



DEPARTMENT OF VETERANS AFFAIRS

8320-01

48 CFR Parts 816, 828, and 852

RIN 2900-AP82

Revise and Streamline VA Acquisition Regulation to Adhere to Federal Acquisition Regulation Principles (VAAR Case 2014-V002).

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) adopts as final the proposed amendments to VA regulations. This rulemaking prescribes five new Economic Price Adjustment clauses for firm-fixed-price contracts, identifies VA's task-order and delivery-order ombudsman, clarifies the nature and use of consignment agreements, adds policy coverage on bond premium adjustments and insurance under fixed-price contracts, and provides for indemnification of contractors for medical research or development contracts. This document adopts the proposed rule published on March 13, 2017, as a final rule with five technical non-substantive changes.

DATES: This rule is effective on [insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mr. Ricky Clark, Senior Procurement Analyst, Procurement Policy and Warrant Management Services, 003A2A, 425 I Street, NW, Washington, DC, 20001, (202) 632-5276 (this is not a toll-free telephone number).

SUPPLEMENTARY INFORMATION: This document adopts as a final rule without change a proposed rule amending the VA Acquisition Regulation (VAAR). On March 13, 2017, VA published a proposed rule in the Federal Register (82 FR 13418) which announced VA's intent to amend regulations for parts 816 and 828. On April 4, 2017, VA published in the Federal Register a correction to the proposed rule at 82 FR 16332.

We provided a 60 day comment period for interested parties to submit comments to VA on or before May 12, 2017. Five respondents submitted comments to the proposed rule. A discussion of the comments is provided below.

One commenter asserted that the restrictions imposed on VA regarding 38 U.S.C. 8127 can often impact the efficiency of using the combined synopsis/solicitation method. The commenter recommends: "Creating a policy and procedure for COs to utilize the commercial combo and still comply with the "purpose" of 38 USC 8127 but COs will need guidance and limitations."

The parts in this final rule do not address acquisition of commercial items or simplified acquisition procedures set forth in the Federal Acquisition Regulation (FAR) parts 12 and 13 or VAAR parts 812 and 813. However, in response to the comment, VA does not concur. In order to satisfy the requirements of 38 U.S.C. 8127, VA must ensure that preference is given for awards to service-disabled veteran-owned small businesses and veteran-owned small businesses, even for acquisition of commercial items under FAR part 13. Accordingly, VA has revised its market research process to facilitate the identification of verified and qualified veteran-owned firms for contract awards. VA's contracting officers will be able to perform the required market research and identify veteran-owned firms more quickly and efficiently as the learning curve

diminishes. VA is committed to complying with 38 U.S.C. 8127, ensuring the mission is not compromised, and that contracting officers are making awards in a timely fashion. Additionally, implementation of 38 U.S.C. 8127, the Veterans Benefits, Healthcare, and Information Technology Act of 2006, does not prohibit the use of the combined synopsis/solicitation method set forth in FAR part 12.

One commenter expressed general support for veterans programs and complimented the revisions made in the rule. VA appreciates the commenter's support of veterans.

One commenter noted that the proposed rule does not require formal rulemaking. VA removed the term "formal" in the description of its rulemaking process. However, in accordance with 41 U.S.C. 1707 (the Office of Federal Procurement Policy Act), a procurement policy, regulation, procedure, or form (including an amendment or modification thereto) may not take effect until 60 days after it is published for public comment in the Federal Register. During this process where VA is examining its VA Acquisition Regulation, proposed rules will be published for public comment in accordance with the Federal rulemaking process.

One commenter stated that this rule could benefit from further explanation as currently in VA there is confusion regarding how consignment agreements are entered into. The first sentence of section 816.770 has been changed from "A consignment agreement is not a contract" to "Consignment agreements shall only be established under a contract and by a contracting officer."

The final rule informs the public that consignment agreements are permitted to be used at VA. As stated in the proposed rule: "This Proposed Rule will streamline the

VAAR to implement and supplement the FAR only when required, and remove internal agency guidance as noted above in keeping with the FAR principles concerning agency acquisition regulations.” Internal agency guidance and procedures relating to consignment agreements are included in M816, the corresponding VA Acquisition Manual (VAAM) part that will be issued within VA when the revised VAAR part 816 is published. The information included in the VAAM will address the concerns raised by the commenter.

One commenter recommends that VA consider the use of cascading set-asides in FAR part 16 related acquisitions. The commenter also takes issue with VA’s implementation of 38 U.S.C. 8127 in that it doesn’t explicitly allow cascading set-asides and believes that this slows the procurement process. We are making no change to VAAR Part 816 at this time based on this comment.

This comment was beyond the scope of the proposed rule. Guidance on cascading set-asides would more appropriately be placed in VAAR Part 819. VA will consider including guidance on cascading when VA proposes revisions to VAAR Part 819. VA is committed to complying with 38 U.S.C. 8127, ensuring the mission is not compromised, and that contracting officers are making awards in a timely fashion.

Technical Non-substantive Changes to the Proposed Rule

This final rule removes the citation of 38 U.S.C. 501 from parts 828 and 852, 41 U.S.C 1121 and 41 U.S.C. 1702 to the authority of parts 816, 828, and 852 which address overall direction of procurement policy, acquisition planning and management responsibilities.

This final rule revises subsection 816.203-4(f) to remove “or under a VA provider agreement.” This clarifies that the prescribed clause applies to VA contracts and should not be utilized for VA provider agreements that are not made under a contract.

Clause 852.216-72, “Proportional Economic Price Adjustment of Contract Price(s) Based on a Price Index,” included in a footnote the sentence, “Selection of the wrong index may result in a claim and reformation of a contract.” This sentence has been removed. The deleted text represents internal VA guidance for VA contracting personnel and is not appropriate for inclusion in a regulation.

This final rule revises section 828.306(b) by replacing “VA Manual MP-1, Part II, Chapter 3” with “VA Policy” in reference to the policy document for emergency or sporadic ambulance services. This change was made to avoid the need to amend the regulation should VA place this policy in a different document in the future.

This final rule revises section 852.216-73(a) by including “by a contracting officer” at the end of the paragraph. This is to clarify that contract modifications must be performed by a contracting officer. Sections 852.216-73(a) and 852.216-74 are revised to remove the terms “ALT #1” and “ALT #2” from the titles of the clauses as well as from their prescriptions at section 816.203-4(e)(3) and (4).

Based on the rationale set forth in the proposed rule and in this document, VA is adopting the provisions of the proposed rule as a final rule with the changes discussed above.

Paperwork Reduction Act

Although this action contains provisions constituting collections of information at 48 CFR 828.306 and 852.228-71, under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521), no new or proposed revised collections of information are associated with this final rule. The information collection requirements for 48 CFR 828.306 and 852.228-71 are currently approved by the Office of Management and Budget (OMB) and have been assigned OMB control number 2900-0590.

Regulatory Flexibility Act

This final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This final rule will generally be small business neutral. The overall impact of the final rule will be of benefit to small businesses owned by veterans or service-disabled veterans as the VAAR is being updated to remove extraneous procedural information that applies only to VA’s internal operating procedures. VA estimates no cost impact to individual business resulting from these rule updates. On this basis, the adoption of this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Therefore, under 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 12866, 13563 and 13771

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits of reducing costs, of harmonizing rules, and of promoting flexibility. E.O. 12866, Regulatory Planning and Review defines "significant regulatory action" to mean any regulatory action that is likely to result in a rule that may: "(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order."

VA has examined the economic, interagency, budgetary, legal, and policy implications of this regulatory action, and it has been determined to be a significant regulatory action under E.O. 12866, because it raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order. VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is

published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's Web site at <http://www.va.gov/orpm> by following the link for VA Regulations Published from FY 2004 Through Fiscal Year to Date. This rule is not expected to be subject to the requirements of EO13771, Reducing Regulation and Controlling Regulatory Costs, because this rule is expected to result in no more than *de minimis* costs.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal Governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal Governments or on the private sector.

List of Subjects

48 CFR Part 816

Government procurement.

48 CFR Part 828

Government procurement, Insurance, Surety bonds.

48 CFR Part 852

Government procurement, Reporting and recordkeeping requirements.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on December 15, 2017, for publication.

Dated: February 12, 2018.

Consuela Benjamin
Regulations Development Coordinator
Office of Regulation Policy & Management,
Office of the Secretary,
Department of Veterans Affairs.

For the reasons set out in the preamble, VA amends 48 CFR, chapter 8, parts 816, 828, and 852 as follows:

PART 816—TYPES OF CONTRACTS

1. The authority citation for part 816 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 41 U.S.C. 1121; 41 U.S.C. 1702; and 48 CFR 1.301-1.304.

Subpart 816.1 [Removed and Reserved]

2. Subpart 816.1 is removed and reserved.

3. Subpart 816.2, consisting of section 816.203, is added to read as follows:

Subpart 816.2—Fixed-Price Contracts

816.203 Fixed-price contracts with economic price adjustment.

816.203-4 Contract clauses.

(e) The contracting officer shall, when contracting by negotiation, use the following clauses.

(1) The contracting officer shall insert the clause at 852.216-71, “Economic Price Adjustment of Contract Price(s) Based on a Price Index,” in solicitations and firm fixed price contracts, subject to FAR 16.203-4(d)(1) and when changes to a price index will be used to calculate corresponding changes to the total contract price or unit prices of the contract.

(i) Exceptions:

(A) Do not use this clause when changes to the price index will apply to only a component part of the contract price.

(B) Do not publish or include the footnotes in the solicitation, they are only included herein to provide guidance to contracting officers.

(2) The contracting officer shall insert the clause at 852.216-72, "Proportional Economic Price Adjustment of Contract Price(s) Based on a Price Index," in solicitations and firm fixed price contracts, and subject to FAR 16.203-4(d)(1) when changes to an industry price index shall be used to calculate changes to only a portion of the contract price or the unit prices of the contract.

(i) Exceptions:

(A) The clause should not be used when a change in the index price will be applied directly and totally to the contract price or the unit prices, i.e., when the Consumer Price Index is used to calculate changes and a 5% increase in the CPI would result in a 5% increase in the total contract price of the unit prices.

(B) Do not publish or include the footnotes in the solicitation, as they are only provided for guidance to the contracting officer.

(3) The contracting officer shall insert the clause at 852.216-73, "Economic Price Adjustment – State Nursing Home Care for Veterans," in solicitations and firm fixed price contracts subject to FAR 16.203-4(d)(1) and the following circumstance: when changes to the Medicaid rate, as authorized by the State Medicaid Agency (SMA), shall be used to calculate corresponding changes in the total contract price or the per diem prices of the agreement or contract.

(4) The contracting officer shall insert the clause at 852.216-74, "Economic Price Adjustment – Medicaid Labor Rates," in solicitations and firm fixed price contracts when the conditions specified in FAR 16.203-4(c)(1) apply. The clause is modifiable by increasing the 10-percent maximum limit on aggregate increases specified in **paragraph**

(c)(4) of this section, upon the approval by the Head of the Contracting Activity (HCA) or designee.

(5) The contracting officer shall insert the clause at 852.216-75, “Economic Price Adjustment – Fuel Surcharge,” in solicitations and firm fixed price contracts when contracting by negotiation is subject to changes in the cost of fuel increases. The clause is subject to the conditions at FAR 16.203-4(d)(1).

(f) The contracting officer shall follow procedures as prescribed in FAR 16.203-4(c) and 38 CFR 51.41(b)(1) for EPA fixed price contracts based on Medicaid rates. These procedures shall be used when contracting by negotiation between the VA and the State Veteran Home for making payments under contracts for nursing home care for Veterans.

816.504 [Removed]

4. Section 816.504 is removed.

5. Section 816.505 is revised to read as follows:

816.505 Ordering.

(b)(8) Task-order and delivery-order ombudsman. The task-order contract and delivery-order ombudsman for VA is the Associate Deputy Assistant Secretary (ADAS) for Procurement Policy, Systems and Oversight. The VA Ombudsman shall review and resolve complaints from contractors concerning all task and delivery order actions. If any corrective action is needed after reviewing complaints from contractors, the VA Ombudsman shall provide a written determination of such action to the contracting officer. Contracting officers shall be notified of any complaints submitted to the VA Ombudsman.

6. Subpart 816.7 is added to read as follows:

Subpart 816.7—Agreements

816.770 Consignment agreements.

Consignment agreements shall only be established under a contract and by a contracting officer. A consignment agreement is defined as a delivery method for a specified period of time in which the contractor provides an item/s for Government use and the contractor receives reimbursement only if and when the item is used by the Government. Consignment agreements are allowable and shall be considered in those instances when the requirement for an item is immediate and on-going and when it is impossible to predetermine the type or model of a particular item until the need is established, and it is determined to be in the best interest of the VA.

PART 828—BONDS AND INSURANCE

7. The authority citation for part 828 is amended to read as follows:

Authority: 38 8127- 8128 and 8151-8153; 40 U.S.C. 121(c); 41 U.S.C 1121; 41 U.S.C, 1702; and 48 CFR 1.301-1.304.

Subpart 828.1—Bonds and Other Financial Protections

828.101, 828.101-2, and 828.101-70 [Removed]

8. Sections 828.101, 828.101-2, and 828.101-70 are removed.

828.106-6 [Removed]

9. Section 828.106-6 is removed.

10. Section 828.106-70 is revised to read as follows:

828.106-70 Bond premium adjustment.

The contracting officer shall insert the clause at 852.228-70, Bond Premium Adjustment, in solicitations and contracts when performance and payment bonds or payment protection is required.

Subpart 828.2 [Removed and Reserved]

11. Subpart 828.2 is removed and reserved.

12. Section 816.306 is amended by revising paragraph (a) to read as follows:

828.306 Insurance under fixed-price contracts.

(a) The contracting officer shall insert the provision at 852.228-71, Indemnification and Insurance, in solicitations when utilizing term contracts or contracts of a continuing nature for ambulance, automobile and aircraft service.

* * * * *

Subpart 828.71 [Redesignated as Subpart 828.70]

13. Subpart 828.71 is redesignated as subpart 828.70 and revised to read as follows:

Subpart 828.70—Indemnification of Contractors for Medical Research or Development Contracts

828.7000 Scope of subpart.

828.7001 Extent of indemnification.

828.7002 Financial protection.

828.7003 Indemnification clause.

828.7000 Scope of subpart.

(a) As used in this subpart, the term “contractor” includes subcontractors of any tier under a contract containing an indemnification provision under 38 U.S.C. 7317.

(b) This subpart sets forth the policies and procedures concerning indemnification of contractors performing contracts involving medical research or research and development that involve risks of an unusually hazardous nature, as authorized by 38 U.S.C. 7317.

(c) The authority to indemnify the contractor under this subpart does not create any rights to third parties that do not exist by law.

828.7001 Extent of indemnification.

(a) A contract for medical research or development authorized by 38 U.S.C. 7303, may provide that the Government will indemnify the contractor against losses or liability specified in paragraphs (b) and (c) of this section if all of the following apply:

(1) The contract work involves a risk of an unusually hazardous nature.

(2) The losses or liability arise out of the direct performance of the contract.

(3) The losses or liability are not covered by the financial protection required under 828.7002.

(b) The Government may indemnify a contractor for liability (including reasonable expenses of litigation or settlement) to third persons for death, bodily injury, or loss of or damage to property from a risk that the contract defines as unusually hazardous. The indemnification will not cover liability under State or Federal worker’s injury compensation laws to employees of the contractor who are both:

(1) Employed at the site of the contract work; and

(2) Working on the contract for which indemnification is granted.

(c) The Government may indemnify the contractor for loss of or damage to property of the contractor from a risk that the contract defines as unusually hazardous.

(d) A contract that provides for indemnification in accordance with this subpart must also require that:

(1) The contractor must notify the contracting officer of any claim or suit against the contractor for death, bodily injury, or loss of or damage to property; and

(2) The Government may choose to control or assist in the defense of any suit or claim for which indemnification is provided in the contract. (38 U.S.C. 7317)

828.7002 Financial protection.

(a) A contractor shall have and maintain an amount of financial protection to cover liability to third persons and loss of or damage to the contractor's property that meets one of the following:

(1) The maximum amount of insurance available from private sources; or

(2) A lesser amount that the Secretary establishes after taking into consideration the cost and terms of private insurance.

(b) Financial protection may include private insurance, private contractual indemnities, self-insurance, other proof of financial responsibility, or a combination that provides the maximum amount required. If a contractor elects to self-insure, the contractor must provide the contracting officer, before award, proof of financial responsibility up to the maximum amount required. (38 U.S.C. 7317)

828.7003 Indemnification clause.

The contracting officer shall include the clause, 852.228-72, "Indemnification of Contractor—Hazardous Research Projects" in contracts and solicitations that indemnify a contractor for liability (including reasonable expenses of litigation or settlement) to

third person for death, bodily injury, or loss of or damage to property from a risk that the contract defines in the performance work statement, the statement of work, or the statement of objectives as unusually hazardous.

PART 852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

14. The authority citation for 48 CFR part 852 is revised to read as follows:
Authority: 38 U.S.C. 8127-8128, and 8151-8153; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C 1702; and 48 CFR 1.301-1.304.

852.216-70 [Removed and Reserved]

15. Section 852.216-70 is removed and reserved.

16. Section 852.216-71 is added to read as follows:

852.216-71 Economic Price Adjustment of Contract Price(s) Based on a Price Index.

As prescribed in 816.203-4(e) (1), insert the following clause:

ECONOMIC PRICE ADJUSTMENT OF CONTRACT PRICE(S) BASED ON A
PRICE INDEX (DATE)

(a) To the extent that contract cost increases are provided for by this economic price adjustment clause, the Contractor warrants that the prices in this contract for the base period and any option periods do not include any amount to protect against such contingent cost increases.

(b) The Base and Adjusting Indexes, for the purpose of price adjustment under this clause, shall be _____,¹ as contained in _____,² as published by _____.³ All adjustments authorized under this clause shall be made by using the Base Index and Adjusting Indexes, which are published _____.⁴

(1) The Base Index, for the purposes of price adjustment under this clause, shall be the most recent Index published prior to the date for receipt of offers, or the due date for receipt of best and final offers if discussions were held whichever is later. The Base Index shall remain constant for the entire term of the contract, including all option periods.

(2) The Adjusting Index shall be the most recent Index published prior to the date of contract adjustment, as specified in paragraph (d) of this clause.

(c) The percentage difference between the Base Index and the Adjusting Index, rounded to the nearest .01 percent (e.g., 4.57%), will be used in calculating all adjustments to the following line items: _____.⁵ The prices for these line items will be multiplied by the percentage increase or decrease and the resulting amount will be added to or deducted from the original line item price for that contract period (e.g.,

¹ The Contracting Officer shall conduct market research to determine a suitable Consumer Price Index or other independent broad-based index to use for the solicitation. For example, for medical services, an appropriate index may be the Consumer Price Index that tracks medical services.

² Specify where the Index can be found, such as in a solicitation for laboratory services, the Contracting Officer might enter "Table 1, CPI-U: U.S. City Average, by expenditure category and commodity and service group, found at <http://www.bls.gov/news.release/cpi.t01.htm>".

³ Provide the information on who publishes the applicable Index used, e.g., in the example for laboratory services, "the U.S. Department of Labor".

⁴ State how often the Index is published, such as "monthly, around the middle of the month". Note that some Consumer Price Indexes are not published monthly. Ensure that the correct information is provided for the specific Index used.

⁵ Enter the line items that will be subject to adjustment or revise this paragraph to otherwise state what prices are subject to adjustment under this clause.

Base Year) to arrive at the new contract price for those line items from the effective date of the adjustment to the beginning of the next contract adjustment period, rounded to the same number of decimal points as the prices originally bid. Calculations for option year contract terms will be based on the prices in the schedule for those option years.

(d) The dates of contract adjustment shall be _____⁶ and the starting dates of each option year, if not already included in these dates. The Contracting Officer shall retain a copy of the Base Index in the contract file and, on each date of adjustment specified in this paragraph (d), shall obtain a copy of the Adjusting Index. The Contracting Officer shall calculate the adjustment due and shall, within 5 business days, issue a modification to the contract adjusting the unit or contract prices, as specified in paragraph (c). The adjusted unit or contract prices shall be effective for all orders placed or services provided after the date of contract adjustment as specified in this paragraph (d) until the beginning of the next contract adjustment period. If the Contracting Officer fails to act, the Contractor shall request in writing a contract adjustment and any subsequent adjustment shall be retroactive to the applicable date of contract adjustment specified in this paragraph (d). The Contractor's entitlement to price increases for a prior contract period (base year or option year) is waived unless the Contractor's written request for an adjustment under this clause is received by the Contracting Officer no later than 30

⁶ Establish time periods for when the Contracting Officer will process adjustments. This could be "the first day of every quarter, January, April, July, and October" or "Annually on October 1st" or some other similar time periods. Since the contracting officer is responsible for initiating the change, the Contracting Officer must establish a reminder mechanism to ensure that the adjustments are accomplished within the time period specified.

days following the end of the base year for changes applicable to the base year, or 30 days following the end of each option year for changes applicable to that option year. The Government's right to contract decreases for prior contract periods (base year or option year) is waived unless the Contracting Officer processes a contract modification no later than 30 days following the end of the base year for changes applicable to the base year, or 30 days following the end of each option year for changes applicable to that option year.

(e) An example of an adjustment calculation is provided herein for informational purposes only.

(1) The original contract price or line item prices for that contract term (e.g., base year) shall be used for all calculations during that particular contract term and new calculations shall be made for each and every contract adjustment period specified in paragraph (d) during that contract term.

(2) For purposes of this example, the contract prices for the line items as specified in paragraph (c) will be adjusted by the percentage calculated as follows:

| | |
|---|-------------------------|
| Adjusting Index for the current period | 196.6 |
| <u>Minus the Base Index</u> | <u>-188.0</u> |
| Equals the Index Point Change | 8.6 |
| Index Point Change Divided by the Base Index | $8.6 / 188.0 = .0457^*$ |
| Result Multiplied by 100 Equals the Percentage Change | 4.57% |
| (The Index Point Change Percentage) | |

*This figure shall be rounded to the fourth decimal place. When the fifth decimal is 1 to 4, the figure shall be rounded down, 5 to 9, rounded up.

(3) For a line item with an original bid price of \$25.00 and a 4.57 percent Index Point Change increase as of the first contract adjustment period, as shown above, the calculations for a new contract price for the first contract adjustment period would be as follows: $\$25.00 \times .0457 = \1.14 , $\$25 + \$1.14 = \$26.14^{**}$. The new contract price for this line item from the beginning of that first contract adjustment period until the start of the next contract adjustment period would be \$26.14 and the Contracting Officer would issue a contract modification reflecting this price change.

**The unit price adjustment shall be rounded up or down, as in paragraph (e)(1) of this clause, to match the number of decimal places in the original bid.

(4) If the Adjusting Index went down for the second adjustment period, reflecting only a 3 percent Index Point Change increase over the Base Index, the new price for this sample line item would be reduced for the second contract adjustment period from \$26.14 to \$25.75 as follows: $\$25 \times .03 = \0.75 , $\$25 + \$0.75 = \$25.75$. Note that the calculations for the second contract adjustment period are based on the original contract price for that contract term of \$25.00. The contract price for this line item is modified to reflect this new price for the second contract adjustment period.

(5) At the start of the first option year and each subsequent option year period (as well as for each contract adjustment period specified in paragraph (d) during that option year, if different), the Contracting Officer shall recalculate the contract or unit prices for that first option year based on any changes between the Adjusting Index

and the Base Index, from the original contract award date to the start of the first option period, and based on the Contractor's new option year prices. Assume the Contractor's bid price for the first option year for the above sample line item was \$25.50 and the calculations shown in paragraph (e)(1) of this clause at the start of the first option period reflected a 6 percent Index Point Change. The new contract price for this sample line item at the start of the first option period would be calculated as follows: $\$25.50 \times .06 = \1.53 , $\$25.50 + \$1.53 = \$27.03$. The Contracting Officer would process a contract modification reflecting a revised contract price of \$27.03 for the first contract adjustment period in the first option year.

(f) Price adjustments pursuant to this clause, shall be documented by a contract modification issued by the Contracting Officer, show the Base Index (see paragraph (b)(1)), the Adjusting Index, the adjusted contract prices (see paragraph (c)), the mathematical calculations used to arrive at the adjusted contract prices, and the effective date of the adjustment (see paragraph (d)).

(g) At the start of each option year, the Contracting Officer shall, within 5 days of the start of the option year period, process a contract modification adjusting the option year prices by the then current Index Point Change percentage, if any, reflecting the new adjusted prices for that first contract adjustment period in that option year.

(h) In the event that _____⁷ discontinues, or alters substantially, its method of calculating the Index cited herein, the parties shall mutually agree upon an appropriate substitute for determining the price adjustment described herein. If the Contracting Officer determines that the Index consistently and substantially fails to reflect market conditions, the Contracting Officer may modify the contract to specify the use of an appropriate substitute index, effective on the date the Index specified herein begins to consistently and substantially fail to reflect market conditions.

(i) Any dispute arising under this clause shall be resolved subject to the "Disputes" clause of the contract.

(End of clause)

⁷ Enter in the name of the entity whose index is used in the clause. In most cases when using this clause format, the index used would be a CPI-U Index and the Contracting Officer would enter "the U.S. Department of Labor".

17. Section 852.216-72 is added to read as follows:

852.216-72 Proportional Economic Price Adjustment of Contract Price(S) Based On A Price Index.

As prescribed in 816.203-4(e)(2), insert the following clause:

PROPORTIONAL ECONOMIC PRICE ADJUSTMENT OF CONTRACT PRICE(S)
BASED ON A PRICE INDEX (DATE)

(a) To the extent that contract cost increases are provided for by this economic price adjustment clause, the Contractor warrants that the prices in this contract for any option periods do not include any amount to protect against such contingent cost increases.

(b) The cost index, for the purpose of price adjustment under this clause, shall be _____¹ as contained in _____² as published by _____³. All adjustments authorized under this clause shall be made by using the Base Index and Adjusting Indexes, which are published _____⁴.

(1) The Base Index, for the purposes of price adjustment under this clause, shall be the most recent Index published prior to the closing date for receipt of offers, or the due date

¹ The Contracting Officer shall conduct market research to determine a suitable cost index for use in the solicitation. The index used is directly related to the type of commodity or service most likely to impact the Contractor and must approximately track the economic changes affecting the Contractor's costs. For transportation services, an appropriate index might be one that tracks the price of gasoline or diesel fuel. For example, in a solicitation for ambulance services, the Contracting Officer might enter into this block "the "Weekly U.S. Retail Gasoline Prices, Regular Grade" Index for New England" (or California or whichever index is the most appropriate).

² Specify where the index can be found, such as in an example for gasoline, "the Energy Information Administration Web site ([see VAAM M816.203-70](#)).

³ Provide the information on who publishes the index, such as, in an example for gasoline, "the U.S. Department of Energy."

⁴ State how often the index used is published, such as, in an example for an index for gasoline, "weekly each Monday at 5:00PM (Eastern time)," or "Tuesday if Monday is a holiday."

for receipt of best and final offers if discussions are held. This Base Index shall remain constant throughout the life of the contract, including all options.

(2) The Adjusting Index shall be the most recent Index published prior to the date of contract adjustment, as specified in paragraph (f).

(c) For purposes of this clause, it will be conclusively presumed that _____ percent (%)⁵ of the price of _____⁶ represents the Base Cost of _____⁷ and the resulting Base Cost will be the basis upon which adjustment will be made under this clause. This Base Cost will be used in calculating all adjustments to the following line items: _____.⁸ A new Base Cost will be calculated for each option year period based on the new option year prices.

(d) The percentage of the price of the indexed commodity (see paragraph (c)) remains fixed throughout the life of the contract and is not subject to modification under this clause. Any pricing actions pursuant to the "Changes" clause or other

⁵ Prior to issuing the solicitation, the Contracting Officer must conduct market research to determine an appropriate percentage to include in this paragraph. The percentage should reflect that portion of the unit price for the services or supplies being acquired that is applicable to the indexed commodity. For instance, in the case of an ambulance contract, research might indicate that, at the time the solicitation is being drafted and based on prior per-mile bid prices, the cost of gasoline accounts for 10% of the per mile cost of operating an ambulance. For example, if the prior bid price had been \$1.60 per mile, ambulances average 10 miles per gallon, and the cost of gasoline had been \$1.559 per gallon, 1 mile's worth of gasoline (\$.16) would be approximately ten (10) percent of the prior per mile bid price of \$1.60 per mile. This percent must be stated in the solicitation so that the same figure applies to all bidders. This figure remains constant throughout the life of the contract.

⁶ Enter in this block the portion of the contract that will be subject to price adjustment, e.g., "each one-way mile of ambulance services," or the line items that will be subject to price adjustment.

⁷ Enter in this block the commodity applicable to the index being used, as in an example for an ambulance contract, "regular grade gasoline".

⁸ Enter the line items that will be subject to adjustment, as in an example for an ambulance contract, the line items that reflect the one-way cost per mile for ambulance services for the base year and for each option year.

clause or provision of the contract, except for this clause, will be priced as though there were no provisions for economic price adjustment.

(e) All price adjustments shall be applicable only to the specific contract adjustment period to which the calculations are made. For every contract adjustment period, new calculations shall be made and new prices determined. Every adjustment during the Base Year shall be based on the original contract prices for that contract year and every adjustment during an option year shall be based on the original contract prices for that option year. The Contracting Officer must make new calculations for each and every contract adjustment period specified in paragraph (f) and at the beginning of each new option year, if different.

(f) The dates of contract adjustment shall be _____⁹ and the starting dates of each option year, if not already included in these dates. The Contracting Officer shall retain a copy of the Base Index in the contract file and, on each date of adjustment specified herein, obtain a copy of the Adjusting Index. The Contracting Officer shall calculate the adjustment due and shall, within 5 business days, issue a modification to the contract adjusting the contract or unit price(s). The adjusted contract or unit price(s) shall be effective for all orders placed or services provided after the date of contract adjustment, as specified in this paragraph (f), until the date of the next contract adjustment. If the Contracting Officer fails to act, the Contractor shall request a contract adjustment in writing and any subsequent

⁹ Establish time periods for when the Contracting Officer will process adjustments. This could be "the first day of each month" or "the first day of every quarter, January, April, July, and October" or "annually on October 1st" or some other similar time periods. Since the Contracting Officer is responsible for initiating the change, the Contracting Officer must establish a reminder mechanism to ensure that the adjustments are accomplished on time.

adjustment shall be retroactive to the applicable date of contract adjustment. The Contractor's entitlement to price increases for a prior contract period (base year or option year) shall be waived unless the Contractor's written request for an adjustment under this clause is received by the Contracting Officer no later than 30 days following the end of the base year for changes applicable to the base year, or 30 days following the end of each option year for changes applicable to that option year. The Government's right to contract decreases for prior contract periods (base year or option year) shall be waived unless the Contracting Officer processes a contract modification no later than 30 days following the end of the base year for changes applicable to the base year, or 30 days following the end of each option year for changes applicable to that option year.

(g) An example of an adjustment calculation is provided herein for informational purposes only.

(1) For purposes of this example, assume that a contract is for ambulance services, that the contract price is \$2.10 per mile one way, that price adjustments will be made on the basis of the cost of gasoline, that the cost of gasoline represents 10% of the total cost per mile (the Base Cost is 10% of \$2.10 (the per mile one way price in Line Item X), or \$0.21), and that contract adjustments will be made quarterly. If the Base Index (the price of gasoline the week prior to receipt of bids) is \$1.559 per gallon and the price of gasoline at the first date of contract adjustment is \$2.129 per gallon, the calculations for contract price adjustment would be as follows:

| | |
|--|--|
| Adjusting Index (most recent Index cost of gasoline as of the date of the first adjustment period) | \$2.129 per gallon |
| Minus the Base Index (Index cost of gasoline as of the date of receipt of offers) | <u>\$1.559 per gallon</u> |
| Equals increase (or decrease) to the Base Index | \$0.570 |
| Divide increase (or decrease) to the Base Index by the Base Index | $\$0.570 + \$1.559 = .3656^*$ (36.56% increase) |

Base Cost of \$0.21 (10% of \$2.10) multiplied by .3656 = \$0.0768 unit price increase

New Unit price following the adjustment is \$2.10 plus \$0.0768 =

\$2.1768 per mile (rounded to \$2.18) **

*This figure shall be rounded to the fourth decimal place. When the fifth decimal is 1 to 4, the figure shall be rounded down, 5 to 9, rounded up.

**The unit price adjustment shall be rounded up or down, as above, to match the number of decimal places in the original bid.

(2) For the second contract adjustment period, all calculations would be based on the original contract bid price for that contract year, \$2.10 per mile in this example. If the price of gasoline goes down during the second adjustment period to the original Base Index price of \$1.559 per gallon, the adjusted contract price for that second period would return to \$2.10 per mile (there would be a zero percent increase or decrease to the Base Cost and thus no change to the original bid price for that contract adjustment

period). The Contracting Officer would then issue a contract modification returning the contract price from \$2.18 to \$2.10 per mile for that contract adjustment period. If, on the other hand, the price of gasoline actually went below the Base Index price, say to \$1.449 per gallon, the calculations for the second economic price adjustment period would be as follows:

| | |
|---|--|
| Adjusting Index (most recent Index cost of gasoline as of the date of the second adjustment period) | \$1.449 per gallon |
| Minus the Base Index (Index cost of gasoline as of the date of receipt of offers) | -\$1.559 per gallon |
| Equals increase (or decrease) to Base Index | (\$0.110) (a negative \$.11) |
| Divide increase (or decrease) to the Base Index by the Base Index | (\$0.11) + \$1.559 = (.0706) (7.06% decrease) |
| Base Cost of \$0.21 (10% of \$2.10) multiplied by (.0706) | =\$0.0148 unit price decrease |

New Unit price following the second economic price adjustment is \$2.10 minus \$0.0148 = \$2.0852 per mile (rounded to \$2.09)

(3) At the start of the first option year, the Contracting Officer shall recalculate the price per mile based on any changes in the price of gasoline from the original contract award date and based on the Contractor's new first option year price per mile.

Assuming the Contractor's bid price per mile for the first option year was \$2.25 per mile, the new Base Cost for gasoline would be 10% of \$2.25, or \$0.225 (note that the

original percent figure from paragraph (c) (10% in this sample) stays constant throughout the life of the contract), but the Base Cost would change if the option year contract price changes. If the Adjusting Index for gasoline at the start of the first option year was now up to \$1.899 per gallon, the new first option year price for the first contract adjustment period would be calculated as follows:

| | |
|---|---|
| Adjusting Index (most recent Index cost of gasoline as of the first day of the first option period) | \$1.899 per gallon |
| Minus the Base Index (Index cost of gasoline as of the date of receipt of offers) | -\$1.559 per gallon |
| Equals increase (or decrease) to the Base Index | \$0.340 |
| Divide the increase (or decrease) to the Base Index by the Base Index | $\$0.34 + \$1.559 = .2181$ (21.81% increase) |

Base Cost of \$0.225 (10%* of \$2.25) multiplied by .2181 = \$0.0491 unit price increase.

New Unit price for the first contract adjustment period in the first option year is

\$2.25 plus \$0.0491 = \$2.2991 per mile (rounded to \$2.30 per mile).

*Note that the percentage remains constant (10%) but that the Base Cost has been increased for the first contract adjustment period in the first option year, since the Base Cost is a percentage of the first option year unit cost per mile (in this sample), and the unit cost per mile has increased in this sample for the first option year from \$2.10 to \$2.25. Although the new unit price for the first contract adjustment period of the first option year following application of the economic price adjustment in this sample would be \$2.30 per mile, all economic price adjustment calculations made during

that first option year would be based on the original first option year bid price (\$2.25 in this sample). If in the second contract adjustment period of the first option year, the calculations resulted in a unit price increase for gasoline of \$0.0332, the adjusted price for that period would be $\$2.25 + \$0.0332 = \$2.2832$, rounded to \$2.28 per mile.

(h) Price adjustments pursuant to this clause, which shall be made by contract modification issued by the Contracting Officer, shall show the Base Index (see paragraph (b)(1)), the Adjusting Index, the Base Cost (see paragraph (c)), the mathematical calculations used to arrive at the adjusted contract unit price, and the effective date of the adjustment.

(i) In the event that _____¹⁰ discontinues, or alters substantially, its method of calculating the Index cited herein, the parties shall mutually agree upon an appropriate substitute for determining the price adjustment described herein. If the Contracting Officer determines that the Index consistently and substantially fails to reflect market conditions, the Contracting Officer may modify the contract to specify use of an appropriate substitute index, effective on the date the Index specified herein begins to consistently and substantially fail to reflect market conditions.

(j) Any dispute arising under this clause shall subject to the "Disputes" clause of the contract.

(End of clause)

¹⁰ Enter in the name of the entity whose index is used in the clause. In the example for ambulance services using the "Weekly U.S. Retail Gasoline Prices, Regular Grade" index; the Contracting Officer would enter the "Energy Information Administration, Department of Energy".

18. Section 852.216-73 is added to read as follows:

852.216-73 Economic Price Adjustment – State Nursing Home Care for Veterans.

As prescribed in 816.203-4(e)(3), insert the following clause:

ECONOMIC PRICE ADJUSTMENT – STATE NURSING HOME CARE FOR
VETERANS (DATE)

This clause does not apply to rates for non-Medicaid nursing homes.

(a) Rate Determination. The per diem rate is established by the current Medicaid rate for Medicaid approved nursing home care plus a fair market amount (percentage) to cover the costs of supplies, services, and equipment above that provided under Medicaid established by the local State Medicaid Agency (SMA). Rates established after the effective date of this contract will require a modification to the contract by the Contacting Officer.

(1) The Medicaid rate covers room, board, and routine nursing care services.

(2) For all levels of nursing care a percentage is added for routine ancillary services/ supplies, such as drugs, nursing supplies, oxygen (occasional use), x-ray, laboratory, physician visits, and rental equipment.

(3) Special equipment, e.g. Clinitron bed, is not considered routine ancillary services (and may not be provided by the VA).

(4) Drug costs which comprise more than eight and one-half percent (8.5%) of the per diem rate are generally not considered routine ancillary supplies (and may not be provided by the VA).

(5) Rehabilitation therapies will be provided as distinct levels of care, i.e., skilled, intermediate, and custodial care. Hospice Care and Dialysis are not included in the rate. Payment for Hospices and Dialysis services is provided by the VA or other payers as determined by the Veteran with the VA's approval.

(b) Economic Price Adjustment. This clause does not apply to ancillary services that may be added or deleted from the agreement.

(1) The per diem rate(s) will apply throughout the term of this contract, including extension period(s). The rate(s) may be adjusted only to reflect a change in a Medicaid rate as authorized by the SMA. Normally, this will be on an annual basis. The negotiated percentage above the Medicaid rate, to cover the all-inclusive nature of the contract, will not be renegotiated; but will be applied and added to the new Medicaid rate for the adjusted per diem rate for each level of care item. In this regard, new rates will be negotiated requiring a modification to the contract. Each per diem price adjustment under this clause is subject to the following limitations:

(2) Any adjustment shall be limited to the effect of increases or decreases in the approved SMA's patient care components within the affected Medicaid groups.

(3) Adjustments will occur no more frequently than those issued by the SMA.

(4) No adjustments are made until the Contracting Officer receives from the SMA an authenticated copy of the new rates signed and dated at the top right of the document by the authorized nursing home official. Within ten days after this occurs, the Contracting Officer will execute an approval signature and date at the approximate locations of the nursing home official's signature, the action of which will serve as the effective date of the adjusted rate. A copy of the fully executed document will be sent to the nursing home official for record keeping purposes.

(End of clause)

852.216-74 [Amended]

19. Subsection 852.216-74 is added to read as follows:

852.216-74 Economic Price Adjustment – Medicaid Labor Rates.

As prescribed in 816.203-4(e)(4), insert the following clause:

ECONOMIC PRICE ADJUSTMENT – MEDICAID LABOR RATES (DATE)

This clause does not apply to rates for non-Medicaid nursing homes.

(a) The Contractor shall notify the Contracting Officer if, at any time during contract performance, the Medicaid rate set by the State Medicaid Agency (SMA) for contract line item increases or decreases in the Schedule. The Contractor shall furnish this notice within 60 days after the increase or decrease, or within any additional period that the Contracting Officer may approve in writing, but not later than the date of final payment under this contract. The notice shall include the Contractor's proposal for an

adjustment in the contract unit prices to be negotiated under paragraph (b) of this clause, and shall include, in the form required by the Contracting Officer, supporting data explaining the cause, effective date, and the amount of the increase or decrease and the amount of the Contractor's adjustment proposal.

(b) The Contracting Officer and the Contractor shall negotiate a price adjustment to the contract's unit prices and its effective date upon receipt of the notice and data under paragraph (a) of this clause. However, the Contracting Officer may postpone the negotiations until an accumulation of increases and decreases of the Medicaid labor rates (including fringe benefits) shown in the Schedule results in an adjustment allowable under paragraph (c)(3) of this clause. The Contracting Officer shall modify this contract as follows:

(1) Include the price adjustment and its effective date;

(2) Revise the Medicaid labor rates (including fringe benefits) as shown in the Schedule to reflect the increases or decreases resulting from the SMA adjustment. The Contractor shall continue performance pending agreement on, or determination of, any adjustment and its effective date.

(c) Any price adjustment under this clause is subject to the following limitations:

(1) Adjustment shall be limited to the effect on unit prices of the increases or decreases of the Medicaid rates of pay for labor (including fringe benefits) shown in the Schedule. There shall be no adjustment for changes in rates or unit prices other than those shown in the Schedule.

(2) No upward adjustment shall apply to supplies or services that are required to be delivered or performed before the effective date of the adjustment, unless the Contractor's failure to deliver or perform according to the delivery schedule results from causes beyond the Contractor's control and without its fault or negligence, within the meaning of the Default clause.

(3) There shall be no adjustment for any change in rates of pay for labor (including fringe benefits) or unit prices for material which would not result in a net change of at least three percent of the then-current total contract price. This limitation shall not apply, however, if, after final delivery of all contract line items, either party requests an adjustment under paragraph (b) of this clause.

(4) The aggregate of the increases in any contract unit price made under this clause shall not exceed 10 percent of the original unit price. There is no percentage limitation on the amount of decreases made under this clause.

(d) The Contracting Officer, precluding certified cost and pricing data may examine the Contractor's books, records, and other supporting data relevant to the cost of labor (including fringe benefits) and material during all reasonable times until the end of 3 years after the date of final payment under this contract or the time periods specified in Subpart 4.7 of the Federal Acquisition Regulation (FAR), whichever is earlier.

(End of clause)

852.216-75 [Amended]

20. Section 852.216-75 is added to read as follows:

852.216-75 Economic Price Adjustment Clause - Fuel Surcharge

As prescribed in 816.203-4(e)(5), insert the following clause:

ECONOMIC PRICE ADJUSTMENT CLAUSE - FUEL SURCHARGE (DATE)

(a) To the extent that contract fuel cost increases are provided for by this economic price adjustment clause, the Contractor warrants that the prices in this contract for any option periods do not include any amount to protect against such contingent fuel cost increases.

(b) The fuel cost index, for the purpose of price adjustment under this clause, shall be the "Weekly Retail On-Highway Diesel Prices Index."

The Base Fuel Cost, for the purpose of price adjustments under this clause, shall be the most recent Index Weekly Average Diesel Fuel Price per gallon published prior to the closing date for receipt of offers, or the due date for receipt of final proposal revisions if discussions are held.

(c) For purposes of this clause, it will be conclusively presumed that x% increase or decrease of the Base Fuel Cost represents a reasonable fluctuation of diesel fuel prices. The Base Fuel Cost (+/-) x% price range will be determined for the base contract year and will remain constant throughout the life of the contract, including option years. Base Fuel Cost price range is documented at time of contract award.

(d) Increases (or decreases) in the diesel fuel costs (Base Fuel Cost x%) as listed on the Index two weeks prior to the end of each calendar quarter can trigger a request from the Contractor to the Government (or from the Government to the Contractor) for cost adjustments. Notice must be in writing to the Subsistence Prime Vendor (SPV) Contracting Officer (or Contracting Officer's Representative) no less than ten days prior

to the beginning of the next quarter.

(e) Since fuel cost is only a part of the SPV Contracted distribution cost, the adjustment will be made as a penny per delivered case for every ten cent fuel price per gallon increase or decrease to the Base Fuel Cost x%. The difference is rounded down to the nearest whole cent and will be added to last line of each invoice noted as "Fuel Adjustment".

| | |
|---|--|
| Example calculation of fuel price change: | Price \$2.50 Base (+ or -) 15% Average National Diesel Fuel \$2.88 - \$2.13 |
| 3rd QTR (3rd week June) first year | \$3.05 - 2.88 = \$.17 (rounded down to 10 cents) Add one cent per delivered case to each invoice, starting first Monday of July. |
| Fuel Price \$3.05 Calculation: | |
| 3rd QTR Diesel Fuel Price decrease | \$2.13 - 1.80 = \$.33 (rounded down to \$.30 cents) Credit each invoice |
| \$1.80 Calculation: | \$.03 cents per delivered case. |

(f) Once approved, the date for contract fuel price adjustment will be the first Monday of the first month of each quarter unless otherwise designated at time of contract award.

(g) The Contracting Officer shall retain a copy of the Base Fuel Index establishing the Base Fuel Cost and the calculation of the price range incorporating the (+/-) x% adjustment in the contract file. All subsequent changes will be documented within the contract file and communicated to the Contractor and VA SPV customers via email one week prior to the fuel price adjustment implementation.

(h) Any adjustments for fuel price changes will only be implemented if requested in writing, reviewed by both parties, and provided within the designated time frames. No retroactive cost adjustments will be made. A contract modification will be issued at inception of first increase or decrease detailing Base Fuel Cost, price range, and calculation of first fuel adjustment charge. Adjustment will remain in effect with quarterly calculation changes as needed until price falls within Base Fuel Cost price range. A contract modification will be issued to terminate the adjustment when price returns to Base Fuel Cost (+/-) x% price range.

(i) In the event that "the Energy Information Administration, Department of Energy" discontinues, or substantially alters its method of calculating the national average diesel fuel prices cited herein, the parties shall mutually agree upon an appropriate substitute for determining the price adjustment described herein. If the Contracting Officer determines the Index consistently and substantially fails to reflect market conditions, the Contracting Officer may modify the contract to specify use of an appropriate substitute Index, effective on the date the Index specified herein begins to consistently and substantially fail to reflect market conditions.

(j) Any dispute arising under this clause shall be determined in accordance with and subject to the "Disputes" clause of the contract.

(End of clause)

21. Section 852.228-71 is revised to read as follows:

852.228-71 Indemnification and Insurance.

As prescribed in 828.306, insert the following clause:

INDEMNIFICATION AND INSURANCE (DATE)

(a) Indemnification. The Contractor expressly agrees to indemnify and save the Government, its officers, agents, servants, and employees harmless from and against any and all claims, loss, damage, injury, and liability, however caused, resulting from, arising out of, or in any way connected with the performance of work under this contract. Further, it is agreed that any negligence or alleged negligence of the Government, its officers, agents, servants, and employees, shall not be a bar to a claim for indemnification unless the act or omission of the Government, its officers, agents, servants, and employees is the sole, competent, and producing cause of such claims, loss, damage, injury, and liability. At the option of the Contractor, and subject to the approval by the Contracting Officer, insurance coverage may be employed as guaranty of indemnification.

(b) Insurance. Satisfactory insurance coverage is a condition precedent to award of this contract. In general, a successful bidder must present satisfactory evidence of full compliance with State and local requirements, or those below stipulated, whichever are the greater. More specifically, workers' compensation and employer's liability coverage will conform to applicable State law requirements for the service defined, whereas general liability and automobile liability of comprehensive type shall, in the absence of higher statutory minimums, be required in the amounts per vehicle used of not less than \$200,000 per person and \$500,000 per occurrence for bodily injury and \$20,000 per occurrence for property damage. State-approved sources of insurance coverage ordinarily will be deemed acceptable to the Department of Veterans Affairs, subject to timely certifications by such sources of the types and limits of the coverages afforded by the sources to the bidder. [Contracting Officer's Note: In those instances

where airplane service is to be used, substitute the word "aircraft" for "automobile" and "vehicle" and modify coverage to require aircraft public and passenger liability insurance of at least \$200,000 per passenger and \$500,000 per occurrence for bodily injury, other than passenger liability, and \$200,000 per occurrence for property damage. Coverage for passenger liability bodily injury shall be at least \$200,000 multiplied by the number of seats or passengers, whichever is greater.]

(End of clause)

22. Section 852.228-73 is added to read as follows:

852.228-73 Indemnification of Contractor—Hazardous Research Projects.

As prescribed in 828.7003, insert the following clause:

INDEMNIFICATION OF CONTRACTOR—HAZARDOUS RESEARCH PROJECTS
(DATE)

(a) This contract involves work with a risk of an unusually hazardous nature as specifically defined in the contract. The government shall indemnify the Contractor, including subcontractors of any tier, against losses or liability specified in paragraphs (b) and (c) of this clause if—

(1) The losses or liability arise out of or results from a risk defined in this contract as unusually hazardous; and

(2) The losses or liability are not covered by the financial protection required by paragraph (c).

(b) The Government shall indemnify a Contractor for—

(1) Liability (including reasonable expenses of litigation or settlement) to third persons for death, bodily injury, or loss of or damage to property from a risk that the contract

defines as unusually hazardous. This indemnification shall not cover liability under State or Federal worker's injury compensation laws to employees of the Contractor who are both:

- (i) Employed at the site of the contract work; and
- (ii) Working on the contract for which indemnification is granted.

(2) The Government shall also indemnify the Contractor for loss of or damage to property of the Contractor from a risk that the contract defines as unusually hazardous.

(c) A Contractor shall have and maintain an amount of financial protection to cover liability to third persons and loss of or damage to the Contractor's property. Financial protection may include private insurance, private contractual indemnities, self-insurance, other proof of financial responsibility, or a combination that provides the maximum amount required. The financial protection provided must meet one of the following—

- (1) The maximum amount of insurance available from private sources; or
- (2) A lesser amount that the Secretary establishes after taking into consideration the cost and terms of private insurance.

(d) Actions in event of a claim—

- (1) The Contractor shall notify the Contracting Officer of any claim or suit against the Contractor for death, bodily injury, or loss of or damage to property; and
- (2) The Government may elect to control or assist in the defense of any suit or claim for which indemnification is provided in the contract.

(End of clause)

Date: 2/21/2018]