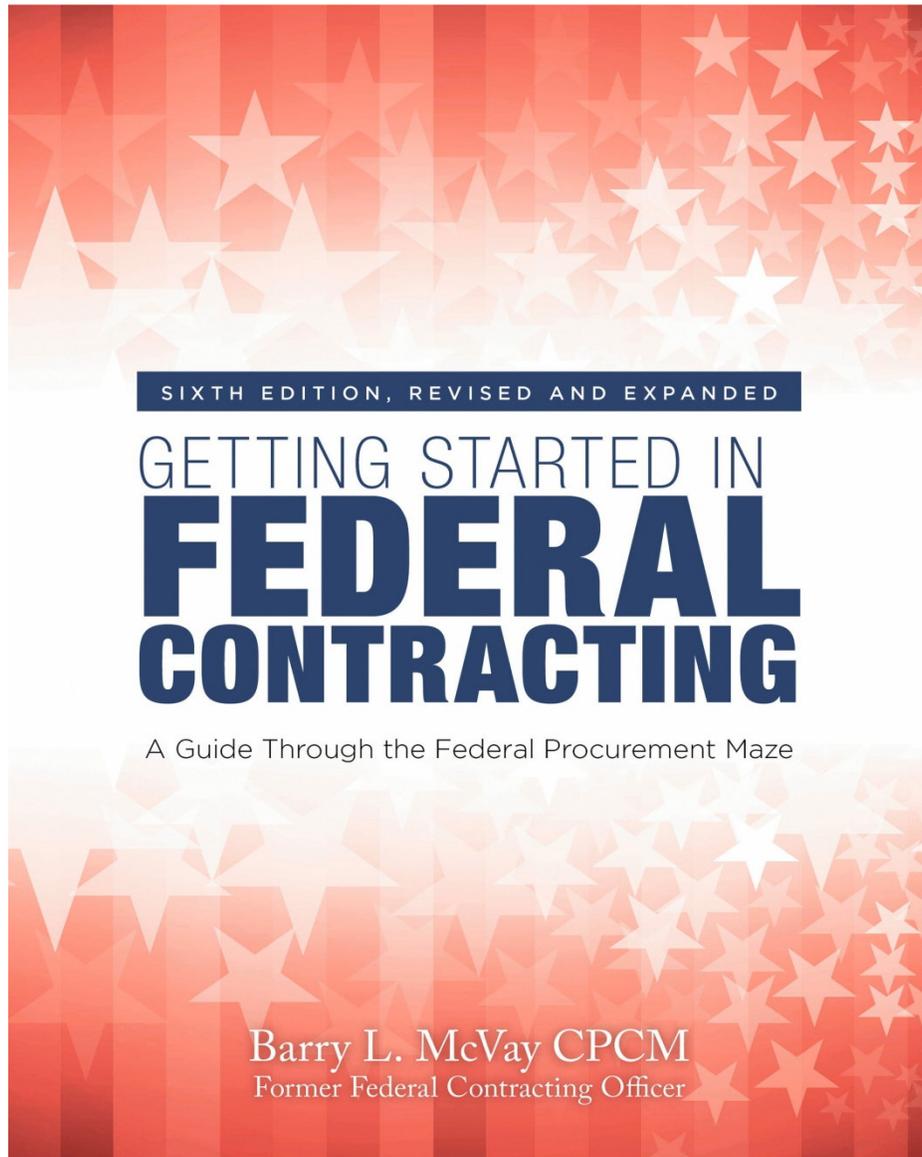
The National Aeronautics and Space Administration (NASA) is proposing to make revisions to its voucher and invoice submittal and payment process to comply with the Office of Management and Budget (OMB) memorandum that directed federal agencies to transition to electronic invoicing for appropriate federal procurements by the end of Fiscal Year (FY) 2018 (for more on the OMB memorandum, see the August 2015 *Federal Contracts Perspective* article “Agencies to Convert to All-Electronic Invoicing”).

In September 2016, NASA revised its voucher submission and payment process to electronically process cost-type vouchers under cost-reimbursement type contracts. This proposed rule would revise NASA’s submission and payment process to have invoices for fixed-price contracts submitted electronically. Therefore, NASA proposes to revise the following sections of the NASA FAR Supplement (NFS):

- Revise NFS 1852.216-80, Task Ordering Procedure, by adding an Alternate II for use with fixed-price contracts. Alternate II would list the required information for progress reports: (1) contract number, task order number, and date of the order; (2) price and billed amounts to date for each task order; (3) significant issues/problems associated with the task order; (4) status of all task orders issued under the contract; and (5) invoice number. In conjunction with this proposed change, the prescription for NFS 1852.216-80 in NFS 1816.506-70, NASA Contract Clause, would be revised to require the inclusion of Alternate II for fixed-price contracts.
- Revise NFS 1852.232-80, Submission of Vouchers/Invoices for Payment, by revising paragraph (c) to add the information required for fixed-price invoices (current paragraph (c) addresses information required for cost-reimbursement vouchers); and revising paragraph (d), which currently addresses conditions under which a contracting officer may authorize a non-electronic payment request for a cost-type voucher, to extend the requirements to non-electronic payment requests for fixed-price invoices.

Comments on this proposed rule must be submitted by November 17, 2017, identified as “NFS Case 2017-N014,” by any of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; (2) email: [John.J.Lopez@nasa.gov](mailto:John.J.Lopez@nasa.gov); (3) fax: 202-358-3082; or (4) mail: National Aeronautics and Space Administration, Headquarters, Office of Procurement, Contract and Grant Policy Division, Attn: John J. López, LP-011, 300 E Street SW, Washington, DC 20546-0001.

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