

# FEDERAL CONTRACTS PERSPECTIVE

Federal Acquisition Developments, Guidance, and Opinions

## CAAC AUTHORIZES DEVIATION INCREASING SIMPLIFIED ACQUISITION AND MICRO-PURCHASE THRESHOLDS

The Civilian Agency Acquisition Council (CAAC) has issued a memorandum to all civilian agencies (except the National Aeronautics and Space Administration, which is a member of the Defense Acquisition Regulations Council [DAR Council]) authorizing them to issue a class deviation from the Federal Acquisition Regulation (FAR) to increase the micro-purchase threshold from \$3,500 to \$10,000, and the simplified acquisition threshold from \$150,000 to \$250,000. This is in response to Sections 806 and 805, respectively, of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91), which made the changes to the thresholds. (For more on the procurement-related provisions in Public Law 115-91, see the January 2018 *Federal Contracts Perspective* article “2018 Defense Authorization Act Increases Simplified Acquisition, Micro-Purchase Thresholds.”)

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Attachment A of the memorandum highlights the appropriate FAR sections needing changes to implement the increased thresholds. The following are the FAR sections affected by the change in the micro-purchase threshold:

- Paragraph (b) of FAR 2.101, Definitions, the definition of “micro-purchase threshold”;
- Paragraph (b)(1) of FAR 13.003, Policy [for simplified acquisition procedures];
- Paragraph (b) of FAR 19.203, Relationship Among Small Business Programs;
- Paragraph (b) of FAR 19.502-1, Requirements for Setting Aside Acquisitions;
- Paragraph (a) of FAR 19.502-2, Total Small Business Set-Asides; and
- Paragraph (j) of FAR 52.212-1, Instructions to Offerors – Commercial Items.

The following are the FAR sections affected by the change in the simplified acquisition threshold:

- Paragraph (b) of FAR 2.101, Definitions, the definition of “simplified acquisition threshold”;
- Paragraph (b)(1) of FAR 13.001, Policy [for simplified acquisition procedures];

- Paragraph (a)(2)(i) of FAR 13.501, Special Documentation Requirements;
- Paragraph (b) of FAR 19.203, Relationship Among Small Business Programs;
- Paragraphs (a) and (b) of FAR 19.502-2, Total Small Business Set-Asides;
- Paragraph (e) of FAR 19.508, Solicitation Provisions and Contract Clauses;
- Paragraph (d)(1) of FAR 52.203-16, Preventing Personal Conflicts of Interest;
- Paragraph (d)(11)(iii) of FAR 52.219-9, Small Business Subcontracting Plan; and
- Alternate IV, paragraph (d)(11)(iii) of FAR 52.219-9, Small Business Subcontracting Plan.

Also, Attachment A includes the changes to the FAR 2.101 definitions of the micro-purchase and simplified acquisition thresholds that were made by Section 816, Amendments to Special Emergency Procurement Authority, and Section 1641, Special Emergency Procurement Authority to Facilitate the Defense Against or Recovery from a Cyber Attack, of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328), to Title 41 of the U.S. Code, Section 1903, Special Emergency Procurement Authority, paragraph (a), Authority (41 USC 1903(a)), but had not yet been officially incorporated into FAR 2.101. In *italics* are the changes made by Section 1641 (which added the word “cyber”) and Section 816 (all the rest) to paragraph (3) of the FAR 2.101 “micro-purchase threshold” definition and paragraph (a) of the FAR 2.101 “simplified acquisition threshold” definition:

For acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation; to facilitate defense against or recovery from *cyber*, nuclear, biological, chemical or radiological attack; *to support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant to 22 USC 2292 et seq.; or to support response to an emergency or major disaster (42 USC 5122)...*

However, be aware that the micro-purchase thresholds are unchanged for: (1) acquisitions of construction (it remains \$2,000); (2) acquisitions for services (\$2,500); (3) construction contracts awarded and performed, or purchase to be made, inside the United States to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical or radiological attack (\$20,000); and (4) construction contracts awarded and performed, or purchase to be made, outside the United States to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack (\$30,000). This is because these thresholds are governed by other statutes (including 41 USC 1903(b)).

Vivina McVay, Editor-in Chief

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Similarly, the simplified acquisition thresholds are unchanged for: (1) acquisitions for supplies of services awarded and performed, or purchase to be made, inside the United States to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack (\$750,000); and (4) acquisitions for supplies of services awarded and performed, or purchase to be made, outside the United States to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical or radiological attack (\$1,500,000). Again, this is because these thresholds are governed by 41 USC 1903(b).

In addition, Attachment A includes as new paragraph (4) of the FAR 2.101 “micro-purchase threshold” definition the changes made by Section 217 of Public Law 114-328, Increased Micro-Purchase Threshold for Research Programs and Entities, which increased the threshold for institutions of higher education, related or affiliated nonprofit entities, nonprofit research organizations, and independent research institutes to “\$10,000 or a higher threshold, as determined appropriate by the head of the agency and consistent with clean audit findings under 31 USC chapter 75, Requirements for Single Audits; an internal institutional risk assessment; or state law.”

Finally, the FAR 2.101 definition of “simplified acquisition threshold” for “acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a humanitarian or peacekeeping operation (10 USC 2302)” is increased from \$300,000 to \$500,000 for any contract to be awarded and performed, or purchase to be made, outside the United States. This is because this particular threshold is based on 41 USC 153, which states, “in the case of a contract to be awarded and performed, or purchase to be made, outside the United States in support of a humanitarian or peacekeeping operation, the term means an amount equal to two times the amount specified for that term in section 134 of this title.”

**EDITOR’S NOTE:** Section 821 of Public Law 114-328, Increased Micro-Purchase Threshold Applicable to Department of Defense Procurements, amended 10 USC 2338, Micro-Purchase Threshold, to increase the micro-purchase threshold for Department of Defense (DOD) acquisitions from \$3,500 to \$5,000 (“notwithstanding subsection (a) of section 1902 of title 41 [41 USC 1902, Procedures Applicable to Purchases Below Micro-Purchase Threshold], the micro-purchase threshold for the Department of Defense for purposes of such section is \$5,000”). Though Section 806 of Public Law 115-91 increased the micro-purchase threshold by amending 41 USC 1902 (“by striking ‘\$3,000’ and inserting ‘\$10,000’”), and the intention was for the \$10,000 threshold to apply throughout the government, the Director of Defense Pricing/Defense Procurement and Acquisition Policy issued a memorandum alerting the DOD acquisition community that DOD’s micro-purchase threshold remains \$5,000 because “Section 806 **did not repeal** 10 USC 2338” (**emphasis** in original). *This is an example of poor legislative drafting – this shows why it is preferable to define a term once in the U.S. Code and then refer to that definition when citing that term elsewhere instead of scattering definitions throughout the U.S. Code and hoping they don’t conflict or contradict each other.*

For more on the acquisition-related provisions of Public Law 114-328, see the January 2017 *Federal Contracts Perspective* article “2017 Defense Authorization Act Increases Micro-Purchase Threshold, Extends SBIR/STTR.” For more on the DOD memorandum, see the February 2018 *Federal Contracts Perspective* article “DOD Provides Guidance on Commercial Item Procurement.”

## UNENFORCEABLE COMMERCIAL TERMS ADDRESSED IN GSAR

The General Services Administration (GSA) is amending the GSA Acquisition Regulation (GSAR) to address common commercial supplier agreement terms that are inconsistent with or create ambiguity with federal law.

Standard commercial supplier agreements (such as license agreements, terms of service [TOS], End User License Agreements [EULA], and terms of sale or purchase) contain terms and conditions that make sense when the purchaser is a private party but are inappropriate when the purchaser is the federal government. Discrepancies between commercial supplier agreements and federal law or the government's needs create recurrent points of inconsistency. As a result, industry and government representatives must spend significant time and resources negotiating and tailoring commercial supplier agreements to comply with federal law and to ensure both parties have agreement on the contract terms. Explicitly addressing common unenforceable terms eliminates the need for negotiation on these identified terms.

To ameliorate this situation, GSA is revising the GSAR as follows:

- GSAR 502.101, Definitions, is added, and it consists of the following definition for “Commercial Supplier Agreements”: “terms and conditions customarily offered to the public by vendors of supplies or services that meet the definition of 'commercial item' set forth in FAR 2.101 [Definitions] and intended to create a binding legal obligation on the end user. Commercial supplier agreements are particularly common in information technology acquisitions, including acquisitions of commercial computer software and commercial technical data, but they may apply to any supply or service. The term applies – (a) regardless of the format or style of the document...and may be presented as part of a proposal or quotation responding to a solicitation for a contract or order; (b) regardless of the media or delivery mechanism used. For example, a commercial supplier agreement may be presented as one or more paper documents or may appear on a computer or other electronic device screen during a purchase, software installation, other product delivery, registration for a service, or another transaction.”
- GSAR subpart 512.2, Special Requirements for the Acquisition of Commercial Items, is added. It consists of GSAR 512.216, Unenforceability of Unauthorized Obligations, which states: “GSA has a deviation to FAR 12.216 [Unenforceability of Unauthorized Obligations] for this section. For commercial contracts, supplier license agreements are referred to as commercial supplier agreements (defined in [GSAR] 502.101). Paragraph (u) of clause [GSAR] 552.212-4 [Contract Terms and Conditions – Commercial Items (FAR DEVIATION)] prevents violations of the Anti-Deficiency Act (31 USC 1341) for supplies or services acquired subject to a commercial supplier agreement.”
- Paragraph (e) is added to GSAR 512.301, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items. It states, “GSA has a deviation to revise certain paragraphs of FAR clause 52.212-4. Use clause [GSAR] 552.212-4, Contract Terms and Conditions – Commercial Items (FAR DEVIATION), for acquisitions of commercial items in lieu of FAR 52.212-4 [Contract Terms and Conditions – Commercial Items] or [FAR] 52.212-4 Alternate I. The contracting officer may tailor this clause in accordance with FAR

12.302 [Tailoring of Provisions and Clauses for the Acquisition of Commercial Items] and GSAM [GSA Acquisition Manual] 512.302.”

- GSAR part 513, Simplified Acquisition Procedures, is added. It consists of two subparts:
  - GSAR subpart 513.2, Actions at or Below the Micro-Purchase Threshold. It consists of GSAR 513.202, Unenforceability of Unauthorized Obligations in Micro-Purchases, which states, “Clause [GSAR] 552.232-39, Unenforceability of Unauthorized Obligations (FAR DEVIATION), will automatically apply to any micro-purchase in lieu of FAR 52.232-39 [Unenforceability of Unauthorized Obligations] for supplies and services acquired subject to a commercial supplier agreement (as defined in [GSAR] 502.101).”
  - GSAR subpart 513.3, Simplified Acquisition Methods. It consists of GSAR 513.302-5, Clauses, which requires the inclusion of GSAR 552.232-39 and GSAR 552.232-78, Commercial Supplier Agreements – Unenforceable Clauses, in all acquisitions for supplies or services that are offered under a commercial supplier agreement.
- GSAR subpart 532.7, Contract Funding, is added. It consists of two sections:
  - GSAR 532.705, Unenforceability of Unauthorized Obligations, which states, “Supplier license agreements defined in FAR 32.705 [Unenforceability of Unauthorized Obligations] are equivalent to commercial supplier agreements defined in [GSAR] 502.101.”
  - GSAR 532.706-3, Clause for Unenforceability of Unauthorized Obligations, which requires the contracting officer to include: (1) GSAR 552.232-39 instead of FAR 52.232-39 in all solicitations and contracts; and (2) GSAR 552.232-78 in all solicitations and contracts (including orders) when not using FAR part 12, Acquisition of Commercial Items.
- GSAR 552.212-4, Contract Terms and Conditions – Commercial Items (FAR DEVIATION), is revised to replace paragraphs (s) and (u) of, and to add paragraph (w) to, FAR 52.212-4:
  - Subparagraph (4) of FAR 52.212-4(s), Order of Precedence, lists “addenda to this solicitation or contract, including any license agreements for computer software” as #4 in the order of precedence if there are any inconsistencies in this solicitation or contract. GSAR 552.212-4(s)(4) deviates from FAR 52.212-4(s)(4) by listing the following as #4: “addenda to this solicitation or contract, including any commercial supplier agreements as amended by the Commercial Supplier Agreements – Unenforceable Clauses provision [GSAR 552.232-78].”
  - FAR 52.212-4(u), Unauthorized Obligations, provides procedures that apply when “any supply or service acquired under this contract is subject to any End Use License Agreement (EULA), Terms of Service (TOS), or similar legal instrument or agreement, that includes any clause requiring the government to indemnify the contractor or any person or entity for damages, costs, fees, or any other loss or liability...” GSAR 552.212-

4(u) replaces “End Use License Agreement (EULA), Terms of Service (TOS), or similar legal instrument or agreement” with “commercial supplier agreement (as defined in [GSAR] 502.101)”.

- GSAR 552.212-4(w), Commercial Supplier Agreements – Unenforceable Clauses, is added. Paragraph (w) states the following:
  - The government is not bound by the commercial supplier agreement.
  - The agreement is governed by federal law, not by the laws of any U.S. state, U.S. territory, district, or municipality, or foreign nation, except where federal law expressly provides for the application of such laws.
  - Commercial suppliers may not unilaterally terminate or suspend a contract based upon a suspected breach of contract by the government because government contracts are subject to the Contract Disputes Act (41 USC chapter 71).
  - Binding arbitration may not be used unless explicitly authorized by agency guidance.
  - After award, the contractor may unilaterally revise terms if they are not material. A material change is defined as terms that: (1) change government rights or obligations; (2) increase government prices; (3) decrease overall level of service; or (4) limit any other government right addressed elsewhere in the contract. A bilateral contract modification is required for any of these changes to be enforceable against the government.
  - Automatic contract renewal clauses (which automatically renew or extend contracts unless affirmative action is taken to terminate the agreement) are impermissible without prior express consent by an authorized government representative.
  - Any clause of the agreement requiring the commercial supplier or licensor to defend or indemnify the end user is amended to provide that the U.S. Department of Justice has the sole right to represent the United States in any such action.
  - Any clause of the agreement permitting the commercial supplier or licensor to audit the end user’s compliance with the agreement is amended to provide that discrepancies found during an audit must comply with the invoicing procedures from the underlying contract or order; disputed charges must be resolved through the procedures of FAR 52.233-1, Disputes; and any audits requested by the commercial supplier or licensor will be performed at the supplier’s or licensor’s expense.
  - Any taxes or surcharges that will be passed along to the government will be governed by the terms of the underlying contract or order, and the contracting officer must make a determination of applicability prior to invoicing unless specifically agreed to otherwise in the government contract.

- The agreement may not be assigned, nor may any rights or obligations under the agreement be delegated, without the government’s prior approval, except the contractor may assign its rights to receive payment to a bank, trust company, or other financing institution.
  - The content of the commercial supplier agreement and the contract price list may not be deemed “confidential information.” Issues regarding release of “unit pricing” will be resolved consistent with the Freedom of Information Act (5 USC 552). The government may retain any confidential information as required by law, regulation, or document retention procedures, provided that all such retained confidential information will continue to be subject to the confidentiality obligations of the agreement.
- GSAR 552.232-39, Unenforceability of Unauthorized Obligations (FAR DEVIATION), is added to amend the language of FAR 52.232-39, Unenforceability of Unauthorized Obligations, to reflect the GSAR 502.101 definition of “commercial supplier agreements,” and to include future fees, penalties, interest and legal costs as unauthorized obligations.
  - GSAR 552.232-78, Commercial Supplier Agreements – Unenforceable Clauses, is added, and it addresses the same unenforceable commercial supplier agreement terms addressed in GSAR 552.212-4(w).

A proposed rule was published in May 2016, and two respondents submitted comments. In response to the comments, the following changes are made to the final rule:

- The order of precedence in GSAR 552.212-4(s) is returned to the original order (the proposed rule had “addenda to this solicitation or contract...” as #6; it is returned to #4); and
- GSAR 552.212-4(w)(1)(vi), which authorizes the contractor to unilaterally revise terms if they are not material, is revised to: (1) delete the requirement in the proposed rule that the full text of the terms be provided with the offer; (2) add the definition of a material change; and (3) clarify when a commercial supplier agreement must be bilaterally modified in the contract.

In addition, several editorial corrections and changes are made to the final rule.

For more on the proposed rule, see the June 2016 *Federal Contracts Perspective* article “GSA Addresses Unenforceable Supplier Terms.”

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## DOD SEEKS COMMENTS ON “PALT” DEFINITION

The Department of Defense (DOD) is seeking comments on a proposed definition for “Procurement Acquisition Lead Time” (PALT) that will apply DOD-wide and on DOD’s plan for measuring and publicly reporting data on PALT for DOD contracts and task orders above the simplified acquisition threshold (now \$250,000 – see above article).

Section 886 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law 115-91) requires DOD to “develop, make available for public comment, and finalize – (1) a definition of the term ‘Procurement Administrative Lead Time’ or ‘PALT’, to be applied Department of Defense-wide, that describes the amount of time from the date on which a solicitation is issued to the date of an initial award of a contract or task order of the Department of Defense; and (2) a plan for measuring and publicly reporting data on PALT for Department of Defense contracts and task orders above the simplified acquisition threshold.”

DOD is proposing to define PALT as “the time between the date on which the initial solicitation for a contract or task order of the Department of Defense is issued and the date of the award of the contract or task order.”

DOD plans to use Federal Procurement Data System – Next Generation (FPDS-NG), the authoritative source for government-wide contract award data, to measure PALT and make PALT data available to the public. This would require the addition of a new data field that reflects the PALT definition. Once the FPDS-NG system is updated (estimated to be completed in fiscal year 2019), the public will be able to utilize FPDS-NG to obtain the PALT information for any contract or task order issued by the DOD that is valued above the simplified acquisition threshold.

The public is invited to submit comments on this proposed definition and the plan as instructed no later than March 12, 2018, identified as “DARS-2018-0005,” by using either of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; or (2) mail to: Defense Procurement and Acquisition Policy, Attn: Greg Snyder, 3060 Defense Pentagon, Room 5E621, Washington, DC 20301-3060.

## FFP COST OR PRICING DATA EXEMPTION CLARIFIED

The Cost Accounting Standards Board (CASB) is issuing a final rule revising the exemption from the Cost Accounting Standards (CAS) for firm-fixed-price (FFP) contracts and subcontracts awarded on the basis of adequate price competition without submission of cost or pricing data by adding the word “certified” before “cost or pricing data.”

In Title 48 of the Code of Federal Regulations (CFR), section 9903.201-1, CAS Applicability, paragraph (b) lists nine categories of contracts and subcontracts that are exempt from all CAS requirements. The following is the text of subparagraph (b)(15): “Firm-fixed-price contracts or subcontracts awarded on the basis of adequate price competition without submission of cost or pricing data.” However, Federal Acquisition Circular (FAC) 2005-45 revised the definition of “cost or pricing data” to include “certified cost or pricing data” and “data other than certified cost or pricing data” (see the September 2010 *Federal Contracts Perspective* article “Federal Acquisition-Related Thresholds Adjusted for Inflation”). Because the CASB believes this causes confusion over the applicability of the CAS to FFP contracts or subcontracts awarded on the basis of adequate price competition, the CASB is adding the word “certified” to “cost or pricing data” in 48 CFR 9903.201-1(b)(15).



## PHASE I OF VAAR UPDATE FINALIZED

The Department of Veterans Affairs (VA) is issuing the first of several final rules that will conduct housekeeping on the VA Acquisition Regulation (VAAR) to: revise or remove any policy that has been superseded by changes in the Federal Acquisition Regulation (FAR); remove any procedural guidance that is internal to the VA; incorporate new regulations and policies; correct inconsistencies within the VAAR; remove redundant and duplicate material already covered by the FAR; delete outdated material or information; and renumber VAAR text, clauses, and provisions to conform to the FAR format, numbering, and arrangement.

Over time, acquisition regulations become outdated and require updating to incorporate additional policies, solicitation provisions, and contract clauses that implement and supplement the FAR to satisfy VA mission needs, and to incorporate changes in dollar and approval thresholds, definitions, and VA position titles and offices.

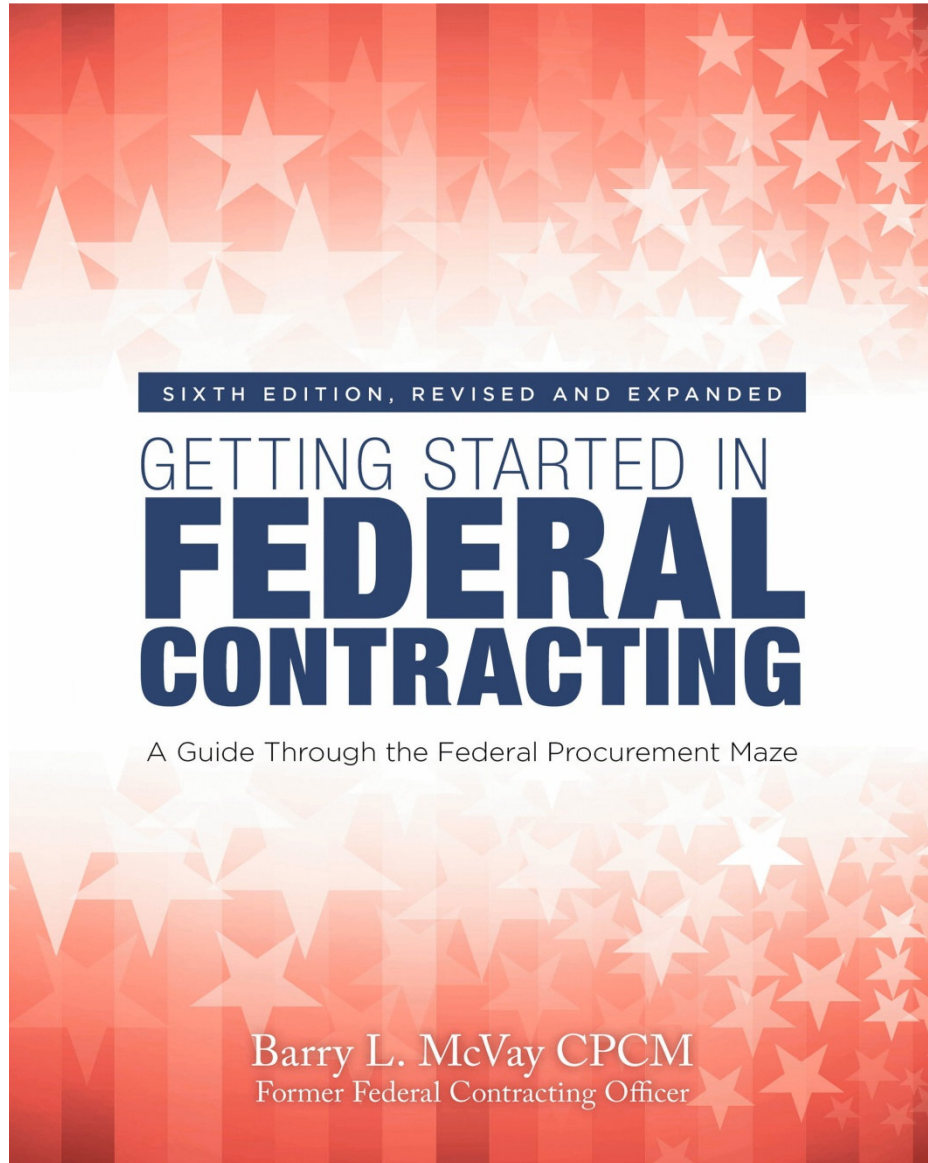
So far, three proposed rules have been published that would incrementally perform this task, with each increment revising the VAAR parts that address related topics.

This finalizes, with several technical non-substantive changes, the first of the proposed rules (see the April 2017 *Federal Contracts Perspective* article “Revision of VAAR to Adhere to FAR Proposed”). Besides conducting clean-up and maintenance, the final rule does the following:

- Prescribes five new VA-specific economic price adjustment clauses for firm-fixed-price contracts. One is new (VAAR 852.216-71, Economic Price Adjustment of Contract Price(s) Based on a Price Index), and four were previously being used though they were not included in the VAAR (VAAR 852.216-72, Proportional Economic Price Adjustment of Contract Price(s) based on a Price Index; VAAR 852.216-73, Economic Price Adjustment – State Nursing Home Care for Veterans (ALT #1); VAAR 852.216-74, Economic Price Adjustment – Medicaid Labor Rates (ALT #2); and VAAR 852.216-75, Economic Price Adjustment – Fuel Surcharge).
- Amends VAAR 816.505, Ordering, to include the title and office of the task and delivery order ombudsman (“the Associate Deputy Assistant Secretary (ADAS) for Procurement Policy, Systems and Oversight”).
- Adds VAAR 816.770, Consignment Agreements, to clarify the nature and use of consignment agreements.
- Amends VAAR 828.306, Insurance Under Fixed-Price Contracts, to add policy on insurance under fixed-price contracts.
- Amends VAAR subpart 828.70, Indemnification of Contractors for Medical Research or Development Contracts (formerly VAAR subpart 828.71), to provide indemnification of contractors for medical research or development contracts, and adds VAAR 852.228-73, Indemnification of Contractor-Hazardous Research Projects, to require contractors to have appropriate insurance coverage when performing work of a hazardous nature.

For more on the second proposed rule, see the June 2017 *Federal Contracts Perspective* article “Phase Two of VAAR Revision Proposed”; for more on the third proposed rule, see the February 2018 *Federal Contracts Perspective* article “VAAR to be Revised to Align with the FAR.”

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