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BIDEN ORDERS FEDERAL CONTRACTORS TO PROTECT EMPLOYEES FROM COVID

President Biden has issued Executive Order (EO) 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, to "promote economy and efficiency in federal procurement by ensuring that the parties that contract with the federal government provide adequate COVID-19 safeguards to their workers performing on or in connection with a federal government contract or contract-like instrument… These safeguards will decrease the spread of COVID-19, which will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work for the federal government."

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The president orders departments and agencies to "ensure that contracts and contract-like instruments…include a clause that the contractor and any subcontractors (at any tier) shall incorporate into lower-tier subcontracts. This clause shall specify that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance or guidance), provided that the Director of the Office of Management and Budget (Director) approves the Task Force Guidance and determines that the guidance, if adhered to by contractors or subcontractors, will promote economy and efficiency in federal contracting. This clause shall apply to any workplace locations (as specified by the Task Force Guidance) in which an individual is working on or in connection with a federal government contract or contract-like instrument…"

Biden goes on to direct the Federal Acquisition Regulatory Council to "amend the Federal Acquisition Regulation [FAR] to provide for inclusion in federal procurement solicitations and contracts subject to this order the clause described in this order, and shall, by October 8, 2021, take initial steps to implement appropriate policy direction to acquisition offices for use of the clause by recommending that agencies exercise their authority under subpart 1.4 of the Federal Acquisition Regulation [Deviations from the FAR]."

On September 17, the Department of Defense (DOD) announced an "early engagement opportunity to support DOD implementation planning for Executive Order 14042…The public is invited to submit early inputs on EO 14042 via the DARS [Defense Acquisition Regulations System] website at **https://www.acq.osd.mil/dpap/dars/early_engagement.html**. Comments can be received up to 30 days after the date of this notice [that is, October 17, 2021], but comments will be most useful if received by DOD within 7 days after the date of this notice."

On September 24, the Safer Federal Workforce Task Force published its guidance (**https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf**). It states that "covered contractors shall adhere to the requirements of this guidance" and strongly encourages agencies "to incorporate a clause requiring compliance with this guidance". The guidance defines terms (such as "covered contractor," fully vaccinated," and "mask"), identifies three workplace safety protocols and explains them (1. vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation; 2. requirements related to masking and physical distancing while in covered contractor workplaces; and 3. designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces), and provides Frequently Asked Questions (FAQs) (such as "Are covered contractor employees who have a prior COVID-19 infection required to be vaccinated?").

On September 28, the director of the Office of Management and Budget (OMB) issued a notice stating that "based on my review of the Safer Federal Workforce Task Force's COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors, scheduled for issuance on September 24, 2021, and exercising the president's authority…delegated to me through Executive Order No. 14042, I have determined that compliance by federal contractors and subcontractors with the COVID-19-workplace safety protocols detailed in that guidance will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a federal government contract."

On September 30, the Civilian Agency Acquisition Council (CAAC), which is one of two councils that oversee the administration of the FAR for all civilian agencies except the National Aeronautics and Space Administration (NASA) and the Coast Guard (which are overseen by the other council, the Defense Acquisition Regulations Council, along with the Department of Defense), issued a letter "authorizing agencies to issue a class deviation to implement Executive Order 14042…" The letter provides a FAR deviation clause that states, "The contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at **https:/www.saferfederalworkforce.gov/contractors/**. The contractor shall include the substance of this clause…in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 [Definitions – currently $250,000] on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas." Agencies are required to include the clause in the following:

- New contracts awarded on or after November 14, 2021, from solicitations issued before October 15, 2021 (including new orders awarded on or after November 14, 2021, from solicitations issued before October 15, 2021, under existing indefinite-delivery contracts);

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- New solicitations issued on or after October 15, 2021, and contracts awarded pursuant to those solicitations (including new solicitations issued on or after October 15, 2021, for orders awarded pursuant to those solicitations under existing indefinite-delivery contracts);

- Extensions or renewals of existing contracts and orders awarded on or after October 15, 2021; and

- Options on existing contracts and orders exercised on or after October 15, 2021.

Agencies are encouraged, but not required, to include the clause in the following:

- Contracts that have been or will be awarded prior to November 14, 2021, on solicitations issued before October 15, 2021; and

- Contracts that are not covered or directly addressed by the EO because the contract or subcontract is under the simplified acquisition threshold or is a contract or subcontract for the manufacturing of products.

The clause shall not be included in:

- Contracts and subcontracts with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638); or

- Solicitations and contracts if performance is outside the United States or its outlying areas (the exclusion is limited to employees who are performing work only outside the U.S. or its outlying areas).

SUDAN REMOVED FROM LIST OF STATE SPONSORS OF TERRORISM

The Department of Defense (DOD) had an easy September, merely issuing one final rule amending the DOD FAR Supplement (DFARS) to reflect the Department of State's removal of Sudan from the list of state sponsors of terrorism, two deviations, and one FAR deviation.

■ **Department of State Rescission of Determination Regarding Sudan:** This final rule implements the Department of State Public Notice: 11281, Rescission of Determination Regarding Sudan, which announced the removal of Sudan from the U.S. list of state sponsors of terrorism, effective December 14, 2020.

To implement the State Department determination, the DFARS is amended to remove "Sudan" from the definition of "state sponsor of terrorism" in DFARS 225.772-1, Definitions; DFARS 252.225-7050, Disclosure of Ownership or Control by the Government of a Country that is a State Sponsor of Terrorism; and DFARS 252.225-7051, Prohibition on Acquisition of Certain Foreign Commercial Satellite Services. (**EDITOR'S NOTE:** The remaining "state sponsors of terrorism" are Iran, North Korea, and Syria.)

■ **Treatment of Incurred Independent Research and Development Costs:** This proposed rule would amend DFARS 231.205-18, Independent Research and Development and Bid and Proposal Costs, to implement the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Public Law 114-328), Section 824, Treatment of Independent Research and Development Costs on Certain Contracts, which makes amendments regarding the treatment of independent research and development (IR&D) expenditures and requires the Defense Contract Audit Agency (DCAA) to provide an annual report to Congress on independent research and development and bid and proposal (B&P) expenditures.

Section 824 amended Title 10 of the U.S. Code, Section 2324, Allowable Costs Under Defense Contracts (10 USC 2324), to provide that "The Secretary of Defense shall prescribe regulations governing the payment by the Department of Defense of expenses incurred by contractors for independent research and development costs. Such regulations shall provide that expenses incurred for independent research and development shall be reported independently from other allowable indirect costs…[These] regulations…shall provide that independent research and development costs shall be considered a fair and reasonable, and allowable, indirect expense on Department of Defense contracts…[These] regulations…may not include provisions that would infringe on the independence of a contractor to choose which technologies to pursue in its independent research and development program if the chief executive officer of the contractor determines that expenditures will advance the needs of the Department of Defense for future technology and advanced capability."

In addition, Section 824 amended 10 USC 2372, Independent Research and Development and Bid and Proposal Costs: Payments to Contractors, to remove the list that limits the allowability of IR&D costs to seven activities of potential interest to DOD (such as "enabling superior performance of future United States weapon systems and components" and "reducing acquisition costs and life-cycle costs of military systems"). Section 824 replaced the list of activities of potential interest to DOD and required a determination by a company's chief executive officer that IR&D expenses will advance the needs of DOD for future technology and advanced capability.

Furthermore, Section 824 decoupled IR&D and B&P costs by moving the language pertaining to B&P costs out of 10 USC 2372 and placing it in the new 10 USC 2372a, Bid and Proposal Costs: Allowable Costs (and 10 USC 2372 was renamed "Independent Research and Development Costs: Allowable Cost"). This made sure that the regulations pertaining to B&P costs would be separated from regulations pertaining to IR&D costs.

Finally, Section 824 amended 10 USC 2313a, Defense Contract Audit Agency: Annual Report, by adding a requirement for the DCAA to submit an annual report to Congress of all incurred IR&D and B&P costs of contractors in the prior government fiscal year.

To implement Section 824, the following changes would be made to DFARS 231.205-18:

- Paragraph (c)(iii)(A)(1) would be added, which would state, "the chief executive officer (CEO) of the contractor must have determined that the expenditures will advance the needs of DOD for future technology and advanced capability (10 USC 2372(d)) (see [DFARS] 242.771-3 [Responsibilities (for independent research and development and bid and proposal costs)])." (**EDITOR'S NOTE:** DFARS 242.771-3(c)(1) would be revised to change the content of the communication from DOD to contractors from the "planned or expected DOD future needs" to the "planned or expected needs of DOD for future technology and advanced capability").

- A new requirement would be added to paragraph (iii)(c)(A)(2) for major contractors to include a statement in the submission to the Defense Technical Information Center (DTIC) that the CEO of the contractor has made the determination required by 10 USC 2372. Major contractors are already required to upload IR&D activities in DTIC to provide DOD with information on the progress of these activities. This simply adds a requirement for those major contractors to include a statement in the DTIC input that the determination required by 10 USC 2372 has been made as a means for DOD know that those costs are allowable.

- Paragraph (c)(iv) would be added to require that "incurred IR&D and B&P costs must be reported independently from each other and other incurred indirect costs." This corresponds to 10 USC 2372 and 10 USC 2372a which require allowable IR&D and B&P costs to be reported independently.

In addition, the following changes would be made elsewhere in the DFARS:

- "IR&D/B&P" would be replaced by "IR&D and B&P" throughout the DFARS based on the Section 824 change to 10 USC 2372 and the addition of 10 USC 2372a which segregate IR&D and B&P costs.

- Since the list of seven activities of potential interest to DOD was deleted from 10 USC 2372 by Section 824, the requirement for the Defense Contract Management Agency (DCMA) administrative contracting officer (ACO) or corporate ACO (CACO) to compare the IR&D activities uploaded in DTIC to the list of seven IR&D activities of potential interest to DOD no longer exists. Therefore, paragraph (a) of DFARS 242.771-3 would be revised to remove the ACO and CACO responsibilities for determining if an activity is of potential interest to DOD.

- To support DCAA's compliance with 10 USC 2313a, new clause DFARS 252.242-70XX, Independent Research and Development and Bid and Proposal Incurred Costs, would be added. The clause would require all contractors with noncommercial awards exceeding the simplified acquisition threshold to provide an incurred cost submission of IR&D and B&P costs for the prior government fiscal year to a website for DCAA to access. The clause's prescription would be in new DFARS 242.771-4, Contract Clause.

Comments on this proposed rule must be submitted no later than November 29, 2021, identified as "DFARS Case 2017-D018," through the Federal eRulemaking Portal at **http://www.regulations.gov** or by email to **osd.dfars@mail.mil**.

■ **Modification of Small Purchase Threshold Exceptions:** This proposed rule would amend DFARS 225.7002, Restrictions on Food, Clothing, Fabrics, Hand or Measuring Tools, and Flags, to implement the NDAA for FY 2021 (Public Law 116-283), Section 817, Restrictions on Food, Clothing, Fabrics, Hand or Measuring Tools, and Flags, which modifies the small purchase threshold exception to sourcing requirements for articles covered by 10 USC 2533a, Requirement to Buy Certain Articles from American Sources; Exceptions (commonly known as

the "Berry Amendment"), from the simplified acquisition threshold (SAT) to "amounts not greater than $150,000."

DFARS 225.7002 identifies the domestic source restrictions of 10 USC 2533a on food, clothing, fabrics, fibers, hand or measuring tools, and flags, unless an exception applies. DFARS 225.7002-2, Exceptions, has historically referred to "actions at or below the small purchase threshold" rather than a specific dollar value as an exception to the domestic source restrictions of the Berry Amendment. Therefore, each time the SAT increased, the exception threshold also increased to align with the new SAT, to include the most recent SAT increase from $150,000 to $250,000 (see the August 2020 ***Federal Contracts Perspective*** article "FAC 2020-07 Increases Simplified Acquisition, Micro-Purchase Thresholds").

This proposed rule would implement Section 817 by revising the exception at DFARS 225.7002-2(a) from "at or below the simplified acquisition threshold"' to "not exceeding $150,000". The net effect of this revision will be to increase the number of acquisitions subject to the domestic source requirements at DFARS 225.7002. Conforming changes would also be made to paragraphs (b) and (c) of DFARS 225.7002-3, Contract Clauses, and the associated contract clause DFARS 252.225-7012, Preference for Certain Domestic Commodities.

Comments on this proposed rule must be submitted no later than November 29, 2021, identified as "DFARS Case 2021-D010," through the Federal eRulemaking Portal at **http://www.regulations.gov** or by email to **osd.dfars@mail.mil**.

EDITOR'S NOTE: While Section 817 reduces the dollar value of the current exception threshold, it also authorizes the adjustment of this statutory threshold for inflation every five years as provided in 41 USC 1908, Inflation Adjustment of Acquisition-Related Dollar Thresholds. For more on the most recent adjustment, see the November 2020 ***Federal Contracts Perspective*** article "FAC 2021-01 Makes 5-Year Inflation Adjustment to Acquisition-Related Thresholds."

■ **Deviation on Limitations on Subcontracting for Small Business:** This FAR deviation directs DOD contracting officers to use FAR 52.219-14, Limitations on Subcontracting (DEVIATION 2021-O0008), instead of FAR 52.219-14. FAR 52.219-14(e)(1), which was amended by Federal Acquisition Circular (FAC) 2021-07 to prohibit contractors from paying "more than 50% of the amount paid by the government for contract performance to subcontractors that are not similarly situated entities," does not provide any exceptions (for more on FAC 2021-07, see "Revision of Limitations on Subcontracting" in the September 2021 ***Federal Contracts Perspective*** article "FAC 2021-07 Addresses Small Business Subcontracting, Accessibility Standards"). However, paragraph (a)(1) of Title 13 of the Code of Federal Regulations, Section 125.6, What are the prime contractor's limitations on subcontracting? (13 CFR 125.6), contains the following exceptions to the 50% subcontract amount that cannot be exceeded for service contracts: "Other direct costs may be excluded to the extent they are not the principal purpose of the acquisition and small business concerns do not provide the service, such as airline travel, work performed by a transportation or disposal entity under a contract assigned the environmental remediation NAICS code (562910), cloud computing services, or mass media purchases. In addition, work performed overseas on awards made pursuant to the Foreign Assistance Act of 1961, or work required to be performed by a local contractor, is excluded."

The "Revision of Limitations on Subcontracting" final rule in FAC 2021-07 did not include these exceptions. Therefore, John M. Tenaglia, Principal Director, Defense Pricing and Contracting, issued the memorandum directing DOD contracting officers to use FAR 52.219-14

(DEVIATION 2021-O0008) instead of FAR 52.219-14 to add the following language excluding certain services from the 50% limitation on subcontracting of service contracts to paragraphs (e)(1)(i) and (ii):

> "(i) Other direct costs, to the extent they are not the principal purpose of the acquisition and small business concerns do not provide the service. Examples include airline travel, work performed by a transportation or disposal entity under a contract assigned the environmental remediation NAICS code (562910), cloud computing services, or mass media purchases.
>
> "(ii) Work performed outside the United States on awards made pursuant to the Foreign Assistance Act of 1961 (22 USC 2151 *et seq*.), or work performed outside the United States required to be performed by a local contractor."

The DOD's FAR deviation is almost an exact duplicate of the FAR deviation that the Civilian Agency Acquisition Council (CAAC) authorized all civilian agencies to issue amending FAR 52.219-14(e)(1) – see "Revision of Limitations on Subcontracting" in the September 2021 ***Federal Contracts Perspective*** article "FAC 2021-07 Addresses Small Business Subcontracting, Accessibility Standards."

ACCELERATED PAYMENTS TO SMALL CONTRACTORS PROPOSED

The FAR Council is proposing to amend FAR 32.009, Providing Accelerated Payments to Small usiness Subcontractors, and FAR 52.232-40, Providing Accelerated Payments to Small Business Subcontractors, to implement NDAA for FY 2020 (Public Law 116-92), Section 873, Accelerated Payments Applicable to Contracts with Certain Small Business Concerns Under the Prompt Payment Act, which requires agencies to establish an accelerated payment date for: (1) small business prime contractors, with a goal of 15 days after receipt of a proper invoice, if a specific payment date is not established by contract; and (2) prime contractors that subcontract with small businesses, with a goal of 15 days after receipt of a proper invoice, if: (i) a specific payment date is not established by contract; and (ii) the contractor agrees to make accelerated payments to the subcontractor without any further consideration from, or fees charged to, the subcontractor.

Currently, FAR 32.009-1, General, requires agencies to "take measures to ensure that prime contractors pay small business subcontractors on an accelerated timetable to the maximum extent practicable, and upon receipt of accelerated payments from the government", and FAR 32.009-2, Contract Clause, requires contracting officers to include FAR 52.232-40 in all solicitations and contracts. FAR 52.232-40 requires prime contractors to provide accelerated payments to their small business subcontractors when the government provides accelerated payments to the prime contractors.

This proposed rule would expand FAR 32.009-1 to state, "agencies shall provide accelerated payments, to the fullest extent permitted by law, with a goal of 15 days after receipt of a proper invoice and all other required documentation, if a specific payment date is not established by contract, to: (1) small business contractors; and (2) prime contractors that subcontract with a small business concern, if the prime contractor agrees to make payments to the small business subcontractor within 15 days of receiving the accelerated payment from the government, after

receipt of a proper invoice and all other required documentation from the small business subcontractor, to the maximum extent practicable, without any further consideration from or fees charged to the subcontractor." While Section 873 does not specify the number of days for the prime contractor to make accelerated payments to the subcontractor, the FAR Council proposes that the prime contractor make payments to the small business subcontractor within 15 days of receiving the accelerated payment from the government, after receipt of a proper invoice and all other required documentation from the small business subcontractor.

These changes would be incorporated into FAR 52.232-40 as paragraphs (a)(1) and (a)(2).

Comments on this proposed rule must be submitted no later than November 29, 2021, identified as "FAR Case 2020-007," through the Federal eRulemaking Portal at **http://www.regulations.gov**.

To further improve cash flow and access to the federal marketplace, the FAR Council is "considering additional regulatory actions to further broaden the reach of accelerated payments to small business subcontractors and welcome public comment on how this broadening might best be accomplished. This proposed rule flows down the requirement for accelerated payments from the prime contractor to small business subcontractors; the accelerated payment requirement does not flow down to other than small businesses, *i.e.*, large business subcontractors. As drafted, large business subcontractors in the supply chain are not required to receive accelerated payments, and therefore are not required to accelerate payments to their small business subcontractors. Should the rule be expanded to apply the accelerated payment requirement to large business subcontractors in order to reach lower tier small business subcontractors? In other words, should all businesses, large and small, be directed to accelerate payment to their subcontractors, all the way down the tiers? What are the benefits, burdens, and unintended consequences, if any, of this type of expansion?"

FEDERAL MINIMUM WAGE INCREASED TO $11.25/HOUR FOR 2022

The Department of Labor (DOL) has announced that the applicable minimum wage rate to be paid to workers performing work on or in connection with federal contracts covered by EO 13658, Establishing a Minimum Wage for Contractors, beginning January 1, 2022, is increased from $10.95 to $11.25 per hour (see FAR subpart 22.19, Establishing a Minimum Wage for Contractors).

EO 13658 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, EO 13658 stated that the 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 became $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 became $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").

In 2017, the DOL determined that the CPI index increased by 1.691% in 2017, so the minimum wage became $10.35 per hour beginning January 1, 2018 (see the October 2017 *Federal Contracts Perspective* article "Federal Minimum Wage Increased to $10.35/Hour For 2018").

In 2018, the DOL determined that the CPI index increased by 2.337% in 2018, so the minimum wage became $10.60 per hour effective January 1, 2019 (see the October 2018 ***Federal Contracts Perspective*** article "Federal Minimum Wage Increased to $10.60/Hour for 2019").

In 2019, the DOL determined that the CPI increased by 2.036% in 2019, so the minimum wage became $10.80 per hour effective January 1, 2020 (see the October 2019 ***Federal Contracts Perspective*** article "Federal Minimum Wage Increased to $10.80/Hour for 2020").

In 2020, the DOL determined that the CPI increased by 1.432% in 2020, so the minimum wage became $10.95 per hour effective January 1, 2021 (see the September 2020 ***Federal Contracts Perspective*** article "Federal Minimum Wage Increased to $10.95/Hour for 2021")

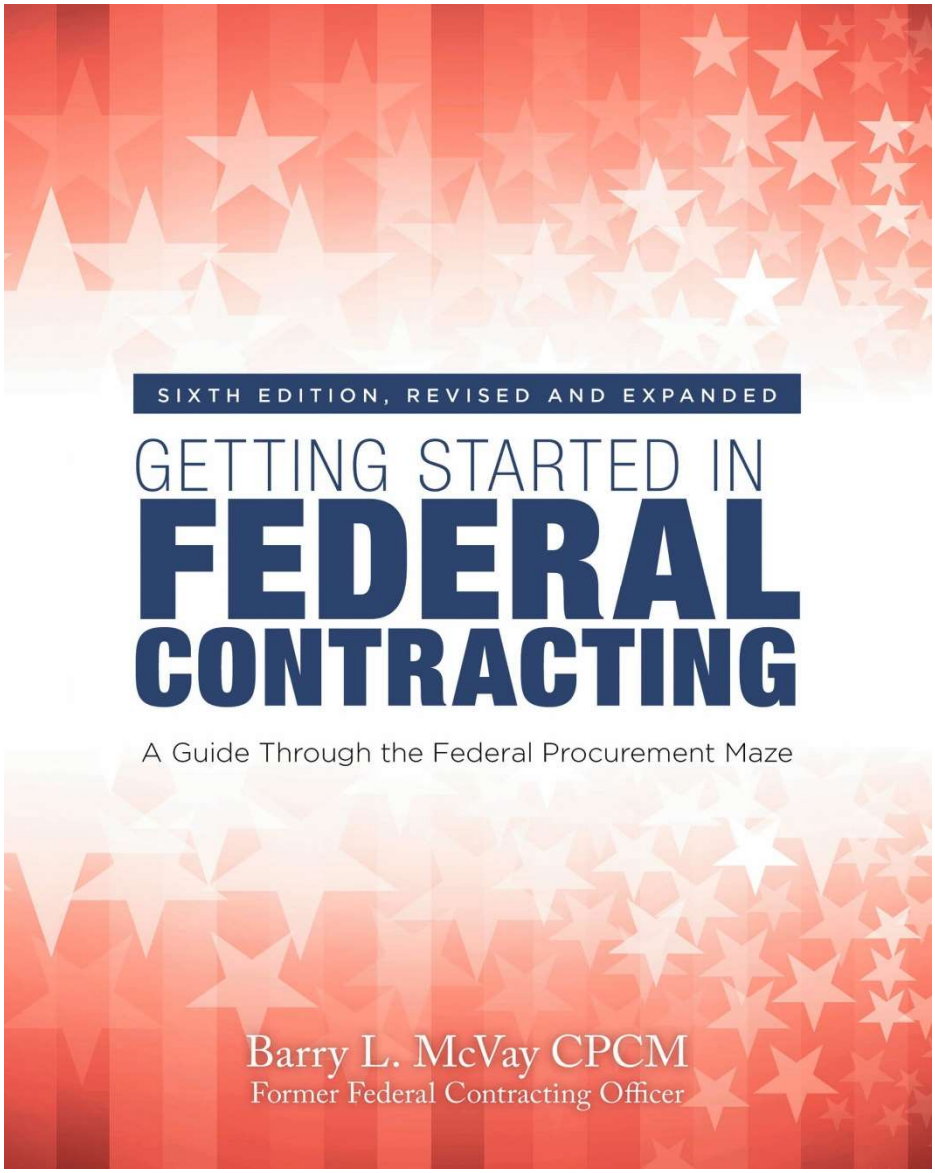
Now, the DOL has determined that the CPI index increased by 2.567% in 2021, and this produces a minimum wage of $11.25 per hour effective January 1, 2022.

In addition, the required minimum cash wage that must be paid to tipped employees performing work on or in connection with covered contracts is increased from $7.65 to $7.90 per hour.

However, on April 27, 2021, President Biden signed EO 14026, Increasing the Minimum Wage for Federal Contractors, which mandates that "workers working on or in connection with a federal government contract" be paid a minimum wage of $15.00 per hour. The $15.00 rate goes into effect January 30, 2022, and will apply to federal contractors and their subcontractors (see the May 2021 ***Federal Contracts Perspective*** article "Biden Orders $15/Hour Minimum Wage on Federal Contracts"). So how do EO 13658 and EO 14026 fit together?

EO 13658 went into effect in 2016 and is still in effect today. EO 14026 has yet to go into effect: all agencies must incorporate the $15.00 minimum wage in ***new solicitations*** by January 30, 2022, and into ***new contracts*** by March 30, 2022. Also, agencies must incorporate the higher wage rate into existing contracts when the parties exercise options or otherwise extend those contracts on or after January 30, 2022.

The DOL announcement states, "For some amount of time, the Department [of Labor] anticipates that there will be some existing contracts with the federal government that do not qualify as a covered 'new contract' for purposes of Executive Order 14026 and thus will remain subject to the minimum wage requirements of Executive Order 13658. The Department anticipates that, in the relatively near future, essentially all covered contracts with the federal government will qualify as 'new' contracts under Executive Order 14026 and be subject to its higher minimum wage rate. Until such time, however, Executive Order 13658 and its regulations at 29 CFR part 10 [Establishing a Minimum Wage for Contractors] must remain in place."



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