

# FEDERAL CONTRACTS PERSPECTIVE

Federal Acquisition Developments, Guidance, and Opinions

## GSA ANNOUNCES TRANSFORMATION OF MULTIPLE AWARDS SCHEDULES

The General Services Administration (GSA) has announced that it will modernize federal acquisition by consolidating the agency’s 24 Multiple Award Schedules (MAS) into one single schedule for products and services. “A single schedule for products and services will make it easier for customers to find and purchase the solutions they need to meet their respective missions,” said GSA’s Federal Acquisition Service Commissioner Alan Thomas. “It will also provide a single entry point to MAS with consistent practices applied across the program and save vendors from the burden of managing contracts on multiple schedules.”

CONTENTS	
GSA to Transform Multiple Awards Schedules .....	1
FY 2018 Spending Up 14% to \$491 Billion.....	3
Task Order Ombudsman Identification Proposed.....	4
Number of Protests Steady in FY 2018 .....	5
GSA Proposes Contractor Manager as Constructor.....	5
DOD Issues Deviation on Use of Fixed-Price Contracts ....	9

The transformation of the MAS (also referred to as the GSA Schedules and Federal Supply Schedules [FSS]) is part of GSA’s strategy to make the government buying and selling experience easy, efficient, and modern. This transformation is scheduled to begin in 2020, giving GSA a year to prepare, and expected to take two years to complete.

Under the MAS, GSA establishes long-term, governmentwide contracts with commercial firms offering more than 10 million commercial supplies and services that federal, state, and local agencies order directly from GSA Schedule contractors, or through the GSA Advantage!® online shopping and ordering system. Approximately \$31 billion dollars is spent through MAS each year.

The 24 MAS schedules being consolidated are:

- 00CORP The Professional Services Schedule (PSS)
- 03FAC Facilities Maintenance and Management
- 23 V Automotive Superstore
- 36 The Office, Imaging and Document Solution
- 48 Transportation, Delivery and Relocation Services
- 51 V Hardware Superstore
- 56 Building and Building Materials/Industrial Services and Supplies
- 58 I Professional Audio/Video Telemetry/Tracking, Recording/Reproducing and Signal Data Solutions
- 599 Travel Services Solutions
- 66 Scientific Equipment and Services

- 67 Photographic Equipment – Cameras, Photographic Printers and Related Supplies & Services (Digital And Film-Based)
- 70 General Purpose Commercial Information Technology Equipment, Software, and Services
- 71 Furniture
- 71 II K Comprehensive Furniture Management Services (CFMS)
- 72 Furnishings and Floor Coverings
- 73 Food Service, Hospitality, Cleaning Equipment and Supplies, Chemicals and Services
- 736 Temporary Administrative and Professional Staffing (TAPS)
- 738 X Human Resources & Equal Employment Opportunity Services
- 75 Office Products/Supplies and Services and New Products/Technology
- 751 Leasing of Automobiles and Light Trucks
- 76 Publication Media
- 78 Sports, Promotional, Outdoor, Recreation, Trophies and Signs (SPORTS)
- 81 I B Shipping, Packaging and Packing Supplies
- 84 Total Solutions for Law Enforcement, Security, Facilities Management, Fire, Rescue, Clothing, Marine Craft and Emergency/Disaster Response

A commonly cited problem is that each schedule has different terms and conditions, making it difficult for contractors with products and services in different MAS schedules, such as a contractor that sells information technology software under Schedule 70 and information technology professional services under Schedule 00CORP. Another problem is that many products and services don't fit neatly into a single schedule, and this can lead to similar products or services being placed in different schedules.

“Reforming our schedules will improve customer service, make it easier for small businesses to access the schedules program, reduce duplication for all our vendors, and allows GSA’s workforce to focus on delivering solutions,” said GSA Administrator Emily Murphy. “This is an important step in addressing feedback we’ve received from our government and business partners.”

“A single schedule for products and services will make it easier for customers to find and purchase the solutions they need to meet their respective missions,” said GSA’s Federal Acquisition Service Commissioner Alan Thomas. “It will also provide a single entry point to MAS with consistent practices applied across the program and save vendors from the burden of managing contracts on multiple schedules.”

Industry partners interested in learning more about how GSA is modernizing acquisition through MAS consolidation can attend GSA’s next industry day at GSA’s headquarters on December 12 from 9:30 am – 2:45 pm EST at the GSA Auditorium, GSA Headquarters, 1800 F St. NW, Washington, DC 20405. For more information, go to <https://interact.gsa.gov/blog/save-date-federal-marketplace-initiative-fmp-industry-day-0>.

Vivina McVay, Editor-in Chief

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## FY 2018 SPENDING UP 14% TO \$491 BILLION

Federal contracting spending in Fiscal Year (FY) 2018 increased to \$491 billion, up 14.1% from the \$430 billion spending level in FY 2017. The FY 2018 budget was the first one prepared by the Trump Administration.

The big dollar increase winner was the Department of Defense (DOD), which saw its contract spending increase 21%, from \$243.5 billion to \$295.4 billion. The biggest percentage increase winner was the Office of Personnel Management, which saw its spending increase 76.5%, from \$782 million to \$1.4 billion. The biggest dollar decrease loser was the Department of the Treasury, which saw its spending decrease 23%, from \$6.1 billion to \$4.7 billion. The biggest percentage decrease loser was the Department of Housing and Urban Development, which saw its spending decrease 39%, from \$1.4 billion to \$835 million.

The following are the largest agencies' FY 2018 spending versus their FY 2017 spending:

Department/Agency	FY 2018 Spending	FY 2017 Spending
Defense	\$295,403,118,665	\$243,486,617,473
Energy	31,958,842,130	28,949,640,886
Veterans Affairs	26,924,456,521	25,824,127,070
Health and Human Services	24,586,021,867	24,775,365,872
Homeland Security	18,123,880,957	16,096,022,287
National Aeronautics and Space Admin	18,033,428,656	17,257,343,033
General Services Administration	14,003,980,236	11,474,929,496
State	9,893,013,300	10,928,084,404
Justice	7,683,708,029	7,538,075,848
Transportation	6,946,821,194	6,205,561,091
Agriculture	6,326,411,972	5,295,094,732
Agency for International Development	4,882,584,499	5,273,426,265
Treasury	4,693,400,530	6,078,523,376
Interior	4,882,584,499	4,908,719,914
Commerce	3,768,316,761	3,196,724,004
Education	2,737,211,594	2,539,589,526
Labor	1,907,904,926	2,086,854,528
Social Security Administration	1,637,973,432	1,563,696,601
Office of Personnel Management	1,380,642,614	782,210,321
Environmental Protection Agency	1,244,720,565	1,275,068,568
Housing and Urban Development	835,461,772	1,378,798,056
National Science Foundation	466,314,327	466,267,212
Securities and Exchange Commission	421,157,850	384,578,333
Pension Benefit Guaranty Corporation	309,160,080	304,823,366
Smithsonian Institution	255,741,459	251,990,193
Nuclear Regulatory Commission	198,950,297	196,744,318
Broadcasting Board of Governors	175,583,557	174,998,321
National Archives and Record Admin	167,738,741	154,469,260
Small Business Administration	152,524,691	116,413,843
Others	<u>1,236,905,551</u>	<u>1,145,815,036</u>
<b>TOTAL</b>	<b>\$490,722,348,755</b>	<b>\$430,110,573,233</b>

## TASK/DELIVERY ORDER OMBUDSMAN IDENTIFICATION PROPOSED

A new rule has been proposed that would add a new clause for use in multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contracts that provides the responsibilities and contact information for the task- and delivery-order ombudsman.

Paragraph (f) of Title 10 of the U.S. Code, Section 2304c (10 USC 2304c), Task and Delivery Order Contracts: Orders, and paragraph (g) of 41 USC 4106, Orders, require agencies to appoint or designate a task- and delivery-order ombudsman who is responsible for reviewing complaints from offerors and contractors, and ensuring that all of the offerors are afforded a fair opportunity to be considered for the award of an order. However, neither paragraph explains how agencies are to make offerors aware of how to contact this official.

To implement the statutory requirement in 10 USC 2304c and 41 USC 4106, paragraph (a)(4)(v) of Federal Acquisition Regulation (FAR) 16.504, Indefinite-Quantity Contracts, specifies that “a solicitation and contract for an indefinite-quantity must...include the name, address, telephone number, facsimile number, and e-mail address of the agency task and delivery order ombudsman (see [FAR] 16.505(b)(8)) if multiple awards may be made...”

Paragraph (b)(8) of FAR 16.505, Ordering, specifies that “the head of the agency shall designate a task-order and delivery-order ombudsman. The ombudsman must review complaints from contractors and ensure they are afforded a fair opportunity to be considered, consistent with the procedures in the contract. The ombudsman must be a senior agency official who is independent of the contracting officer and may be the agency’s advocate for competition.”

In response to the requirement in FAR 16.504(a)(4)(v), several agencies have created agency-level contract clauses that provide this information to contractors. Others have not, leaving it to their contracting officers to provide this information as they see fit.

This rule would add a standardized clause, FAR 52.216-XX, Task-Order and Delivery-Order Ombudsman, for use by all agencies to provide the necessary information to contractors.

Paragraph (a) of the proposed clause would notify the contractor that “the agency has designated the following task-order and delivery-order ombudsman for this contract. The ombudsman must review complaints from the contractor concerning all task- and delivery-order actions for this contract and ensure the contractor is afforded a fair opportunity for consideration in the award of task- or delivery-orders, consistent with the procedures in the contract.” This paragraph would be followed by a blank line for the “contracting officer to insert name, address, telephone number, and email address for the agency ombudsman or provide the URL address where this information may be found.”

Paragraph (b) would provide the following direction to offerors and contractors: “Before consulting with the ombudsman, the contractor is encouraged to first address complaints with the contracting officer for resolution. When requested, the ombudsman may keep the identity of the concerned party or entity confidential, unless prohibited by law or agency procedure.”

Finally, paragraph (c) would warn the offeror or contractor that “consulting an ombudsman does not alter or postpone the timeline for any other process (*e.g.*, protests).”

In addition, this rule proposes an Alternate I, which would consist of a paragraph (d) that would be added to FAR 52.216-XX for contracts used by multiple agencies. This paragraph (d) would explain that for contracts used by multiple agencies, “complaints from contractors concerning orders placed under contracts used by multiple agencies are primarily reviewed by the task-order and delivery-order ombudsman for the ordering agency,” and provides the offeror with the contact information.

Finally, FAR 16.504(a)(4)(v) would be removed, and the prescription for FAR 52.216-XX and its Alternate I would be added as paragraph (j) of FAR 16.506, Solicitation Provisions and Contract Clauses.

Comments on this proposed rule must be submitted no later than December 31, 2018, identified as FAR Case 2017-020, by either of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; or (2) mail: General Services Administration, Regulatory-Secretariat Division (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd Floor, Washington, DC 20405.

## **NUMBER OF PROTESTS STEADY IN FY 2018**

The Government Accountability Office (GAO) issued its annual letter on bid protests to various Congressional committees, in which it reported that 2,607 protests, cost claims, and requests for reconsideration were filed in Fiscal Year (FY) 2018, a less than 0.5% increase from the 2,596 filed in FY 2017. The number of FY 2016 cases – 2,789 – was the largest number of protests filed since FY 1995. Of the 2,607 FY 2018 cases, 2,474 were protests against contract award, 55 were cost claims, and 78 were requests for reconsideration.

In addition, GAO closed 2,642 cases in FY 2018, a 1% decrease from the 2,672 cases closed in FY 2017. Of these 2,642 closed cases, 356 were attributable to GAO's bid protest jurisdiction over task or delivery orders placed under indefinite-delivery/indefinite-quantity (IDIQ) contracts.

The FY 2018 protest sustain rate (the number of GAO decisions in favor of the protestor versus the number of all protests) was 15%, compared to the 17% sustain rate for FY 2017 and 23% sustain rate for FY 2016. The 44% effectiveness rate (the protestor obtained some form of relief from the agency either as a result of voluntary corrective action by the agency or a GAO decision sustaining the protest) was lower than the 47% effectiveness rate for FY 2017 and the 46% effectiveness rate for FY 2016.

GAO's review of its decisions shows the most prevalent reasons for sustaining protests during FY 2018 were: (1) unreasonable technical evaluation; (2) unreasonable cost or price evaluation; and (3) flawed selection decision. In comparison, the most prevalent reasons for sustaining protests during FY 2017 were: (1) unreasonable technical evaluation; (2) unreasonable past performance evaluation; (3) unreasonable cost or price evaluation; (4) inadequate documentation of the record; and (5) flawed selection decision.

## **GSA PROPOSES CONSTRUCTION MANAGER AS CONSTRUCTOR**

The General Services Administration (GSA) is proposing a rule that would incorporate an additional project delivery method for construction – construction manager as constructor (CMc) – into the GSA Acquisition Regulation (GSAR) by adding GSAR subpart 536.71, Construction-Manager-as-Constructor Contracting, and corresponding clauses.

CMc is a project management and contracting technique that is one of three predominant methods used for acquiring construction services by GSA – the others are traditional (design-bid-build) and design-build. The CMc technique used by GSA follows industry best practices that have been commonly used in the private sector for many years, and has worked well for numerous GSA construction procurements. There is ample guidance on traditional and design-

build procurements in the FAR but there is no guidance on CMc procurement. GSA has implemented CMc through internal Public Building Services policies. Incorporating CMc into the GSAR will provide centralized guidance that enables industry to understand and execute CMc construction contracts and ensure consistent application of construction project principles across GSA.

The proposed GSAR changes would include the following:

- To GSAR 536.102, Definitions, would be added the following definition for “Construction-Manager-as-Constructor”: “the project delivery method where design and construction are contracted concurrently through two separate contracts and two separate contractors. Unlike the traditional design-bid-build delivery method, under the CMc delivery method, the government awards a separate contract to a designer (*i.e.*, architect-engineer contractor) and to a construction contractor (*i.e.*, CMc contractor) prior to the completion of the design documents. The government retains the CMc contractor during design to work with the architect-engineer contractor to provide constructability reviews and cost estimating validation. The CMc contract includes design phase services at a firm-fixed-price and an option for construction at a guaranteed maximum price.”

- GSAR subpart 536.5, Contract Clauses

- GSAR 536.515, Schedules for Construction Contracts, would be added. It would prescribe a new clause, GSAR 552.236-15, Schedules for Construction Contracts.
- GSAR 536.521, Specifications and Drawings for Construction, would be added. It would prescribe GSAR 552.236-21, Specifications and Drawings for Construction.
- GSAR 536.570-1, Definitions, and the clause it prescribes, GSAR 552.236-70, Definitions, would be removed. GSAR 536.570-2, Authorities and Limitations, would be redesignated as GSAR 536.570-1, and the clause it prescribes, GSAR 552.236-71, Authorities and Limitations, would be redesignated as GSAR 552.236-70.
- GSAR 536.571, Contractor Responsibilities, would be added. It would prescribe GSAR 552.236-71, Contractor Responsibilities, which would be a GSA-unique clause that addresses requirements for the different project delivery methods. The clause does not have a threshold for use or restriction on the contract type.

There are two alternates of the clause, and these do not have thresholds for use: Alternate I replaces paragraphs (d), (e), (f), and (g) of the base clause to provide guidance specific to a design-build construction project; and Alternate II replaces paragraphs (d), (e), (f), and (g) of the base clause and adds paragraphs (h), (i), and (j) to the base clause to provide guidance specific to a CMc project.

- GSAR subpart 536.71, Construction-Manager-as-Constructor Contracting, would be added.

- GSAR 536.7102, Definitions, would include the following definitions: “CMc contingency allowance” (“an allowance for the exclusive use of the construction contractor to cover reimbursable costs during construction that are not the basis of a

change order”); “early work package” (“a set of construction activities that can be clearly defined and separately performed from the remainder of the construction work”); “estimated cost of work” (“the estimated direct cost of the construction work”); “fee for the construction” (“a fixed amount established in the construction contract for all of the contractor's indirect costs, including overhead and profit, for the construction work”); and “guaranteed maximum price” (“the ceiling price described in FAR 16.403-2 [Fixed-Price Incentive (Successive Targets) Contracts]”).

- GSAR 536.7103, Construction Contract Solicitation Procedures, would provide policies related to evaluation factors, price realism, total evaluated price, and release of the government estimate.
- GSAR 536.7104, Construction Contract Award, would require the contracting officer to “use the SF [Standard Form] 1442 [Solicitation, Offer, and Award (Construction, Alteration or Repair)] to identify the services or items to be acquired as separately identified line items on a unit price or lump sum basis including the design phase services, the construction work GMP [guaranteed maximum price] option(s), and any other work not included in the previously identified items.”
- GSAR 536.7105, Construction Contract Administration, would describe the responsibilities of the architect-engineering contractor and the construction contractor (GSAR 536.7105-1), and would provide policies on guaranteed maximum price (GSAR 536.7105-2), accounting and audit requirements (GSAR 536.7105-3), value engineering (GSAR 536.7105-4), shared savings incentive (GSAR 536.7105-5), allowances (GSAR 536.7105-6), early work packages (GSAR 536.7105-7), and conversion to a firm-fixed-price contract (GSAR 536.7105-8).
- GSAR 536.7106, Construction Contract Closeout, would require the contracting officer to “ensure that the construction contractor’s proposal for final settlement is accurate and reliable in accordance with the open book accounting practices of the contract; [and] obtain an independent audit of the construction contractor’s costs.” These requirements would not apply if the contract has been converted to a firm-fixed-price contract.
- GSAR 536.7107, Contract Clauses, would prescribe the inclusion of the following new clauses in CMC solicitations and contracts: GSAR 552.236-79, Construction-Manager-As-Constructor, in place of FAR 52.216-17 Incentive Price Revision – Successive Targets; and GSAR 552.236-80, Accounting Records and Progress Payments, in place of FAR 52.230-2 Cost Accounting Standards, FAR 52.230-3 Disclosure and Consistency of Cost Accounting Practices, and FAR 52.230-6 Administration of Cost Accounting Standards.
- GSAR 552.236-15, Schedules for Construction Contracts, would be added to supplement FAR 52.236-15, Schedules for Construction Contracts, by addressing milestone events, cost breakdown, and requirements for different project delivery methods. While FAR 52.236-15 is required to be included in solicitations and contracts when a fixed-price construction contract exceeding the simplified acquisition threshold (\$250,000) is contemplated, there

would be no threshold for the use of GSAR 552.236-15 or restriction on the contract type (“insert the clause...in solicitations and contracts if construction, dismantling, demolition, or removal of improvements is contemplated”), thus making it more inclusive than FAR 52.236-15.

The base clause provides guidance for any type of construction project. There are three alternates of the clause, and these *do* have thresholds for use: Alternate I provides guidance specific to a design-bid-build construction project that exceeds the simplified acquisition threshold; Alternate II provides guidance specific to a design-build construction project that exceeds the simplified acquisition threshold; and Alternate III provides guidance specific to a CMc project that exceeds the simplified acquisition threshold.

- GSAR 552.236-21, Specifications and Drawings for Construction, would be added. It currently is GSAR 552.236-77, Specifications and Drawings. The revised clause numbering and title would bring it into conformance with that of FAR 52.236-21, Specifications and Drawings for Construction. GSAR 552.236-21 would supplement FAR 52.236-21 by addressing inconsistencies in specifications and drawings, and clarify the definition of “similar” when it occurs on drawings. As with FAR 52.236-15, FAR 52.236-21 is required to be included in solicitations and contracts when a fixed-price construction contract exceeding the simplified acquisition threshold is contemplated, but there would be no threshold for the use of GSAR 552.236-21 or restriction on the contract type.

The base clause provides guidance for any type of construction project. The main difference between proposed GSAR 552.236-21 and current GSAR 552.236-77 is the addition of two paragraphs: “(f) Different requirements within the contract documents shall be deemed inconsistent only if compliance with both cannot be achieved. (g) Unless otherwise noted, the drawings shall be interpreted to provide for a complete construction, assembly, or installation of the work, without regard to the detail with which material components are shown in the drawings.”

There are two alternates of the clause, and these *do* have thresholds for use: Alternate I adds a paragraph (h) to the base clause that provides guidance specific to a design-build construction project that exceeds the simplified acquisition threshold; and Alternate II adds a paragraph (h) to the base clause that provides guidance specific to a CMc project that exceeds the simplified acquisition threshold.

- GSAR 552.236-70, Definitions, would be removed.
- GSAR 552.236-71, Contractor Responsibilities. would be added to address requirements for the different project delivery methods. The clause does not have a threshold for use or restriction on the contract type.

There are two alternates of the clause, and these *do not* have thresholds for use: Alternate I replaces paragraphs (d), (e), (f), and (g) of the base clause to provide guidance specific to a design-build construction project; and Alternate II replaces paragraphs (d), (e), (f), and (g) of the base clause and adds paragraphs (h), (i), and (j) to the base clause to provide guidance specific to a CMc project.



- GSAR 552.236-79, Construction-Manager-As-Constructor, would be added to provide guidance specific to a CMc project. It would address the guaranteed maximum price, conversion to firm-fixed-price, and final settlement.
- GSAR 552.236-80, Accounting Records and Progress Payments, would be added to provide guidance specific to a CMc project. It would address records maintenance and the auditing of accounts and progress payments.

Comments on this proposed rule must be submitted no later than January 7, 2019, identified as GSAR Case 2015-G503, by either of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; or (2) mail: General Services Administration, Regulatory Secretariat Division, 1800 F Street, NW, ATTN: Lois Mandell Washington, DC 20405.

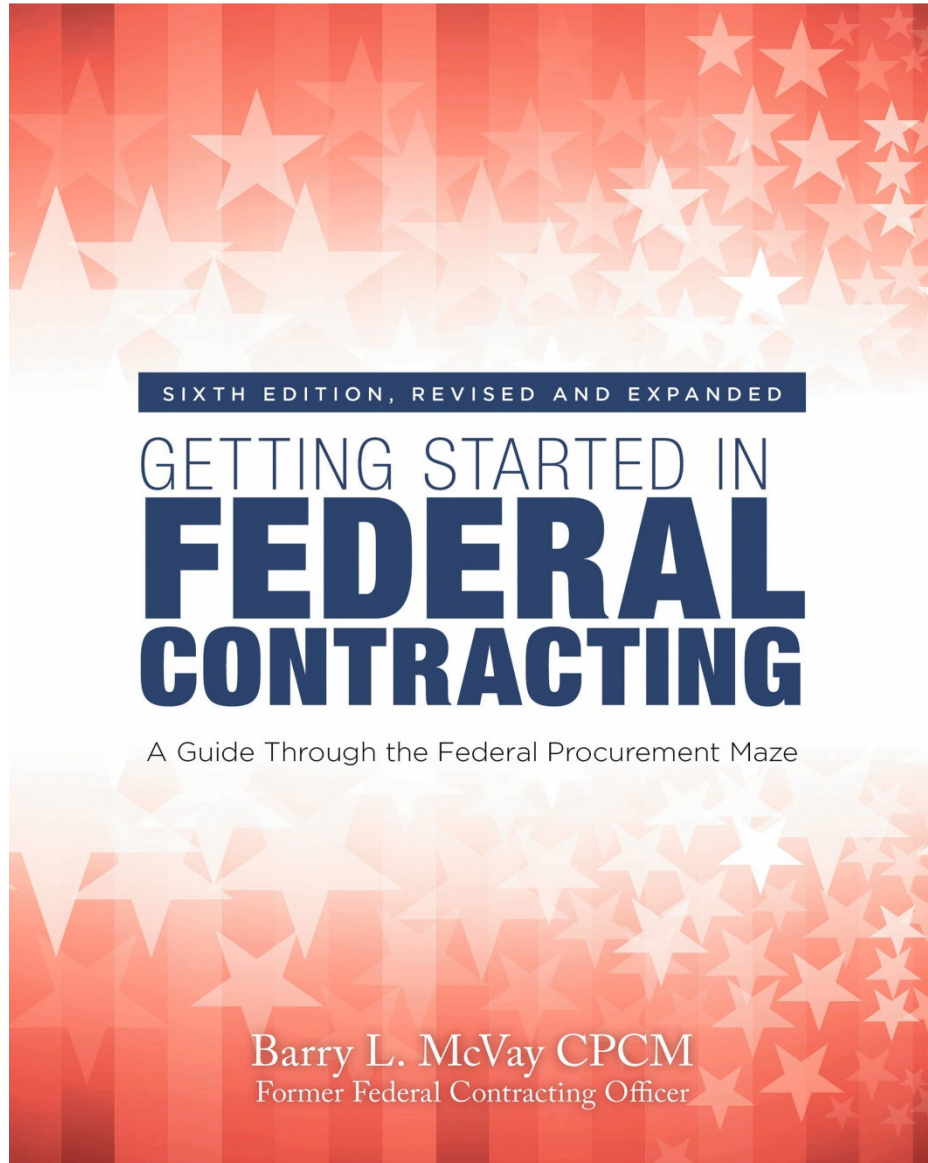
## **DOD ISSUES DEVIATION ON USE OF FIXED-PRICE CONTRACTS**

The Office of the Under Secretary of Defense for Acquisition and Sustainment has issued a class deviation directing Department of Defense (DOD) contracting officers to “first consider the use of fixed-price contracts, including fixed-price incentive contracts, in the determination of contract type...” This implements the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Public Law 114-328), Section 829, Preference for Fixed-Price Contracts, which mandates that the Defense FAR Supplement (DFARS) be “revised to establish a preference for fixed-price contracts, including fixed-price incentive fee contracts, in the determination of contract type.”

In addition, the class deviation directs DOD contracting officers to “not award the following cost-type contracts unless the contract is approved by the head of the contracting activity: cost-reimbursement contracts in excess of \$50 million to be awarded after October 1, 2018, and before October 1, 2019; [and] cost-reimbursement contracts in excess of \$25 million to be awarded after October 1, 2019.” Section 829 mandates that these contracts be approved “by the service acquisition executive of the military department concerned, the head of the Defense Agency concerned, the commander of the combatant command concerned, or the Under Secretary of Defense for Acquisition, Technology, and Logistics (as applicable).” However, the class deviation allows the head of the contracting activity to approve these contracts because “the Under Secretary of Defense for Acquisition and Sustainment has determined that use of cost-type contracts is approved for research and development valued in excess of \$25 million, if the contracting officer executes a written determination that the level of program risk does not permit realistic pricing and it is not possible to provide an equitable and sensible allocation of program risk between the government and the contractor.”

**EDITOR’S NOTE:** The NDAA for FY 2017, Section 901, Organization of the Office of the Secretary of Defense, mandates that the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics be divided in two: the Office of the Under Secretary of Defense for Research and Engineering, and the Office of Under Secretary of Defense for Acquisition and Sustainment, effective February 1, 2018. That is why the Office of Under Secretary of Defense for Acquisition and Sustainment is issuing the class deviation as opposed to the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics.

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