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BIDEN ORDERS \$15/HOUR MINIMUM WAGE ON FEDERAL CONTRACTS

On April 27, President Biden issued Executive Order 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 1, 2022, and will apply to federal contractors and their subcontractors. Executive Order 14026 is an extension and update of Executive Order 13658, Establishing a Minimum Wage for Contractors, which was issued by President Obama in 2014 (when Joe Biden was vice president) (see the March 2014 *Federal Contracts Perspective* article “President Issues Executive Order Mandating \$10.10/Hour Minimum Wage”). Executive Order 14026 increases the minimum wage applicable to federal contracts from \$10.95 per hour, a 37% increase (see the September 2020 *Federal Contracts Perspective* article “Federal Minimum Wage Increased to \$10.95/Hour for 2021”).

Executive Order 14026 will:

- Increase the hourly minimum wage for federal contractors to \$15.00 an hour. Starting January 30, 2022, all agencies must incorporate a \$15.00 minimum wage in new contract solicitations, and by March 30, 2022, all agencies must implement the minimum wage into new contracts. Also, agencies must implement the higher wage into existing contracts when the parties exercise options to extend those contracts.
- Continue to index the minimum wage to the “Consumer Price Index for Urban Wage Earners and Clerical Workers (United States city average, all items, not seasonally adjusted)” so that every year after 2022 the minimum wage it will be automatically adjusted to reflect changes in the cost of living.
- Eliminate the tipped minimum wage for federal contract workers by 2024. Federal statute allows employers of tipped workers to pay a subminimum wage as long as their tips bring their wages up to the level of the minimum wage. Executive Order 13658 partially raised the wages for tipped workers; Executive Order 14026 will ensure tipped employees working on federal contracts will earn the same minimum wage as other employees on federal contracts (the current minimum wage for tipped contract workers is \$7.65 per hour (see the September 2020 *Federal Contracts Perspective* article “Federal Minimum Wage Increased to \$10.95/Hour for 2021”). The minimum wage for tipped workers will start at \$10.50 per hour on January 30, 2022, then

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increase on January 1, 2023, to 85% of the indexed minimum wage in effect for 2023, then increase on January 1, 2024, to 100% of the indexed minimum wage in effect for 2024.

- Ensure a \$15.00 minimum wage for federal contract workers with disabilities. Current law permits these workers to be paid less than the minimum wage, but Executive Order 13658 required that contract workers with disabilities be paid the same minimum wage as other federal contract workers. Executive Order 14026 continues this parity.
- Restore minimum wage protections to outfitters and guides operating on federal lands by revoking Executive Order 13838, Exemption From Executive Order 13658 for Recreational Services on Federal Lands (see the October 2018 *Federal Contracts Perspective* article “Federal Minimum Wage Increased to \$10.60/Hour for 2019”, and “Recreational Services on Federal Lands” in the November 2020 *Federal Contracts Perspective* article “FAC 2021-02 Addresses ROTC, Recreational Services”).

Executive Order 14026 applies to “any new contract; new contract-like instrument; new solicitation; extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument, if (i): (A) it is a procurement contract or contract-like instrument for services or construction; (B) it is a contract or contract-like instrument for services covered by the Service Contract Act [which applies to federal contracts and subcontracts for services exceeding \$2,500]; (C) it is a contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor regulations...; or (D) it is a contract or contract-like instrument entered into with the federal government in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public; and (ii) the wages of workers under such contract or contract-like instrument are governed by the Fair Labor Standards Act [which establishes \$7.25/hour as the national minimum wage and mandates overtime pay at a rate not less than one and a half times the regular rate of pay after 40 hours of work in a workweek], the Service Contract Act, or the Davis-Bacon Act [which applies to most federal contracts for construction exceeding \$2,000].”

The Secretary of Labor is required to issue regulations implementing Executive Order 14026 by November 24, 2021. The Federal Acquisition Regulation (FAR) is to be amended within 60 days of the issuance of the Labor regulations to require the inclusion of a clause in solicitations and contracts that provides, as a condition of payment, that the contractor is to pay workers employed in the performance of the contract or any covered subcontract the minimum wage specified by the executive order.

EDITOR’S NOTE: President Biden states in his executive order that “raising the minimum wage enhances worker productivity and generates higher-quality work by boosting workers’ health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory and training costs.” If this is the case, why hadn’t contractors raised the wages themselves to \$15/hour to obtain an edge over their competitors?

Vivina McVay, Editor-in Chief

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GSA TIDIES UP A BIT, TOO

As did the Department of Defense in March (see the April 2021 *Federal Contracts Perspective* article “DOD Tides Up a Bit”), the General Services Administration (GSA) took it easy in April and lightly touched up the GSA Acquisition Regulation (GSAR) a bit.

■ **Redesignate Terminology for Unique Identification of Entities Receiving GSA Awards:** This direct final rule amends the GSAR to redesignate the terminology for unique identification of entities receiving GSA awards by substituting “unique entity identifier” for “Data Universal Numbering System (DUNS®) number,” thus conforming the GSAR to changes made to the FAR (see “Unique Identification of Entities Receiving Federal Awards” in the October 2016 *Federal Contracts Perspective* article “FAC 2005-91 Finalizes Rule on Women-Owned Small Business Sole Source Contracts”).

The changes are made to: (1) paragraph (b) of GSAR 504.1103, Procedures [for the System for Award Management (SAM)], by replacing “DUNS or DUNS+4 number” with “unique entity identifier”; (2) paragraph (b)(2) of GSAR 509.406-3, Procedures [for debarment], by replacing “DUNS numbers” with “unique entity identifiers”; and (3) replacing “FAR 52.204-6, Data Universal Numbering System (DUNS) Number” with “FAR 52.204-6, Unique Entity Identifier” in paragraph (a) of GSAR 570.701, FAR Provisions and Clauses [for acquiring leasehold interests in real property].

Because these changes are considered noncontroversial, this direct final rule will go into effect on June 22, 2021, unless adverse comments are received by May 24, 2021. If GSA receives adverse comments, GSA will withdraw the rule. Adverse comments must be submitted: (1) through the Federal eRulemaking portal at <https://www.regulations.gov> by searching for “GSAR Case 2020-G538”; or (2) by calling Bryon Boyer, Procurement Analyst, at 817-850-5580, or by emailing him at gsarpolicy@gsa.gov.

■ **Removal of Office of General Counsel Review for Final Payments:** This proposed rule would revise GSAR 532.905-70, Final Payment – Construction and Building Service Contracts, to remove the requirement for contracting officers to obtain approval of legal counsel before processing final payments for construction and building service contracts where, after 60 days, the contracting officer is unable to obtain a release of claims from the contractors. Legal review is not a statutory requirement, and the decision to process final payments in such cases is a business decision, not a legal one.

This proposed rule would make the following changes to GSAR 532.905-70:

- Revise paragraph (b), which currently states “Contracting officers may not process the final payment on construction or building service contracts until the contractor submits a properly executed GSA Form 1142, Release of Claims, except as provided in paragraph (c) of this section”, to read as follows: “A contracting officer may only process the final payment for a construction or building service contract once: (1) the contractor submits a properly executed GSA Form 1142, Release of Claims; or (2) the contracting officer documents in the contract file: (i) that the contracting officer requested a release of claims from the contractor and did not receive a response within 60 calendar days; and (ii) approval to process the final payment from one level above the contracting officer.”

- Paragraph (c) would be removed (“In cases where, after 60 days from the initial attempt, the contracting officer is unable to obtain a release of claims from the contractor, the final payment may be processed with the approval of assigned legal counsel”).
- Paragraph (d) would be removed (“The amount of final payment must include, as appropriate, deductions to cover any of the following: (1) liquidated damages for late completion; (2) liquidated damages for labor violations; (3) amount withheld for improper payment of labor wages; (4) the amount of unilateral change orders covering defects and omissions.”)

Comments on this proposed rule must be submitted by June 18, 2021: (1) through the Federal eRulemaking portal at <https://www.regulations.gov> by searching for “GSAR Case 2020-G521”; or (2) by calling Logan Kemp, GSA Acquisition Policy Division, at 202-969-4066, or by emailing him at gsarpolicy@gsa.gov.

■ **Justification Authorizing Public Buildings Service (PBS) to Use Other than Full and Open Competition for Urgent Lease Acquisitions:** This justification, issued by Jeffrey Koses, GSA Senior Procurement Executive, provides the Public Buildings Service (PBS) limited authority to use other than full and open competition for certain urgent lease actions (“urgent lease actions refer to leases entered into using urgent and compelling justifications to limit competition in response to an urgent need which may be related to a natural disaster, or may be more localized, such as mold or a fire at a particular building which requires the agency to relocate, temporarily or permanently”).

“GSA is often called upon to provide workspace and related support services to federal agencies in emergencies,” states Mr. Koses. “The need to provide such workspace and services in support of disaster relief efforts is often of unusual and compelling urgency. Any delay could seriously harm a critical government program and the recipients of federal assistance. [FAR 6.302-2, Unusual and Compelling Urgency] allows for contracting without full and open competition when there is an unusual and compelling urgency... This class justification satisfies the requirements of FAR 6.302-2 for the vast majority of GSA emergency lease procurements and streamlines the process for efficiently awarding these contracts.”

The class justification (the text of which is Attachment A to the memorandum) applies to individual acquisitions of workspace and related supporting emergency services provided to federal agencies: (1) to facilitate recovery from an emergency or major disaster declared by the president under applicable statutory authority; (2) to facilitate disaster preparedness or response; (3) to facilitate recovery from a cyber, nuclear, biological, chemical, or radiological attack; or (4) to facilitate the preparedness or response to health, safety, or other issues which so adversely impact the mission of an agency in a government controlled location as to necessitate the agency’s expeditious relocation.

The class justification is limited to lease acquisitions: (1) with a total period of performance no longer than one year, unless exceptional circumstances exist (Attachment B is the exceptional circumstances determination that must be executed by the Head of the Contracting Activity [HCA] when the lease is to exceed one year and exceed the simplified leasing acquisition threshold [SLAT – the average annual amount of rent for the term of the lease exceeds \$250,000]); and (2) with a total contract value up to the prospectus threshold (see <https://www.>

[gsa.gov/real-estate/design-construction/gsa-annual-prospectus-thresholds](https://www.gsa.gov/real-estate/design-construction/gsa-annual-prospectus-thresholds)), unless a higher threshold is approved by the HCA.

Attachment C to the memorandum is the certification that the contracting officer must execute that the requirement falls within the scope and applicability of the class justification.

The class justification is effective immediately and remains in effect until rescinded, amended, or incorporated into the GSAR.

EPA PROPOSES ADDRESSING INVOICING VIA THE IPP

The Environmental Protection Agency (EPA) is proposing to amend EPA Acquisition Regulation (EPAAR) 1552.232-70, Submission of Invoices, to further address electronic invoicing at EPA via the Invoice Processing Platform (IPP) (<https://www.ipp.gov/>). EPAAR 1552.232-70 is for cost-reimbursable and time-and-materials contracts and orders, which require considerable supporting documentation. While such documentation is necessary for those types of contracts and orders, that extensive documentation is not necessary for other contract types, like firm-fixed-price (FFP) contracts. Therefore, this proposed rule would amend EPAAR 1552.232-70 as follows:

- The name of EPAAR 1552.232-70 would be changed to “Additional Instructions for Submission of Electronic Invoices Via the Invoice Processing Platform (IPP).”
- An Alternate 2 would be added for use “in all other procurements where electronic invoicing via the Invoice Processing Platform (IPP) is required except for simplified acquisitions (for instance, use Alternate 2 for contract/order types such as firm-fixed-price, commercial items, architect-engineering and construction)” (this prescription for Alternate 2 is added to EPAAR 1532.908, Contract Clauses). Alternate 2 specifies that “the contractor shall submit invoices using the electronic form invoicing program Invoice Processing Platform (IPP), which is a secure web-based service provided by the U.S. Treasury that more efficiently manages government invoicing.” (**EDITOR’S NOTE:** The basic clause is used in cost-reimbursement contracts, and Alternate 1 is used in fixed-rate and non-commercial time-and-materials (T&M) procurements. The basic clause and Alternate 1 remain essentially unchanged.)

Comments on this proposed rule must be submitted by June 14, 2021, identified as “Docket ID No. EPA-HQ-OMS-2020-0389,” through the Federal eRulemaking portal at <https://www.regulations.gov>.

DOD PROHIBITS NETWORKS ALLOWING PORNOGRAPHY

The Department of Defense (DOD) Office of Defense Pricing and Contracting has issued a class deviation implementing Section 8116 of the Consolidated Appropriations Act, 2021 (Public Law 116-260), which provides that “none of the funds made available in this act may be used to maintain or establish a computer network unless such network is designed to block access to pornography websites.” Section 8116 goes on to provide that “nothing [in Section 8116] shall limit the use of funds necessary for any federal, state, tribal, or local law enforcement agency or

any other entity carrying out criminal investigations, prosecution, or adjudication activities, or for any activity necessary for the national defense, including intelligence activities.”

This class deviation implements Section 8116 by requiring the inclusion of DFARS 252.239-7098, Prohibition on Contracting to Maintain or Establish a Computer Network Unless Such Network is Designed to Block Access to Certain Websites – Representation (DEVIATION 2021-O0003), in all solicitations that will use funds made available by Public Law 116-260, including those for the acquisition of commercial items under FAR part 12, Acquisition of Commercial Items. DFARS 252.239-7098 (DEVIATION 2021-O0003) includes the following representation: “By submission of its offer, the offeror represents that it is not providing as part of its offer a proposal to maintain or establish a computer network unless such network is designed to block access to pornography websites.”

DHS SUSPENDS LIMITATIONS FOR UNACCOMPANIED CHILDREN

The Department of Homeland Security (DHS) has issued a class deviation from the Homeland Security Acquisition Manual (HSAM) suspending the HSAM limitations on the use of incremental funding of fixed-price, time-and-material, or labor hour contracts for services to facilitate the rapid procurement of services and supplies required to support unaccompanied alien children (UAC) while in DHS custody awaiting transfer to the Department of Health and Human Services (HHS).

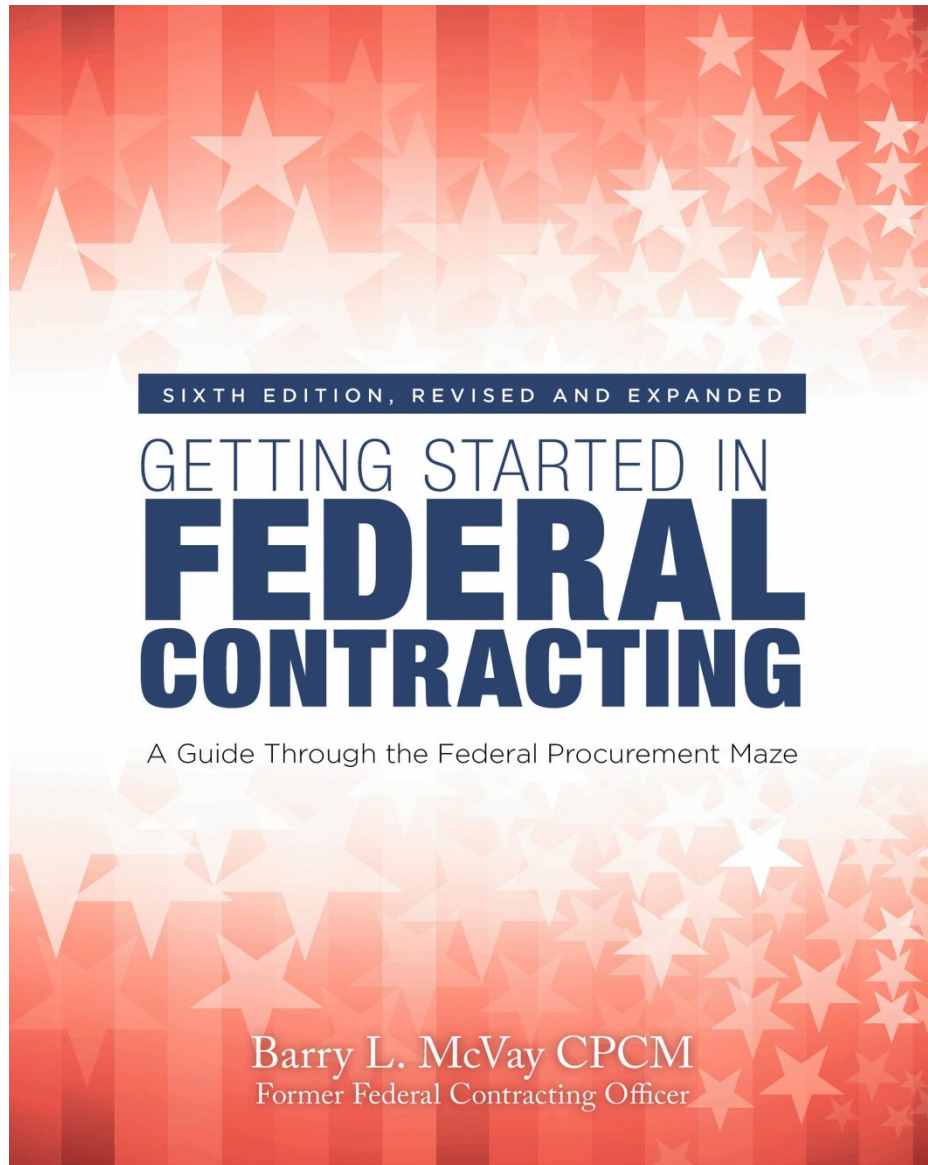
FAR 52.232-22, Limitation of Funds, provides policy and procedures on incremental funding, but the clause applies only to cost-type contracts. Paragraph (e) of HSAM 3032.702, Policy [for contract funding], restricts use of incremental funding of fixed-price, time-and-material, or labor-hour contracts to only during a continuing resolution (CR) or the short-term apportionment immediately following a CR. In addition, paragraph (f) prohibits the use of incremental funding for non-severable services and all supplies.

“It is imperative the department maximize funding flexibility to provide quick and efficient mission critical response efforts for UAC,” states Soraya Correa, DHS Chief Procurement Officer. “DHS must take immediate measures to provide shelter, meals, medical care, and other related services and supporting supplies for UAC. In this situation, strict compliance with HSAM requirements could result in failure to procure, or to provide essential supplies and materials when needed. Delays in procuring services and related supplies for UAC in DHS custody could pose a substantial risk to human life, health, and safety.”

Therefore, “effective immediately for procurements of supplies and materials in support of UAC requirements, contracting officers may incrementally fund fixed-price, time-and-materials, and labor-hour contracts for services, including non-severable services. The policy for supplies to be fully funded remains in effect.” Awards and modifications using incremental funding must be approved one level above the contracting officer, and the contract file must contain documentation that clearly explains how the procurement supports UAC in DHS custody.

This class deviation expires September 30, 2021, unless it is modified or rescinded.

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