

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2010-0076, Sequence 9]

Federal Acquisition Regulation; Federal Acquisition Circular 2005-47; Introduction

AGENCIES: Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2005-47. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at <http://www.regulations.gov>.

DATES: For effective dates see separate documents, which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below in relation to each FAR case. Please cite FAC 2005-47 and the specific FAR case numbers. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755.

LIST OF RULES IN FAC 2005-47

Item	Subject	FAR case	Analyst
I	Notification of Employee Rights Under the National Labor Relations Act (Interim)	2010-006	McFadden.
II	HUBZone Program Revisions	2006-005	Morgan.
III	Preventing Abuse of Interagency Contracts (Interim)	2008-032	Sakalos.
IV	Small Disadvantaged Business Self-Certification (Interim)	2009-019	Morgan.
V	Uniform Suspension and Debarment Requirement (Interim)	2009-036	Gary.
VI	Limitation on Pass-Through Charges	2008-031	Chambers.
VII	Technical Amendments.		

SUPPLEMENTARY INFORMATION:

Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005-47 amends the FAR as specified below:

Item I—Notification of Employee Rights Under the National Labor Relations Act (FAR Case 2010-006) (Interim)

This interim rule amends the Federal Acquisition Regulation (FAR) to implement Executive Order 13496, Notification of Employee Rights Under Federal Labor Laws, as implemented by the Department of Labor (DoL). The Executive order requires contractors and subcontractors to post a notice that includes employee rights under the National Labor Relations Act, 29 U.S.C. 151 *et seq.* This Act encourages collective bargaining, and protects the exercise by employees of their freedom to associate, to self organize and to designate representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment. This FAR interim rule establishes a new subpart 22.16, Notification of Employee Rights under the National Labor Relations Act. The rule also creates a new FAR clause 52.222-40, Notification of Employee Rights under the National Labor Relations Act. In addition, this rule

revises the FAR clauses at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, and 52.244-6, Subcontracts for Commercial Items, to include the requirements of the new FAR clause 52.222-40. The required employee notice, “Notification of Employee Rights Under the National Labor Relations Act,” may be obtained from the DoL; downloaded from a DoL Web site; provided by the Federal contracting agency, if requested; or reproduced and used as exact duplicate copies of the DoL’s official poster (*see* FAR 52.222-40(c)). Contracting officers shall insert the clause at FAR 52.222-40, Notification of Employee Rights under the National Labor Relations Act, in all solicitations and contracts, including acquisitions for commercial items and commercially available off-the-shelf items, except acquisitions—

(1) Under the simplified acquisition threshold. For indefinite-quantity contracts, include the clause only if the value of orders in any calendar year of the contract is expected to exceed the simplified acquisition threshold;

(2) For work performed exclusively outside the United States; or

(3) Covered (in their entirety) by an exemption granted by the Secretary.

A contracting agency may modify the clause at FAR 52.222-40, if necessary, to reflect an exemption granted by the

Secretary of the Department of Labor (*see* 22.1603(b)).

Item II—HUBZone Program Revisions (FAR Case 2006-005)

This FAR final rule implements the Small Business Administration (SBA) final rule published in the **Federal Register** at 69 FR 29411 on May 24, 2004, and an interim rule published in the **Federal Register** at 70 FR 51243 on August 30, 2005, amending its HUBZone regulations at 13 CFR part 126 to implement the Small Business Reauthorization Act of 2000, the Consolidated Appropriations Act of 2005, and other various policy changes. The FAR is amended to—

(1) Require a HUBZone small business concern to be a HUBZone small business concern both at the time of its initial offer and at the time of contract award;

(2) Require that HUBZone concerns provide to the contracting officer a copy of the notice required by 13 CFR 126.501 if material changes occur before award that could affect its HUBZone eligibility;

(3) *Allow waiver of the 50 percent requirement.* In accordance with 13 CFR 126.700, for general construction or construction by special trade contractors, a HUBZone small business concern must spend at least 50 percent of the cost of contract performance incurred for personnel on its own employees or subcontract employees of

other HUBZone small business concerns. This final rule amends FAR clause 52.219-3, Notice of Total HUBZone Set-Aside, and FAR clause 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns, to include an Alternate I, to be used to waive the 50 percent requirement only after determining that at least two HUBZone small business concerns cannot meet the requirement. However, the HUBZone small business prime contractor must still meet the performance of work requirements set forth in 13 CFR 125.6(c).

Item III—Preventing Abuse of Interagency Contracts (FAR Case 2008-032) (Interim)

This interim rule implements section 865 of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009. FAR subpart 17.5 now addresses all interagency acquisitions, not just those made under the Economy Act authority. A new subsection 17.502-1 is added to require that all interagency acquisitions include a determination of best procurement approach. For an assisted acquisition between the servicing agency and the requesting agency, this subsection now requires a written agreement that establishes the general terms and conditions governing the relationship between the parties. Subsection 17.502-2 contains business-case analysis requirements when an agency wishes to establish a contract that would be used by other agencies. There is a statutory exception included in subpart 17.5 for orders of \$500,000 or less issued against Federal Supply Schedules.

Item IV—Small Disadvantaged Business Program Self-Certification of Subcontractors (FAR Case 2009-019) (Interim)

This interim rule amends the FAR by allowing small disadvantaged businesses (SDBs) to self-represent their SDB status to prime contractors in good faith when seeking Federal subcontracting opportunities. This change implements revisions made by the Small Business Administration (SBA) to its SDB regulations. This case only addresses the subcontracting status portion of the SBA final rule for Small Disadvantaged Business certification. The Small Disadvantaged Business certification for prime contracts will be addressed in a future rule. This change removes a cost of compliance burden on SDB subcontractors seeking SBA certification.

Item V—Uniform Suspension and Debarment Requirement (FAR Case 2009-036) (Interim)

This interim rule amends the FAR at parts 9 and 52 to implement section 815 of the National Defense Authorization Act for Fiscal Year 2010, Public Law 111-84. The law requires that suspension and debarment requirements flow down to all subcontracts except contracts for the acquisition of commercially available off-the-shelf items, and in the case of contracts for the acquisition of commercial items, first-tier subcontracts only.

This requirement will protect the Government against contracting with entities at any tier who are suspended, debarred or proposed for debarment. This rule does not have a significant impact on the Government, contractors or any automated systems.

Item VI—Limitations on Pass-Through Charges (FAR Case 2008-031)

This final rule adopts the interim rule published in the **Federal Register** at 74 FR 52853, October 14, 2009, as a final rule with minor changes.

The interim rule amended the FAR to implement section 866 of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009 (Pub. L. 110-417) and section 852 of the John Warner NDAA for Fiscal Year 2007 (Pub. L. 109-364). This legislation required the Councils to amend the FAR to minimize excessive pass-through charges by contractors from subcontractors, or from tiers of subcontractors, that add no or negligible value, and to ensure that neither a contractor nor a subcontractor receives indirect costs or profit/fee (*i.e.*, pass-through charges) on work performed by a lower-tier subcontractor to which the higher-tier contractor or subcontractor adds no, or negligible, value.

To enable agencies to ensure that pass-through charges are not excessive, the interim rule included a solicitation provision and a contract clause requiring offerors and contractors to identify the percentage of work that will be subcontracted, and when subcontract costs will exceed 70 percent of the total cost of work to be performed, to provide information on indirect costs and profit/fee and value added with regard to the subcontract work.

Item VII—Technical Amendments

Editorial changes are made at FAR 3.104-1, 5.601, 7.105, and 10.002.

Dated: November 24, 2010.

Millisa Gary,

Acting Director, Acquisition Policy Division.

Dated: November 23, 2010.

Shay D. Assad,

Director, Defense Procurement and Acquisition Policy.

Dated: November 24, 2010.

Joseph A. Neurauter,

Deputy Associate Administrator and Senior Procurement Executive, Office of Acquisition Policy, U.S. General Services Administration.

Dated: November 23, 2010.

William P. McNally,

Assistant Administrator for Procurement, National Aeronautics and Space Administration.

[FR Doc. 2010-30558 Filed 12-10-10; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 2, 22, and 52

[FAC 2005-47; FAR Case 2010-006; Item I; Docket 2010-0106, Sequence 1]

RIN 9000-AL76

Federal Acquisition Regulation; Notification of Employee Rights Under the National Labor Relations Act

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing an interim rule to amend the Federal Acquisition Regulation (FAR) to implement Executive Order 13496, Notification of Employee Rights Under Federal Labor Laws, as implemented by the Department of Labor (DoL). This Executive Order requires contractors to display a notice to employees of their rights under Federal labor laws, and the DoL has determined that the notice shall include employee rights under the National Labor Relations Act.

DATES: *Effective Date:* December 13, 2010.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before February 11, 2011 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–47, FAR Case 2010–006, by any of the following methods:

- *Regulations.gov*: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2010–006” under the heading “Enter Keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “FAR Case 2010–006.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2010–006” on your attached document.

- *Mail*: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE., Washington, DC 20417. *Instructions*: Please submit comments only and cite FAC 2005–47, FAR Case 2010–006, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Clare McFadden, Procurement Analyst, at (202) 501–0044. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–47, FAR Case 2010–006.

SUPPLEMENTARY INFORMATION:

A. Background

Executive Order 13496, Notification of Employee Rights Under Federal Labor Laws, dated January 30, 2009 (published in the **Federal Register** at 74 FR 6107 on February 4, 2009), which revokes Executive Order 13201 of February 17, 2001, requires contractors and subcontractors to post a notice that informs employees of their rights under Federal labor laws. DoL has determined that the notice shall include employee rights under the National Labor Relations Act (“Act”), 29 U.S.C. 151 *et seq.* This Act encourages collective bargaining, and protects the exercise by employees of their freedom to associate, to self organize and to designate representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment. The DoL rule provides sanctions for noncompliance, but full compliance with the Executive Order and any related rules, regulations and orders of the Secretary of Labor is expected of all contractors. The DoL issued a final rule implementing Executive Order 13496 at 29 CFR part 471, published in the

Federal Register at 75 FR 28368 on May 20, 2010, with an effective date of June 21, 2010.

This FAR interim rule implements the requirements of the DoL final rule by creating a new FAR subpart 22.16 and clause 52.222–40, Notification of Employee Rights Under the National Labor Relations Act. Additionally, this rule revises FAR clauses at 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, and FAR 52.244–6, Subcontracts for Commercial Items, to include the requirements of the new FAR clause 52.222–40.

This rule amending the FAR is the formal notice to contracting officers to insert FAR clause 52.222–40 in all solicitations and contracts including acquisitions for commercial items and commercially available off-the-shelf (COTS), except acquisitions (*see* FAR 22.1605)—

(1) Under the simplified acquisition threshold;

(2) For work performed exclusively outside the United States; or

(3) Covered in their entirety by an exemption granted by the Secretary of Labor.

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it implements the requirements of DoL’s final rule, published in the **Federal Register** on May 20, 2010, with an effective date of June 21, 2010, that implemented Executive Order 13496 at 29 CFR part 471. The DoL final rule, implementing the requirements of Executive Order 13496, requires contractors to post notices and to insert a clause in subcontracts requiring subcontractors to post the notice and similarly insert a clause in their subcontracts. The notice advises contractor and subcontractor employees of their rights under the National Labor Relations Act. The rule provides sanctions for noncompliance, but full compliance with the Executive Order and any related rules, regulations and orders of the Secretary of Labor is expected of all contractors. Further, this rule is only implementing the DoL rule which prescribes the content of the

notices to be posted. The Department of Labor has certified that its rule will not have a significant economic impact on a substantial number of small entities. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

The Councils will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005–47, FAR Case 2010–006) in all correspondence.

C. Paperwork Reduction Act

This interim rule does not impose any information collection requirements apart from those already imposed by the DoL rule (75 FR 28368, May 20, 2010, effective date June 21, 2010). DoL has addressed the Paperwork Reduction Act (44 U.S.C. chapter 35) in the preamble to the final rule. DoL identified the burdens associated with the filing and processing of complaints by complainants and contractors in the notice of final rulemaking and obtained Office of Management and Budget clearance for such burdens. DoL also noted that the public disclosure of information originally supplied by the Federal Government to a recipient for the purpose of disclosure to the public is not considered a collection of information under the Act. The Councils believe that the package submitted by DoL meets the requirement imposed by the Paperwork Reduction Act and sufficiently covers this interim rule so that no further action is necessary.

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to implement Executive Order 13496 and the DoL rule at 29 CFR part 471, effective June 21, 2010. If this rule is not issued as an interim rule, contractors will not have the contractual requirement to display the notice to employees of their rights under Federal labor laws, as is required by DoL regulations on or after June 21,

2010. In addition, the regulated community was provided ample opportunity to comment on DoL's promulgation of that regulation, which prescribes the content of the employee notice, requirements for its posting, and enforcement procedures, and DoL received and considered numerous such comments in drafting the final rule. However, pursuant to 41 U.S.C. 418b and FAR 1.501-3, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 1, 2, 22, and 52

Government procurement.

Dated: November 24, 2010.

Millisa Gary,

Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 2, 22, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 2, 22, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

■ 2. Amend section 1.106, in the table following the introductory text, by adding in numerical sequence, FAR segment "22.16" and its corresponding OMB Control Number "1215-0209", and FAR segment "52.222-40" and its corresponding OMB Control Number "1215-0209".

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 3. Amend section 2.101 in paragraph (b)(2), in the definition "United States" by redesignating paragraphs (5) through (8) as paragraphs (6) through (9), respectively, and adding a new paragraph (5) to read as follows:

2.101 Definitions.

* * * * *

United States * * *

(5) For use in subpart 22.16, *see* the definition at 22.1601.

* * * * *

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 4. Add subpart 22.16 to read as follows:

Subpart 22.16—Notification of Employee Rights Under the National Labor Relations Act

Sec.

22.1600 Scope of subpart.

22.1601 Definitions.

22.1602 Policy.

22.1603 Exceptions.

22.1604 Compliance evaluation and complaint investigations and sanctions for violations.

22.1605 Contract clause.

Subpart 22.16—Notification of Employee Rights Under the National Labor Relations Act

22.1600 Scope of subpart.

This subpart prescribes policies and procedures to implement Executive Order 13496, dated January 30, 2009 (74 FR 6107, February 4, 2009).

22.1601 Definitions.

As used in this subpart—
Secretary means the Secretary of Labor, U.S. Department of Labor.

United States means the 50 States, the District of Columbia, Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island.

22.1602 Policy.

(a) Executive Order 13496 requires contractors to post a notice informing employees of their rights under Federal labor laws.

(b) The Secretary has determined that the notice must contain employee rights under the National Labor Relations Act (Act), 29 U.S.C. 151 *et seq.* The Act encourages collective bargaining, and protects the exercise by employees of their freedom to associate, to self-organize, and to designate representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

22.1603 Exceptions.

(a) The requirements of this subpart do not apply to—

(1) Contracts under the simplified acquisition threshold;

(2) Subcontracts of \$10,000 or less; and

(3) Contracts or subcontracts for work performed exclusively outside the United States.

(b) *Exemptions granted by the Secretary.* (1) If the Secretary finds that the requirements of the Executive Order impair the ability of the Government to procure goods and services on an economical and efficient basis or if special circumstances require an exemption in order to serve the national interest, the Secretary may exempt a contracting department or agency, or

groups of departments or agencies, from the requirements of any or all of the provisions of this Executive Order with respect to a particular contract or subcontract, or any class of contracts or subcontracts, including the requirement to include the clause at 52.222-40, or parts of that clause, in contracts.

(2) Requests for exemptions may be submitted in accordance with Department of Labor regulations at 29 CFR 471.3.

22.1604 Compliance evaluation and complaint investigations and sanctions for violations.

(a) The Secretary may conduct compliance evaluations or investigate complaints of any contractor or subcontractor to determine if any of the requirements of the clause at 52.222-40 have been violated.

(b) Contracting departments and agencies shall cooperate with the Secretary and provide such information and assistance as the Secretary may require in the performance of the Secretary's functions.

(c) If the Secretary determines that there has been a violation, the Secretary may take such actions as set forth in 29 CFR 471.14.

(d) The Secretary may not terminate or suspend a contract or suspend or debar a contractor if the agency head has provided written objections, which must include a statement of reasons for the objection and a finding that the contractor's performance is essential to the agency's mission, and continues to object to the imposition of such sanctions and penalties. Procedures for enforcement by the Secretary are set out in 29 CFR 471.10 through 29 CFR 471.16.

22.1605 Contract clause.

(a) Insert the clause at 52.222-40, Notification of Employee Rights under the National Labor Relations Act, in all solicitations and contracts, including acquisitions for commercial items and commercially available off-the-shelf items, except acquisitions—

(1) *Under the simplified acquisition threshold.* For indefinite-quantity contracts, include the clause only if the value of orders in any calendar year of the contract is expected to exceed the simplified acquisition threshold;

(2) For work performed exclusively outside the United States; or

(3) Covered (in their entirety) by an exemption granted by the Secretary.

(b) A contracting agency may modify the clause at 52.222-40, if necessary, to reflect an exemption granted by the Secretary (*see* 22.1603(b)).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 5. Amend section 52.212–5 by—
- a. Revising the date of the clause;
- b. Redesignating paragraphs (b)(27) through (b)(44) as paragraphs (b)(28) through (b)(45), respectively; and adding a new paragraph (b)(27);
- c. Adding paragraph (e)(1)(vii); and
- d. In Alternate II by—
- (1) Revising the date of Alternate II;
- (2) Redesignating paragraphs (e)(1)(ii)(G) through (M) as paragraphs (e)(1)(ii)(H) through (N), respectively; and adding a new paragraph (e)(1)(ii)(G).

The revised and added text reads as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (DEC 2010)

* * * * *

(b) * * *

(27) 52.222–40, Notification of Employee Rights Under the National Labor Relations Act (DEC 2010) (E.O. 13496).

* * * * *

(e)(1) * * *

(vii) 52.222–40, Notification of Employee Rights Under the National Labor Relations Act (DEC 2010) (E.O. 13496). Flow down required in accordance with paragraph (f) of FAR clause 52.222–40.

* * * * *

Alternate II (DEC 2010).

* * * * *

(e)(1) * * *

(ii) * * *

(G) 52.222–40, Notification of Employee Rights Under the National Labor Relations Act (DEC 2010) (E.O. 13496). Flow down required in accordance with paragraph (f) of FAR clause 52.222–40.

* * * * *

- 6. Amend section 52.213–4 by revising the date of the clause; and removing from paragraph (a)(2)(vii) “(Oct 2010)” and adding “(DEC 2010)” in its place.

The revision reads as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (DEC 2010)

* * * * *

- 7. Add section 52.222–40 to read as follows:

52.222–40 Notification of Employee Rights Under the National Labor Relations Act.

As prescribed in 22.1605, insert the following clause:

Notification of Employee Rights Under the National Labor Relations Act (DEC 2010)

(a) During the term of this contract, the Contractor shall post an employee notice, of such size and in such form, and containing such content as prescribed by the Secretary of Labor, in conspicuous places in and about its plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically, in the languages employees speak, in accordance with 29 CFR 471.2(d) and (f).

(1) Physical posting of the employee notice shall be in conspicuous places in and about the Contractor’s plants and offices so that the notice is prominent and readily seen by employees who are covered by the National Labor Relations Act and engage in activities related to the performance of the contract.

(2) If the Contractor customarily posts notices to employees electronically, then the Contractor shall also post the required notice electronically by displaying prominently, on any Web site that is maintained by the Contractor and is customarily used for notices to employees about terms and conditions of employment, a link to the Department of Labor’s Web site that contains the full text of the poster. The link to the Department’s Web site, as referenced in (b)(3) of this section, must read, “Important Notice about Employee Rights to Organize and Bargain Collectively with Their Employers.”

(b) This required employee notice, printed by the Department of Labor, may be—

(1) Obtained from the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5609, Washington, DC 20210, (202) 693–0123, or from any field office of the Office of Labor-Management Standards or Office of Federal Contract Compliance Programs;

(2) Provided by the Federal contracting agency if requested;

(3) Downloaded from the Office of Labor-Management Standards Web site at <http://www.dol.gov/olms/regs/compliance/EO13496.htm>; or

(4) Reproduced and used as exact duplicate copies of the Department of Labor’s official poster.

(c) The required text of the employee notice referred to in this clause is located at Appendix A, Subpart A, 29 CFR Part 471.

(d) The Contractor shall comply with all provisions of the employee notice and related rules, regulations, and orders of the Secretary of Labor.

(e) In the event that the Contractor does not comply with the requirements set forth in paragraphs (a) through (d) of this clause, this contract may be terminated or suspended in whole or in part, and the Contractor may be

suspended or debarred in accordance with 29 CFR 471.14 and subpart 9.4. Such other sanctions or remedies may be imposed as are provided by 29 CFR part 471, which implements Executive Order 13496 or as otherwise provided by law.

(f) *Subcontracts.* (1) The Contractor shall include the substance of this clause, including this paragraph (f), in every subcontract that exceeds \$10,000 and will be performed wholly or partially in the United States, unless exempted by the rules, regulations, or orders of the Secretary of Labor issued pursuant to section 3 of Executive Order 13496 of January 30, 2009, so that such provisions will be binding upon each subcontractor.

(2) The Contractor shall not procure supplies or services in a way designed to avoid the applicability of Executive Order 13496 or this clause.

(3) The Contractor shall take such action with respect to any such subcontract as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for noncompliance.

(4) However, if the Contractor becomes involved in litigation with a subcontractor, or is threatened with such involvement, as a result of such direction, the Contractor may request the United States, through the Secretary of Labor, to enter into such litigation to protect the interests of the United States.

(End of clause)

- 8. Amend section 52.244–6 by revising the date of the clause and adding paragraph (c)(1)(vii) to read as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (DEC 2010)

* * * * *

(c)(1) * * *

(vii) 52.222–40, Notification of Employee Rights Under the National Labor Relations Act (DEC 2010) (E.O. 13496), if flow down is required in accordance with paragraph (f) of FAR clause 52.222–40.

* * * * *

[FR Doc. 2010–30559 Filed 12–10–10; 8:45 am]

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DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 2, 19, 33, and 52**

[FAC 2005–47; FAR Case 2006–005; Item II; Docket 2009–0014, Sequence 2]

RIN 9000–AL18

**Federal Acquisition Regulation;
HUBZone Program Revisions**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement revisions to the Small Business Administration's HUBZone Program. This case requires that, for award of a HUBZone contract, a HUBZone small business concern must be a HUBZone small business concern both at the time of its initial offer and at the time of contract award. In addition, for general construction or construction by special trade contractors, a HUBZone small business concern must spend at least 50 percent of the cost of contract performance incurred for personnel on its own employees or subcontract employees of other HUBZone small business concerns. The 50 percent requirement may be waived in some circumstances.

DATES: *Effective Date:* January 12, 2011.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Karlos Morgan, Procurement Analyst, at (202) 501–2364. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAR Case 2006–005.

SUPPLEMENTARY INFORMATION:**A. Background**

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 74 FR 16823 on April 13, 2009. This FAR final rule implements the Small Business Administration (SBA) final rule published in the **Federal Register** at 69 FR 29411 on May 24, 2004, and an interim rule amending its HUBZone regulations at 13 CFR part 126 to implement the Small Business

Reauthorization Act of 2000, the Consolidated Appropriations Act, 2005, and other various policy changes published in the **Federal Register** at 70 FR 51243 on August 30, 2005. The public comment period for the FAR proposed rule closed June 12, 2009. Seven respondents submitted comments on the proposed rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided below.

1. *Comment:* Confirmation of subcontractors' representation. The respondent expressed concern that the addition of paragraph (d)(2) to FAR 52.219–8, Utilization of Small Business Concerns, requiring prime contractors to confirm that a subcontractor's representation as a HUBZone concern has been certified by the SBA, would add time and expense to the solicitation and award of subcontracts, particularly when Web sites are down for maintenance or experiencing technical issues and prime contractors must rely on a written response from the SBA to a letter or e-mail. The respondent is concerned that this requirement imposes an additional burden on prime contractors that will result in no direct improvement in the existing process.

Response: The revision to FAR 52.219–8(d)(2) makes it clear that the contractor is required to verify the "qualified" HUBZone small business status of its subcontractor, using any of the suggested sources in the regulation.

Section 3(p)(5)(D) of the Small Business Act requires SBA to establish a "List of Qualified HUBZone Small Business Concerns" which is available "to any Federal agency or other entity." This final rule includes the SBA Internet site at http://dsbs.sba.gov/dsbs/search/dsp_searchhubzone.cfm available to the public where the list of qualified HUBZone small businesses may be accessed. The list can also be obtained by accessing <http://www.sba.gov/hubzone>. HUBZone qualified subcontractors are required to be certified by SBA pursuant to the Small Business Act and SBA's regulations and this clause ensure that HUBZone subcontracts are awarded to, and goaling credit received for, eligible concerns.

2. *Comment:* Applicability of additional paragraph. Three respondents expressed concern with the addition of paragraph (d)(3) in FAR clause 52.219–8, Utilization of Small Business Concerns. According to the respondents, the proposed requirement is not limited in scope. It would apparently apply to all subcontract competitions, even competitions in which a small business did not

compete. One of the respondents believes that there will be a significant impact to the procurement process should this proposed rule be adopted as published, and the respondent also believes that protests are not allowed at the subcontract level. The proposed requirement for advance notice will delay subcontract awards, impact program schedules, require significantly more effort, increase the number of disputes, and increase administrative costs. One of the respondents requested an exception for those contractors that have successfully undergone an approved Contractor Purchasing System Review in accordance with FAR subpart 44.3 and maintain an approved system. A respondent requested a waiver of the clause if the contractor has undergone a successful Contractor Purchasing System Review.

Response: The final rule amends the FAR to conform to existing SBA regulations (13 CFR 125.3(c)(1)(v) for subcontracts above \$100,000, and 13 CFR 125.3(c)(1)(vi) which addresses best practices for under \$100,000). The SBA regulations prescribe written notification which must include the name and location of the apparent successful offeror and its small business program status. The intent of the notification requirement is to allow the unsuccessful small business subcontractor to protest the size status of the successful subcontractor to the contracting officer or SBA (see FAR 19.703). The SBA regulation was not adequately addressed in the proposed rule and the coverage has been narrowed and moved to FAR 52.219–9, Small Business Subcontracting Plan. The requirement for notification applies only to prime contractors with contracts requiring subcontracting plans. The notification applies to those subcontracts over the simplified acquisition threshold in which a small business concern received a preference. The Councils do not agree with waiver of the clause if the contractor has undergone a successful Contractor Purchasing System Review.

3. *Comment:* Commercial items. Two respondents urge the FAR Council not to apply the proposed FAR 52.219–8(d) successful subcontractor notification to prime contractors that are suppliers of commercial items. One respondent stated that the FAR does not define "subcontractor" in the context of commercial item acquisition and believes that the clause requires the prime contractor to reveal competitive information about its subcontractor. The respondents state that it is impractical to segregate the purchases of materials and other supplies and services for

products sold under Government contracts from those sold under other commercial contracts. In addition, the proposed rule is not required by statute and SBA is not obligated or permitted to impose this requirement on commercial item acquisitions.

Response: The respondents misinterpreted the commercial item statute. The SBA regulation upon which this is based, 13 CFR 125.3(c)(1)(v), is not required by statute and cannot be waived under FAR subpart 12.5 procedures. However, the SBA regulation was not adequately addressed in the proposed rule, and the coverage has been narrowed and moved to FAR 52.219–9(e)(6). The requirement for notification applies only to prime contractors with contracts requiring subcontracting plans. The notification applies to those subcontracts over the simplified acquisition threshold in which a small business concern received a preference. In addition, “subcontract” is defined in FAR 2.101, and the Councils determined that there was no need to create a special definition for this case. Further, the notification releases only the name of the apparent successful small business subcontractor, its location, and its small business status so that others may protest its size; this does not reveal competitive information about the subcontractor.

4. *Comment:* Task orders. The respondent requested that the regulations address the use of HUBZones in task-order contracts. The respondent is concerned with the accountability of firms and the oversight afforded them by the contracting officer.

Response: If the contracting officer is notified of possible contractor violations of Federal law involving fraud, waste, or abuse, or a violation of the False Claims Act, the contracting officer must either coordinate the matter with the agency Office of the Inspector General, or take action in accordance with agency procedures and in accordance with FAR part 3, Improper Business Practices and Personal Conflicts of Interest.

Additionally, the FAR requires the contracting officer to monitor the contractor’s performance throughout the life of the contract. Where the contractor is found to be in noncompliance with the terms and conditions of the contract, such as compliance with the Limitations on Subcontracting clause (FAR 52.219–14), the contracting officer is required to take appropriate action in accordance with FAR part 42.

5. *Comment:* Geographical restriction. The respondent requested that the rule contain a geographic restriction for HUBZone performance and address

contract administration and other enforcement issues.

Response: The comment is outside the scope of this FAR case.

6. *Comment:* Use of terminology. The respondent noted that FAR 19.1303(a) should be changed to reflect deletion of the word “qualified” in the title of this section.

Response: The final rule deletes the word “qualified.”

7. *Comment:* Sole source authority. The respondent suggested replacing the language at FAR 19.1306, HUBZone sole source awards, to be consistent with the proposed Service-Disabled Veteran-Owned Small Business rule addressing sole source award authority (74 FR 23373, May 19, 2009).

Response: FAR Case 2008–023, Clarification of Criteria for Sole Source Awards to Service Disabled Veteran Owned Small Business Concerns, was published as a final rule in the **Federal Register** at 75 FR 38687 on July 2, 2010. The changes in that rule have been reflected in this case.

8. *Comment:* Clause numbering. The respondent stated that the proposed rule, at FAR 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, appears to have inadvertently used the wrong subparagraph numbers for the clauses listed in paragraph (b) of the clause.

Response: The paragraph numbering has been revised in the final rule to reflect the current FAR baseline.

9. *Comment:* Program parity. The respondent stated that the proposed rule should address “parity” among all of SBA’s programs, *i.e.*, HUBZone, 8(a), and Service-Disabled Veteran-Owned Small Business.

Response: This comment is outside the scope of this FAR case.

10. *Comment:* Price preference. The respondent stated that the newly designated FAR 19.1309(b) is inconsistent with the statute creating the HUBZone program and therefore the second sentence should be deleted. The HUBZone Act requires that a HUBZone price preference be applied in the evaluation process for all full and open competitions.

Response: The sentence was deleted. The HUBZone Price Evaluation Preference applies to those contracting actions that are awarded through full and open competition to HUBZone Small Business Concerns. FAR 19.1307(a)(1) has also been deleted.

11. *Comment:* HUBZone certification by contracting officer. The respondent has requested deletion of the second sentence of FAR 52.219–3(f) and 52.219–4(g) from the final rule, which

mandates that a HUBZone offeror provide the contracting officer a copy of its HUBZone eligibility if material changes occur before contract award that could affect its eligibility. The respondent states that the contracting officer is not the authority allowed to take action on such facts; only the SBA has the authority to certify or de-certify a HUBZone small business. In addition, the HUBZone small business may be able to resolve any issue which would prevent the SBA from taking action to de-certify the firm.

Response: The contracting officer does not have the authority to certify or de-certify a HUBZone program participant. If the contracting officer receives a notice of a material change from a HUBZone small business concern, then he/she should file a HUBZone status protest before awarding a HUBZone contract to that concern.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, applies to this final rule. The Councils prepared a Final Regulatory Flexibility Analysis (FRFA), and it is summarized as follows:

The FAR rule requires a HUBZone small business concern to be eligible for the HUBZone Program both at the time of its initial offer and at the time of contract award. This requirement will eliminate some small businesses that are not eligible in both instances. In addition, it is estimated that approximately 220 counties will be added as HUBZones as a result of base closures. The requirements for percentage of work that must be performed by the HUBZone contractor’s own employees or a HUBZone subcontractor has been increased for the “performance of work” requirements for general and specialty construction. The rule impacts some small business concerns by revising the FAR to state that except for construction or service contracts, when the total value of the contract exceeds \$25,000, a HUBZone small business concern nonmanufacturer must agree to furnish in performing the contract only end items manufactured or produced by HUBZone small business manufacturer concerns.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat will be submitting a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the

FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 2, 19, 33, and 52

Government procurement.

Dated: November 24, 2010.

Millisa Gary,

Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 19, 33, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 19, 33, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) in the definitions by—

■ a. Revising the definition of “HUBZone”;

■ b. Adding in alphabetical order the definition of “HUBZone contract”; and

■ c. Removing from the definition of “HUBZone small business concern” the word “Administration” and adding “Administration (13 CFR 126.103)”.

The revised and added text reads as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

HUBZone means a historically underutilized business zone that is an area located within one or more qualified census tracts, qualified nonmetropolitan counties, lands within the external boundaries of an Indian reservation, qualified base closure areas, or redesignated areas, as defined in 13 CFR 126.103.

HUBZone contract means a contract awarded to a “HUBZone small business” concern through any of the following procurement methods:

(1) A sole source award to a HUBZone small business concern.

(2) Set-aside awards based on competition restricted to HUBZone small business concerns.

(3) Awards to HUBZone small business concerns through full and open competition after a price evaluation preference in favor of HUBZone small business concerns.

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

■ 3. Amend section 19.000 by revising paragraph (a)(6) to read as follows:

19.000 Scope of part.

(a) * * *

(6) The “8(a)” business development program (hereafter referred to as 8(a) program), under which agencies contract with the SBA for goods or services to be furnished under a subcontract by a small disadvantaged business concern;

* * * * *

■ 4. Amend section 19.101 in the definition “Affiliates”, in paragraph (7) by—

■ a. Redesignating paragraphs (7)(ii) through (7)(v) as paragraphs (7)(iii) through (7)(vi);

■ b. Adding a new paragraph (7)(ii); and

■ c. Revising the first sentence of newly redesignated paragraph (7)(iii).

The added and revised text reads as follows:

19.101 Explanation of terms.

* * * * *

Affiliates * * *

(7) * * *

(ii) *HUBZone joint venture.* A HUBZone joint venture of two or more HUBZone small business concerns may submit an offer for a HUBZone contract as long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract, provided one of the following conditions apply:

(A) The aggregate total of the joint venture is small under the size standard corresponding to the NAICS code assigned to the contract.

(B) The aggregate total of the joint venture is not small under the size standard corresponding to the NAICS code assigned to the contract and either—

(1) For a revenue-based size standard, the estimated contract value exceeds half the size standard corresponding to the NAICS code assigned to the contract; or

(2) For an employee-based size standard, the estimated contract value exceeds \$10 million.

(iii) *Joint venture.* Concerns submitting offers on a particular acquisition as joint ventures are considered as affiliated and controlling or having the power to control each other with regard to performance of the contract. * * *

* * * * *

■ 5. Amend section 19.102 by adding paragraph (f)(8) to read as follows:

19.102 Size standards.

* * * * *

(f) * * *

(8) For non-manufacturer rules pertaining to HUBZone contracts, *see* 19.1303(e).

* * * * *

■ 6. Amend section 19.306 by—

■ a. Redesignating paragraphs (a) through (k) as paragraphs (b) through (l);

■ b. Adding new paragraph (a);

■ c. Revising the newly redesignated paragraph (b);

■ d. Removing from end of newly redesignated paragraph (d) “(AA/HUB)” and adding “(Director/HUB)” in its place;

■ e. Revising the newly redesignated paragraphs (e) and (f);

■ f. Redesignating newly redesignated paragraphs (g) through (l) as (h) through (m);

■ g. Adding a new paragraph (g);

■ h. Removing from the second sentence of the newly redesignated paragraph (i) “8(a) Business Development (ADA/GC&8(a)BD).” and adding “Administrator for Government Contracting and 8(a) Business Development(AA/GC&BD).” in its place;

■ i. Removing from the newly redesignated paragraph (j) “ADA/GC&8(a)BD” and adding “AA/GC&BD” in its place (twice).

■ j. Removing from the newly redesignated paragraph (k) “AA/HUB” and adding “Director/HUB” in its place;

■ k. Removing from the newly redesignated paragraph (l) “AA/HUB’s” and adding “Director/HUB’s” in its place; and

■ l. Removing from the first sentence of the newly redesignated paragraph (m) “ADA/GC&8(a)BD” and adding “AA/GC&BD” in its place and removing from the last sentence “ADA/GC&8(a)BD’s” and adding “AA/GC&BD’s” in its place.

The added and revised text reads as follows:

19.306 Protesting a firm’s status as a HUBZone small business concern.

(a) *Definition.* As used in this section—

Interested party has the meaning given in 13 CFR 126.103.

(b) *HUBZone Small Business Status.*

(1) For sole source acquisitions, the SBA or the contracting officer may protest the apparently successful offeror’s HUBZone small business concern status.

(2) For all other acquisitions, an offeror that is an interested party, the contracting officer, or the SBA may protest the apparently successful offeror’s qualified HUBZone small business concern status.

* * * * *

(e)(1) The protest of an offeror that is an interested party must be submitted by—

- (i) For sealed bids:
 - (A) The close of business on the fifth business day after bid opening; or
 - (B) The close of business on the fifth business day from the date of identification of the apparent successful offeror, if the price evaluation preference was not applied at the time of bid opening.

(ii) For negotiated acquisitions, the close of business on the fifth business day after notification by the contracting officer of the apparently successful offeror.

(2) Any protest submitted after these time limits is untimely, unless it is submitted by the SBA or the contracting officer. Any protest received prior to bid opening or notification of intended award, whichever applies, is premature and shall be returned to the protester.

(f) Except for premature protests, the contracting officer shall forward all protests received, notwithstanding whether the contracting officer believes that the protest is not sufficiently specific, timely, or submitted by an interested party. The contracting officer shall also forward a referral letter with the information required by 13 CFR 126.801(e).

(g)(1) Protests may be submitted in person or by facsimile, express delivery service, or U.S. mail (postmarked within the applicable time period) to the Director/HUB, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, Fax (202) 205-7167.

(2) The Director/HUB will notify the protester and the contracting officer that the protest was received and indicate whether the protest will be processed or dismissed for lack of timeliness or specificity. A protest will be dismissed if SBA determines the protester is not an interested party.

* * * * *

■ 7. Amend section 19.703 by revising paragraphs (d)(1)(i) and (ii) to read as follows:

19.703 Eligibility requirements for participating in the program.

* * * * *

(d)(1) * * *

(i) HUBZone small business database search application Web page at http://dsbs.sba.gov/dsbs/dsp_searchhubzone.cfm or <http://www.sba.gov/hubzone>.

(ii) In writing to the Director/HUB, U.S. Small Business Administration, 409 3rd Street, SW., Washington DC 20416; or

* * * * *

19.800 [Amended]

■ 8. Amend section 19.800 in paragraph (e) by removing the last sentence.

19.803 [Amended]

■ 9. Amend section 19.803 in paragraph (c) by removing from the end of the last sentence “(but see 19.800(e))”.

19.804–3 [Amended]

■ 10. Amend section 19.804–3 in paragraph (a) by removing from the last sentence “(AA)/8(a)/BD”.

19.805–1 [Amended]

■ 11. Amend section 19.805–1 in paragraph (d) by removing “(AA/8(a)BD)” and adding “(AA/BD)” in its place; and removing “AA/8(a)BD” and adding “AA/BD” in its place each time it appears (two times).

■ 12. Amend section 19.1301 by revising paragraph (a) to read as follows:

19.1301 General.

(a) The Historically Underutilized Business Zone (HUBZone) Act of 1997 (15 U.S.C. 631 note) created the HUBZone Program.

* * * * *

■ 13. Amend section 19.1303 by—

- a. Revising the section heading;
- b. Removing from paragraph (a) “qualified”;
- c. Revising paragraphs (b), (c), and (d); and
- d. Adding paragraph (e).

The revised and added text reads as follows:

19.1303 Status as a HUBZone small business concern.

* * * * *

(b) If the SBA determines that a concern is a HUBZone small business concern, it will issue a certification to that effect and will add the concern to the List of Qualified HUBZone Small Business Concerns at http://dsbs.sba.gov/dsbs/search/dsp_searchhubzone.cfm. Only firms on the list are HUBZone small business concerns, eligible for HUBZone preferences. HUBZone preferences apply without regard to the place of performance. Information on HUBZone small business concerns can also be obtained at <http://www.sba.gov/hubzone> or by writing to the Director for the HUBZone Program (Director/HUB) at U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416 or at hubzone@sba.gov.

(c) A joint venture may be considered a HUBZone small business concern if it meets the criteria in the explanation of affiliates (see 19.101).

(d) To be eligible for a HUBZone contract under this section, a HUBZone

small business concern must be a HUBZone small business concern both at the time of its initial offer and at the time of contract award.

(e) A HUBZone small business concern may submit an offer for supplies as a nonmanufacturer if it meets the requirements of the nonmanufacturer rule set forth at 13 CFR 121.406(b)(1) and if the small business manufacturer providing the end item is also a HUBZone small business concern.

(1) There are no waivers to the nonmanufacturer rule for HUBZone contracts.

(2) For HUBZone contracts at or below \$25,000 in total value, a HUBZone small business concern may supply the end item of any manufacturer, including a large business, so long as the product acquired is manufactured or produced in the United States.

■ 14. Amend section 19.1305 by—

- a. Removing from paragraph (a) “A participating agency contracting” and adding “The contracting” in its place;
- b. Removing from paragraph (c) “A participating agency” and adding “A contracting officer” in its place; and
- c. Revising paragraph (e) to read as follows:

19.1305 HUBZone set-aside procedures.

* * * * *

(e) The procedures at 19.202–1 and, except for acquisitions not exceeding the simplified acquisition threshold, at 19.402 apply to this section.

(1) When the SBA intends to appeal a contracting officer’s decision to reject a recommendation of the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) to set aside an acquisition for competition restricted to HUBZone small business concerns, the SBA procurement center representative shall notify the contracting officer, in writing, of its intent within 5 business days of receiving the contracting officer’s notice of rejection.

(2) Upon receipt of notice of SBA’s intent to appeal, the contracting officer shall suspend action on the acquisition unless the head of the contracting activity makes a written determination that urgent and compelling circumstances, which significantly affect the interests of the Government, exist.

(3) Within 15 business days of SBA’s notification to the contracting officer, SBA must file its formal appeal with the head of the agency, or the appeal will be deemed withdrawn. The head of the agency shall reply to SBA within 15

business days of receiving the appeal. The decision of the head of the agency shall be final.

■ 15. Amend section 19.1306 by revising paragraph (a) introductory text and paragraph (a)(2)(ii) to read as follows:

19.1306 HUBZone sole source awards.

(a) A contracting officer may award contracts to HUBZone small business concerns on a sole source basis (see 19.501(c) and 6.302–5(b)(5)) before considering small business set-asides (see subpart 19.5), provided none of the exclusions at 19.1304 apply; and—

* * * * *

(2) * * *

(ii) \$4 million for a requirement within all other NAICS codes;

* * * * *

■ 16. Amend section 19.1307 by removing paragraph (a)(1); redesignating paragraphs (a)(2) and (a)(3) as paragraphs (a)(1) and (a)(2), respectively; amending newly redesignated paragraph (a)(1) by adding “or” to the end of the paragraph; and adding paragraph (e) to read as follows:

19.1307 Price evaluation preference for HUBZone small business concerns.

* * * * *

(e) When the two highest rated offerors are a HUBZone small business concern and a large business, and the evaluated offer of the HUBZone small business concern is equal to the evaluated offer of the large business after considering the price evaluation preference, the contracting officer shall award the contract to the HUBZone small business concern.

19.1308 [Redesignated as 19.1309]

■ 17a. Redesignate section 19.1308 as section 19.1309

■ 17b. Add new section 19.1308 to read as follows:

19.1308 Performance of work requirements (limitations on subcontracting) for general construction or construction by special trade contractors.

(a) Before issuing a solicitation for general construction or construction by special trade contractors, the contracting officer shall determine if at least two HUBZone small business concerns can spend at least 50 percent of the cost of contract performance to be incurred for personnel on their own employees or subcontract employees of other HUBZone small business concerns.

(b) The clause at 52.219–3, Notice of Total HUBZone Set-Aside or Sole Source Award, or 52.219–4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns,

shall be used, as applicable, with its Alternate I to waive the 50 percent requirement (see 19.1309) if at least two HUBZone small business concerns cannot meet the conditions of paragraph (a); but, the HUBZone prime contractor can still meet the following—

(1) For general construction, at least 15 percent of the cost of the contract performance to be incurred for personnel using the concern’s employees; or

(2) For construction by special trade contractors, at least 25 percent of the cost of contract performance to be incurred for personnel using the concern’s employees.

(c) See 13 CFR 125.6 for definitions of terms used in paragraph (a) of this section.

■ 17c. Revise newly redesignated section 19.1309 to read as follows:

19.1309 Contract clauses.

(a) The contracting officer shall insert the clause 52.219–3, Notice of Total HUBZone Set-Aside or Sole Source Award, in solicitations and contracts for acquisitions that are set aside for, or awarded on a sole source basis to, HUBZone small business concerns under 19.1305 or 19.1306.

(1) The contracting officer shall use the clause with its Alternate I to waive the 50 percent requirement if the conditions at 19.1308(b) apply.

(2) If a waiver is granted, the HUBZone small business prime contractor must still meet the performance of work requirements set forth in 13 CFR 125.6(c).

(b) The contracting officer shall insert the clause at FAR 52.219–4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns, in solicitations and contracts for acquisitions conducted using full and open competition.

(1) The contracting officer shall use the clause with its Alternate I to waive the 50 percent requirement if the conditions at 19.1308(b) apply.

(2) If a waiver is granted, the HUBZone small business prime contractor must still meet the performance of work requirements set forth in 13 CFR 125.6(c).

PART 33—PROTESTS, DISPUTES, AND APPEALS

■ 18. Amend section 33.102 in paragraph (a) by revising the second sentence to read as follows:

33.102 General.

(a) * * * (See 19.302 for protests of small business status, 19.305 for protests of disadvantaged business

status, 19.306 for protests of HUBZone small business status, and 19.307 for protests of service-disabled veteran-owned small business status.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 19. Amend section 52.212–3 by revising the date of the provision and paragraphs (c)(10)(i) and (ii) to read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (JAN 2011)

* * * * *

(c) * * *

(10) * * *

(i) It is, is not a HUBZone small business concern listed, on the date of this representation, on the List of Qualified HUBZone Small Business Concerns maintained by the Small Business Administration, and no material changes in ownership and control, principal office, or HUBZone employee percentage have occurred since it was certified in accordance with 13 CFR Part 126; and

(ii) It is, is not a HUBZone joint venture that complies with the requirements of 13 CFR Part 126, and the representation in paragraph (c)(10)(i) of this provision is accurate for each HUBZone small business concern participating in the HUBZone joint venture. [The offeror shall enter the names of each of the HUBZone small business concerns participating in the HUBZone joint venture: _____.] Each HUBZone small business concern participating in the HUBZone joint venture shall submit a separate signed copy of the HUBZone representation.

* * * * *

■ 20. Amend section 52.212–5 by—

■ a. Revising the date of the clause and paragraph (b)(7);

■ b. Removing from paragraph (b)(8) “(July 2005)” and adding “(JAN 2011)” in its place;

■ c. Removing from paragraph (b)(12) “(May 2004)” and adding “(JAN 2011)” in its place; and

■ d. Removing from paragraph (b)(13)(i) “(Oct 2010)” and adding “(JAN 2011)” in its place.

The revised text reads as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (JAN 2011)

* * * * *

(b) * * *
 (7) 52.219–3, Notice of Total HUBZone Set-Aside or Sole-Source Award (JAN 2011) (15 U.S.C. 657a).

* * * * *

■ 21. Amend section 52.213–4 by revising the date of the clause and paragraph (a)(2)(vii) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (JAN 2011)

(a) * * *
 (2) * * *
 (vii) 52.244–6, Subcontracts for Commercial Items (JAN 2011).

* * * * *

■ 22. Amend section 52.219–1 by revising the date of the provision and paragraphs (b)(6)(i) and (ii) to read as follows:

52.219–1 Small Business Program Representations.

* * * * *

Small Business Program Representations (JAN 2011)

* * * * *

(b) * * *
 (6) * * *
 (i) It is, is not a HUBZone small business concern listed, on the date of this representation, on the List of Qualified HUBZone Small Business Concerns maintained by the Small Business Administration, and no material changes in ownership and control, principal office, or HUBZone employee percentage have occurred since it was certified in accordance with 13 CFR Part 126; and
 (ii) It is, is not a HUBZone joint venture that complies with the requirements of 13 CFR Part 126, and the representation in paragraph (b)(6)(i) of this provision is accurate for each HUBZone small business concern participating in the HUBZone joint venture. [*The offeror shall enter the names of each of the HUBZone small business concerns participating in the HUBZone joint venture: _____.*] Each HUBZone small business concern participating in the HUBZone joint venture shall submit a separate signed copy of the HUBZone representation.

* * * * *

■ 23. Amend section 52.219–3 by—
 ■ a. Revising the section heading, the introductory text, the date of the clause, and paragraph (a);
 ■ b. Removing from paragraph (b)(1) “concerns shall” and adding “concerns will” in its place;
 ■ c. Revising paragraphs (c)(3), (c)(4), (d), and (e); and
 ■ d. Adding paragraph (f) and Alternate I.

The revised and added text reads as follows:

52.219–3 Notice of Total HUBZone Set-Aside or Sole Source Award.

As prescribed in 19.1309(a), insert the following clause:

Notice of Total Hubzone Set-Aside or Sole Source Award (JAN 2011)

(a) *Definitions.* See 13 CFR 125.6(e) for definitions of terms used in paragraph (c).

* * * * *

(c) * * *
 (3) *General construction.* (i) At least 15 percent of the cost of contract performance to be incurred for personnel will be spent on the HUBZone prime contractor’s employees;

(ii) At least 50 percent of the cost of the contract performance to be incurred for personnel will be spent on the HUBZone prime contractor’s employees or on a combination of the HUBZone prime contractor’s employees and employees of HUBZone small business concern subcontractors; and

(iii) No more than 50 percent of the cost of contract performance to be incurred for personnel will be subcontracted to concerns that are not HUBZone small business concerns; or

(4) *Construction by special trade contractors.* (i) At least 25 percent of the cost of contract performance to be incurred for personnel will be spent on the HUBZone prime contractor’s employees;

(ii) At least 50 percent of the cost of the contract performance to be incurred for personnel will be spent on the HUBZone prime contractor’s employees or on a combination of the HUBZone prime contractor’s employees and employees of HUBZone small business concern subcontractors;

(iii) No more than 50 percent of the cost of contract performance to be incurred for personnel will be subcontracted to concerns that are not HUBZone small business concerns.

(d) A HUBZone joint venture agrees that, in the performance of the contract, the applicable percentage specified in paragraph (c) of this clause will be performed by the aggregate of the HUBZone small business participants.

(e)(1) When the total value of the contract exceeds \$25,000, a HUBZone small business concern nonmanufacturer agrees to furnish in performing this contract only end items manufactured or produced by HUBZone small business concern manufacturers.

(2) When the total value of the contract is equal to or less than \$25,000, a HUBZone small business concern nonmanufacturer may provide end items manufactured by other than a HUBZone small business concern manufacturer provided the end items are produced or manufactured in the United States.

(3) Paragraphs (e)(1) and (e)(2) of this section do not apply in connection with construction or service contracts.

(f) *Notice.* The HUBZone small business offeror acknowledges that a prospective HUBZone awardee must be a HUBZone small

business concern at the time of award of this contract. The HUBZone offeror shall provide the Contracting Officer a copy of the notice required by 13 CFR 126.501 if material changes occur before contract award that could affect its HUBZone eligibility. If the apparently successful HUBZone offeror is not a HUBZone small business concern at the time of award of this contract, the Contracting Officer will proceed to award to the next otherwise successful HUBZone small business concern or other offeror.

(End of clause)

Alternate I (JAN 2011). As prescribed in 19.1309(a)(1), substitute the following paragraphs (c)(3) and (c)(4) for paragraphs (c)(3) and (c)(4) of the basic clause:

(c)(3) General construction, at least 15 percent of the cost of the contract performance to be incurred for personnel will be spent on the concern’s employees; or

(c)(4) Construction by special trade contractors, at least 25 percent of the cost of the contract performance to be incurred for personnel will be spent on the concern’s employees.

■ 24. Amend section 52.219–4 by—
 ■ a. Revising the introductory paragraph, the date of the clause, and paragraph (a);
 ■ b. Adding paragraph (b)(4);
 ■ c. Removing from the second sentence of paragraph (c) introductory text “paragraph (d)” and adding “paragraphs (d) and (e)” in its place;
 ■ d. Revising paragraphs (d)(3), (d)(4), (e), and (f); and
 ■ e. Adding paragraph (g) and Alternate I.

The revised and added text reads as follows:

52.219–4 Notice of Price Evaluation Preference for HUBZone Small Business Concerns.

As prescribed in 19.1309(b), insert the following clause:

Notice of Price Evaluation preference for HUBZone Small Business Concerns (JAN 2011)

(a) *Definitions.* See 13 CFR 125.6(e) for definitions of terms used in paragraph (d).

(b) * * *

(4) When the two highest rated offerors are a HUBZone small business concern and a large business, and the evaluated offer of the HUBZone small business concern is equal to the evaluated offer of the large business after considering the price evaluation preference, award will be made to the HUBZone small business concern.

* * * * *

(d) * * *

(3) *General construction.* (i) At least 15 percent of the cost of contract performance to be incurred for personnel will be spent on the prime contractor’s employees;

(ii) At least 50 percent of the cost of the contract performance to be incurred for

personnel will be spent on the prime contractor's employees or on a combination of the prime contractor's employees and employees of HUBZone small business concern subcontractors;

(iii) No more than 50 percent of the cost of contract performance to be incurred for personnel will be subcontracted to concerns that are not HUBZone small business concerns; or

(4) *Construction by special trade contractors.* (i) At least 25 percent of the cost of contract performance to be incurred for personnel will be spent on the prime contractor's employees;

(ii) At least 50 percent of the cost of the contract performance to be incurred for personnel will be spent on the prime contractor's employees or on a combination of the prime contractor's employees and employees of HUBZone small business concern subcontractors;

(iii) No more than 50 percent of the cost of contract performance to be incurred for personnel will be subcontracted to concerns that are not HUBZone small business concerns.

(e) A HUBZone joint venture agrees that the aggregate of the HUBZone small business concerns to the joint venture, not each concern separately, will perform the applicable percentage of work requirements.

(f)(1) When the total value of the contract exceeds \$25,000, a HUBZone small business concern nonmanufacturer agrees to furnish in performing this contract only end items manufactured or produced by HUBZone small business concern manufacturers.

(2) When the total value of the contract is equal to or less than \$25,000, a HUBZone small business concern nonmanufacturer may provide end items manufactured by other than a HUBZone small business concern manufacturer provided the end items are produced or manufactured in the United States.

(3) Paragraphs (f)(1) and (f)(2) of this section do not apply in connection with construction or service contracts.

(g) *Notice.* The HUBZone small business offeror acknowledges that a prospective HUBZone awardee must be a HUBZone small business concern at the time of award of this contract. The HUBZone offeror shall provide the Contracting Officer a copy of the notice required by 13 CFR 126.501 if material changes occur before contract award that could affect its HUBZone eligibility. If the apparently successful HUBZone offeror is not a HUBZone small business concern at the time of award of this contract, the Contracting Officer will proceed to award to the next otherwise successful HUBZone small business concern or other offeror.

(End of clause)

Alternate I (JAN 2011). As prescribed in 19.1309(b)(1), substitute the following paragraphs (d)(3) and (d)(4) for paragraphs (d)(3) and (d)(4) of the basic clause:

(3) General construction, at least 15 percent of the cost of the contract performance to be incurred for personnel will be spent on the concern's employees; or

(4) Construction by special trade contractors, at least 25 percent of the cost of the contract performance to be incurred for personnel will be spent on the concern's employees.

■ 25. Amend section 52.219–8 by revising the date of the clause; and paragraph (d) to read as follows:

52.219–8 Utilization of small business concerns.

* * * * *

Utilization of Small Business Concerns (JAN 2011)

* * * * *

(d)(1) Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as a small business concern, a veteran-owned small business concern, a service-disabled veteran-owned small business concern, a small disadvantaged business concern, or a women-owned small business concern.

(2) The Contractor shall confirm that a subcontractor representing itself as a HUBZone small business concern is certified by SBA as a HUBZone small business concern by accessing the Central Contractor Registration (CCR) database or by contacting the SBA. Options for contacting the SBA include—

(i) HUBZone small business database search application Web page at http://dsbs.sba.gov/dsbs/search/dsp_searchhubzone.cfm; or <http://www.sba.gov/hubzone>;

(ii) In writing to the Director/HUB, U.S. Small Business Administration, 409 3rd Street, SW., Washington DC 20416; or

(iii) The SBA HUBZone Help Desk at hubzone@sba.gov.

■ 26. Amend section 52.219–9 by revising the date of the clause and adding paragraph (e)(6) to read as follows:

52.219–9 Small business subcontracting plan.

* * * * *

Small Business Subcontracting Plan (JAN 2011)

* * * * *

(e) * * *

(6) For all competitive subcontracts over the simplified acquisition threshold in which a small business concern received a small business preference, upon determination of the successful subcontract offeror, the Contractor must inform each unsuccessful small business subcontract offeror in writing of the name and location of the apparent successful offeror prior to award of the contract.

* * * * *

[FR Doc. 2010–30560 Filed 12–10–10; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 8, 9, 17, 18, 35, and 41

[FAC 2005–47; FAR Case 2008–032; Item III; Docket 2010–0107, Sequence 1]

RIN 9000–AL69

Federal Acquisition Regulation; Preventing Abuse of Interagency Contracts

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement provisions regarding, the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009 requirements for preventing abuse of interagency contracts.

DATES: *Effective Date:* December 13, 2010.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before February 11, 2011 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–47, FAR Case 2008–032, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2008–032” under the heading “Enter Keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “FAR Case 2008–032.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2008–032” on your attached document.

- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE., Washington, DC 20417.

Instructions: Please submit comments only and cite FAC 2005–47, FAR Case 2008–032, in all correspondence related to this case. All comments received will

be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Lori Sakalos, Procurement Analyst, at (202) 208-0498. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-47, FAR Case 2008-032.

SUPPLEMENTARY INFORMATION:

A. Background

Interagency acquisitions offer important benefits to Federal agencies, including economies and efficiencies and the ability to leverage resources. This interim rule, which implements section 865 of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009, is designed to ensure these benefits are consistently achieved. The rule strengthens FAR subpart 17.5, Interagency Acquisitions, by—

- Broadening the scope of coverage to address all interagency acquisitions (with limited exceptions), rather than just those conducted under the Economy Act (31 U.S.C. 1535), in recognition that an increasing number of interagency acquisitions are conducted under other authorities;

- Requiring agencies to support the decision to use an interagency acquisition with a determination that such action is the “best procurement approach”;

- Directing that assisted acquisitions be accompanied by written agreements between the requesting agency and the servicing agency documenting the roles and responsibilities of the respective parties, including the planning, execution, and administration of the contract;

- Requiring the development of business cases to support the creation of multi-agency contracts. The Office of Management and Budget (OMB) is developing additional guidance on the use of business cases; once the guidance is issued, it will be referenced in the FAR; and

- Requiring the senior procurement executive for each executive agency to submit an annual report on interagency acquisitions to the Director of OMB, in accordance with section 865(c) of Public Law 110-417.

The interim rule clarifies the meaning of “interagency acquisition,” “direct acquisition,” and “assisted acquisitions” and moves the terms from FAR subparts 4.6 and 17.5 to FAR part 2. It also amends FAR subpart 8.4, Federal

Supply Schedules, to add a cross reference to the requirements in subpart 17.5 for orders over \$500,000 (a threshold established by statute).

In developing the rule, the Councils reviewed interagency guidance issued by the Office of Federal Procurement Policy at http://www.whitehouse.gov/omb/assets/procurement/iac_revised.pdf.

The OMB guidance addresses procedures for the use of interagency acquisitions to maximize competition, deliver best value to executive agencies, and minimize waste, fraud, and abuse. In addition, as required by section 865(a), training on interagency acquisitions has been made available through the Federal Acquisition Institute (see <http://www.fai.gov/IAA/launchpage.htm>).

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not impose any additional requirements on small businesses. The rule is strengthening interagency acquisition procedures to achieve efficiencies and economies of scale across the Federal Government. The rule also requires agencies, in the multi-agency contract business-case analysis, to consider strategies to ensure small business participation during acquisition planning. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

The Councils will also consider comments from small entities concerning the existing regulations in parts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005-47, FAR Case 2008-032) in all correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management

and Budget under 44 U.S.C. chapter 35, *et seq.*

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because section 865(b) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417) required the publication of the regulations within one year after enactment, October 14, 2008. However, pursuant to 41 U.S.C. 418b and FAR 1.501-3(b), the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 2, 4, 8, 9, 17, 18, 35, and 41

Government procurement.

Dated: November 24, 2010.

Millisa Gary,

Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 4, 8, 9, 17, 18, 35, and 41 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 4, 8, 9, 17, 18, 35, and 41 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) by—

■ a. Adding, in alphabetical order, the definitions “Assisted acquisition”, “Direct acquisition”, and “Interagency acquisition”;

■ b. Amending the definition “Multi-agency contract (MAC)” by removing “17.500(b)” and adding “17.502-2” in its place; and

■ c. Adding, in alphabetical order, the definitions “Requesting agency”, and “Servicing agency”.

The added text reads as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Assisted acquisition means a type of interagency acquisition where a servicing agency performs acquisition activities on a requesting agency’s behalf, such as awarding and

administering a contract, task order, or delivery order.

* * * * *

Direct acquisition means a type of interagency acquisition where a requesting agency places an order directly against a servicing agency's indefinite-delivery contract. The servicing agency manages the indefinite-delivery contract but does not participate in the placement or administration of an order.

* * * * *

Interagency acquisition means a procedure by which an agency needing supplies or services (the requesting agency) obtains them from another agency (the servicing agency), by an assisted acquisition or a direct acquisition. The term includes—

(1) Acquisitions under the Economy Act (31 U.S.C. 1535); and

(2) Non-Economy Act acquisitions completed under other statutory authorities (e.g., General Services Administration Federal Supply Schedules in subpart 8.4 and Governmentwide acquisition contracts (GWACs)).

* * * * *

Requesting agency means the agency that has the requirement for an interagency acquisition.

* * * * *

Servicing agency means the agency that will conduct an assisted acquisition on behalf of the requesting agency.

* * * * *

PART 4—ADMINISTRATIVE MATTERS

4.601 [Amended]

■ 3. Amend section 4.601 by removing the definitions “Assisted acquisition”, “Direct acquisition”, “Requesting agency”, and “Servicing agency”.

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 4. Amend section 8.404 by revising paragraph (b) to read as follows:

8.404 Use of Federal Supply Schedules.

* * * * *

(b)(1) The contracting officer, when placing an order or establishing a BPA, is responsible for applying the regulatory and statutory requirements applicable to the agency for which the order is placed or the BPA is established. The requiring agency shall provide the information on the applicable regulatory and statutory requirements to the contracting officer responsible for placing the order.

(2) For orders over \$500,000, see subpart 17.5 for additional requirements

for interagency acquisitions. For example, the requiring agency shall make a determination that use of the Federal Supply Schedule is the best procurement approach, in accordance with 17.502–1(a).

* * * * *

PART 9—CONTRACTOR QUALIFICATIONS

9.106–3 [Amended]

■ 5. Amend section 9.106–3 by removing the word “accommodated” and adding the words “accommodated (also see subpart 17.5)” in its place.

PART 17—SPECIAL CONTRACTING METHODS

■ 6. Revise subpart 17.5 to read as follows:

Subpart 17.5—Interagency Acquisitions

Sec.

17.500 Scope of subpart.

17.501 General.

17.502 Procedures.

17.502–1 General.

17.502–2 The Economy Act.

17.503 Ordering procedures.

17.504 Reporting requirements.

17.500 Scope of subpart.

(a) This subpart prescribes policies and procedures applicable to all interagency acquisitions under any authority, except as provided for in paragraph (b) of this section.

(b) This subpart does not apply to orders of \$500,000 or less issued against Federal Supply Schedules.

17.501 General.

(a) Interagency acquisitions are commonly conducted through indefinite-delivery contracts, such as task- and delivery-order contracts. The indefinite-delivery contracts used most frequently to support interagency acquisitions are Federal Supply Schedules (FSS), Governmentwide acquisition contracts (GWACs), and multi-agency contracts (MACs).

(b) An agency shall not use an interagency acquisition to circumvent conditions and limitations imposed on the use of funds.

(c) An interagency acquisition is not exempt from the requirements of subpart 7.3, Contractor Versus Government Performance.

(d) An agency shall not use an interagency acquisition to make acquisitions conflicting with any other agency's authority or responsibility (for example, that of the Administrator of General Services under title 40, United States Code, “Public Buildings, Property

and Works” and title III of the Federal Property and Administrative Services Act of 1949.)

17.502 Procedures.

17.502–1 General.

(a) *Determination of best procurement approach*—(1) *Assisted acquisitions*.

Prior to requesting that another agency conduct an acquisition on its behalf, the requesting agency shall make a determination that the use of an interagency acquisition represents the best procurement approach. As part of the best procurement approach determination, the requesting agency shall obtain the concurrence of the requesting agency's responsible contracting office in accordance with internal agency procedures. At a minimum, the determination shall include an analysis of procurement approaches, including an evaluation by the requesting agency that using the acquisition services of another agency—

(i) Satisfies the requesting agency's schedule, performance, and delivery requirements (taking into account factors such as the servicing agency's authority, experience, and expertise as well as customer satisfaction with the servicing agency's past performance);

(ii) Is cost effective (taking into account the reasonableness of the servicing agency's fees); and

(iii) Will result in the use of funds in accordance with appropriation limitations and compliance with the requesting agency's laws and policies.

(2) *Direct acquisitions*. Prior to placing an order against another agency's indefinite-delivery vehicle, the requesting agency shall make a determination that use of another agency's contract vehicle is the best procurement approach. At a minimum, the determination shall include an analysis, including factors such as:

(i) The suitability of the contract vehicle;

(ii) The value of using the contract vehicle, including—

(A) The administrative cost savings from using an already existing contract;

(B) Lower prices, greater number of vendors, and reasonable vehicle access fees; and

(iii) The expertise of the requesting agency to place orders and administer them against the selected contract vehicle throughout the acquisition lifecycle.

(b) *Written agreement on responsibility for management and administration*—(1) *Assisted acquisitions*. (i) Prior to the issuance of a solicitation, the servicing agency and the requesting agency shall both sign a

written interagency agreement that establishes the general terms and conditions governing the relationship between the parties, including roles and responsibilities for acquisition planning, contract execution, and administration and management of the contract(s) or order(s). The requesting agency shall provide to the servicing agency any unique terms, conditions, and applicable agency-specific statutes, regulations, directives, and other applicable requirements for incorporation into the order or contract; for patent rights, *see* 27.304–2. In preparing interagency agreements to support assisted acquisitions, agencies should review the Office of Federal Procurement Policy guidance, *Interagency Acquisitions*, available at http://www.whitehouse.gov/omb/assets/procurement/iac_revised.pdf.

(ii) Each agency's file shall include the interagency agreement between the requesting and servicing agency, and shall include sufficient documentation to ensure an adequate audit consistent with 4.801(b).

(2) *Direct acquisitions.* The requesting agency administers the order; therefore, no written agreement with the servicing agency is required.

17.502–2 The Economy Act.

(a) The Economy Act (31 U.S.C. 1535) authorizes agencies to enter into agreements to obtain supplies or services by interagency acquisition. The Economy Act also provides authority for placement of orders between major organizational units within an agency; procedures for such intra-agency transactions are addressed in agency regulations.

(b) The Economy Act applies when more specific statutory authority does not exist. Examples of more specific authority are 40 U.S.C. 501 for the Federal Supply Schedules (subpart 8.4), and 40 U.S.C. 11302(e) for Governmentwide acquisition contracts (GWACs).

(c) *Requirements for determinations and findings.* (1) Each Economy Act order to obtain supplies or services by interagency acquisition shall be supported by a determination and findings (D&F). The D&F shall state that—

(i) Use of an interagency acquisition is in the best interest of the Government; and

(ii) The supplies or services cannot be obtained as conveniently or economically by contracting directly with a private source.

(2) If the Economy Act order requires contract action by the servicing agency, the D&F must also include a statement

that at least one of the following circumstances applies:

(i) The acquisition will appropriately be made under an existing contract of the servicing agency, entered into before placement of the order, to meet the requirements of the servicing agency for the same or similar supplies or services.

(ii) The servicing agency has the capability or expertise to enter into a contract for such supplies or services that is not available within the requesting agency.

(iii) The servicing agency is specifically authorized by law or regulation to purchase such supplies or services on behalf of other agencies.

(3) The D&F shall be approved by a contracting officer of the requesting agency with authority to contract for the supplies or services to be ordered, or by another official designated by the agency head, except that, if the servicing agency is not covered by the Federal Acquisition Regulation, approval of the D&F may not be delegated below the senior procurement executive of the requesting agency.

(4) The requesting agency shall furnish a copy of the D&F to the servicing agency with the order.

(d) *Business-case analysis requirements for multi-agency contracts.* In order to establish a multi-agency contract in accordance with Economy Act authority, a business-case analysis must be prepared by the servicing agency. The business-case analysis shall—

(1) Consider strategies for the effective participation of small businesses during acquisition planning (*see* 7.103(s));

(2) Detail the administration of such contract, including an analysis of all direct and indirect costs to the Government of awarding and administering such contract;

(3) Describe the impact such contract will have on the ability of the Government to leverage its purchasing power, *e.g.*, will it have a negative effect because it dilutes other existing contracts;

(4) Include an analysis concluding that there is a need for establishing the multi-agency contract; and

(5) Document roles and responsibilities in the administration of the contract.

(e) *Payment.* (1) The servicing agency may ask the requesting agency, in writing, for advance payment for all or part of the estimated cost of furnishing the supplies or services. Adjustment on the basis of actual costs shall be made as agreed to by the agencies.

(2) If approved by the servicing agency, payment for actual costs may be made by the requesting agency after the

supplies or services have been furnished.

(3) Bills rendered or requests for advance payment shall not be subject to audit or certification in advance of payment.

(4) If the Economy Act order requires use of a contract by the servicing agency, then in no event shall the servicing agency require, or the requiring agency pay, any fee or charge in excess of the actual cost (or estimated cost if the actual cost is not known) of entering into and administering the contract or other agreement under which the order is filled.

17.503 Ordering procedures.

(a) Before placing an order for supplies or services with another Government agency, the requesting agency shall follow the procedures in 17.502–1 and, if under the Economy Act, also 17.502–2.

(b) The order may be placed on any form or document that is acceptable to both agencies. The order should include—

(1) A description of the supplies or services required;

(2) Delivery requirements;

(3) A funds citation;

(4) A payment provision (*see* 17.502–2(e) for Economy Act orders); and

(5) Acquisition authority as may be appropriate (*see* 17.503(d)).

(c) The requesting and servicing agencies should agree to procedures for the resolution of disagreements that may arise under interagency acquisitions, including, in appropriate circumstances, the use of a third-party forum. If a third party is proposed, consent of the third party should be obtained in writing.

(d) When an interagency acquisition requires the servicing agency to award a contract, the following procedures also apply:

(1) If a justification and approval or a D&F (other than the requesting agency's D&F required in 17.502–2(c)) is required by law or regulation, the servicing agency shall execute and issue the justification and approval or D&F. The requesting agency shall furnish the servicing agency any information needed to make the justification and approval or D&F.

(2) The requesting agency shall also be responsible for furnishing other assistance that may be necessary, such as providing information or special contract terms needed to comply with any condition or limitation applicable to the funds of the requesting agency.

(3) The servicing agency is responsible for compliance with all other legal or regulatory requirements applicable to the contract, including—

(j) Having adequate statutory authority for the contractual action; and

(ii) Complying fully with the competition requirements of part 6 (see 6.002). However, if the servicing agency is not subject to the Federal Acquisition Regulation, the requesting agency shall verify that contracts utilized to meet its requirements contain provisions protecting the Government from inappropriate charges (for example, provisions mandated for FAR agencies by part 31), and that adequate contract administration will be provided.

(e) Nonsponsoring Federal agencies may use a Federally Funded Research and Development Center (FFRDC) only if the terms of the FFRDC's sponsoring agreement permit work from other than a sponsoring agency. Work placed with the FFRDC is subject to the acceptance by the sponsor and must fall within the purpose, mission, general scope of effort, or special competency of the FFRDC. (See 35.017; see also 6.302 for procedures to follow where using other than full and open competition.) The nonsponsoring agency shall provide to the sponsoring agency necessary documentation that the requested work would not place the FFRDC in direct competition with domestic private industry.

17.504 Reporting requirements.

The senior procurement executive for each executive agency shall submit to the Director of OMB an annual report on interagency acquisitions, as directed by OMB.

PART 18—EMERGENCY ACQUISITIONS

■ 7. Amend section 18.113 by revising the section heading to read as follows:

18.113 Interagency acquisitions.

* * * * *

PART 35—RESEARCH AND DEVELOPMENT CONTRACTING

■ 8. Amend section 35.017–3 by revising the second sentence of paragraph (b) to read as follows:

35.017–3 Using an FFRDC.

* * * * *

(b) * * * The nonsponsoring agency is responsible for making the determination required by 17.502–2(c) and providing the documentation required by 17.503(e). * * *

PART 41—ACQUISITION OF UTILITY SERVICES

■ 9. Revise section 41.206 to read as follows:

41.206 Interagency agreements.

Agencies shall use interagency agreements (e.g., consolidated purchase, joint use, or cross-service agreements) when acquiring utility service or facilities from other Government agencies and shall comply with the policies and procedures at 17.502–2, The Economy Act.

[FR Doc. 2010–30561 Filed 12–10–10; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 19, and 52

[FAC 2005–47; FAR Case 2009–019; Item IV; Docket 2010–0108, Sequence 1]

RIN 9000–AL77

Federal Acquisition Regulation; Small Disadvantaged Business Self-Certification

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to incorporate changes made by the Small Business Administration (SBA) to its Small Disadvantaged Business (SDB) Program.

DATES: *Effective Date:* December 13, 2010.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before February 11, 2011 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–47, FAR Case 2009–019, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2009–019” under the heading “Enter Keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “FAR Case 2009–019.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR

Case 2009–019” on your attached document.

- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE., Washington, DC 20417.

Instructions: Please submit comments only and cite FAC 2005–47, FAR Case 2009–019, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Karlos Morgan, Procurement Analyst, at (202) 501–2364. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–47, FAR Case 2009–019.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule amends the FAR to allow subcontractors on Federal contracts to self-represent their status as SDBs to prime contractors. SBA published an interim final rule in the **Federal Register** at 73 FR 57490, October 3, 2008, to allow SDB subcontractors to provide written statements to prime contractors representing in good faith their status as an SDB concern for the purposes of subcontract awards under Federal prime contracts. Under SBA's previous regulation, only those firms that were certified by SBA as SDBs could participate as SDBs for Federal prime contract and subcontract opportunities. SBA stated that, effective October 3, 2008, it would no longer serve as a source for SDB certification for firms seeking to establish themselves as SDBs. The revision to SBA's regulation removed any uncertainty regarding SDB subcontractors' ability to self-represent themselves in good faith to prime contractors.

In order to maintain consistency between the SBA regulations and the FAR, the Councils are amending the FAR as outlined below:

- FAR 2.101, Definitions: The term “small disadvantaged business concern” is revised to be consistent with 13 CFR part 124, which continues to recognize small business concerns that have been certified by SBA, and to add language that allows small business concerns to self-represent their status as SDBs for subcontracts.

- FAR 19.301–1, Representations by the offeror: Amended to update citations.

- FAR 19.703, Eligibility requirements for participating in the

program: Amended to add language that allows the contractor to rely on small business concerns to self-represent their status as SDBs for subcontracts.

- FAR 52.219–8, Utilization of Small Business Concerns: Amended to include language that the small business concern can self-represent its SDB status in writing.

- FAR 52.219–25, Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting: Amended to allow the contractor to accept written self-representations of small disadvantaged status from subcontractors.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of the Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this revision removes a requirement for SDBs to obtain SBA SDB certification prior to award of a subcontract. This change will be beneficial to SDBs because they will no longer have to incur the cost associated with a formal certification process. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

The Councils will also consider comments from small entities concerning the existing regulations in parts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005–47, FAR Case 2009–019) in all correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of the

National Aeronautics and Space Administration that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the FAR currently prohibits small business concerns that are not certified by the SBA from participating as SDB concerns for subcontracting. This interim rule implements changes promulgated by the SBA and is necessary for the FAR to be consistent with SBA’s regulations pertaining to SDB certifications. However, pursuant to 41 U.S.C. 418b and FAR 1.501–3(b), the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 2, 19, and 52

Government procurement.

Dated: November 24, 2010.

Millisa Gary,

Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 19, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 19, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2), in the definition “Small disadvantaged business concern”, by—

■ a. Revising the introductory text and paragraph (1)(iii);

■ b. Amending paragraph (2) by removing the period at the end of the paragraph and adding a semicolon in its place; and

■ c. Adding paragraph (3).

The revised and added text reads as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Small disadvantaged business concern (except for 52.212–3(c)(4) and 52.219–1(b)(2) for general statistical purposes and 52.212–3(c)(9)(ii), 52.219–22(b)(2), 52.219–22(b)(1)(C), and 52.219–23(a)(3) for joint ventures under the price evaluation adjustment for small disadvantaged business concerns), consistent with 13 CFR 124.1002, means an offeror, that is a small business under the size standard applicable to the acquisition; and either—

(1) * * *

(iii) It is identified, on the date of its representation, as a certified small disadvantaged business concern in the CCR Dynamic Small Business Search data base maintained by the Small Business Administration;

* * * * *

(3) It represents in writing that it qualifies as a small disadvantaged business (SDB) for any Federal subcontracting program if it believes in good faith that it is owned and controlled by one or more socially and economically disadvantaged individuals and meets the SDB eligibility criteria of 13 CFR 124.1002.

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

19.301–1 [Amended]

■ 3. Amend section 19.301–1 in paragraph (d), in the last sentence, by removing “13 CFR 124.1011” and adding “13 CFR 124.1004” in its place.

■ 4. Amend section 19.703 by removing from paragraph (a)(1) “HUBZone small business,” and adding “HUBZone small business, small disadvantaged business,” in its place; removing from paragraph (a)(2), in the second sentence, “13 CFR 124.1015 through 124.1022” and adding “13 CFR 124.1007 through 124.1014” in its place; and revising paragraph (b) to read as follows:

19.703 Eligibility requirements for participating in the program.

* * * * *

(b) A contractor acting in good faith may rely on the written representation of its subcontractor regarding the subcontractor’s status as a small business, small disadvantaged business, veteran-owned small business, service-disabled veteran-owned small business, or a woman-owned small business concern. The contractor, the contracting officer, or any other interested party can challenge a subcontractor’s size status representation by filing a protest, in accordance with 13 CFR 121.1001 through 121.1008. Protests challenging a subcontractor’s small disadvantaged business representation must be filed in accordance with 13 CFR 124.1007 through 124.1014.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Amend section 52.212–5 by revising the date of the clause; removing from paragraph (b)(11) “(MAY 2004)”, and adding “(DEC 2010)” in its place; removing from paragraph (e)(1)(ii) “(October 2000)”, and adding “(DEC

2010)” in its place; revising the date of Alternate II; and removing from Alternate II, paragraph (e)(1)(ii)(C) “(MAY 2004)” and adding “(DEC 2010)” in its place.

The revised text reads as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (DEC 2010)

* * * * *

Alternate II (DEC 2010). * * *

* * * * *

■ 6. Amend section 52.213–4 by revising the date of the clause, and paragraph (a)(2)(vii) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (DEC 2010)

(a) * * *

(2) * * *

(vii) 52.244–6, Subcontracts for Commercial Items (DEC 2010).

* * * * *

■ 7. Amend section 52.219–8 by—

- a. Revising the date of the clause; and
- b. In paragraph (c), in the definition “Small disadvantaged business concern”, by redesignating paragraphs (1) through (4) as paragraphs (1)(i) through (iv), respectively, and revising the newly redesignated paragraph (1)(iv); and adding paragraph (2).

The revised and added text reads as follows:

52.219–8 Utilization of Small Business Concerns.

* * * * *

Utilization of Small Business Concerns (DEC 2010)

* * * * *

(c) * * *

* * * * *

Small disadvantaged business concern

* * *

(1)(i) * * *

(iv) It is identified, on the date of its representation, as a certified small disadvantaged business in the CCR Dynamic Small Business Search database maintained by the Small Business Administration, or

(2) It represents in writing that it qualifies as a small disadvantaged business (SDB) for any Federal subcontracting program, and believes in good faith that it is owned and controlled by one or more socially and economically disadvantaged individuals and

meets the SDB eligibility criteria of 13 CFR 124.1002.

* * * * *

■ 8. Amend section 52.219–25 by revising the date of the clause; revising the second sentence of paragraph (a); redesignating paragraph (b) as paragraph (c); and adding a new paragraph (b) to read as follows:

52.219–25 Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting.

* * * * *

Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting (DEC 2010)

(a) * * * The Contractor shall obtain representations of small disadvantaged status from joint venture partners, teaming arrangement members, and subcontractors (see exception in paragraph (b) of this section) through use of a provision substantially the same as paragraph (b)(1)(i) of the provision at FAR 52.219–22, Small Disadvantaged Business Status. * * *

(b) For subcontractors that are not certified as a small disadvantaged business by the Small Business Administration, the Contractor shall accept the subcontractor’s written self-representation as a small disadvantaged business, unless the Contractor has reason to question the self-representation.

* * * * *

■ 9. Amend section 52.244–6 by revising the date of the clause; and removing from paragraph (c)(1)(iii) “(MAY 2004)” and adding “(DEC 2010)” in its place.

The revised text reads as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (DEC 2010)

* * * * *

[FR Doc. 2010–30563 Filed 12–10–10; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 9 and 52

[FAC 2005–47; FAR Case 2009–036; Item V; Docket 2010–0109, Sequence 1]

RIN 9000–AL75

Federal Acquisition Regulation; Uniform Suspension and Debarment Requirement

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 815 of the National Defense Authorization Act for Fiscal Year 2010. Section 815 extends the flowdown of the restriction on subcontracting to lower tier subcontractors that have been suspended or debarred, with some exceptions for contracts for the acquisition of commercial items and commercially available off-the-shelf items.

DATES: *Effective Date:* December 13, 2010.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before February 11, 2011 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–47, FAR Case 2009–036, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2009–036” under the heading “Enter Keyword or ID” and selecting “Search”. Select the link “Submit a Comment” that corresponds with “FAR Case 2009–036”. Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2009–036” on your attached document.

- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE., Washington, DC 20417.

Instructions: Please submit comments only and cite FAC 2005–47, FAR Case 2009–036, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Millisa Gary, Procurement Analyst, at (202) 501–0699. Please cite FAC 2005–47, FAR Case 2009–036. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule revises the FAR to implement section 815 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84). Section 815 amends section 2455(c)(1) of the Federal Acquisition Streamlining Act of 1994 (31 U.S.C. 6101 note) by amending the definition of “procurement activities” to include subcontracts at any tier, except—

- It does not include subcontracts for commercially available off-the-shelf (COTS) items; and
- In the case of commercial items, such term includes only the first-tier subcontracts.

This has the effect, except for COTS items, of expanding the requirement of 2455(a), which states that “No agency shall allow a party to participate in any procurement * * * activity if any agency has debarred, suspended, or otherwise excluded * * * that party from participation in a procurement * * * activity.”

Prime contractors will not be restricted from subcontracts with suspended or debarred entities for COTS items; subcontractors for COTS items will not be required to disclose to the prime contractor whether the subcontractor, or any of its principals, is debarred, suspended, or proposed for debarment at the time of subcontract award.

This interim rule amends—

(1) FAR 9.405–2 to exclude COTS items from the restrictions on subcontracting with contractors that have been debarred, suspended, or proposed for debarment;

(2) The clause at FAR 52.209–6, Protecting the Government’s Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment, by flowing down the requirements to check whether a subcontractor is suspended or debarred beyond the first-tier, with the stated exceptions for COTS items; and

(3) The clause at FAR 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, because the requirement that commercial contracts must flow the requirement down to the first-tier is now statutory.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. The rule removes the current requirements relating to subcontracts for COTS items, and in the case of commercial items, the requirement extends only to the first-tier subcontracts. This rule will impact small entities that are awarded a lower-tier subcontract for a non-COTS item that exceeds \$30,000, in that these entities must now disclose to the higher-tier subcontractor whether they are suspended, debarred, or proposed for suspension. Although a substantial number of small entities may be impacted by this rule, the impact is not significant. It will likely only take one minute to include the required information with an offer. For the other impact of the rule, which will require the higher-tier subcontractor to provide an explanation if desiring to subcontract with an entity that has been debarred, suspended, or proposed for debarment, the Councils do not expect this requirement to impact a substantial number of small entities, because it would only be in rare circumstances that a subcontractor would potentially jeopardize performance or integrity by knowingly contracting with an entity that is debarred, suspended or proposed for debarment. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

The Councils will also consider comments from small entities concerning the existing regulations in parts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005–47, FAR Case 2008–036) in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR only impose minimal additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0094. Because the change in burden hours is so slight, no new approval by OMB is required.

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to implement the changes resulting from the enactment of Section 815 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84), effective October 28, 2009. However, pursuant to 41 U.S.C. 418b and FAR 1.501–3(b), the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 9 and 52

Government procurement.

Dated: November 24, 2010.

Millisa Gary,

Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 9 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 9 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 9—CONTRACTOR QUALIFICATIONS

■ 2. Amend section 9.405–2 by revising paragraph (b) introductory text to read as follows:

9.405–2 Restrictions on subcontracting.

* * * * *

(b) The Government suspends or debars contractors to protect the Government’s interests. By operation of the clause at 52.209–6, Protecting the Government’s Interests When Subcontracting with Contractors Debarred, Suspended or Proposed for Debarment, contractors shall not enter into any subcontract in excess of \$30,000, other than a subcontract for a commercially available off-the-shelf

item, with a contractor that has been debarred, suspended, or proposed for debarment unless there is a compelling reason to do so. If a contractor intends to subcontract, other than a subcontract for a commercially available off-the-shelf item, with a party that is debarred, suspended, or proposed for debarment as evidenced by the parties' inclusion in the EPLS (*see* 9.404), a corporate officer or designee of the contractor is required by operation of the clause at 52.209-6, Protecting the Government's Interests when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment, to notify the contracting officer, in writing, before entering into such subcontract. For contracts for the acquisition of commercial items, the notification requirement applies only for first-tier subcontracts. For all other contracts, the notification requirement applies to subcontracts at any tier. The notice must provide the following:

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 3. Amend section 52.209-6 by—
- a. Revising the date of the clause;
- b. Redesignating paragraphs (a) through (c) as paragraphs (b) through (d), respectively; and adding a new paragraph (a);
- c. Revising the newly designated paragraphs (b), (c), and (d) introductory text; and
- d. Adding paragraph (e).

The revised and added text reads as follows:

52.209-6 Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, or Proposed for Debarment.

* * * * *

Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, or Proposed for Debarment (DEC 2010)

(a) *Definition. Commercially available off-the-shelf (COTS) item*, as used in this clause—

- (1) Means any item of supply (including construction material) that is—
 - (i) A commercial item (as defined in paragraph (1) of the definition in FAR 2.101);
 - (ii) Sold in substantial quantities in the commercial marketplace; and
 - (iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and
- (2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

(b) The Government suspends or debars Contractors to protect the Government's

interests. Other than a subcontract for a commercially available off-the-shelf item, the Contractor shall not enter into any subcontract, in excess of \$30,000 with a Contractor that is debarred, suspended, or proposed for debarment by any executive agency unless there is a compelling reason to do so.

(c) The Contractor shall require each proposed subcontractor whose subcontract will exceed \$30,000, other than a subcontractor providing a commercially available off-the-shelf item, to disclose to the Contractor, in writing, whether as of the time of award of the subcontract, the subcontractor, or its principals, is or is not debarred, suspended, or proposed for debarment by the Federal Government.

(d) A corporate officer or a designee of the Contractor shall notify the Contracting Officer, in writing, before entering into a subcontract with a party (other than a subcontractor providing a commercially available off-the-shelf item) that is debarred, suspended, or proposed for debarment (*see* FAR 9.404 for information on the Excluded Parties List System). The notice must include the following:

* * * * *

(e) *Subcontracts.* Unless this is a contract for the acquisition of commercial items, the Contractor shall include the requirements of this clause, including this paragraph (e) (appropriately modified for the identification of the parties), in each subcontract that—

- (1) Exceeds \$30,000 in value; and
- (2) Is not a subcontract for commercially available off-the-shelf items.

(End of clause)

- 4. Amend section 52.212-5 by—
- a. Revising the date of the clause; and
- b. Redesignating paragraphs (b)(6) through (b)(44) as paragraphs (b)(7) through (b)(45), respectively; and adding a new paragraph (b)(6).

The revised and added text reads as follows:

52.212-5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (DEC 2010)

(b) * * *

(6) 52.209-6, Protecting the Government's Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment (DEC 2010) (31 U.S.C. 6101 note). (Applies to contracts over \$30,000). (Not applicable to subcontracts for the acquisition of commercially available off-the-shelf items).

* * * * *

- 5. Amend section 52.213-4 by revising the date of the clause and paragraph (b)(2)(i) to read as follows:

52.213-4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (DEC 2010)

(b) * * *

(2) * * *

(i) 52.209-6, Protecting the Government's Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment (DEC 2010) (Applies to contracts over \$30,000). (Not applicable to subcontracts for the acquisition of commercially available off-the-shelf items).

* * * * *

[FR Doc. 2010-30565 Filed 12-10-10; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 15, 31, and 52

[FAC 2005-47; FAR Case 2008-031; Item VI; Docket 2009-0034, Sequence 2]

RIN 9000-AL27

Federal Acquisition Regulation; Limitation on Pass-Through Charges

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have adopted as final, with changes, the interim rule amending the Federal Acquisition Regulation (FAR) to implement section 866 of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2009, which applies to executive agencies other than DoD. DoD is subject to section 852 of the John Warner NDAA for FY 2007, which is also implemented in this final rule. Section 866 requires the Councils to amend the FAR, and section 852 requires the Secretary of Defense to prescribe regulations to minimize excessive pass-through charges by contractors from subcontractors, or from tiers of subcontractors, that add no or negligible value, and to ensure that neither a contractor nor a subcontractor receives indirect costs or profit/fee (*i.e.*, pass-through charges) on work performed by

a lower-tier subcontractor to which the higher-tier contractor or subcontractor adds no or negligible value.

DATES: *Effective Date:* January 12, 2011.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Edward Chambers, Procurement Analyst, at (202) 501-3221. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-47, FAR Case 2008-031.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 74 FR 52853, October 14, 2009, to implement section 866 of the Duncan Hunter NDAA for FY 2009 (Pub. L. 110-417) as well as section 852 of the John Warner NDAA for FY 2007 (Pub. L. 109-364). These acts required the Councils to amend the FAR to minimize excessive pass-through charges by contractors from subcontractors, or from tiers of subcontractors, that add no or negligible value, and to ensure that neither a contractor nor a higher-tier subcontractor receives indirect costs or profit/fee (*i.e.*, pass-through charges) on work performed by a lower-tier subcontractor to which the contractor or higher-tier subcontractor adds no or negligible value.

To enable agencies to ensure that pass-through charges are not excessive, the interim rule included a solicitation provision and a contract clause requiring offerors and contractors to identify the percentage of work that will be subcontracted, and when subcontract costs will exceed 70 percent of the total cost of work to be performed, to provide information on indirect costs and profit/fee and value added with regard to the subcontract work. Seventy percent was selected as the threshold for this information reporting requirement, because it represents a substantial amount of subcontracting.

To ensure that the Government can make a determination as to whether or not pass-through charges are excessive, the interim rule incorporated a reporting threshold that affords the contracting officer the ability to understand what functions the contractor will perform (*e.g.*, consistent with the contractor's disclosed practice) and thus will provide added value, whether it be before award, or if the contractor subsequently decides to subcontract substantially all of the effort. The rule provides a recovery mechanism for the excessive pass-through charges for those situations in which a contractor

subcontracts all, or substantially all, of the performance of the contract, and does not perform the subcontract management functions, or other value-added functions, that were charged to the Government through indirect costs and related profit/fee.

The final rule adopts the interim rule with a minor change involving the addition of two types of fixed-price incentive contracts to the list of contracts at FAR 15.408(n)(2)(i)(B)(2) for DoD that are not subject to the limitation on pass-through charges clauses. These additions are fixed-price incentive contracts awarded on the basis of adequate price competition and fixed-price incentive contracts for the acquisition of a commercial item. Section 852 of the John Warner NDAA for FY 2007 (Pub. L. 109-364) is clear that DoD contracts awarded on the basis of adequate price competition, and DoD contracts for the acquisition of a commercial item are not subject to the limitation on pass-through charges.

B. Discussion and Analysis

The FAR Secretariat received five responses to the interim rule. These responses included a total of 31 comments on 23 issues. Each issue is discussed in the following sections.

Issue 1: Three respondents expressed their support for the interim rule with one respondent stating that they were in favor of companies being responsible, responsive, and capable of providing adequate management systems to track the level of subcontracting taking place under specific contracts.

Response: The Councils acknowledge their support for the interim rule.

Issue 2: One respondent recommended that guidance should be provided to assist contracting officers with implementing the rule. The respondent cited several examples of what should be in that guidance.

Response: The Councils disagree with the inclusion of such implementation guidance in the FAR. Agencies will provide supplemental guidance and training to implement this rule, as appropriate.

Issue 3: One respondent recommended that the clause language incorporate GAO recommendations relative to "requiring contracting officials to take risk into account when determining the degree of assessment needed."

Response: The Councils do not concur. The respondent's recommendation goes to procedures for assessing contractor value added. Such procedures are beyond the scope of this case, and reasonably should be implemented through agency guidance.

Issue 4: One respondent recommended that the final rule be written such as to "serve as a tool to ensure consistency to the extent practicable between contractor's proposals and actual performance rather than to serve as a basis to disallow cost after incurrence."

Response: The Councils do not concur with the respondent's recommendation. Unless otherwise required under the contract, contractors have the right to revise and manage workload under the contract as they see fit. The clauses provide sufficient protection to the Government for such cases where the contractor revises the workload from what had been negotiated to a situation where excessive pass-through charges exist.

Issue 5: One respondent recommended that the final rule be written such as to "carefully consider the potential effects on those small businesses performing as prime contractors on contract set-asides given that small business prime contractors could experience significant financial impacts as a result of disallowed pass-through costs under this rule."

Response: The Councils do not concur with the respondent's recommendation. Section 866 of the FY 2009 NDAA does not set forth an exclusion for small businesses under this rule.

Issue 6: One respondent recommended that the final rule should reconcile DoD policies to avoid confusion. Specifically, they assert that the Wynne memorandum dated July 12, 2004, and the policies enacted in the Weapons Systems Acquisition Reform Act of 2009 are contrary to this rule, which "exerts pressure on contracting officials to keep work in-house to address the reporting requirement."

Response: The Councils do not concur with the respondent's recommendation. The Councils do not agree that there are conflicts between this rule and DoD policy. Competition and teaming arrangements are not hindered by this regulation, and subcontracting efforts are not limited to 70 percent of the total effort. The 70 percent threshold triggers an information reporting requirement. This rule is emphasizing that value is to be added by the contractor to the subcontracted effort.

Issue 7: One respondent recommended that "a distinction be made with regard to G&A applied to contracts versus applied profit. This will serve to protect the contractor's recovery of allowable G&A if incurred in accordance with CAS and the contractor's disclosed practices, while focusing the Government's attention to the negotiated item of profit."

Response: The Councils do not concur with the respondent's recommendation. The Councils disagree that a distinction should be made with regard to G&A applied to contracts versus applied profit because the statutes prohibit application of overhead to excessive pass-through charges, as well as profit.

Issue 8: One respondent recommended that the rule should use the threshold in FAR 15.403-4 to ensure a consistent minimum threshold among all executive agencies in lieu of multiple thresholds currently in the rule. The respondent believed that if the Councils utilize the threshold in FAR 15.404-4, the rule "will exclude a significant number of subcontracts from this burdensome requirement but still cover the vast majority of the total value of subcontracts."

Response: The Councils do not concur with the respondent's recommendation. By statute, civilian agencies are required to establish the threshold at the simplified acquisition threshold, while DoD established its threshold at the threshold for obtaining cost or pricing data in FAR 15.403-4.

Issue 9: One respondent recommended that the provision and clause be amended to include definitions of "total cost of the work" and "total cost of work". As such, the respondent recommended that "FAR 52.215-22 be amended to provide that, for purposes of determining whether the 70 percent subcontracting threshold is reached, the 'total cost of the work' to be performed by the prime contractor or a higher-tier subcontractor shall include the prime contractor's or higher-tier subcontractor's direct and indirect costs of the work, excluding applicable profit or fee, to be performed under the contract or higher-tier subcontractor, as the case may be, and the 'total cost of the work' to be performed by each subcontractor to the prime contractor or to a higher-tier subcontractor shall include its direct and indirect costs, including applicable profit or fee, of the work to be performed under its subcontract." Also, the respondent recommended that "FAR 52.215-23 be amended to provide that, for purposes of determining whether a prime contractor, or higher-tier subcontractor, changes the amount of subcontractor effort after award such that it exceeds 70 percent of the total cost of work to be performed under the contractor or higher-tier subcontractor, the 'total cost of the work' to be performed by the prime contractor or higher-tier subcontractor under the contract or higher-tier subcontractor shall include the contractor's or higher-tier subcontractor's direct and indirect costs

of the work, excluding applicable profit or fee, to be performed under the contract or higher-tier subcontractor, as the case may be, and the 'total cost of the work' to be performed by each subcontractor to the prime contractor or to a higher-tier subcontractor shall include its direct and indirect costs, including applicable profit or fee, of the work to be performed under its subcontract."

Response: The Councils do not concur with the respondent's recommendation. The Councils believe that the respondent's recommended definitions are not necessary, as they are universally understood within the acquisition community.

Issue 10: Two respondents believed that the determination of value-added work be performed before contract award and not during contract performance. One respondent recommended that "the rule be placed in FAR Part 15 (for example, in 15.404-1, Proposal Analysis) rather than in a clause to affirm and emphasize the basic contract formation policy that contracts should not be entered into where the contracting officer determines after a thorough proposal analysis that an offeror adds no or negligible value to the proposed acquisition." The respondent believed that the pass-through rule, as currently written, "would unfairly continue to subject contractors to continuing post-award reviews by the government of pass-through charges and potential disallowances throughout the life of the contract which is unjustified, inappropriate, onerous, and not required by sections 866 or 852 of the NDAs." Similarly, another respondent recommended that FAR 52.215-23 be changed to add language from Alternate I to the standard clause, thus, mandating that contracting officers determine prior to award that the contractor will add value. The respondent also recommended that FAR 52.215-23(c) be changed "to require the contracting officer to make a determination as to whether the contractor will, in fact, provide 'added value', thereby putting the contractor on notice as to whether it can apply indirect costs and profit to work performed by subcontractors." This determination should be required to be made in a reasonable time not to exceed 30 days and if no determination made by 30 days, consider work to be value-added.

Response: The Councils do not concur with the respondent's recommendations. The statute's requirements are not limited only to pre-award restrictions, but instead set forth the requirements to ensure that neither a contractor nor a subcontractor

receives indirect costs or profit on work performed by a lower-tier subcontractor to which the higher-tier contractor or subcontractor adds no or negligible value at any time.

Issue 11: One respondent recommended that the final rule include an exemption for cost accounting standard (CAS)-covered contracts since allocability and allowability of pass-through charges are already covered in CAS and cost principles.

Response: The Councils do not concur with the respondent's recommendation. The statutes do not set forth an exclusion for CAS-covered contracts. Furthermore, CAS does not ensure that the Government does not pay excessive pass-through charges as required by the statutes.

Issue 12: One respondent recommended that the final rule include an exemption for contracts issued subject to the Truth In Negotiations Act (TINA) requirements since already existing cost or pricing data requirements would provide necessary data relative to pass-through charges.

Response: The Councils do not concur with the respondent's recommendation. The statutes do not set forth an exclusion for contracts subject to TINA. Furthermore, TINA does not ensure that the Government does not pay excessive pass-through charges as required by the statutes.

Issue 13: Two respondents recommended that the final rule include an exemption for all commercial item acquisitions since, as currently written, commercial items/services procured by DoD through time-and-materials or labor-hour contracts could be subject to the pass-through clause. One of these respondents believed that applying these requirements to commercial contracts would be unnecessary; contrary to TINA; inconsistent with the Federal Acquisition Streamlining Act, as well as the Services Acquisition Reform Act; and exceed Congressional authority.

Response: The Councils do not concur with these respondents' recommendations. The statutes do not set forth an exemption for commercial item/service time-and-materials or labor-hour contracts. Furthermore, the Councils do not believe it would be within the spirit of the statute to implement such exemptions.

Issue 14: Two respondents recommended that FAR 52.215-23(e) be removed as redundant or re-worded to specifically address what additional records or data the contracting officer requires access to that is not currently addressed by FAR 52.215-2.

Response: The Councils do not concur with the respondent's recommendation. The audit and records FAR clause at 52.215-2 does not provide access to all of the necessary records to show excessive pass-through charges. The final rule maintains the access to records FAR provision at 52.215-23(e) because it is needed to fully implement the statutes and ensure that the Government is not paying excessive pass-through charges.

Issue 15: One respondent recommended that the 70 percent threshold be raised to 90 percent which reflects the level initially contemplated by Congress in the Senate version of the bill (section 844 of S2766). The respondent believed there was no basis for the 70 percent threshold.

Response: The Councils disagree with this recommendation. As permitted by section 852 of the "John Warner NDAA for FY 2007", the Councils have identified 70 percent as the threshold whereby a greater risk is assumed by the Government in paying excessive pass-through charges. The Councils consider this 70 percent threshold reasonable, because it affords the parties an opportunity to address subcontracting management requirements above this level in more detail and to ensure the contracting officer is able to determine the disclosed subcontract management functions are of benefit to the Government. The statute requires that the Government not pay excessive pass-through charges on any contract, subcontract, or order.

Issue 16: One respondent recommended that the flowdown provisions of the solicitation provision and clause be limited to first-tier subcontractors. The respondent believed that there was little benefit in micro-managing pass-through charges deep into the supply chain.

Response: The Councils do not concur with the respondent's recommendation. It is very apparent from the language of the statutes that Congressional intent is to flow down this requirement beyond the first tier-subcontract level.

Issue 17: One respondent recommends that the final rule include a set of narrowly defined definitions for all key terms, such as, but not limited to "no or negligible value", "substantial value", and "added value".

Response: In general, the Councils do not concur with the respondent's recommendation. The Councils believe that the respondent's recommended definitions are not necessary, as they are universally understood within the acquisition community. However, the rule does provide definitions of five of the more commonly understood terms,

including "no or negligible value" and "added value".

Issue 18: One respondent recommended that the definition of "added value" in FAR 52.215-23(a), where "e.g." is included in parentheses, be changed to "including, but not limited to".

Response: The Councils do not concur with the respondent's recommendation. The term "e.g." means for example, which does not imply that these functions are all inclusive.

Issue 19: One respondent recommended that the pass-through provision and clause be limited to only sole source contracts (firm-fixed-price, time and materials, or otherwise) below the TINA threshold.

Response: The Councils do not concur with the respondent's recommendation. The statutes do not limit implementation of the requirements on such a limited basis.

Issue 20: One respondent recommended that the intent of FAR 52.215-23(d) be clarified since, as written, it is an open invitation to contracting officers to revisit contract terms and price agreements after the fact, which is unfair and unproductive, and further be clarified as to how this section will be implemented in light of other contract compliance requirements and/or other operative contract clauses.

Response: The Councils do not concur with the respondent's recommendation. This is not an invitation to revisit contract terms or price agreements. This is a compliance function performed under, and in conjunction with, standard contract administration.

Issue 21: One respondent recommended that the final rule specifically address small business goals. The respondent did not want to have the rule inadvertently discourage substantial subcontracting to small firms that do provide value added solutions. In general, the respondent recommended clarifying intent and wording of the final rule to prevent contracting officers from leaving out legitimate small firms or discouraging prime contractors from subcontracting. Specifically, the respondent recommended that the following language be added to the rule, "not intended to penalize companies with substantial small business goals that may on individual task orders exceed 70 percent".

Response: The Councils disagree with including the respondent's recommended language. It is not the Government's intention to establish a disincentive for a company from achieving their small business subcontractor goals. This rule merely

requires that the Government not pay excessive pass-through charges to contractors who add no or negligible value. The contracting officer has the discretion to make the determination whether the contractor has added value.

Issue 22: One respondent recommended that the definition of value-added at FAR 52.215-23(a) be "expanded to include all activities with respect to subcontractor sourcing, selection, negotiation, and administration that facilitate performance of services and delivery of goods to the Government and reduce Government's risk."

Response: The Councils disagree. The recommended language is too broad and does not adhere to the intent of the statute. The interim rule language provided examples for the contracting officer to consider, but ultimately this is a contracting officer determination.

Issue 23: One respondent recommended that the Defense Federal Acquisition Regulation Supplement (DFARS) language in the second interim rule that was published in the **Federal Register** at 73 FR 27464, May 13, 2008, be eliminated since it is no longer required based upon this rule.

Response: Although this comment is outside the scope of this case, the language has been removed from the DFARS (DFARS Case 2006-D057, 75 FR 48278, effective August 10, 2010).

C. Regulatory Planning and Review

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

D. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because we do not expect a significant number of entities to propose excessive pass-through charges under contracts or subcontracts, and the information required from offerors and contractors regarding pass-through charges is minimal.

E. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to

the paperwork burden previously approved under OMB Control Number 9000-0173.

List of Subjects in 48 CFR Parts 15, 31, and 52

Government procurement.
Dated: November 24, 2010.

Millisa Gary,
Acting Director, Acquisition Policy Division.

Interim Rule Adopted as Final With Changes

■ Accordingly, the interim rule amending 48 CFR parts 15, 31, and 52, which was published in the **Federal Register** at 74 FR 52853, October 14, 2009, is adopted as final with the following changes:

PART 15—CONTRACTING BY NEGOTIATION

■ 1. The authority citation for 48 CFR part 15 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

- 2. Amend section 15.408 by—
- a. Removing from paragraph (n)(2)(i)(B)(2)(iii) the word “or”;
- b. Removing the period from the end of paragraph (n)(2)(i)(B)(2)(iv) and adding a semicolon in its place; and
- c. Adding paragraphs (n)(2)(i)(B)(2)(v) and (n)(2)(i)(B)(2)(vi) to read as follows:

15.408 Solicitation provisions and contract clauses.

* * * * *

- (n) * * *
- (2)(i) * * *
- (B) * * *
- (2) * * *

(v) A fixed-price incentive contract awarded on the basis of adequate price competition; or
(vi) A fixed-price incentive contract for the acquisition of a commercial item.

[FR Doc. 2010-30566 Filed 12-10-10; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 3, 5, 7, and 10

[FAC 2005-47; Item VII; Docket 2010-0110, Sequence 1]

Federal Acquisition Regulation; Technical Amendments

AGENCIES: Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: This document makes amendments to the Federal Acquisition Regulation (FAR) in order to make editorial changes.

DATES: *Effective Date:* December 13, 2010.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, 1275 First St., NE., Washington, DC 20417, (202) 501-4755, for information pertaining to status or publication schedules. Please cite FAC 2005-47, Technical Amendments.

SUPPLEMENTARY INFORMATION: This document makes amendments to the Federal Acquisition Regulation (FAR) in 48 CFR parts 3, 5, 7, and 10 for purposes of updating.

List of Subjects in 48 CFR Parts 3, 5, 7, and 10

Government procurement.
Dated: November 24, 2010.

Millisa Gary,
Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 3, 5, 7, and 10 as set forth below:

■ 1. The authority citation for 48 CFR parts 3, 5, 7, and 10 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3.104-1 [Amended]

■ 2. Amend section 3.104-1 by removing from the definition “Federal agency procurement,” in the second sentence, the word “innovative” and adding the word “innovation” in its place.

PART 5—PUBLICIZING CONTRACT ACTIONS

5.601 [Amended]

■ 3. Amend section 5.601 by removing from paragraphs (a), (b)(1), and (b)(2) “<http://www.contractdirectory.gov>” and adding “<http://www.contractdirectory.gov/contractdirectory/>” in its place.

PART 7—ACQUISITION PLANNING

7.105 [Amended]

■ 4. Amend section 7.105 by removing from paragraph (b)(1), in the second sentence, “<http://www.contractdirectory.gov>” and adding

“<http://www.contractdirectory.gov/contractdirectory/>” in its place.

PART 10—MARKET RESEARCH

10.002 [Amended]

■ 5. Amend section 10.002 by removing from paragraph (b)(2)(iv) “<http://www.contractdirectory.gov>” and adding “<http://www.contractdirectory.gov/contractdirectory/>” in its place.

[FR Doc. 2010-30567 Filed 12-10-10; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2010-0077, Sequence 9]

Federal Acquisition Regulation; Federal Acquisition Circular 2005-47; Small Entity Compliance Guide

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2005-47, which amend the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been performed. Interested parties may obtain further information regarding these rules by referring to FAC 2005-47, which precedes this document. These documents are also available via the Internet at <http://www.regulations.gov>.

DATES: For effective dates see separate documents, which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below. Please cite FAC 2005-47 and the specific FAR case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755.

LIST OF RULES IN FAC 2005–47

Item	Subject	FAR Case	Analyst
I	Notification of Employee Rights Under the National Labor Relations Act (Interim)	2010–006	McFadden.
*II	HUBZone Program Revisions	2006–005	Morgan.
III	Preventing Abuse of Interagency Contracts (Interim)	2008–032	Sakalos.
IV	Small Disadvantaged Business Self-Certification (Interim)	2009–019	Morgan.
V	Uniform Suspension and Debarment Requirement (Interim)	2009–036	Gary.
VI	Limitation on Pass-Through Charges	2008–031	Chambers.
VII	Technical Amendments.		

SUPPLEMENTARY INFORMATION:

Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005–47 amends the FAR as specified below:

Item I—Notification of Employee Rights Under the National Labor Relations Act (FAR Case 2010–006) (Interim)

This interim rule amends the Federal Acquisition Regulation (FAR) to implement Executive Order 13496, Notification of Employee Rights Under Federal Labor Laws, as implemented by the Department of Labor (DoL). The Executive order requires contractors and subcontractors to post a notice that includes employee rights under the National Labor Relations Act, 29 U.S.C. 151 *et seq.* This Act encourages collective bargaining, and protects the exercise by employees of their freedom to associate, to self organize and to designate representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment. This FAR interim rule establishes a new subpart 22.16, Notification of Employee Rights under the National Labor Relations Act. The rule also creates a new FAR clause 52.222–40, Notification of Employee Rights under the National Labor Relations Act. In addition, this rule revises the FAR clauses at 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, and 52.244–6, Subcontracts for Commercial Items, to include the requirements of the new FAR clause 52.222–40. The required employee notice, “Notification of Employee Rights Under the National Labor Relations Act,” may be obtained from the DoL; downloaded from a DoL Web site; provided by the Federal contracting agency, if requested; or reproduced and used as exact duplicate copies of the DoL’s official poster (*see* FAR 52.222–40(c)). Contracting officers shall insert the clause at FAR 52.222–40,

Notification of Employee Rights under the National Labor Relations Act, in all solicitations and contracts, including acquisitions for commercial items and commercially available off-the-shelf items, except acquisitions—

(1) Under the simplified acquisition threshold. For indefinite-quantity contracts, include the clause only if the value of orders in any calendar year of the contract is expected to exceed the simplified acquisition threshold;

(2) For work performed exclusively outside the United States; or

(3) Covered (in their entirety) by an exemption granted by the Secretary.

A contracting agency may modify the clause at FAR 52.222–40, if necessary, to reflect an exemption granted by the Secretary of the Department of Labor (*see* 22.1603(b)).

Item II—HUBZone Program Revisions (FAR Case 2006–005)

This FAR final rule implements the Small Business Administration (SBA) final rule published in the **Federal Register** at 69 FR 29411 on May 24, 2004, and an interim rule published in the **Federal Register** at 70 FR 51243 on August 30, 2005, amending its HUBZone regulations at 13 CFR part 126 to implement the Small Business Reauthorization Act of 2000, the Consolidated Appropriations Act of 2005, and other various policy changes. The FAR is amended to—

(1) Require a HUBZone small business concern to be a HUBZone small business concern both at the time of its initial offer and at the time of contract award;

(2) Require that HUBZone concerns provide to the contracting officer a copy of the notice required by 13 CFR 126.501 if material changes occur before award that could affect its HUBZone eligibility.

(3) *Allow waiver of the 50 percent requirement.* In accordance with 13 CFR 126.700, for general construction or construction by special trade contractors, a HUBZone small business concern must spend at least 50 percent of the cost of contract performance incurred for personnel on its own

employees or subcontract employees of other HUBZone small business concerns. This final rule amends FAR clause 52.219–3, Notice of Total HUBZone Set-Aside, and FAR clause 52.219–4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns, to include an Alternate I, to be used to waive the 50 percent requirement only after determining that at least two HUBZone small business concerns cannot meet the requirement. However, the HUBZone small business prime contractor must still meet the performance of work requirements set forth in 13 CFR 125.6(c).

Item III—Preventing Abuse of Interagency Contracts (FAR Case 2008–032) (Interim)

This interim rule implements section 865 of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009. FAR subpart 17.5 now addresses all interagency acquisitions, not just those made under the Economy Act authority. A new subsection 17.502–1 is added to require that all interagency acquisitions include a determination of best procurement approach. For an assisted acquisition between the servicing agency and the requesting agency, this subsection now requires a written agreement that establishes the general terms and conditions governing the relationship between the parties. Subsection 17.502–2 contains business-case analysis requirements when an agency wishes to establish a contract that would be used by other agencies. There is a statutory exception included in subpart 17.5 for orders of \$500,000 or less issued against Federal Supply Schedules.

Item IV—Small Disadvantaged Business Program Self-Certification of Subcontractors (FAR Case 2009–019) (Interim)

This interim rule amends the FAR by allowing small disadvantaged businesses (SDBs) to self-represent their SDB status to prime contractors in good faith when seeking Federal subcontracting opportunities. This change implements revisions made by

the Small Business Administration (SBA) to its SDB regulations. This case only addresses the subcontracting status portion of the SBA final rule for Small Disadvantaged Business certification. The Small Disadvantaged Business certification for prime contracts will be addressed in a future rule. This change removes a cost of compliance burden on SDB subcontractors seeking SBA certification.

Item V—Uniform Suspension and Debarment Requirement (FAR Case 2009–036) (Interim)

This interim rule amends the FAR at parts 9 and 52 to implement section 815 of the National Defense Authorization Act for Fiscal Year 2010, Public Law 111–84. The law requires that suspension and debarment requirements flow down to all subcontracts except contracts for the acquisition of commercially available off-the-shelf items, and in the case of contracts for the acquisition of commercial items, first-tier subcontracts only.

This requirement will protect the Government against contracting with entities at any tier who are suspended, debarred or proposed for debarment. This rule does not have a significant impact on the Government, contractors or any automated systems.

Item VI—Limitations on Pass-Through Charges (FAR Case 2008–031)

This final rule adopts the interim rule published in the **Federal Register** at 74 FR 52853, October 14, 2009, as a final rule with minor changes.

The interim rule amended the FAR to implement section 866 of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009 (Pub. L. 110–417) and section 852 of the John Warner NDAA for Fiscal Year 2007 (Pub. L. 109–364). This legislation required the Councils to amend the FAR to minimize excessive pass-through charges by contractors from subcontractors, or from tiers of subcontractors, that add no or negligible value, and to ensure that neither a contractor nor a subcontractor receives

indirect costs or profit/fee (*i.e.*, pass-through charges) on work performed by a lower-tier subcontractor to which the higher-tier contractor or subcontractor adds no, or negligible, value.

To enable agencies to ensure that pass-through charges are not excessive, the interim rule included a solicitation provision and a contract clause requiring offerors and contractors to identify the percentage of work that will be subcontracted, and when subcontract costs will exceed 70 percent of the total cost of work to be performed, to provide information on indirect costs and profit/fee and value added with regard to the subcontract work.

Item VII—Technical Amendments

Editorial changes are made at FAR 3.104–1, 5.601, 7.105, and 10.002.

Dated: November 24, 2010.

Millisa Gary,

Acting Director, Acquisition Policy Division.

[FR Doc. 2010–30568 Filed 12–10–10; 8:45 am]

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