

Date: December 23, 2020

From: Executive Director, Office of Acquisition and Logistics (003A), and Senior Procurement Executive

Subj: Class Deviation from the Federal Acquisition Regulation Regarding Limitations on Subcontracting for Small Business Concerns, CAAC Letter 2019-01, Supplement 1 (VIEWS 032096696)

To: Heads of the Contracting Activities

1. Purpose. To issue a class deviation in accordance with Federal Acquisition Regulation (FAR) 1.404 to implement regulatory changes, as advised by the Civilian Agency Acquisition Council (CAAC) letter [2019-01, Supplement 1](#), issued July 2, 2020.

2. FAR Section Impacted. FAR part 52.

3. Effective Date. Immediately.

4. Expiration Date. This deviation expires when incorporated into the FAR or superseded.

5. Applicability. This class deviation applies to all VA contracting activities.

6. Exception. None.

7. Background. CAAC letter 2019-01 was issued to serve as consultation in accordance with FAR 1.404 allowing agencies to authorize a class deviation to implement regulatory changes made by the Small Business Administration to limitations on subcontracting in its final rule published in the Federal Register at 81 FR 34243 on May 31, 2016. The final rule changed and standardized the limitations on subcontracting and the nonmanufacturer rule with which small businesses must comply under Government contracts awarded pursuant to the set-aside, sole source, or HUBZone price evaluation preference authorities of the Small Business Act.

a. Need for Deviation. Since the issuance of CAAC letter 2019-01, FAR Case 2014-002, Set-Asides under Multiple Award Contracts was issued as a final rule, and became effective on March 30, 2020. FAR Case 2014-002 significantly changed FAR Part 19 and the clauses related to awards under FAR part 19. The purpose of this class deviation is to implement required updates to the limitations on subcontracting and the nonmanufacturer rule for all small businesses in the clauses relating to awards under FAR part 19 identified in the CAAC letter Supplement 1. Pending publication of the amendment to the FAR via FAR case 2016-011, Revision of Limitations on Subcontracting, this class deviation implements these updates.

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b. New Policy. This class deviation updates the limitations on subcontracting and the nonmanufacturer rule for all small businesses in the clauses relating to set-asides and sole source awards as follows—

- All awards under FAR part 19 will use 1) 52.219-14 Limitations on Subcontracting (JUN 2020)(DEVIATION 2019-01 SUPPLEMENT 1) in lieu of either the current FAR clause or the deviation clause from the original CAAC letter, and 2) 52.219-33 Nonmanufacturer Rule (JUN 2020)(DEVIATION 2019-01 SUPPLEMENT 1) in lieu of the current FAR clause. These are shown in Attachment 7.
- Small business set-asides will use the current FAR clauses 52.219-6 or 52.219-7 in lieu of the deviation clauses from Attachment 1 of the original CAAC letter (also see notation on Attachment 1 herein).
- 8(a) Program actions will use the deviated clauses 52.219-14 and 52.219-33 shown in Attachment 7 instead of the current FAR clause equivalents (also see notation on Attachment 2 herein).
- Historically Underutilized Business Zone (HUBZone) (52.219-3 and 52.219-4) set-asides and sole source actions, will use the clauses in Attachment 3.
- Service-Disabled Veteran-Owned Small Business (SDVOSB) set-asides (52.219-27)—**Not Applicable to VA.** [NOTE: *Contracting officers shall use the VAAR SDVOSB and veteran-owned small business (VOSB) clauses under the VFCP as prescribed at VAAR subpart 819.70 and as revised and updated in Class Deviation from VA Acquisition Regulation Part 819—Small Business Programs and Part 852—Solicitation and Contract Clauses, issued on December 23, 2020. **Contracting officers are not authorized to use FAR clause 52.219-27 for VA procurements.***
- Economically Disadvantaged Women-Owned Small Business (EDWOSB) set-asides or sole source actions (52.219-29), will use the clauses in attachment 5.
- Women-Owned Small Business (WOSB) (52.219-30) set-asides and sole source actions will use the clauses in Attachment 6.

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8. Additional information. Direct questions or concerns regarding this deviation to the Office of Acquisition and Logistics (003A), Procurement Policy and Warrant Management Service (003A2A) via email at va.procurement.policy@va.gov or (202) 632-5288.

Angela Billups

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Attachments

Attachment 1 – Small Business Concerns

Attachment 2 – 8(a) Program Participants

Attachment 3 – HUBZone Small Business Concerns

Attachment 4 – **[Not Applicable to VA]**

Attachment 5 – EDWOSB Concerns

Attachment 6 – WOSB Concerns Eligible under the WOSB Program

Attachment 7 – All awards under FAR part 19

Attachment 1 - Small Business Concerns

No deviation is necessary for 52.219-6 or 52.219-7; use the current FAR clause as prescribed in the FAR. Also, use deviated clauses 52.219-14 and 52.219-33 shown in Attachment 7, instead of their current FAR clause equivalents; those clauses apply to small business set-asides for contracts that exceed the simplified acquisition threshold.

Attachment 2 - 8(a) Program Participants

Use deviated clauses 52.219-14 and 52.219-33 shown in Attachment 7 instead of the current FAR clause equivalents. The limitations on subcontracting clause applies to contracts and task or delivery orders awarded pursuant to competitive 8(a) procurements and 8(a) sole source awards regardless of the dollar value of the award.

Attachment 3 - HUBZone Small Business Concerns

In solicitations, contracts, and task or delivery orders that are set aside for, or awarded on a sole-source basis to, HUBZone small business concerns under FAR part 19, as well as procurements using the HUBZone price evaluation preference, contracting officers shall use the 52.219-3 and 52.219-4 deviation clauses below, in lieu of the current FAR clauses. Contracting officers shall not use Alternate I of FAR 52.219-3 or Alternate I of FAR 52.219-4, as those alternates conflict with the deviation clauses below.

Also, use deviated clauses 52.219-14 and 52.219-33 shown in Attachment 7, instead of their current FAR clause equivalents. The limitations on subcontracting and the nonmanufacturer rule apply to contracts and task or delivery orders that are set aside for, or awarded on a sole-source basis to, HUBZone small business concerns under FAR part 19, or awarded using the HUBZone price evaluation preference, regardless of the dollar value of the award.

Baseline is FAC 2020-05, effective March 30, 2020.

Changes to the baseline are shown as **[bolded, bracketed additions]** and ~~strikeouts~~.

FAR text unchanged shown as asterisks *** or *****

52.219-3 Notice of HUBZone Set-Aside or Sole[-]Source Award.

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

Notice of HUBZone Set-Aside or Sole[-]Source Award (MAR 2020)
[(JUN 2020) (DEVIATION)]

(a) Definition. [**"HUBZone small business concern," as used in this clause, means a small business concern, certified by the Small Business Administration (SBA), that appears on the List of Qualified HUBZone Small Business Concerns maintained by the SBA (13 CFR 126.103).**] ~~See 13 CFR 125.1 and 126.103 for definitions of terms used in the clause.~~

(b) *Applicability.* This clause applies only to—

~~(1)~~ Contracts that have been set aside or awarded on a sole source basis to, HUBZone small business concerns;

~~(2)~~ Part or parts of a multiple-award contract that have been set aside for HUBZone small business concerns;

~~(3)~~ Orders **[set aside]** ~~set aside~~ for HUBZone small business concerns under multiple-award contracts as described in 8.405-5 and 16.505(b) (2) (i) (F); and

~~(4)~~ Orders issued directly to HUBZone small business concerns under multiple-award contracts as described in 19.504(c) (1) (ii).

(c) *General.*

~~(1)~~ Offers are solicited only from HUBZone small business concerns. Offers received from concerns that are not HUBZone small business concerns will not be considered.

~~(2)~~ Any award resulting from this solicitation will be made to a HUBZone small business concern.

(d) ~~Limitations on subcontracting.~~ The Contractor shall spend

~~(1) For services (except construction), at least 50 percent of the cost of contract performance incurred for personnel on its own employees or employees of other HUBZone small business concerns;~~

~~(2) For supplies (other than acquisition from a nonmanufacturer of the supplies), at least 50 percent of the cost of manufacturing, excluding the cost of materials, on the concern or other HUBZone small business concerns;~~

~~(3) For general construction~~

~~(i) At least 15 percent of the cost of contract performance to be incurred for personnel on its own employees;~~

~~(ii) At least 50 percent of the cost of the contract performance to be incurred for personnel on its own or on a combination of its own employees and employees of HUBZone small business concern subcontractors; and~~

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

~~(4) For construction by special trade contractors.~~

~~(i) At least 25 percent of the cost of contract performance incurred for personnel on its own employees;~~

~~(ii) At least 50 percent of the cost of the contract performance to be incurred for personnel on its own employees or on a combination of its own 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 on concerns that are not HUBZone small business concerns.~~

~~(e) A HUBZone small business contractor shall comply with the limitations on subcontracting as follows:~~

~~(1) For contracts, in accordance with paragraph (b) (1) or (2) of this clause~~

~~[Contracting Officer check as appropriate.]~~

~~By the end of the base term of the contract and then by the end of each subsequent option period; or~~

~~By the end of the performance period for each order issued under the contract.~~

~~(2) For orders, in accordance with paragraph (b) (3) or (4) of this clause, by the end of the performance period for the order.~~

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

(g[d]) *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)

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

As prescribed in 19.1309(b)(1), insert the following clause:

Notice of Price Evaluation preference for HUBZone Small Business Concerns (MAR 2020) [(JUN 2020) (DEVIATION)]

~~(a) Definition. See 13 CFR 126.103 for the definition of HUBZone.~~

(b[a]) *Evaluation preference.*

(1) Offers will be evaluated by adding a factor of 10 percent to the price of all offers, except—

(i) Offers from HUBZone small business concerns that have not waived the evaluation preference; and

(ii) Otherwise successful offers from small business concerns.

(2) The factor of 10 percent shall be applied on a line item basis or to any group of items on which award may be made. Other evaluation factors described in the solicitation shall be applied before application of the factor.

(3) 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.

(e[b]) *Waiver of evaluation preference.* A HUBZone small business concern may elect to waive the evaluation preference,

in which case the factor will be added to its offer for evaluation purposes. ~~The agreements in paragraphs (d) and (e) of this clause do not apply if the offeror has waived the evaluation preference.~~

- Offeror elects to waive the evaluation preference.

~~(d) Limitations on subcontracting. The Contractor shall spend~~
~~**[By submission of an offer and execution of a contract, a]**~~

~~(1) For services (except construction), at least 50 percent of the cost of personnel for contract performance on its own employees or employees of other HUBZone small business concerns;~~

~~(2) For supplies (other than procurement from a nonmanufacturer of such supplies), at least 50 percent of the cost of manufacturing, excluding the cost of materials, on the concern or other HUBZone small business concerns;~~

~~(3) For general construction~~

~~(i) At least 15 percent of the cost of contract performance to be incurred for personnel on its own employees;~~

~~(ii) At least 50 percent of the cost of the contract performance to be incurred for personnel on its own employees or on a combination of its own 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 on concerns that are not HUBZone small business concerns; or~~

~~(4) For construction by special trade contractors~~

~~(i) At least 25 percent of the cost of contract performance to be incurred on its own employees;~~

~~(ii) At least 50 percent of the cost of the contract performance to be incurred for personnel on its own employees or on a combination of its own 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 on concerns that are not HUBZone small business concerns.~~

~~(c) 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 [**specified in the clause at 52.219-14, Limitations on Subcontracting**].~~

(~~¶~~[c]) *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)

Attachment 4 - SDVOSB Concerns

NOT APPLICABLE TO VA CONTRACTS

Contracting officers shall use the VAAR SDVOSB and veteran-owned small business (VOSB) clauses under the VFCP as prescribed at VAAR subpart 819.70 and as revised and updated in Class Deviation from VA Acquisition Regulation Part 819–Small Business Programs and Part 852–Solicitation and Contract Clauses, issued on December 23, 2020. Contracting officers are not authorized to use FAR clause 52.219-27 for VA procurements.

Attachment 5 - EDWOSB Concerns

In solicitations, contracts, and task or delivery orders that are set aside for, or awarded on a sole source basis to, EDWOSB concerns under FAR part 19, contracting officers shall use the 52.219-29 deviation clause below in lieu of the current FAR clause. The FAR prescription reference in 19.1508(a)(2) is obsolete and can be disregarded.

Also, use deviated clauses 52.219-14 and 52.219-33 shown in Attachment 7, instead of their current FAR clause equivalents. The limitations on subcontracting and the nonmanufacturer rule apply to contracts and task or delivery orders that are set aside for, or awarded on a sole- source basis to, EDWOSB concerns under FAR part 19 regardless of the dollar value of the award.

Baseline is FAC 2020-05, effective March 30, 2020.

Changes to the baseline are shown as **[bolded, bracketed additions]** and ~~strikeouts~~.

FAR text unchanged shown as asterisks *** or *****

52.219-29 Notice of Set-Aside for, or Sole[-]Source Award to, Economically Disadvantaged Women-Owned Small BusinessConcerns.

As prescribed in 19.1508 **[(a) (1)]**, insert the following clause:

Notice of Set-Aside for, or Sole[-]Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns. (MAR 2020)
[(JUN 2020) (DEVIATION)]

(a) *Definitions*. "Economically disadvantaged women-owned small business (EDWOSB) concern" means—

A[a] small business concern that is at least 51 percent directly and unconditionally owned by, and the management and daily business operations of which are controlled by, one or more women who are citizens of the United States and who are economically disadvantaged in accordance with 13 CFR part 127.

It automatically qualifies as a women-owned small business (WOSB) concern eligible under the WOSB Program.

"WOSB Program Repository" means a secure, Web-based application that collects, stores, and disseminates documents to the contracting community and SBA, which verify the eligibility of a business concern for a contract to be awarded under the WOSB Program.

(b) *Applicability.* This clause applies only to—

~~(1)~~ Contracts that have been set aside for, or awarded on a sole source basis to, EDWOSB concerns;

~~(2)~~ Part or parts of a multiple-award contract that have been set aside for EDWOSB concerns;

~~(3)~~ Orders set aside for EDWOSB concerns under multiple-award contracts as described in 8.405-5 and 16.505(b)(2)(i)(F); and

~~(4)~~ Orders issued directly to EDWOSB concerns under multiple-award contracts as described in 19.504(c)(1)(ii).

(c) *General.*

~~(1)~~ Offers are solicited only from EDWOSB concerns. Offers received from concerns that are not EDWOSB concerns will not be considered.

~~(2)~~ Any award resulting from this solicitation will be made to an EDWOSB concern.

~~(3)~~ The Contracting Officer will ensure that the apparent successful offeror has provided all required documents to the WOSB Program Repository. The contract will not be awarded until all required documents are received.

~~(d) Limitations on subcontracting. An EDWOSB concern agrees that in the performance of the contract for~~

~~(1) Services (except construction), the concern will perform at least 50 percent of the cost of the contract incurred for personnel with its own employees;~~

~~(2) Supplies or products (other than procurement from a non-manufacturer in such supplies or products), the concern will perform at least 50 percent of the cost of manufacturing the supplies or products (not including the costs of materials);~~

~~(3) General construction, the concern will perform at least 15 percent of the cost of the contract with its own employees (not including the costs of materials); and~~

~~(4) Construction by special trade contractors, the concern will perform at least 25 percent of the cost of the contract with its own employees (not including the cost of materials).~~

~~(e) An EDWOSB concern shall comply with the limitations on subcontracting as follows:~~

~~(1) For contracts, in accordance with paragraphs (b)(1) and (2) of this clause~~

~~_____ [Contracting Officer check as appropriate.]~~

~~___ By the end of the base term of the contract and then by the end of each subsequent option period; or~~

~~___ By the end of the performance period for each order issued under the contract.~~

~~(2) For orders, in accordance with paragraphs (b) (3) and (4) of this clause, by the end of the performance period for the order.~~

~~(f)~~ **[(d)]** *Joint Venture.* A joint venture may be considered an EDWOSB concern if-

(1) It meets the applicable size standard corresponding to the **[North American Industry Classification System]**~~NAICS~~ code assigned to the contract, unless an exception to affiliation applies pursuant to 13 CFR 121.103(h) (3);

(2) The EDWOSB participant of the joint venture is designated in the System for Award Management as an EDWOSB concern;

(3) The parties to the joint venture have entered into a written joint venture agreement that contains provisions-

(i) Setting forth the purpose of the joint venture;

(ii) Designating an EDWOSB concern as the managing venturer of the joint venture, and an employee of the managing venturer as the project manager responsible for the performance of the contract;

(iii) Stating that not less than 51 percent of the net profits earned by the joint venture will be distributed to the EDWOSB;

(iv) Specifying the responsibilities of the parties with regard to contract performance, sources of labor, and negotiation of the EDWOSB contract; and

(v) Requiring the final original records be retained by the managing venturer upon completion of the EDWOSB contract performed by the joint venture **[/; and]-**

(4) ~~The joint venture performs the applicable percentage of work required in accordance with paragraph (d) above; and~~

(5) The ~~procuring activity~~**[Contracting Officer]** executes the contract in the name of the EDWOSB or joint venture.

(End of clause)

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Attachment 6 - WOSB Concerns Eligible under the WOSB Program

In solicitations, contracts, and task or delivery orders that are set aside for, or awarded on a sole source basis to, WOSB concerns eligible under the WOSB Program under FAR part 19, contracting officers shall use the 52.219-30 deviation clause below in lieu of the current FAR clause. The FAR prescription reference at 19.1508(b)(2) is obsolete and can be disregarded.

Also, use deviated clauses 52.219-14 and 52.219-33 shown in Attachment 7, instead of their current FAR clause equivalents. The limitations on subcontracting and the nonmanufacturer rule apply to contracts and task or delivery orders that are set aside for, or awarded on a sole-source basis to, WOSB concerns eligible under the WOSB Program under FAR part 19 regardless of the dollar value of the award.

Baseline is FAC 2020-05, effective March 30, 2020.

Changes to the baseline are shown as **[bolded, bracketed additions]** and ~~strikeouts~~.

FAR text unchanged shown as asterisks *** or *****

52.219-30 Notice of Set-Aside for, or Sole[-]Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program.

As prescribed in 19.1508 **[(b) (1)]**, insert the following clause:

Notice of Set-Aside for, or Sole[-]Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program. (MAR 2020)
[(JUN 2020) (DEVIATION)]

(a) Definitions. [As used in this clause-]

“Women-owned small business (WOSB) concern eligible under the WOSB Program” (in accordance with 13 CFR part 127), means a small business concern that is at least 51 percent directly and unconditionally owned by, and the management and daily business

operations of which are controlled by, one or more women who are citizens of the United States.

“WOSB Program Repository” means a secure, Web-based application that collects, stores, and disseminates documents to the contracting community and SBA, which verify the eligibility of a business concern for a contract to be awarded under the WOSB Program.

(b) Applicability. This clause applies only to—

~~(1)~~ Contracts that have been set aside for, or awarded on a sole source basis to, WOSB concerns eligible under the WOSB Program;

~~(2)~~ Part or parts of a multiple-award contract that have been set aside for WOSB concerns eligible under the WOSB Program;

~~(3)~~ Orders set aside for WOSB concerns eligible under the WOSB Program, under multiple-award contracts as described in [8.405-5](#) and [16.505\(b\)\(2\)\(i\)\(F\)](#); and

~~(4)~~ Orders issued directly to WOSB concerns eligible under the WOSB Program under multiple-award contracts as described in [19.504\(c\)\(1\)\(ii\)](#).

(c) General.

~~(1)~~ Offers are solicited only from WOSB concerns eligible under the WOSB Program. Offers received from concerns that are not WOSB concerns eligible under the WOSB ~~p~~**[P]**rogram shall not be considered.

~~(2)~~ Any award resulting from this solicitation will be made to a WOSB concern eligible under the WOSB Program.

~~(3) The Contracting Officer will ensure that the apparent successful offeror has provided the required documents to the WOSB Program Repository. The contract shall not be awarded until all required documents are received.~~

~~(d) *Limitations on subcontracting.* A WOSB concern eligible under the WOSB Program agrees that in the performance of the contract for~~

~~(1) Services (except construction), the concern will perform at least 50 percent of the cost of the contract incurred for personnel with its own employees;~~

~~(2) Supplies or products (other than procurement from a non-manufacturer in such supplies or products), the concern will perform at least 50 percent of the cost of manufacturing the supplies or products (not including the costs of materials);~~

~~(3) General construction, the concern will perform at least 15 percent of the cost of the contract with its own employees (not including the costs of materials); and~~

~~(4) Construction by special trade contractors, the concern will perform at least 25 percent of the cost of the contract with its own employees (not including cost of materials).~~

~~(e) A WOSB concern shall comply with the limitations on subcontracting as follows:~~

~~(1) For contracts, in accordance with paragraphs (b)(1) and (2) of this clause~~

~~[Contracting Officer check as appropriate.]~~

~~By the end of the base term of the contract and then by the end of each subsequent option period; or~~

~~By the end of the performance period for each order issued under the contract.~~

~~(2) For orders, in accordance with paragraphs (b) (3) and (4) of this clause, by the end of the performance period for the order.~~

~~(f)~~ **(d)** *Joint Venture.* A joint venture may be considered a WOSB concern eligible under the WOSB Program if—

(1) It meets the applicable size standard corresponding to the **[North American Industry Classification System]** ~~NAICS~~ code assigned to the contract, unless an exception to affiliation applies pursuant to 13 CFR 121.103(h) (3);

(2) The WOSB participant of the joint venture is designated in the System for Award Management as a WOSB concern eligible under the WOSB Program;

(3) The parties to the joint venture have entered into a written joint venture agreement that contains provisions—

(i) Setting forth the purpose of the joint venture;

(ii) Designating a WOSB concern eligible under the WOSB Program as the managing venturer of the joint venture, and an employee of the managing venturer as the project manager responsible for the performance of the contract;

(iii) Stating that not less than 51 percent of the net profits earned by the joint venture will be distributed to the WOSB;

(iv) Specifying the responsibilities of the parties with regard to contract performance, sources of labor, and negotiation of the WOSB contract; and

(v) Requiring the final original records be retained by the managing venturer upon completion of the WOSB contract performed by the joint venture [**; and**] -

~~(4) The joint venture must perform the applicable percentage of work required in accordance with paragraph (d) above; and~~

~~(5)~~ [(4)] The ~~procuring activity~~ [**Contracting Officer**] executes the contract in the name of the WOSB concern eligible under the WOSB Program or joint venture.

(End of clause)

Attachment 7 - All awards under FAR Part 19

Limitations on Subcontracting and the Nonmanufacturer Rule Deviation Clauses

Use deviated clauses 52.219-14 and 52.219-33 below, instead of their current FAR clause equivalents.

Baseline is FAC 2020-05, effective March 30, 2020.

Changes to the baseline are shown as **[bolded, bracketed additions]** and ~~strikeouts~~.

FAR text unchanged shown as asterisks *** or *****

52.219-14 Limitations on Subcontracting.

As prescribed in 19.507(e), insert the following clause:

Limitations on Subcontracting (MAR 2020)

[(JUN 2020) (DEVIATION)]

(a) This clause does not apply to the unrestricted portion of a partial set-aside.

(b) **[Definition. "Similarly situated entity," as used in this clause, means a first-tier subcontractor, including an independent contractor, that-**

(1) Has the same small business program status as that which qualified the prime contractor for the award (e.g., for a small business set-aside contract, any small business concern, without regard to its socioeconomic status); and

(2) Is considered small for the size standard under the North American Industry Classification System (NAICS) code the prime contractor assigned to the subcontract.

[(c)] *Applicability.* This clause applies only to-

(1) Contracts that have been set aside for ~~small~~

~~business concerns or 8(a) participants~~ [any of the small business concerns identified in 19.000(a)(3)];

(2) Part or parts of a multiple-award contract that have been set aside for ~~small business concerns or 8(a) participants~~ [any of the small business concerns identified in 19.000(a)(3)];

(3) [Contracts that have been awarded on a sole-source basis in accordance with subparts 19.8, 19.13, 19.14, and 19.15;

(4)]Orders[expected to exceed the simplified acquisition threshold and that are-

(i) Set]~~set~~ aside for small business concerns ~~or 8(a) participants~~ under multiple-award contracts[,] as described in 8.405-5 and 16.505(b)(2)(i)(F); ~~and~~[or

(ii) Issued directly to small business concerns under multiple-award contracts as described in 19.504(c)(1)(ii);

(5) Orders, regardless of dollar value, that are-

(i) Set aside in accordance with subparts 19.8, 19.13, 19.14, or 19.15 under multiple-award contracts, as described in 8.405-5 and 16.505(b)(2)(i)(F); or

(ii) Issued directly to concerns that qualify for the programs described in subparts 19.8, 19.13, 19.14, or 19.15 under multiple-award contracts, as described in 19.504(c)(1)(ii); and

(6) Contracts using the HUBZone price evaluation preference to award to a HUBZone small business concern unless the concern waived the evaluation preference.]

~~(4) Orders issued directly to small business concerns or §(a) participants under multiple award contracts as described in 19.504(e) (1) (ii).~~

[(d) Independent contractors. An independent contractor shall be considered a subcontractor.]

(e[e]) Limitations on subcontracting. By submission of an offer and execution of a contract, the Contractor agrees that[,] in performance of the **[a]** contract ~~in the case of a contract~~ **[assigned a North American Industry Classification System (NAICS) code]** for—

~~(1) Services (except construction).~~ **[Services (except construction)]** ~~At least~~ [, it will not pay more than] 50 percent of the **[amount paid by the Government for contract performance to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the prime contractor's 50 percent subcontract amount that cannot be exceeded. When a contract includes both services and supplies, the 50 percent limitation shall apply only to the service portion of the contract;]** ~~cost of contract performance incurred for personnel shall be expended for employees of the concern.~~

~~(2) Supplies (other than procurement from a nonmanufacturer of such supplies).~~ **[Supplies (other than procurement from a non- manufacturer of such supplies)]** ~~The~~ concern shall perform work for at least[, it will not pay more than] 50 percent of the ~~cost of manufacturing the~~ **supplies [amount paid by the Government for contract performance], not including [excluding] the cost of materials[, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further**

subcontracts will count towards the prime contractor's 50 percent subcontract amount that cannot be exceeded. When a contract includes both supplies and services, the 50 percent limitation shall apply only to the supply portion of the contract;]-

(3) ~~General construction.~~ [General construction, it will not pay more than 85 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the prime contractor's 85 percent subcontract amount that cannot be exceeded; or]- ~~The concern will perform at least 15 percent of the cost of the contract, not including the cost of materials, with its own employees.~~

(4) ~~Construction by special trade contractors.~~ [Construction by special trade contractors, it will not pay more than 75 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the prime contractor's 75 percent subcontract amount that cannot be exceeded]- ~~The concern will perform at least 25 percent of the cost of the contract, not including the cost of materials, with its own employees.~~

(e[f]) The Contractor shall comply with the limitations on subcontracting as follows:

(1) For contracts, in accordance with paragraphs (b[c]) (1) [, (2) ,] and (2[3]) [, and (6)] of this clause -

[Contracting Officer check as appropriate.]

___By the end of the base term of the contract and then by the end of each subsequent option period; or

___By the end of the performance period for each order issued under the contract.

(2) For orders, in accordance with paragraphs (b[c]) (3[4]) and (4[5]) of this clause, by the end of the performance period for the order. [

(g)A joint venture agrees that, in the performance of the contract, the applicable percentage specified in paragraph (e) of this clause will be performed by the aggregate of the joint venture participants.]

(End of clause)

52.219-33 Non-manufacturer Rule.

As prescribed in 19.507(h), insert the following clause:
Non-manufacturer Rule (MAR 2020) [(JUN 2020) (DEVIATION)]

(a) ~~This clause does not apply to the unrestricted portion of a partial set aside.~~ [Definitions. As used in this clause—

“Manufacturer” means the concern that transforms raw materials, miscellaneous parts, or components into the end item. Concerns that only minimally alter the item being procured do not qualify as manufacturers of the end item. Concerns that add substances, parts, or components to an existing end item to modify its performance will not be considered the end item manufacturer, where those identical modifications can be performed by and are available from the manufacturer of the existing end item.

"Non-manufacturer" means a concern, including a supplier, that provides an end item it did not manufacture, process, or produce.]

(b) *Applicability.* ~~This clause applies to~~

~~(1) Contracts that have been set aside, in total or in part;~~

~~(2) Orders under multiple award contracts as described in 8.405-5 and 16.505(b)(2)(i)(F) that have been set aside for any of the small business concerns identified in 19.000(a)(3); and~~

~~(3) Orders issued directly to any of the small business concerns identified in 19.000(a)(3) under multiple award contracts as described in 19.504(c)(1)(ii). [~~

(1) This clause does not apply to contracts awarded pursuant to the unrestricted portion of a partial set-aside or to a contractor that is the manufacturer of the product or end item.

(2) This clause applies to—

(i) Contracts that have been awarded pursuant to a set-aside, in total or in part, for any of the small business concerns identified in 19.000(a)(3);

(ii) Contracts that have been awarded on a sole-source basis in accordance with subparts 19.8, 19.13, 19.14, and 19.15;

(iii) Orders expected to exceed the simplified acquisition threshold and that are—

(A) Set aside for small business under multiple-award contracts as described in 8.405-5 and 16.505(b)(2)(i)(F); or

(B) Issued directly to a small business concern under multiple-award contracts as described in 19.504(c)(1)(ii);

(iv) Orders, regardless of dollar value, that are—

(A) Set aside in accordance with subparts 19.8, 19.13, 19.14, and 19.15 under multiple-award contracts as described in 8.405-5 and 16.505(b) (2) (i) (F); or

(B) Issued directly to concerns that qualify for the programs described in subparts 19.8, 19.13, 19.14, and 19.15 under multiple-award contracts as described in 19.504(c) (1) (ii), regardless of dollar value; and

(v) Contracts using the HUBZone price evaluation preference to award to a HUBZone concern unless the Contractor waived the evaluation preference.]

~~(c) (1) The Contractor shall—~~

~~(i) (A) Provide the end item of a small business manufacturer, or if set aside or awarded on a sole source basis to a HUBZone small business, provide the end item of a HUBZone small business manufacturer, that has been manufactured or produced in the United States or its outlying areas; or~~

~~(B) If this procurement is an order as described in 8.405-5 or 16.505(b) (2) (i) (F) or processed under simplified acquisition procedures (see part 13), and the total amount does not exceed \$25,000, provide the end item of any domestic manufacturer;~~

~~(ii) Not exceed 500 employees;~~

~~(iii) Be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied;~~
and

~~(iv) Take ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice.~~

~~(2) In addition to the requirements set forth in paragraph (c)(1) of this clause, when the end item being acquired is a kit of supplies or other goods, 50 percent of the total value of the components of the kit shall be manufactured in the United States or its outlying areas by small business concerns. Where the Government has specified an item for the kit which is not produced by U.S. small business concerns, such items shall be excluded from the 50 percent calculation. See 13 CFR 121.406(c) for further information regarding nonmanufacturers.~~

~~(3) For size determination purposes, there can be only one manufacturer of the end product being acquired. For the purposes of the nonmanufacturer rule, the manufacturer of the end product being acquired is the concern that transforms raw materials and/or miscellaneous parts or components into the end product. Firms which only minimally alter the item being procured do not qualify as manufacturers of the end item, such as firms that add substances, parts, or components to an existing end item to modify its performance, will not be considered the end item manufacturer, where those identical modifications can be performed by and are available from the manufacturer of the existing end item. See 13 CFR 121.406 for further information regarding manufacturers.~~

[Requirements.

(1) The Contractor shall-

(i) Provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas; for

kit assemblers who are nonmanufacturers, see paragraph (c)(2) of this clause instead;

(ii) Be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied; and

(iii) Take ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice; for example, providing storage, transportation, or delivery.

(2) When the end item being acquired is a kit of supplies, at least 50 percent of the total cost of the components of the kit shall be manufactured, processed, or produced in the United States or its outlying areas by small business concerns.]

(End of clause)