

DEPARTMENT OF DEFENSE

**GENERAL SERVICES
ADMINISTRATION**

**NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

48 CFR Chapter 1

[Docket No. FAR–2021–0051, Sequence No. 4]

**Federal Acquisition Regulation;
Federal Acquisition Circular 2021–07;
Introduction**

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

and National Aeronautics and Space
Administration (NASA).

ACTION: Summary presentation of final
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) 2021–07. A
companion document, the *Small Entity
Compliance Guide* (SECG), follows this
FAC.

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

FOR FURTHER INFORMATION CONTACT: The
analyst whose name appears in the table
below in relation to the FAR case. For
information pertaining to status or
publication schedules, contact the
Regulatory Secretariat Division at 202–
501–4755 or GSARegSec@gsa.gov.

RULES LISTED IN FAC 2021–07

Item	Subject	FAR Case	Analyst
I	Section 508-Based Standards in Information and Communication Technology	2017–011	Jackson.
II	Revision of Limitations on Subcontracting	2016–011	Uddowla.
III	Scope of Review by Procurement Center Representatives	2020–012	Jones.
IV	Good Faith in Small Business Subcontracting	2019–004	Bowman.
V	Technical Amendments.		

ADDRESSES: The FAC, including the
SECG, is available via the internet at
<https://www.regulations.gov>.

SUPPLEMENTARY INFORMATION:
Summaries for each FAR rule follow.
For the actual revisions and/or
amendments made by these FAR rules,
refer to the specific item numbers and
subjects set forth in the documents
following these item summaries. FAC
2021–07 amends the FAR as follows:

**Item I—Section 508-Based Standards in
Information and Communication
Technology (FAR Case 2017–011)**

This final rule amends the FAR to
implement the Access Board’s final rule
published January 17, 2017. Section 508
of the Rehabilitation Act of 1973
requires the FAR to incorporate revised
accessibility standards developed by the
Access Board for information and
communication technology (ICT). The
Access Board is also known as the
Architectural and Transportation
Barriers Compliance Board. This rule
ensures that Federal employees with
disabilities have comparable access to,
and use of, such information and data
relative to other Federal employees.
Section 508 also requires Federal
agencies to ensure that members of the
public with disabilities have
comparable access to publicly available
information and data.

**Item II—Revision of Limitations on
Subcontracting (FAR Case 2016–011)**

This rule amends the FAR to
implement regulatory changes made by
the Small Business Administration
(SBA) in its final rule published in the
Federal Register at 81 FR 34243, on
May 31, 2016. SBA’s final rule
implements the statutory requirements
of section 1651 of the National Defense
Authorization Act for Fiscal Year 2013.
Section 1651 revised and standardized
the limitations on subcontracting,
including the nonmanufacturer rule,
that apply to small business concerns
under FAR part 19 procurements.
Section 1651 shifts the limitations on
subcontracting from the concept of a
required percentage of work to be
performed by a prime contractor to the
concept of a limit on the percentage of
the overall award amount to be spent by
the prime on subcontractors.
Significantly, section 1651 excludes
from this calculation the percentage of
the award amount that the prime
contractor spends on subcontractors
who are similarly situated entities. This
rule implements the revised and
standardized limitations on
subcontracting through the use of a
single FAR clause for every small
business program, instead of continuing
to implement through multiple FAR
clauses that were specific to a particular
small business program. This rule also
revises the FAR clause implementing
the nonmanufacturer rule to reflect the

standardized requirements across all the
small business programs.

This rule may have a positive
economic impact on small businesses.
Through the ability to meet the
limitations by means of subcontracts
with similarly situated entities, this rule
will make it possible for small
businesses to compete for larger
contracts than they could in the past.

**Item III—Scope of Review by
Procurement Center Representatives
(FAR Case 2020–012)**

This final rule amends the FAR to
implement section 1811 of the National
Defense Authorization Act for Fiscal
Year 2017 (Pub. L. 114–328), as
implemented in the Small Business
Administration (SBA) final rule
published at 84 FR 65647 on November
29, 2019. Section 1811 allows SBA’s
procurement center representatives to
review any solicitation for a contract or
task order, without regard to whether it
is set aside for small business concerns,
or reserved in the case of a multiple-
award contract, or whether it would
result in a bundled or consolidated
contract or order.

**Item IV—Good Faith in Small Business
Subcontracting (FAR Case 2019–004)**

This final rule amends the FAR to
implement section 1821(c) of the
National Defense Authorization Act
(NDAA) for Fiscal Year (FY) 2017 (15
U.S.C 637 note, Pub. L. 114–328), as
implemented in the Small Business

Administration (SBA) final rule published at 84 FR 65647, dated November 29, 2019.

Specifically, the final FAR rule at FAR 19.705–7 includes examples of a good faith effort to comply with the subcontracting plan, and examples of a failure to make a good faith effort. Failure to make a good faith effort to comply with the plan may result in assessment of liquidated damages.

Additionally, the final rule amends the FAR to require that prime contractors with a commercial subcontracting plan include indirect costs in their subcontracting goals. Previously, prime contractors were required to include indirect costs in the summary subcontract report (SSR) but not in their subcontracting goals, which led to inconsistencies when comparing the SSR to the goals in the commercial subcontracting plan. Including indirect costs in both the SSR and subcontracting goals established in the commercial subcontracting plan will allow for consistency.

Item V—Technical Amendments

Editorial changes are made at FAR 42.709–1 through 42.709–7, 52.242–3, and 52.245–1.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Federal Acquisition Circular (FAC) 2021–07 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2021–07 is effective August 11, 2021 except for Items I through V, which are effective September 10, 2021.

John M. Tenaglia,
Principal Director, Defense Pricing and Contracting, Department of Defense.

Jeffrey A. Koses,
Senior Procurement Executive/Deputy CAO,
Office of Acquisition Policy, U.S. General Services Administration.

Karla Smith Jackson,
Assistant Administrator for Procurement,
National Aeronautics and Space Administration.

[FR Doc. 2021–16362 Filed 8–10–21; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 7, 10, 11, 12 and 39

[FAC 2021–07; FAR Case 2017–011; Item I; Docket No. FAR–2017–0011, Sequence No. 1]

RIN 9000–AN46

Federal Acquisition Regulation: Section 508–Based Standards in Information and Communication Technology

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to incorporate recent revisions and updates to accessibility standards issued by the U.S. Access Board.

DATES: Effective September 10, 2021.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949, or by email at michael.o.jackson@gsa.gov for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or GSARegSec@gsa.gov. Please cite FAC 2021–07, FAR Case 2017–011.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule at 85 FR 17831 on March 31, 2020, to implement the U.S. Access Board's revisions by strengthening FAR requirements for accessibility to electronic and information technology (now generally referred to as “information and communication technology” or “ICT”) provided by the Federal Government. Among other things, section 508 of the Rehabilitation Act of 1973 mandates that Federal agencies “develop, procure, maintain, or use” ICT in a manner that ensures that Federal employees with disabilities have comparable access to, and use of, such information and data relative to Federal employees who are not individuals with disabilities. Section 508 also requires Federal agencies to ensure that members of the public with disabilities have comparable access to, and use of, information and data relative

to members of the public who are not individuals with disabilities.

The Access Board, also known as the Architectural and Transportation Barriers Compliance Board, is tasked with issuing accessibility standards for ICT covered under section 508, and updating these standards periodically to reflect technological changes. The Federal Acquisition Regulatory Council, in turn, is required to revise the FAR to incorporate the Access Board's accessibility standards or any amendments thereto.

In December 2000, the Access Board published its initial set of accessibility standards at 65 FR 80500, (December 21, 2000). Thereafter, a final FAR rule was published incorporating the Access Board's accessibility standards at 66 FR 20894 (April 25, 2001).

The Access Board completed a multiyear effort to “refresh” its initial, existing set of accessibility standards under section 508 to address advances in ICT, harmonize with accessibility standards developed by standards organizations worldwide, and ensure consistency with the Access Board's regulations that had been promulgated since the late 1990s. The revised section 508 Accessibility Standards support the access needs of individuals with disabilities, while also considering the costs of procuring ICT that complies with section 508.

The Access Board's final rule was published in the **Federal Register** at 82 FR 5790 on January 18, 2017. This final rule updates the FAR to ensure that the updated standards are appropriately considered in Federal ICT acquisitions. The final rule includes a “safe harbor” provision for existing (*i.e.*, legacy) ICT, which considers legacy ICT in existence on or before January 18, 2018, to be compliant if it meets the earlier standard issued pursuant to section 508 of the Rehabilitation Act of 1973 (see E202.2 of Revised Standards) and the legacy ICT is not altered after January 18, 2018. In other words, such “untouched” ICT need not be modified or upgraded to conform to the revised 508 standards as long as it already conforms to the original 508 standards. However, ICT acquired on or before January 18, 2018, will need to be upgraded or modified to conform to the new standard if such ICT is altered after January 18, 2018, or does not comply with the original 508 standards. In addition, ICT acquired after January 18, 2018, must be upgraded or modified to conform to the new standard. The upgrades and modifications would be included in requirements documents issued by the agency.

Two respondents submitted comments on the proposed rule.

II. Discussion and Analysis

For details on the proposed changes to the FAR, see the proposed rule. The Councils reviewed the comments received in response to the proposed rule. Two respondents submitted public comments supporting the issuance of the rule. No changes were made to the final rule as a result of public comments. The Councils acknowledge support for the rule. However, clarifying changes were made to the language at section 7.105 to detail information that should be included in the acquisition plan when an exception or an exemption to the standards apply. At FAR section 39.204, paragraph (a)(3), examples are included of the portions of ICT that are “operable parts” by adding the text “*i.e.*, hardware-based user controls for activating, deactivating, or adjusting ICT”.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule does not create new solicitation provisions or contract clauses or impact any existing provisions or clauses. This rule amends FAR part 39, Acquisition of Information Technology, and other references to Government requirements for information and communication technology. The objective of the rule is to update the FAR text to align with the accessibility standards revisions made by the Access Board at 36 CFR 1194.1. The accessibility standards are currently applicable to all information and communication technology acquisitions. As such, determinations and findings under 41 U.S.C. 1905 to 1907 regarding the applicability of this rule to acquisitions at or below the SAT or to acquisitions for commercial and COTS items are not required.

Section 508 requirements will continue to apply when acquiring ICT through contracts at or below the SAT, or contracts for the acquisition of commercial items, including COTS items.

IV. Expected Impact of the Rule

This final rule amends the FAR to incorporate recent revisions and updates to the accessibility standards issued by the U.S. Access Board pursuant to section 508. These revisions and updates provide benefits that would accrue to Federal agencies, including productivity increases by Federal employees and time saved from reduced

phone calls to Federal agencies. Additionally, persons with disabilities using public-facing Federal information and data (*e.g.*, Federal websites) would experience improved access and time savings. There are also substantial unquantifiable benefits. For example, enhanced ICT accessibility for persons with disabilities can be expected to improve access and use of mission-critical ICT, productivity, ability to achieve professional potential, independent living, increase civic engagement, decrease stigma, promote equality, and enhance integration into American society. Updating the FAR to incorporate the revised 508 accessibility standards is also expected to provide benefits to ICT firms that are difficult to quantify and thus were not monetized. For example, harmonization with national and international consensus standards is likely to assist American ICT companies by helping to achieve economies of scale created by wider use of these technical standards.

This rule codifies changes made by the U.S. Access Board. As such, the monetized costs and benefits in the Final Regulatory Impact Analysis (FRIA), which accompanied the U.S. Access Board's Final ICT Rule, are now realized at the Federal contract level.

The Access Board's FRIA estimates that, under the expected cost scenario, incremental compliance costs to Federal agencies for procured ICT under the revised 508 accessibility standards over a 10-year timeframe will be \$79.0 million per year using a 7% discount rate, and \$82.8 million per year using a 3% discount rate. These costs will largely be incurred from compliance with the revised 508 accessibility standards for procured ICT products and services.

With respect to monetized benefits attributable to procured ICT, the Access Board's FRIA estimates that, under the expected scenario, benefits for procured ICT (and, hence, this final rule) are likely to have an annualized value of \$33.1 million over a 10-year timeframe using a 7% discount rate, and \$35.2 million using a 3% discount rate.

To access the U.S. Access Board's FRIA, go to the Access Board's website (<https://www.access-board.gov/ict/fria.html>) or the electronic docket for the Access Board's Final ICT rule at the Federal eRulemaking Portal (<https://www.regulations.gov/docket/ATBCB-2015-0002>).

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is

necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD, GSA, and NASA will send the rule and the “Submission of Federal Rules Under the Congressional Review Act” form to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601–612. The FRFA is summarized as follows:

This final rule amends the FAR to incorporate recent revisions and updates to the accessibility standards issued by the Architectural and Transportation Barriers Compliance Board (referred to as the “U.S. Access Board”) pursuant to section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d). Section 508 generally mandates that Federal agencies develop, procure, maintain, and use information and communication technology (ICT) in a manner that ensures Federal employees and members of the public with disabilities have access to, and use of, information and data that is comparable to the access to, and use of, the information and data by Federal employees and members of the public who are not individuals with disabilities. The U.S. Access Board periodically reviews and revises these accessibility standards to reflect technological advances and other changes to ICT that occur over the passage of time.

There were no significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis.

The rule applies to all contractors and subcontractors, regardless of size. Based on fiscal year 2018 data from the Federal Procurement Data System (FPDS), it is estimated that there are approximately 22,809 contractors that manufacture, sell, or lease ICT supplies or services required to comply with section 508 standards. Approximately 12,845 of these contractors

are small businesses. As a result of incorporating the updated accessibility standards, the monetized costs and benefits in the Final Regulatory Impact Analysis, which accompanied the U.S. Access Board's Final ICT Rule, are now realized at the Federal contract level for small businesses. However, there are unquantifiable impacts at the Federal contract level for small businesses in the final rule. For instance, small businesses will have to analyze whether the ICT they or their resellers plan to sell to the Federal Government complies with the revised 508 accessibility standards. Manufacturers may want to redesign their supplies and services to make them fully compliant, to have a better chance for their items to be purchased by the Government. The final rule may decrease demand for some supplies and services that are not fully compliant, potentially leading to decreased sales for small entities manufacturing or selling those items. Conversely, the final rule may increase demand for some supplies and services that are fully compliant and meet agencies' business needs, potentially leading to increased sales for small businesses manufacturing or selling those items. To meet the requirements of the law, small businesses cannot be exempt from any part of the rule.

This rule does not include any new reporting or recordkeeping requirements. There is a compliance requirement; entities will need to familiarize themselves with the differences between the 2000 and 2017 standards in order to assess the impact on procurements and comply with the revised functional performance criteria and technical accessibility standards beyond those currently mandated in FAR subpart 39.2.

There are no known significant alternatives to the rule for effective implementation of this statutory requirement. Since the statute imposes private enforcement, where individuals with disabilities can file civil rights lawsuits, the Government has little flexibility in promulgating alternatives to the Access Board's standards. The impact of this rule may be significant for small entities that are not currently in compliance with existing standards.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

List of Subjects in 48 CFR Parts 2, 7, 10, 11, 12, and 39

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 7, 10, 11, 12, and 39 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 7, 10, 11, 12, and 39 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. In section 2.101, amend paragraph (b)(2) by—

- a. Removing the definition “Electronic and information technology (EIT)”;
- and
- b. Adding in alphabetical order the definition “Information and communication technology (ICT)” to read as follows:

2.101 Definitions.

- (b) * * *
- (2) * * *

Information and communication technology (ICT) means information technology and other equipment, systems, technologies, or processes, for which the principal function is the creation, manipulation, storage, display, receipt, or transmission of electronic data and information, as well as any associated content. Examples of ICT include but are not limited to the following: Computers and peripheral equipment; information kiosks and transaction machines; telecommunications equipment; customer premises equipment; multifunction office machines; software; applications; websites; videos; and electronic documents.

* * * * *

PART 7—ACQUISITION PLANNING

■ 3. Amend section 7.103 by revising paragraph (q) to read as follows:

7.103 Agency-head responsibilities.

* * * * *

(q) Ensuring that acquisition planners specify needs and develop plans, drawings, work statements, specifications, or other product or service requirements (e.g., help desks, call centers, training services, and automated self-service technical support) descriptions that address information and communication

technology (ICT) accessibility standards (see 36 CFR 1194.1) in proposed acquisitions and that these standards are included in requirements planning (see subpart 39.2).

* * * * *

■ 4. Amend section 7.105 by redesignating paragraph (b)(5)(iv) as paragraph (b)(5)(v) and adding a new paragraph (b)(5)(iv) to read as follows.

7.105 Contents of written acquisition plans.

- (b) * * *
- (5) * * *

(iv) For information technology acquisitions, identify the applicable ICT accessibility standard(s). When an exception or an exemption to the standard(s) applies, the plan must list the exception and/or exemption, and the item(s) to which it applies. For those items listing 39.204 or 39.205(a)(1) or (2), the corresponding accessibility standard does not need to be identified. See subpart 39.2 and 36 CFR 1194.1.

* * * * *

PART 10—MARKET RESEARCH

■ 5. Amend section 10.001 by revising paragraph (a)(3)(ix) to read as follows:

10.001 Policy.

- (a) * * *
- (3) * * *

(ix) Assess the availability of supplies or services that meet all or part of the applicable information and communication technology accessibility standards at 36 CFR 1194.1 (see subpart 39.2).

* * * * *

PART 11—DESCRIBING AGENCY NEEDS

■ 6. Amend section 11.002 by revising paragraph (f) to read as follows:

11.002 Policy.

* * * * *

(f) In accordance with section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), the contracting officer shall obtain from the requiring activity the requirement documents, which must identify—

(1) The needs of current and future users with disabilities to determine how—

(i) Users with disabilities will perform the functions supported by the information and communication technology (ICT);

(ii) The ICT will be developed, installed, configured and maintained to support users with disabilities;

(2) The applicable ICT accessibility standards (see subpart 39.2); and

(3) Any ICT accessibility standards that cannot be met due to an exception or an exemption for any component or portion of the product (see 7.105(b)(5)(iv), 39.204, and 39.205).

* * * * *

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 7. Amend section 12.202 by revising paragraph (d) to read as follows:

12.202 Market research and description of agency need.

* * * * *

(d) Requirements documents shall identify the applicable information and communication technology accessibility standards at 36 CFR 1194.1 (see 11.002(f) and subpart 39.2).

* * * * *

PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

■ 8. Amend section 39.000 by revising paragraph (b) to read as follows:

39.000 Scope of part.

* * * * *

(b) Information and communication technology (see 2.101(b)).

■ 9. Revise section 39.001 to read as follows:

39.001 Applicability.

This part applies to the acquisition of—

(a) Information technology by or for the use of agencies except for acquisitions of information technology for national security systems. However, acquisitions of information technology for national security systems shall be conducted in accordance with 40 U.S.C. 11302 with regard to requirements for performance and results-based management; the role of the agency Chief Information Officer in acquisitions; and accountability. These requirements are addressed in OMB Circular No. A–130; and

(b) Information and communication technology by or for the use of agencies or for the use of the public, unless an exception (see 39.204) or an exemption (see 39.205) applies. See 36 CFR 1194.1.

39.101 [Amended]

■ 10. In section 39.101 amend paragraph (a)(1)(i) by removing the word “accommodations” and adding the word “accessibility” in its place.

■ 11. Revise subpart 39.2 heading to read as follows:

Subpart 39.2—Information and Communication Technology

* * * * *

■ 12. Amend section 39.201 by—

■ a. Revising paragraph (a); and

■ b. Removing from paragraph (c) introductory text the term “EIT” and adding the term “ICT” in its place.

The revision reads as follows:

39.201 Scope of subpart.

(a) This subpart implements section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), and the Architectural and Transportation Barriers Compliance Board’s (U.S. Access Board) information and communication technology (ICT) accessibility standards at 36 CFR 1194.1.

* * * * *

■ 13. Revise sections 39.203 and 39.204, and add section 39.205 to read as follows:

39.203 Applicability.

(a) *General.* Unless an exception at 39.204 or an exemption at 39.205 applies, acquisitions for ICT supplies and services shall meet the applicable ICT accessibility standards at 36 CFR 1194.1.

(b) *Indefinite-quantity contracts.* Confirmation of an exception or a determination of an exemption is not required prior to award of an indefinite-quantity contract, except for requirements that are to be satisfied by initial award. The contract must identify which supplies and services the contractor indicates as compliant and show where full details of compliance can be found (e.g., vendor’s or other exact website location).

(c) *Task order or delivery order.* At the time of issuance of a task order or delivery order under an indefinite-quantity contract, the requiring and ordering activities shall ensure compliance with the ICT accessibility standards and document an exception or exemption if applicable. Any task order or delivery order, or portion thereof, issued for a noncompliant ICT item shall be supported by the appropriate exception or exemption documented by the requiring activity.

(d) *Commercial items.* When acquiring commercial items, an agency must comply with those ICT accessibility standards that can be met with supplies or services that are available in the commercial marketplace and that best address the agency’s needs, but see 39.205(a)(3).

(e) *Legacy ICT.* Any component or portion of existing ICT (i.e., ICT that was procured, maintained, or used on or before January 18, 2018) is not required

to comply with the current ICT accessibility standards if it—

(1) Complies with an earlier standard issued pursuant to section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), which is set forth in Appendix D to 36 CFR 1194.1; and

(2) Has not been altered (i.e., a change that affects interoperability, the user interface, or access to information or data) after January 18, 2018.

(f) *Alterations of legacy ICT.* When altering any component or portion of existing ICT, after January 18, 2018, the component or portion must be modified to conform to the current ICT accessibility standards in 36 CFR 1194.1.

39.204 Exceptions.

(a) The requirements in 39.203 do not apply to acquisitions for—

(1) *National security systems.* ICT operated by agencies as part of a national security system, as defined by 40 U.S.C. 11103(a);

(2) *Incidental contract items.* ICT acquired by a contractor incidental to a contract, i.e., for in-house use by the contractor to perform the contract; or

(3) *Maintenance or monitoring spaces.* The portions of ICT that are operable parts (i.e., hardware-based user controls for activating, deactivating, or adjusting ICT) or status indicators, and that are located in spaces frequented only by service personnel for maintenance, repair, or occasional monitoring of equipment.

(b) The contracting officer shall receive, as a part of the requirements documentation, written confirmation from the requiring activity that an exception, in accordance with paragraph (a)(1), (2), or (3) of this section, applies to the ICT supply or service (see 7.105(b)(5)(iv)). This documentation shall be maintained in the contract file.

39.205 Exemptions.

(a) *Allowable exemptions.* An agency may grant an exemption for the following:

(1) *Undue burden.* When an agency determines the acquisition of ICT conforming with all the applicable ICT accessibility standards would impose an undue burden on the agency, compliance with the ICT accessibility standards is only required to the extent that it would not impose an undue burden. In determining whether conformance to one or more ICT accessibility standards would impose an undue burden, an agency shall consider the extent to which conformance would impose significant difficulty or expense considering the agency resources

available to the program or component for which the ICT supply or service is being procured.

(2) *Fundamental alteration.* When an agency determines that acquisition of ICT that conforms with all applicable ICT accessibility standards would result in a fundamental alteration in the nature of the ICT, such acquisition is required to conform only to the extent that conformance will not result in a fundamental alteration in the nature of the ICT.

(3) *Nonavailability of conforming commercial items.* Where there are no commercial items that fully conform to the ICT accessibility standards, the agency shall procure the supplies or service available in the commercial marketplace that best meets the ICT accessibility standards consistent with the agency's needs.

(b) *Alternative means of access.* An agency shall provide individuals with disabilities access to and use of information and data by an alternative means to meet the identified needs when an exemption in paragraphs (a)(1), (2), or (3) of this section applies.

(c) *Documentation.* When an exemption applies, the contracting officer shall obtain, as part of the requirements documentation, a written determination from the requiring activity explaining the basis for the exemption in paragraphs (a)(1), (2) or (3) of this section. This documentation shall be maintained in the contract file.

(1) *Undue burden.* A determination of undue burden shall address why and to what extent compliance with applicable ICT accessibility standards constitutes an undue burden.

(2) *Fundamental alteration.* A determination of fundamental alteration shall address the extent to which compliance with the applicable ICT accessibility standards would result in a fundamental alteration in the nature of the ICT.

(3) *Nonavailability of conforming commercial items.* A determination of commercial items nonavailability shall include—

- (i) A description of the market research performed;
- (ii) A listing of the requirements that cannot be met; and
- (iii) The rationale for determining that the ICT to be procured best meets the ICT accessibility standards in 36 CFR 1194.1, consistent with the agency's needs.

[FR Doc. 2021-16363 Filed 8-10-21; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 19 and 52

[FAC 2021-07; FAR Case 2016-011; Item II; Docket No. 2016-0011; Sequence No. 1]

RIN 9000-AN35

Federal Acquisition Regulation: Revision of Limitations on Subcontracting

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement revised and standardized limitations on subcontracting, including the nonmanufacturer rule, that apply to small business concerns.

DATES: Effective September 10, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Mahruha Uddowla, Procurement Analyst, at 703-605-2868 or by email at mahruha.uddowla@gsa.gov, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755 or GSARegSec@gsa.gov. Please cite FAC 2021-07, FAR Case 2016-011.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule at 83 FR 62540 on December 4, 2018, to implement regulatory changes made by the Small Business Administration (SBA) in its final rule published in the **Federal Register** at 81 FR 34243 on May 31, 2016, which became effective on June 30, 2016. SBA's final rule implements the statutory requirements of section 1651 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (15 U.S.C. 657s). Section 1651 revised and standardized the limitations on subcontracting, including the nonmanufacturer rule, that apply to small business concerns under FAR part 19. Twenty-nine respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils)

reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes

This final rule makes the following significant changes from the proposed rule:

- *The definition of “similarly situated entity”.* The definition of “similarly situated entity” is revised at FAR 19.001 and in FAR clause 52.219-14, Limitations on Subcontracting. It now provides an example of entities having the same small business program status and to specify that the entity must be small under the size standard associated with the North American Industry Classification System (NAICS) code the prime contractor assigned to the subcontract.

- *Applicable dollar threshold.* The final rule reflects the clarification that the nonmanufacturer rule and the limitations on subcontracting apply to set-asides and sole source awards made pursuant to subparts 19.8, 19.13, 19.14, and 19.15, as well as awards using the HUBZone price evaluation preference pursuant to subpart 19.13, regardless of dollar value.

- *HUBZone price evaluation preference.*

- Paragraph (e)(2) is added to FAR 19.507, Solicitation provisions and contract clauses, to clarify that, in solicitations and contracts using the HUBZone price evaluation preference, the contracting officer shall insert the clause at FAR 52.219-14, Limitations on Subcontracting. Paragraph (h)(1)(ii)(B) is added to specify that the contracting officer shall insert the clause at FAR 52.219-33, Nonmanufacturer Rule, in solicitations and contracts when the HUBZone price evaluation preference is used. For the FAR clauses at 52.219-14 and 52.219-33, the prescription also states that the contracting officer shall not insert the clause in the resultant contract if the prospective contractor waived the use of the price evaluation preference or is an other than small business.

- The clause at FAR 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns, is revised to remove the proposed rule definition of “similarly situated entity”, and to delete (instead of revising) the new redundant paragraphs (d) and (e), which pertained to the limitation on subcontracting.

- *Limitations on Subcontracting.* FAR clause 52.219-14, Limitations on Subcontracting, is revised to clarify that

this clause applies to contracts using the HUBZone price evaluation preference to award to a HUBZone small business concern unless the concern waived the evaluation preference. Additionally, to provide clarification on calculating the 50 percent limitation for contracts that include both services and supplies (*i.e.*, “mixed contracts”), paragraph (e)(1) of the clause at FAR 52.219–14 is revised to specify that when a contract is assigned a NAICS code for services, the 50 percent limitation shall only apply to the services portion of the contract. Paragraph (e)(2) is revised to specify that when a contract is assigned a NAICS code for supplies, the 50 percent limitation shall only apply to the supply portion of the contract.

- **Nonmanufacturer Rule.** FAR clause 52.219–33, Nonmanufacturer Rule, is revised to clarify the clause applies to contracts using the HUBZone price evaluation preference to award to a HUBZone small business concern unless the concern waived the evaluation preference. Paragraph (c)(2) is revised to remove text concerning an item for a kit that is not produced by small business concerns in the United States or its outlying areas.

- **Revisions to include recent FAR changes.** Prior to publication of this final rule, FAR part 19 and its associated provisions and clauses were substantially revised as a result of FAC 2020–05 (published February 27, 2020, and effective March 30, 2020). As a result, some revisions in the proposed rule are no longer included in this final rule, because the revisions have already been made to the FAR in FAC 2020–05. Other revisions appear in a different location due to the changed landscape of FAR part 19. The final rule also contains revisions that were not in the proposed rule due to changes made in FAC 2020–05. For example, prior to March 30, 2020, the FAR did not include coverage of the limitations on subcontracting and nonmanufacturer rule in subparts 19.8, 19.13, 19.14, and 19.15; FAC 2020–05 added coverage tailored for each of those subparts. Due to the standardization of the limitations on subcontracting and nonmanufacturer rule, this final rule removes the coverage from those subparts and consolidates the coverage in subpart 19.5. In addition, as of March 30, 2020, FAR part 19 includes coverage for orders issued directly to one small business under a reserve. This final rule provides guidance on the applicability of the limitations on subcontracting and nonmanufacturer rule for this new topic.

B. Analysis of Public Comments

1. Support for the Rule

Comment: Several respondents expressed support for the rule.

Response: The Councils acknowledge the expressions of support.

2. Faster Implementation

Comment: Several respondents expressed disappointment at the time it took to publish the proposed rule. More specifically, two respondents noted that it had taken over 2 years to publish the proposed rule. One respondent requested immediate implementation of the rule by means of a class deviation for the civilian agencies or an “interim final rule,” noting that it is burdensome for small businesses if one agency has a class deviation in place while others do not. Another respondent also requested issuance of an “interim final rule” and recommended that the FAR Council coordinate with SBA on SBA’s pending rulemaking and issue its own final rule that matches SBA’s final rule.

Response: The Councils acknowledge the length of time between the opening of FAR case 2016–011 and publication of the proposed rule. More time was required to publish the proposed rule due to changes in the rulemaking process that occurred in 2017 to more fully consider the regulatory or deregulatory impact of the rulemaking. The Councils have taken steps to try to shorten the time required to implement SBA’s rules in the FAR. Beginning in 2019, the Councils started working on proposed FAR rules after SBA publishes a proposed rule, instead of waiting for a final rule from SBA. This approach should allow more timely publication of FAR rules implementing SBA rules.

3. Simplified Acquisition Threshold vs. Dollar Value

Comment: Several respondents recommended changing all references to “\$150,000” to “the simplified acquisition threshold (SAT).” Furthermore, two respondents highlighted the fact that SBA updated its regulation at 13 CFR 121.406(d) to reference the term “the simplified acquisition threshold” and that the FAR at 48 CFR 2.101 contains the definition of the SAT.

Response: This final rule has been revised to include recent amendments to the FAR, including the removal of many of the references to the dollar value “\$150,000” (reference FAC 2020–05).

4. Other Pending FAR Rules

Comment: Two respondents pointed out that the proposed text for FAR

52.219–4(e) does not account for the joint venture options afforded to HUBZone small business concerns under SBA’s regulations and requires further revisions to bring the clause into alignment with SBA’s limitations on subcontracting rules for HUBZone joint ventures. Specifically, the respondents are concerned the SBA’s requirement that a HUBZone joint venture partner perform 40 percent of the joint venture’s work, is not being addressed.

Response: A separate FAR case, 2017–019, Policy on Joint Ventures, will address the respondents’ concern. The final rule will address the policy that a HUBZone joint venture partner must perform 40 percent of the joint venture’s work.

5. HUBZone Price Evaluation Preference

Comment: One respondent stated that the clause at FAR 52.219–4 places HUBZone distributors at a significant disadvantage by effectively preventing them from taking advantage of the HUBZone price evaluation preference, because it is not possible for a HUBZone nonmanufacturer to obtain a waiver of the nonmanufacturer rule from SBA for a full-and-open contract. The respondent also stated that the HUBZone nonmanufacturer should be permitted to supply a product of any business when utilizing the HUBZone price evaluation preference. The respondent further stated that if the clause at FAR 52.219–4 continues to require full compliance with the nonmanufacturer rule for HUBZone distributors, then the waiver rules must be modified to permit SBA to issue a waiver of the nonmanufacturer rule, upon request of a HUBZone firm, for a full and open contract when the price evaluation preference is utilized. The respondent further stated that if HUBZone distributors are not permitted to supply products of any size business, the clause at FAR 52.219–4 should be modified to permit HUBZone distributors to provide products of any type of small business rather than the current requirement to supply products made by other HUBZone small businesses.

Response: This final rule is implementing SBA’s final rule published in the **Federal Register** at 81 FR 34243 on May 31, 2016, and the changes requested by the respondent would not be consistent with that SBA rule. An award made using the HUBZone price evaluation preference is considered a HUBZone contract (see 13 CFR 126.600(c) and FAR 2.101). SBA’s regulations regarding the limitations on subcontracting and the nonmanufacturer rule apply to

HUBZone contracts (see 13 CFR 125.6). The Councils have updated the final rule at FAR 19.507(e) and (h) to clarify that solicitations and contracts using the HUBZone price evaluation preference to award to a HUBZone small business concern must include the FAR clauses at 52.219–14, Limitations on Subcontracting, and 52.219–33, Nonmanufacturer Rule. The Councils have also updated the paragraphs entitled “Applicability” in these clauses to clarify their applicability to contracts awarded to a HUBZone small business concern using the HUBZone price evaluation preference and that the limitations on subcontracting and nonmanufacturer rule do not apply if the price evaluation preference is waived by the offeror.

6a. Similarly Situated Entities—Definition

Comment: One respondent requested clarification on which subcontractors count as similarly situated entities. The respondent specifically requested additional examples regarding “standard small business set-asides.”

Response: SBA’s regulation at 13 CFR 125.1 states that “for small business set-aside, partial set-aside, or reserve” a similarly situated entity is “a subcontractor that is a small business concern.” Therefore, the definition of “similarly situated entity” in this final FAR rule has been revised to clarify that, for a small business set-aside, a similarly situated entity is a small business, without regard to socioeconomic status.

6b. Similarly Situated Entities—Loophole for 8(a) Participants

Comment: One respondent stated the proposed rule circumvents FAR 19.808–1(e) by allowing a new ANC or Indian Tribe to win a sole-source follow-on contract and then to subcontract it to the incumbent without competing it, which would increase costs to the Government. The respondent requested language be added to FAR 52.219–14(e)(1) through (4) to prohibit treatment of such a subcontractor as a similarly situated entity.

Response: The FAR does not direct subcontracting decisions of prime contractors. Additionally, SBA’s regulation does not provide that a prime contractor must compete a subcontract before it can award a subcontract, whether or not the award is to a similarly situated entity. This final rule will not be revised to incorporate the requested language as the rule is consistent with SBA’s regulations.

6c. Treatment of Similarly Situated Entity Subcontractors

Comment: One respondent acknowledged the proposed rule properly provides that first-tier subcontracts awarded to a “similarly situated entity” are excluded from the calculation of the 50 percent subcontract amount that cannot be exceeded. However, the respondent points out, the clauses then provide that all work further subcontracted by such similarly situated entity does count toward the 50 percent subcontract amount that cannot be exceeded. The respondent believes this formulation creates an inconsistency among small business programs and an administrative burden for prime contractors and urges that this further limitation be deleted.

Response: SBA’s regulation at 13 CFR 125.6(c) limits similarly situated entities to the first-tier subcontractors. Therefore, this final rule also contains this limitation. Determining compliance with the limitations on subcontracting by including in the calculation subcontracts beyond the prime contractor and first-tier subcontractor creates the possibility that the first-tier subcontractor may subcontract 100% of the work it received from the prime to an entity that is not similarly situated. This would create a loophole for entities that are not small business concerns and would not have qualified to receive the prime contract, to benefit as subcontractors from Government contracts that are set aside for performance by small business concerns. To address these concerns, SBA’s regulations apply the limitations on subcontracting collectively to the prime and any similarly situated first-tier subcontractor. Any work performed by a similarly situated first-tier subcontractor will count toward compliance with the applicable limitation on subcontracting. For purposes of determining whether the prime and its subcontractor complied with the applicable limitation on subcontracting, work that is not performed by the employees of the prime contractor or employees of first-tier similarly situated subcontractors will count as subcontracts performed by non-similarly situated entities. Using similarly situated subcontractors gives the prime contractor greater flexibility but does require monitoring and oversight by the prime contractor to ensure the benefits flow to the intended recipients. The final rule has been revised at FAR 52.219–14 to provide additional clarity on this issue.

6d. Similarly Situated Entities—Interpretation of the Rule

Comment: One respondent requested clarification of its understanding of the proposed rule regarding the prime contractor not completing 50 percent of the work because it subcontracted to a similarly situated entity.

Response: A prime contractor may subcontract more than 50 percent of the work to a similarly situated entity and still comply with the limitations on subcontracting. SBA’s regulation at 13 CFR 125.6(c) provides three examples to illustrate when the prime contractor meets, or fails to meet, the limitations on subcontracting. One example describes an award for supplies to a service-disabled veteran-owned small business (SDVOSB) that subcontracts to a similarly situated entity for 51 percent of the work, which does not violate the limitations on subcontracting. However, any work that the similarly situated entity further subcontracts will be counted toward the 50 percent subcontract limit.

7a. Application of the Limitations on Subcontracting and Nonmanufacturer Rule at or Below the SAT

Comment: Two respondents submitted substantially similar comments suggesting that set-asides below the SAT in all small business and small business socioeconomic categories should be exempt from any limitations on subcontracting, including the nonmanufacturer rule. Another respondent stated the original intent of the nonmanufacturer rule was to promote U.S. innovation in manufacturing and technology by allowing small U.S. manufacturers to compete with large business for Federal Government contracts. This respondent also stated the recent SBA change to raise the value of application of the nonmanufacturer rule to the SAT contradicts this intent and threatens the U.S. Defense Industrial Base.

Response: This rule implements SBA’s policy on the limitations on subcontracting and the nonmanufacturer rule. The rule reflects distinct statutory authorities for setting aside small business procurements and small business socioeconomic category procurements below and above the threshold at 15 U.S.C. 644(j).

For small business socioeconomic category procurements (*i.e.*, a set-aside or sole source contract for 8(a) participants, women-owned small businesses, HUBZone small businesses, or SDVOSBs), the limitations on subcontracting, and the nonmanufacturer rule, apply to

procurements regardless of contract value. The Small Business Act at 15 U.S.C. 657s established the applicability of the limitations on subcontracting and the nonmanufacturer rule for contracts awarded to “covered” small business (or socioeconomic category) concerns “under section 637(a), 637(m), 644(a), 657a, or 657f” of Title 15. Contracts with “covered” concerns under 15 U.S.C. 637(a), 637(m), 657a, and 657f include set-aside or sole source contracts, and any evaluation-preference contracts, regardless of dollar value, for specific small business socioeconomic categories, *i.e.*, small disadvantaged businesses participating in the section 8(a) business development program, women-owned small businesses, HUBZone small businesses, and SDVOSBs.

Set-aside contracts with small business concerns below the threshold (*i.e.*, the simplified acquisition threshold) at 15 U.S.C. 644(j) are not designated as “covered” in section 657s (see SBA’s implementing regulations 13 CFR 125.6(a)). For this reason, contracts resulting from small business set-asides below this threshold would be exempt from the limitations on subcontracting and the nonmanufacturer rule.

7b. Application of the Limitations on Subcontracting and Nonmanufacturer Rule to Commercial Items

Comment: Two respondents commented that the limitations on subcontracting, including those related to the nonmanufacturer rule, should not apply to acquisitions for commercial items and commercially available off-the-shelf (COTS) items because the complex and confusing limits conflict with the straightforward nature of commercial and COTS acquisitions.

Response: The Councils do not concur with this comment. Section 1651 of the NDAA for FY 2013 is silent on its applicability to commercial and COTS items. The corresponding final rule implemented by the SBA in its regulation did not exempt acquisitions of commercial or COTS items from the limitations on subcontracting. Further, the revisions to the limitations on subcontracting reflected in this final FAR rule actually facilitate access to the Federal marketplace for small businesses, simplify the process of tracking costs spent by prime contractors on subcontractors, and make the application of limitations on subcontracting consistent across the small business programs. Exclusion of acquisitions for commercial and COTS items will limit the full realization of these improvements for small businesses and hinder their

participation in Federal procurements as both prime contractors and subcontractors.

8. Limitations on Subcontracting Too Restrictive

Comment: One respondent suggests the proposed rule restricts opportunities for small businesses and discourages subcontracting arrangements. The same respondent recommends eliminating all limitations between prime contractors and subcontractors, regardless of business size.

Response: The rule does not restrict small business subcontracting opportunities nor does it discourage subcontracting arrangements. Rather, the proposed rule provides small businesses with greater flexibility in how they choose to comply with the limitations on subcontracting. Moreover, the new rules make it easier for small business prime contractors to do business with Federal agencies by giving them more choices that are less burdensome and less costly for pursuing and winning larger contracts than before. The rule implements an SBA final rule intended to ensure that the benefits of set-aside contracts flow to the intended beneficiaries. The recommended elimination of all limitations on subcontracting is counter to that intent and is beyond the scope of this rule.

9. Mixed Contracts

Comment: One respondent noted that 13 CFR 125.6(b) discusses the limitations on subcontracting with respect to mixed contracts (*i.e.*, contracts for both supplies and services). The proposed revision to the clause at FAR 52.219–14 failed to address mixed contracts. The respondent proposed bringing the FAR into alignment with SBA’s regulation by adding another subparagraph to address mixed contracts.

Response: According to SBA’s final rule published in the **Federal Register** at 81 FR 34243, on May 31, 2016, SBA’s regulation at 13 CFR 125.6(b) states that, “where a contract combines services and supplies, the contracting officer shall select the appropriate NAICS code” that best describes the principal purpose of the product or service being acquired. The contracting officer’s selection of the applicable NAICS code determines which limitation on subcontracting applies. Thus, for a prime contract that includes both services and supplies, the NAICS code assigned by the contracting officer determines the relevant amount for purposes of calculating compliance with the limitation on subcontracting; *e.g.*,

when a NAICS code for services is assigned, the limitation on subcontracting for services applies to the services portion of the contract. Likewise, for subcontracts, the prime contractor will assign the NAICS. To provide clarification on calculating the 50 percent limitation for contracts that include both services and supplies (*i.e.*, “mixed contracts”), this final rule revises the clause at 52.219–14, Limitations on Subcontracting, to specify that when a contract is assigned a NAICS code for services, the 50 percent limitation applies only to the services portion of the contract, and that when a contract is assigned a NAICS code for supplies, the 50 percent limitation applies only to the supply portion of the contract.

10. Revisions to the Clause on the Nonmanufacturer Rule

Comment: One respondent indicated that the proposed solicitation provision does not state that the nonmanufacturer rule requirements can be waived by SBA, either on an individual or class basis; and furthermore, the provision does not state that nonmanufacturers need to have no more than 500 employees. The respondent further stated that the SBA has proposed to eliminate its rule about “kit assemblers,” and suggested that the Council similarly remove all rules about “kit assemblers.”

Response: The Councils reviewed the area of the rule identified by the respondent and found that the SBA waiver information for the nonmanufacturer rule is not appropriate for inclusion in the contract clause at 52.219–33, Nonmanufacturer Rule. FAR 19.507(h)(2) instructs contracting officers not to use 52.219–33 when SBA has waived the nonmanufacturer rule. Individual and class waivers of the nonmanufacturer rule are addressed in the final rule at FAR 19.505(c).

The size standard for nonmanufacturers is located in the solicitation provisions that contain the requirement for offerors to represent size status (*e.g.*, 52.219–1, Small Business Program Representations). There is no need to include it in the clause at 52.219–33, which does not address representation of size status.

The Councils found that removing the text on kit assemblers from the FAR is premature in this final rule, and must be addressed in a separate case. Therefore, the suggested revisions have not been included in the final rule.

11. Orders Under Multiple Award Contracts

Comment: One respondent stated that clarification should be provided for orders set aside for small business under multiple-award contracts regarding whether, for the purpose of applying the limitations on subcontracting and the nonmanufacturer rule, the value is determined at the contract level or at the order level. The respondent further expressed a preference for having the value determined at the individual order level, so that the nonmanufacturer rule would only apply to orders above the simplified acquisition threshold.

Response: The prescriptions for the clauses at FAR 52.219–14, Limitations on Subcontracting, and 52.219–33, Nonmanufacturer Rule, specify use of the clauses when “any portion of the requirement is set aside for small business and is expected to exceed the simplified acquisition threshold”. The prescriptions also specify use of the clauses in multiple-award contracts when orders may be set aside for small business because the clauses apply to orders that are set aside for small business under multiple-award contracts. The applicability of the limitations on subcontracting and the nonmanufacturer rule is determined partly by whether the contract or the order is being set aside for small business. If an order is set aside for small business, the clause applies to the order if it exceeds the simplified acquisition threshold (see 52.219–14(c)(4) and 52.219–33(b)(2)(iii)). Alternatively, if a multiple-award contract is set aside for small business, the clause applies to the contract if it exceeds the simplified acquisition threshold.

12a. Additional SBA Rule—Hazardous Waste Industry

Comment: Six respondents stated the hazardous waste industry should be excluded from the limitations on subcontracting as disposal facilities and transportation costs are prohibitively expensive for small businesses to own and operate. Therefore, small businesses subcontract out these services, which would cause them to exceed the limitations on subcontracting.

Two respondents stated environmental remediation requires the purchase of significant materials, which is similar to construction. The respondents requested these materials be excluded from the limitations on subcontracting.

Response: These changes are included in SBA’s final rule at 13 CFR 125.6(a), published in the **Federal Register** on

November 29, 2019 (84 FR 65647). SBA’s rule updates the limitations on subcontracting. A new FAR case would have to be opened to implement the additional changes, which require public comment under 41 U.S.C. 1707 prior to implementation in the FAR. Therefore, the suggested changes are not incorporated in this final rule.

12b. Additional SBA Rule—Independent Contractors

Comment: Two respondents suggested additional language be added to the proposed rule to define an independent contractor. One respondent requested that the term “independent contractor” be removed from the rule. One respondent recommended that independent contractors should not be subject to FAR 44.201–1, Consent requirements.

Response: SBA made clarifications regarding independent contractors in its final rule, published in the **Federal Register** on November 29, 2019 (84 FR 65647), which updates the limitations on subcontracting. Those changes are beyond the scope of this FAR case. A new FAR case would have to be opened to implement additional changes in the FAR, including publication for notice and comment if necessary. The suggested changes are not consistent with the SBA’s regulations which are being implemented in this final FAR rule, and therefore will not be included in this final FAR rule.

12c. Additional SBA Rule—Exclusion of Materials and Other Direct Costs From the Limitation on Subcontracting for Services

Comment: Four respondents stated the cost of materials and other direct costs for services should be excluded from the limitations on subcontracting, which would treat these contracts the same as supply contracts.

Response: This rule implements SBA’s final rule published in the **Federal Register** at 81 FR 34243 on May 31, 2016, which does not provide an exclusion for the cost of materials or other direct costs. These changes are in SBA’s final rule, published in the **Federal Register** on November 29, 2019 (84 FR 65647), which updates the limitations on subcontracting. A new FAR case would have to be opened to implement the additional changes.

12d. Additional SBA Rule—Inconsistencies Between FAR and SBA

Comment: Two respondents stated that because of SBA’s proposed rule published December 4, 2018, 83 FR 62516, the FAR will be inconsistent with SBA’s regulations once again,

which will create new confusion. They requested the FAR Council issue an interim final rule.

Response: SBA’s final rule published November 29, 2019, 84 FR 6564, made updates to the limitations on subcontracting. A new FAR case would have to be opened to implement the SBA’s November 29, 2019 changes. The FAR Council may issue an interim rule without first publishing a proposed rule only when urgent and compelling circumstances exist, which justify changing the FAR prior to seeking public comment.

13. Information Technology Value Added Resellers

Comment: One respondent requested a clarification of whether the nonmanufacturer rule applies to Information Technology Value Added Resellers (ITVAR), NAICS code 541519.

Response: An ITVAR provides a total solution to information technology acquisitions by providing multi-vendor hardware and software along with significant value added services. SBA’s regulation at footnote 18 within 13 CFR 121.201 states that the nonmanufacturer rule applies to an ITVAR procurement unless SBA has issued a class or contract-specific waiver of the nonmanufacturer rule.

14. Out of Scope

Comment: One respondent stated DoD Class Deviation 2019–O0003, Limitations on Subcontracting for Small Business, contains a requirement stating, if the contract falls below the SAT, it is not a complete waiver of the nonmanufacturer rule because the small business must still provide the end item of any domestic firm. The respondent noted this same requirement is not present in the current SBA regulations, nor in the current proposed rule change and encourages the Councils to proceed with issuing a final rule that does not include this restriction. A second respondent recommended that clear definitions of subcontract and subcontractor should be provided to regulate the use of independent contractors (consultants) and ancillary services, as well as to formulate policies and mechanisms with respect to consent to subcontract, flow down of contract provisions, and other FAR requirements. A third respondent asked if the proposed regulation would take precedence over a specified agency’s clause.

Response: These comments are beyond the scope of this rule. SBA’s waiver of the nonmanufacturer rule (13 CFR 121.406(b)(7)) has no effect on requirements external to the Small

Business Act which involve domestic sources of supply, such as the Buy American Act or the Trade Agreements Act. Class deviations issued by individual agencies do not impact the text of this rule. In many instances the definition of subcontractor used in the FAR varies depending on which statutes or FAR regulations apply. It is not possible to use the same definition across all the parts of the FAR. Agency regulations and guidance must be consistent with the FAR unless an authorized deviation (see FAR 1.404) is in place.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

The Federal Acquisition Regulatory (FAR) Council has made the following determinations with respect to the rule's application of section 1651 of the NDAA for FY 2013 to contracts at or below the simplified acquisition threshold (SAT) and for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items. Discussion of these determinations is set forth below.

A. Applicability to Contracts at or Below the SAT

Pursuant to 41 U.S.C. 1905, a provision of law is not applicable to acquisitions at or below the SAT unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1905 and states that the law applies to acquisitions at or below the SAT; or (iii) the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to acquisitions at or below the SAT.

The purpose of this rule is to implement section 1651 of the NDAA for FY 2013. Section 1651 provides revised limitations on subcontracting that apply across all small business programs. It also requires that the limitations on subcontracting be determined based on the percentage of the overall award amount that a prime contractor spends on its subcontractors. In addition, section 1651 provides that the percentage of the award amount that the prime contractor spends on subcontractors who are similarly situated entities is not considered subcontracted for purposes of the

limitations on subcontracting in section 1651.

These statutory requirements are reflected in SBA's final rule published in the **Federal Register** at 81 FR 34243, on May 31, 2016, which did not exempt acquisitions at or below the SAT that are set aside for, or awarded on a sole-source basis to, 8(a) program participants, HUBZone, service-disabled veteran-owned, women-owned, or economically disadvantaged women-owned small business concerns; or that use the HUBZone price evaluation preference to award to a HUBZone small business concern. SBA's final rule did exempt acquisitions at or below the SAT that are set aside for small businesses.

The law is silent on the applicability of these requirements to acquisitions at or below the SAT and does not independently provide for criminal or civil penalties; nor does it include terms making express reference to 41 U.S.C. 1905 and its application to acquisitions at or below the SAT. Therefore, it does not apply to acquisitions at or below the SAT unless the FAR Council makes a written determination as provided at 41 U.S.C. 1905.

Application of the law to acquisitions at or below the SAT will maximize the positive impact set-aside and sole-source contracts provide for small businesses in the socioeconomic programs (e.g., HUBZone, 8(a), service-disabled veteran-owned, and women-owned small business programs) by ensuring these benefits extend to the many contracts valued below the SAT. According to the Federal Procurement Data System, an average of 283,374 contracts per year resulted from FAR part 19 set-asides and sole-source awards at or below the simplified acquisition threshold during fiscal years 2016–2018. Failure to apply section 1651 below the SAT would exclude a significant number of acquisitions, contrary to the goal of promoting opportunities for small businesses in the Federal marketplace to the maximum extent possible. Further, the FAR clauses imposing limitations on subcontracting and the nonmanufacturer rule are currently prescribed for use in solicitations and contracts at or below the SAT that are set aside for, or awarded on a sole-source basis to, 8(a) program participants, HUBZone, service-disabled veteran-owned, women-owned, or economically disadvantaged women-owned small business concerns; or that use the HUBZone price evaluation preference to award to a HUBZone small business concern. Making section 1651 applicable to acquisitions at or below the SAT would allow the amended

versions of those clauses, reflecting the requirements of section 1651, to be incorporated into such solicitations and contracts. Exclusion of the amended clauses from those documents would create confusion among contractors and the Federal contracting workforce. Finally, under the FAR clauses currently incorporated into those documents, contractors are already required to comply with the limitations on subcontracting and the nonmanufacturer rule. The new requirements will result in substantial savings for contractors.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of the rule to acquisitions at or below the SAT.

B. Applicability to Contracts for the Acquisition of Commercial Items

Pursuant to 41 U.S.C. 1906, acquisitions of commercial items (other than acquisitions of COTS items, which are addressed in 41 U.S.C. 1907) are exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1906 and states that the law applies to acquisitions of commercial items; or (iii) the FAR Council makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of commercial items from the provision of law. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to acquisitions of commercial items.

The purpose of this rule is to implement section 1651 of the NDAA for FY 2013. Section 1651 provides revised limitations on subcontracting that apply across all small business programs. It also requires that the limitations on subcontracting be determined based on the percentage of the overall award amount that a prime contractor spends on its subcontractors. In addition, section 1651 provides that the percentage of the award amount that the prime contractor spends on subcontractors who are similarly situated entities is not considered subcontracted for purposes of the limitations on subcontracting in section 1651.

These statutory requirements are reflected in SBA's final rule published in the **Federal Register** at 81 FR 34243, on May 31, 2016, which did not exempt acquisitions of commercial items.

The law is silent on the applicability of these requirements to acquisitions of commercial items and does not independently provide for criminal or

civil penalties; nor does it include terms making express reference to 41 U.S.C. 1906 and its application to acquisitions of commercial items. Therefore, it does not apply to acquisitions of commercial items unless the FAR Council makes a written determination as provided at 41 U.S.C. 1906.

The law furthers the Administration's goal of simplifying the acquisition process and facilitating easier access to the Federal marketplace, in this case for small business contractors who make up an important component of the Government's industrial base. It advances the interests of small business prime contractors by making it easier to comply with the limitations on subcontracting, potentially allowing those contractors to compete for larger contracts than they could in the past. The law also advances the interests of small business subcontractors by encouraging small business prime contractors to award more subcontracts to similarly situated small businesses. Exclusion of a large segment of Federal contracting, such as acquisitions for commercial items, would limit the full implementation of these objectives. Further, the primary FAR clauses implementing the limitations on subcontracting and the nonmanufacturer rule are currently prescribed for use in solicitations and contracts for commercial items. Making section 1651 applicable to acquisitions for commercial items would allow the amended versions of those clauses, reflecting the requirements of section 1651, to be included in such solicitations and contracts. Exclusion of those amended clauses from contracts for commercial items would create confusion among contractors and the Federal contracting workforce. Finally, the burden on contractors would not increase significantly if the requirements of section 1651 were applied to acquisitions for commercial items. Under the FAR clauses currently incorporated into contracts for commercial items, contractors are already required to comply with the limitations on subcontracting and the nonmanufacturer rule. The new requirements will result in substantial savings for contractors.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of the rule to the acquisition of commercial items.

C. Applicability to Contracts for the Acquisition of COTS Items

Pursuant to 41 U.S.C. 1907, acquisitions of COTS items will be exempt from a provision of law unless the law (i) contains criminal or civil

penalties; (ii) specifically refers to 41 U.S.C. 1907 and states that the law applies to acquisitions of COTS items; (iii) concerns authorities or responsibilities under the Small Business Act (15 U.S.C. 644) or bid protest procedures developed under the authority of 31 U.S.C. 3551 *et seq.*, 10 U.S.C. 2305(e) and (f), or 41 U.S.C. 3706 and 3707; or (iv) the Administrator for Federal Procurement Policy makes a written determination and finding that would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items from the provision of law. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to acquisitions of COTS items.

The purpose of this rule is to implement section 1651 of the NDAA for FY 2013 (codified at 15 U.S.C. 657s). Section 1651 provides revised limitations on subcontracting that apply across all small business programs. It also requires that the limitations on subcontracting be determined based on the percentage of the overall award amount that a prime contractor spends on its subcontractors. In addition, section 1651 provides that the percentage of the award amount that the prime contractor spends on subcontractors who are similarly situated entities is not considered subcontracted for purposes of the limitations in section 1651.

These statutory requirements are reflected in SBA's final rule published in the **Federal Register** at 81 FR 34243, on May 31, 2016, which did not exempt acquisitions of COTS items.

The law is silent on the applicability of these requirements to acquisitions of COTS items and does not independently provide for criminal or civil penalties; nor does it concern bid protest procedures developed under the authority of the relevant statutes. Therefore, it does not apply to acquisitions of COTS items unless the Administrator for Federal Procurement Policy makes a written determination as provided at 41 U.S.C. 1907.

The law furthers the Administration's goal of simplifying the acquisition process and facilitating easier access to the Federal marketplace, in this case for small business contractors who make up an important component of the Government's industrial base. It advances the interests of small business prime contractors by making it easier to comply with the limitations on subcontracting, potentially allowing those contractors to compete for larger contracts than they could in the past.

The law also advances the interests of small business subcontractors by encouraging small business prime contractors to award more subcontracts to similarly situated small businesses. Exclusion of a large segment of Federal contracting, such as acquisitions for COTS items, would limit the full implementation of these objectives. Further, FAR clauses imposing limitations on subcontracting and the nonmanufacturer rule are currently prescribed for use in solicitations and contracts for COTS items. Making section 1651 applicable to acquisitions of COTS items would allow the amended versions of those clauses, reflecting the requirements of section 1651, to be incorporated into such solicitations and contracts. Exclusion of the amended clauses from those documents would create confusion among contractors and the Federal contracting workforce. Finally, the burden on contractors would not increase significantly if the requirements of section 1651 were applied to acquisitions for COTS items. Under the FAR clauses currently incorporated into contracts for those items, contractors are already required to comply with the limitations on subcontracting and the nonmanufacturer rule. The new requirements will result in substantial savings for contractors.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of the rule to the acquisition of COTS items.

IV. Expected Cost Savings

The purpose of this rule is to implement statutory authorities and SBA regulations that are designed to make it easier and less burdensome for small business prime contractors to comply with requirements related to how much work they may subcontract under Federal contracts, including task and delivery orders under those contracts (*i.e.*, the "limitations on subcontracting"). The changes to these requirements would both ease compliance costs and provide more authorized ways to subcontract. Section 1651 of the NDAA for FY 2013 revised and standardized the limitations on subcontracting, including the nonmanufacturer rule. The nonmanufacturer rule is the requirement that the prime contractor, who is a reseller of a product (*i.e.*, a "nonmanufacturer"), provide an end product manufactured by a small business in the United States or its outlying areas. The limitations on subcontracting and the nonmanufacturer rule are meant to

ensure that the benefits of contracts and orders awarded to small businesses flow to the intended beneficiaries.

Prior to section 1651, the limitations on subcontracting and the nonmanufacturer rule were inconsistent across the small business programs. For example, under the 8(a) and WOSB Programs, the prime contractor was required to perform a certain percentage of work itself, whereas under the HUBZone and SDVOSB Programs, the prime contractor could include subcontracts to other HUBZone small business or SDVOSB concerns in the percentage of work it performed. Similarly, with regard to the nonmanufacturer rule, a prime contractor for a contract or order set aside or awarded on a sole-source basis under the HUBZone Program was required to provide products manufactured by another HUBZone small business, but for awards under the other small business programs, the prime contractor was required to provide products manufactured by any small business.

In addition, the basis of the limitations on subcontracting has

changed. Prior to section 1651, the limitations on subcontracting were calculated as a percentage of work to be performed by a prime contractor; the calculation was based on the contractor's costs to perform the contract (e.g., salaries and other allowable costs under FAR part 31). As a result of section 1651, the limitations on subcontracting will be calculated as a percentage of the overall contract or order amount (i.e., the contract price, including costs and profit or fee) to be spent by the prime contractor on subcontractors. As a result, for the purpose of compliance with the limitations on subcontracting the prime contractor no longer has to track the percentage of costs incurred that it spends performing work itself. It only has to track the percentage of the overall award amount (i.e., contract price) that it spends on subcontractors. For small businesses, this change will reduce the burden associated with tracking and documenting compliance with the limitations on subcontracting.

Section 1651 also applied the concept of "similarly situated entities" to all small business programs. A similarly

situated entity is a small business subcontractor that has the same small business program status as that which qualified the prime contractor for the prime contract. The percentage of the contract or order amount that the prime contractor spends on subcontractors who are similarly situated entities is not considered subcontracted for purposes of compliance with the limitations on subcontracting. Prior to section 1651, small businesses that wanted to work together to comply with the limitations on subcontracting were required to form a joint venture or a new legal entity (except in small business programs where the concept of similarly situated entities was already applied). The concept of similarly situated entities eliminates the need for paperwork, coordination, and other costs associated with forming such a joint venture or new legal entity simply to comply with the limitations on subcontracting.

These important changes allow small businesses greater flexibility on how they choose to comply with the limitations on subcontracting. The impact is illustrated in the following example of a non-construction contract:

Limitations on subcontracting	Previous	New
Contract Value	\$1,000	\$1,000.
Small Business' Cost of Contract Performance incurred for personnel.	\$800	Not tracked.
LOS Requirement	Contractor must spend \$400—i.e., 50 percent of the \$800 cost of contract performance incurred for its own personnel. The contract value (i.e., \$1,000) is not used to determine compliance under previous rule..	Contractor may pay up to \$500 (50 percent of the contract price) to a non-similarly situated entity, e.g., large business, AND/OR subcontract to a similarly situated entity without limitation.

Under the current limitations on subcontracting, the small business only has one way to comply. In the example above, it must spend at least \$400 on its own employees and, therefore, must be able to track its contract costs to ensure compliance with the requirement. Under the new limitations on subcontracting, there are multiple and less costly ways to comply, and the small business can choose the most efficient option, as demonstrated below:

- The small business can continue to spend \$400 on its own employees and subcontract \$400 to any business, as it did to comply with the previous limitations on subcontracting. Because the prime contractor is not subcontracting more than \$500 to businesses that are not similarly situated entities, it will meet the new limitations on subcontracting.
- The small business can subcontract to any combination of similarly situated and non-similarly situated entities and remain in compliance with the new

limitations on subcontracting as long as the amount spent on non-similarly situated entities does not exceed \$500. For example, the small business can subcontract \$500 to any business and spend \$300 on its own employees, or subcontract \$500 to any business, \$100 to a similarly situated entity, and spend only \$200 on its own employees.

SBA's final rule specified that similarly situated entities must also comply with the limitations on subcontracting. As part of implementing section 1651, the SBA made a few more revisions to their regulations that are reflected in this FAR rule:

- The nonmanufacturer rule does not apply to small business set-asides at or below the simplified acquisition threshold. Note that currently, the FAR applies the nonmanufacturer rule to small business set-asides above \$25,000.
- Waivers of the nonmanufacturer rule will now be allowed for procurements under the HUBZone Program. Such waivers allow a

HUBZone small business to provide the product of any size business.

- In the event SBA grants a nonmanufacturer rule waiver after the issuance of a solicitation, but before award, contracting officers are required to amend that solicitation to notify potential offerors of the waiver and to give them more time to submit proposals.

The above changes drive both costs and savings; however, the rule is expected to result in net savings to small entities, as well as to the Government. Since the rule will only revise regulations under the various small business programs, there will be no costs or savings to large businesses. The expected net savings of the rule, calculated at present value using a 7-percent discount rate over ten years, is estimated to be \$189,298,957.

To access the full regulatory cost analysis for this rule, go to the Federal eRulemaking Portal at <http://www.regulations.gov>, search for "FAR

Case 2016–011,” click “Open Docket,” and view “Supporting Documents.”

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD, GSA and NASA will submit for an interim or final rule a report to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

DoD, GSA, and NASA are amending the Federal Acquisition Regulation (FAR) to implement changes made by the Small Business Administration (SBA) in its final rule published in the **Federal Register** at 81 FR 34243 on May 31, 2016. SBA's final rule implements the statutory requirements of section 1651 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013, which revised and standardized the limitations on subcontracting, including the nonmanufacturer rule, that apply to small business concerns under FAR part 19 procurements.

The objectives of this rule are to apply the limitations on subcontracting consistently to the small business concerns identified in FAR 19.000(a)(3) and to change the method of calculation to the percentage of the award amount to be spent on subcontractors.

There were no significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis.

This rule may have a positive economic impact on small businesses, because it will make application of the limitations on subcontracting and the nonmanufacturer rule uniform across all small business programs and make it easier to calculate compliance with the limitations on subcontracting. Through the ability to meet the limitations by means of subcontracts with similarly situated entities, this rule will make it possible for small businesses to compete for larger contracts than they could in the past. The rule will encourage small business prime contractors to award subcontracts to other, similarly situated, small businesses.

According to the System for Award Management (SAM), there are 315,655 active registrants that are considered small for at least one North American Industry Classification System code. Firms looking to be prime contractors for Government contracts are required to register in SAM. However, firms do not need to register in SAM to participate in subcontracting. Thus, the number of small business firms impacted by this rule may be greater than the number of firms registered in SAM.

This rule does not include any new reporting or recordkeeping requirements for small entities. This rule does not include any new compliance requirements. The FAR already required compliance with the limitations on subcontracting and the nonmanufacturer rule for small business prime contractors receiving awards pursuant to part 19. This rule simply revises the limitations on subcontracting and the nonmanufacturer rule to match that required by section 1651 of the NDAA for FY 2013. According to the Federal Procurement Data System, there were approximately 70,992 contracts per year in fiscal years 2016–2018 under all the small business programs to which the limitations on subcontracting or the nonmanufacturer rule would apply.

This rule is not expected to have a negative impact on the majority of small entities.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of SBA.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) 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 3245–0374, titled: *Certification for the Women-Owned Small Business Federal Contract Program*.

List of Subjects in 48 CFR Parts 19 and 52

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are amending 48 CFR parts 19 and 52 as set forth below:

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

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 19—SMALL BUSINESS PROGRAMS

■ 2. Amend section 19.001 by removing the definition of “Nonmanufacturer” and adding, in alphabetical order, the definition of “Similarly situated entity” to read as follows:

19.001 Definitions.

* * * * *

Similarly situated entity 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 socioeconomic status); and (2) Is considered small for the size standard under the NAICS code the prime contractor assigned to the subcontract.

■ 3. Revise section 19.505 to read as follows:

19.505 Limitations on subcontracting and nonmanufacturer rule.

(a) *Applicability.* (1) This section applies to small business set-asides above the simplified acquisition threshold and orders issued directly to a small business in accordance with 19.504(c)(1)(ii) above the simplified acquisition threshold.

(2) This section applies, regardless of dollar value, to the following awards under subparts 19.8, 19.13, 19.14, and 19.15:

- (i) Contracts that are set aside.
- (ii) Contracts that are awarded on a sole-source basis.
- (iii) Orders that are set-aside as described in 8.405–5 and 16.505(b)(2)(i)(F).
- (iv) Orders that are issued directly in accordance with 19.504(c)(1)(ii).
- (v) Contracts that use the HUBZone price evaluation preference to award to a HUBZone small business concern unless the concern waived the evaluation preference.

(b)(1) *Limitations on subcontracting.* A small business concern subject to the limitations on subcontracting is required to comply with the following:

(i) For a contract or order assigned a North American Industry Classification System (NAICS) code for services (except construction), the concern 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 concern'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.

(ii) For a contract or order assigned a NAICS code for supplies or products (other than a procurement from a nonmanufacturer of such supplies or products), the concern will not pay more than 50 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 concern'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.

(iii) For a contract or order assigned a NAICS code for general construction, the concern 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 concern's 85 percent subcontract amount that cannot be exceeded.

(iv) For a contract or order assigned a NAICS code for construction by special trade contractors, the concern 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 concern's 75 percent subcontract amount that cannot be exceeded.

(2) *Compliance period.* A small business contractor subject to the limitations on subcontracting is required to comply with the limitations on subcontracting—

(i) For a contract that has been set aside, either by the end of the base term

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, at the contracting officer's discretion; and

(ii) For an order set aside under a contract as described in 19.504(a), (b), or (c)(1)(i) or an order issued in accordance with 19.504(c)(1)(ii), by the end of the performance period for the order.

(c) *Nonmanufacturer rule.* The nonmanufacturer rule applies to nonmanufacturers in accordance with paragraph (c)(1) of this section and to kit assemblers who are nonmanufacturers in accordance with paragraph (c)(2) of this section.

(1) *Nonmanufacturers.* Any concern, including a supplier, that is awarded a contract or order subject to the nonmanufacturer rule, other than a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce (*i.e.*, a "nonmanufacturer"), is required to—

(i) Provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas (see paragraph (c)(3) of this section for determining the manufacturer of an end item);

(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; for example, providing storage, transportation, or delivery.

(2) *Kit assemblers.* When the end item being acquired is a kit of supplies—

(i) The offeror may not exceed 500 employees; and

(ii) 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 business concerns that are small under the size standards for the NAICS codes of the components of the kit.

(3) *Identification of manufacturers.* For the purposes of applying the nonmanufacturer rule, the manufacturer, processor, or producer is the concern that manufactures, processes, or produces an end item with its own facilities (*i.e.*, transforms raw materials, miscellaneous parts, or components into the end item being acquired). See 13 CFR 121.406(b)(2).

(4) *Waiver of nonmanufacturer rule.*

(i) The SBA may grant an individual or a class waiver to the nonmanufacturer rule to allow a nonmanufacturer to provide an end item of an other than small business without regard to the

place of manufacture, processing, or production.

(A) *Class waiver.* An agency may request that SBA waive the requirement at paragraph (c)(1)(i) or (c)(2)(ii) of this section for a specific product or class of products. See 13 CFR 121.1202 for an explanation of when SBA will issue a class waiver.

(B) *Individual waiver.* The contracting officer may also request a waiver of the requirements at paragraph (c)(1)(i) or (c)(2)(ii) of this section for an individual acquisition once the contracting officer determines through market research that no known small business manufacturers, processors, or producers in the United States or its outlying areas can reasonably be expected to offer an end item meeting the requirements of the solicitation. This type of waiver is known as an individual waiver and would apply only to a specific acquisition.

(ii) *Waiver requests.* Requests for waivers shall include the content specified at 13 CFR 121.1204 and shall be sent via email to nmrwaivers@sba.gov or by mail to the—Director, Office of Government Contracting, Small Business Administration, 409 Third Street SW, Washington, DC 20416.

(iii) *List of class waivers.* For the most current listing of class waivers, contact the SBA Office of Government Contracting or go to <https://www.sba.gov/document/support-non-manufacturer-rule-class-waiver-list>.

(iv) *Notification of waiver.* The contracting officer shall provide potential offerors with written notification of any class or individual waiver in the solicitation. If providing the notification after solicitation issuance, the contracting officer shall provide potential offerors a reasonable amount of additional time to respond to the solicitation.

(5) *Multiple-item acquisitions.* (i) If at least 50 percent of the estimated contract value is composed of items that are manufactured, processed, or produced by small business concerns, then a waiver of the nonmanufacturer rule is not required. There is no requirement that each item acquired in a multiple-item acquisition be manufactured, processed, or produced by a small business in the United States or its outlying areas.

(ii) If more than 50 percent of the estimated acquisition cost is composed of items manufactured, processed, or produced by other than small business concerns, then a waiver is required. SBA may grant an individual waiver for one or more items in an acquisition in order to ensure that at least 50 percent

of the cost of the items to be supplied by the nonmanufacturer comes from small business manufacturers, processors, and producers in the United States or its outlying areas or are subject to a waiver.

(iii) If a small business offeror is both a manufacturer of item(s) and a nonmanufacturer of other item(s) for an acquisition, the contracting officer shall apply the manufacturer size standard.

■ 4. Amend section 19.507 by revising paragraphs (e) and (h) to read as follows:

19.507 Solicitation provisions and contract clauses.

* * * * *

(e) The contracting officer shall insert the clause at 52.219–14, Limitations on Subcontracting, in solicitations and contracts—

(1) For supplies, services, and construction, if any portion of the requirement is to be set aside for small business and the contract amount is expected to exceed the simplified acquisition threshold, and in any solicitations and contracts that are set aside or awarded on a sole-source basis in accordance with subparts 19.8, 19.13, 19.14, or 19.15, regardless of dollar value. This includes multiple-award contracts when orders may be set aside for small business concerns, as described in 8.405–5 and 16.505(b)(2)(i)(F), and when orders may be issued directly to a small business concern as described in 19.504(c)(1)(ii). For contracts that are set aside, the contracting officer shall indicate in paragraph (f) of the clause whether compliance with the limitations on subcontracting is required at the contract or order level;

(2) *Using the HUBZone price evaluation preference.* However, if the prospective contractor waived the use of the price evaluation preference, or is an other than small business, do not insert the clause in the resultant contract.

* * * * *

(h)(1) The contracting officer shall insert the clause at 52.219–33, Nonmanufacturer Rule, in solicitations and contracts (including multiple-award contracts when orders may be set aside for small business concerns as described in 8.405–5 and 16.505(b)(2)(i)(F), and when orders may be issued directly to a small business concern as described in 19.504(c)(1)(ii)), when—

(i) the item being acquired has been assigned a manufacturing or supply NAICS code, and—

(ii)(A) Any portion of the requirement is to be—

(1) Set aside for small business and is expected to exceed the simplified acquisition threshold; or

(2) Set aside or awarded on a sole-source basis in accordance with subparts 19.8, 19.13, 19.14, or 19.15, regardless of dollar value; or

(B) *Using the HUBZone price evaluation preference.* However, if the prospective contractor waived the use of the price evaluation preference, or is an other than small business, do not insert the clause in the resultant contract.

(2) The contracting officer shall not insert the clause at 52.219–33 when the Small Business Administration has waived the nonmanufacturer rule (see 19.505(c)(4)).

19.811–3 [Amended]

■ 5. Amend section 19.811–3 by removing from paragraph (d) “The clause at 52.219–18 with its Alternate I shall be used when” and adding “Use the clause at 52.219–18 with its Alternate I when” in its place.

19.1308 [Removed and Reserved]

■ 6. Remove and reserve section 19.1308.

■ 7. Revise section 19.1309 to read as follows:

19.1309 Contract clauses.

(a) The contracting officer shall insert the clause at 52.219–3, Notice of HUBZone Set-Aside or Sole-Source Award, in solicitations and contracts for acquisitions that are set aside or awarded on a sole-source basis to, HUBZone small business concerns under 19.1305 or 19.1306. This includes multiple-award contracts when orders may be set aside for HUBZone small business concerns as described in 8.405–5 and 16.505(b)(2)(i)(F) or when orders may be issued directly to one HUBZone small business concern in accordance with 19.504(c)(1)(ii).

(b) The contracting officer shall insert the clause at 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.

(c) For use of clause 52.219–14, Limitations on Subcontracting, see the prescription at 19.507(e).

(d) For use of clause 52.219–33, Nonmanufacturer Rule, see the prescription at 19.507(h).

19.1403 [Amended]

■ 8. Amend section 19.1403 by removing from paragraph (d) “19.1407(c)” and adding “19.505” in its place.

19.1407 [Removed and Reserved]

■ 9. Remove and reserve section 19.1407.

■ 10. Revise section 19.1408 to read as follows:

19.1408 Contract clauses.

(a) The contracting officer shall insert the clause at 52.219–27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside, in solicitations and contracts for acquisitions that are set aside or awarded on a sole-source basis to, service-disabled veteran-owned small business concerns under 19.1405 and 19.1406. This includes multiple-award contracts when orders may be set aside for service-disabled veteran-owned small business concerns as described in 8.405–5 and 16.505(b)(2)(i)(F) or when orders may be issued directly to one service-disabled veteran-owned small business contractor in accordance with 19.504(c)(1)(ii).

(b) For use of clause 52.219–14, Limitations on Subcontracting, see the prescription at 19.507(e).

(c) For use of clause 52.219–33, Nonmanufacturer Rule, see the prescription at 19.507(h).

19.1507 [Removed and Reserved]

■ 11. Remove and reserve section 19.1507.

■ 12. Revise section 19.1508 to read as follows:

19.1508 Contract clauses.

(a) The contracting officer shall insert the clause at 52.219–29, Notice of Set-Aside for, or Sole-Source Award to, Economically Disadvantaged Women-owned Small Business Concerns, in solicitations and contracts for acquisitions that are set aside or awarded on a sole-source basis to, EDWOSB concerns under 19.1505(b) or 19.1506(a). This includes multiple-award contracts when orders may be set aside for EDWOSB concerns as described in 8.405–5 and 16.505(b)(2)(i)(F) or when orders may be issued directly to one EDWOSB contractor in accordance with 19.504(c)(1)(ii).

(b) The contracting officer shall insert the clause at 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, in solicitations and contracts for acquisitions that are set aside or awarded on a sole-source basis to WOSB concerns under 19.1505(c) or 19.1506(b). This includes multiple-award contracts when orders may be set aside for WOSB concerns eligible under the WOSB Program as described in 8.405–5 and 16.505(b)(2)(i)(F) or when orders may be issued directly to one

WOSB contractor in accordance with 19.504(c)(1)(ii).

(c) For use of clause 52.219–14, Limitations on Subcontracting, see the prescription at 19.507(e).

(d) For use of clause 52.219–33, Nonmanufacturer Rule, see the prescription at 19.507(h).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 13. Amend section 52.204–8 by—
- a. Revising the date of the provision;
- b. Revising paragraph (a)(3);
- c. Revising the date of Alternate I; and
- d. Revising paragraph (a)(2) of Alternate I.

The revisions read as follows:

52.204–8 Annual Representations and Certifications.

* * * * *

Annual Representations and Certifications (SEP 2021)

(a) * * *

(3) The small business size standard for a concern that submits an offer, other than on a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce is 500 employees if the acquisition—

(i) Is set aside for small business and has a value above the simplified acquisition threshold;

(ii) Uses the HUBZone price evaluation preference regardless of dollar value, unless the offeror waives the price evaluation preference; or

(iii) Is an 8(a), HUBZone, service-disabled veteran-owned, economically disadvantaged women-owned, or women-owned small business set-aside or sole-source award regardless of dollar value.

* * * * *

Alternate I (SEP 2021).

* * *

(a) * * *

(2) The small business size standard for a concern that submits an offer, other than on a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce, (*i.e.*, nonmanufacturer), is 500 employees if the acquisition—

(i) Is set aside for small business and has a value above the simplified acquisition threshold;

(ii) Uses the HUBZone price evaluation preference regardless of dollar value, unless the offeror waives the price evaluation preference; or

(iii) Is an 8(a), HUBZone, service-disabled veteran-owned, economically disadvantaged women-owned, or women-owned small business set-aside or sole-source award regardless of dollar value.

* * * * *

- 14. Amend section 52.212–1 by revising the date of the provision and paragraph (a) to read as follows:

52.212–1 Instructions to Offerors—Commercial Items.

* * * * *

Instructions to Offerors—Commercial Items (SEP 2021)

(a) *North American Industry Classification System (NAICS) code and small business size standard.* The NAICS code(s) and small business size standard(s) for this acquisition appear elsewhere in the solicitation.

However, the small business size standard for a concern that submits an offer, other than on a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce is 500 employees if the acquisition—

(1) Is set aside for small business and has a value above the simplified acquisition threshold;

(2) Uses the HUBZone price evaluation preference regardless of dollar value, unless the offeror waives the price evaluation preference; or

(3) Is an 8(a), HUBZone, service-disabled veteran-owned, economically disadvantaged women-owned, or women-owned small business set-aside or sole-source award regardless of dollar value.

* * * * *

- 15. Amend section 52.212–5 by revising the date of the clause and paragraphs (b)(11), (b)(12), (b)(19), (b)(21), (b)(22), (b)(23), (b)(24), and (b)(26) to read 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 (SEP 2021)

* * * * *

(b) * * *

(11) 52.219–3, Notice of HUBZone Set-Aside or Sole-Source Award (SEP 2021) (15 U.S.C. 657a).

(12) 52.219–4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns (SEP 2021) (if the offeror elects to waive the preference, it shall so indicate in its offer) (15 U.S.C. 657a).

* * * * *

(19) 52.219–14, Limitations on Subcontracting (SEP 2021) (15 U.S.C. 657s).

* * * * *

(21) 52.219–27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside (SEP 2021) (15 U.S.C. 657f).

(22)(i) 52.219–28, Post-Award Small Business Program Rerepresentation (SEP 2021) (15 U.S.C. 632(a)(2)).

(ii) Alternate I (MAR 2020) of 52.219–28.

(23) 52.219–29, Notice of Set-Aside for, or Sole-Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns (SEP 2021) (15 U.S.C. 637(m)).

(24) 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 (SEP 2021) (15 U.S.C. 637(m)).

* * * * *

(26) 52.219–33, Nonmanufacturer Rule (SEP 2021) (15 U.S.C. 657s).

* * * * *

- 16. Amend section 52.219–1 by—
- a. Revising the date of the provision;
- b. Removing from paragraph (b)(1) “—” and adding a space in its place;
- c. Revising paragraph (b)(3);
- d. Revising the date of Alternate II; and
- e. Revising paragraph (b)(2) of Alternate II.

The revisions read as follows:

52.219–1 Small Business Program Representations.

* * * * *

Small Business Program Representations (SEP 2021)

* * * * *

(b) * * *

(3) The small business size standard for a concern that submits an offer, other than on a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce (*i.e.*, nonmanufacturer), is 500 employees if the acquisition—

(i) Is set aside for small business and has a value above the simplified acquisition threshold;

(ii) Uses the HUBZone price evaluation preference regardless of dollar value, unless the offeror waives the price evaluation preference; or

(iii) Is an 8(a), HUBZone, service-disabled veteran-owned, economically disadvantaged women-owned, or women-owned small business set-aside or sole-source award regardless of dollar value.

* * * * *

Alternate II (SEP 2021).

* * * * *

(b) * * *

(2) The small business size standard for a concern that submits an offer, other than on a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce (*i.e.*, nonmanufacturer), is 500 employees if the acquisition—

(i) Is set aside for small business and has a value above the simplified acquisition threshold;

(ii) Uses the HUBZone price evaluation preference regardless of dollar value, unless the offeror waives the price evaluation preference; or

(iii) Is an 8(a), HUBZone, service-disabled veteran-owned, economically disadvantaged women-owned, or women-owned small business set-aside or sole-source award regardless of dollar value.

* * * * *

- 17. Amend section 52.219–3 by—
- a. Revising the introductory text;
- b. Revising the title and date of the clause;

- c. Revising paragraph (a);
 - d. In paragraph (b)(1) removing “sole source” and adding “sole-source” in its place;
 - e. In paragraph (b)(3) removing “set-aside” and adding “set aside” in its place;
 - f. Removing paragraphs (d), (e), and (f);
 - g. Redesignating paragraph (g) as paragraph (d); and
 - h. Removing Alternate I.
- The revisions read as follows:

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 (SEP 2021)

(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).

* * * * *

- 18. Amend section 52.219–4 by—
- a. In the introductory text removing “19.1309(b)(1)” and adding “19.1309(b)” in its place;
- b. Revising the date of the clause;
- c. Removing paragraphs (a), (d), and (e);
- d. Redesignating paragraphs (b), (c) and (f) as paragraphs (a), (b) and (c), respectively;
- e. Revising newly redesignated paragraph (b); and
- f. Removing Alternate I.

The revision reads as follows:

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

* * * * *

Notice of Price Evaluation Preference for HUBZone Small Business Concerns (SEP 2021)

* * * * *

(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.

☐ Offeror elects to waive the evaluation preference.

* * * * *

- 19. Revise section 52.219–14 to read as follows:

52.219–14 Limitations on Subcontracting.

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

Limitations on Subcontracting (SEP 2021)

(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 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 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 aside for small business concerns under multiple-award contracts, as described in 8.405–5 and 16.505(b)(2)(i)(F); 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.

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

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

(1) Services (except construction), 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;

(2) Supplies (other than procurement from a nonmanufacturer of such supplies), it will not pay more than 50 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 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, 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

(4) 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.

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

(1) For contracts, in accordance with paragraphs (c)(1), (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 (c)(4) and (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)

- 20. Amend section 52.219–27 by—
- a. Revising the date of the clause;
- b. Removing paragraphs (d) and (e);
- c. Redesignating paragraph (f) as paragraph (d); and
- d. Revising newly redesignated paragraph (d).

The revisions read as follows:

52.219–27 Notice of Service-Disabled Veteran-Owned Small Business Set-Aside.

* * * * *

Notice of Service-Disabled Veteran-Owned Small Business Set-Aside (SEP 2021)

* * * * *

(d) A joint venture may be considered a service-disabled veteran owned small business concern if—

(1) At least one member of the joint venture is a service-disabled veteran-owned small business concern, and makes the following representations:

(i) That it is a service-disabled veteran-owned small business concern, and

(ii) That it is a small business concern under the North American Industry Classification Systems (NAICS) code assigned to the procurement;

(2) Each other concern is small under the size standard corresponding to the NAICS code assigned to the procurement;

(3) The joint venture meets the requirements of 13 CFR 121.103(h); and

(4) The joint venture meets the requirements of 13 CFR 125.15(b).

■ 21. Amend section 52.219–28 by revising the date of the clause and paragraph (e) to read as follows:

52.219–28 Post-Award Small Business Program Rerepresentation.

* * * * *

Post-Award Small Business Program Rerepresentation (SEP 2021)

* * * * *

(e) The small business size standard for a Contractor providing an end item that it does not manufacture, process, or produce itself, for a contract other than a construction or service contract, is 500 employees if the acquisition—

(1) Was set aside for small business and has a value above the simplified acquisition threshold;

(2) Used the HUBZone price evaluation preference regardless of dollar value, unless the Contractor waived the price evaluation preference; or

(3) Was an 8(a), HUBZone, service-disabled veteran-owned, economically disadvantaged women-owned, or women-owned small business set-aside or sole-source award regardless of dollar value.

* * * * *

■ 22. Amend section 52.219–29 by—

■ a. Revising the section heading, clause heading, and date of the clause;

■ b. In paragraph (a) removing from the definition “Economically disadvantaged women-owned small business (EDWOSB) concern” “means- A small” and adding “means a small” in its place;

■ c. In paragraph (b)(1) removing “sole source” and adding “sole-source” in its place;

■ d. Removing paragraphs (d) and (e);

■ e. Redesignating paragraph (f) as paragraph (d);

■ f. In newly redesignated paragraph (d)—

■ i. In paragraph (1) removing “NAICS” and adding “North American Industry Classification System” in its place;

■ ii. In paragraph (3)(v) removing “venture.” and adding “venture; and” in its place;

■ iii. Removing paragraph (4);

■ iv. Redesignating paragraph (5) as (4); and

■ v. In newly redesignated paragraph (4) removing “procuring activity” and adding “Contracting Officer” in its place.

The revision reads as follows:

52.219–29 Notice of Set-Aside for, or Sole-Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns.

* * * * *

Notice of Set-Aside for, or Sole-Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns (SEP 2021)

* * * * *

■ 23. Amend section 52.219–30 by—

■ a. Revising the section heading, clause heading, date of the clause, and the introductory text of paragraph (a);

■ b. In paragraph (b)(1) removing “sole source” and adding “sole-source” in its place;

■ c. In the second sentence of paragraph (c)(1) removing “WOSB program” and adding “WOSB Program” in its place;

■ d. Removing paragraphs (d) and (e);

■ e. Redesignating paragraph (f) as paragraph (d);

■ f. In newly redesignated paragraph (d):

■ i. In paragraph (1) removing “NAICS” and adding “North American Industry Classification System” in its place;

■ ii. In paragraph (d)(3)(v) removing “venture.” and adding “venture; and” in its place;

■ iii. Removing paragraph (4);

■ iv. Redesignating paragraph (5) as (4); and

■ v. In newly redesignated paragraph (4) removing “procuring activity” and adding “Contracting Officer” in its place.

The revisions read as follows:

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.

* * * * *

Notice of Set-Aside for, or Sole-Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program (SEP 2021)

(a) *Definitions.* As used in this clause—

* * * * *

■ 24. Revise section 52.219–33 to read as follows:

52.219–33 Nonmanufacturer Rule.

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

Nonmanufacturer Rule (SEP 2021)

(a) *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.

Nonmanufacturer means a concern, including a supplier, that provides an end item it did not manufacture, process, or produce.

(b) *Applicability.*

(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); and

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

(c) *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)

* * * * *

[FR Doc. 2021–16364 Filed 8–10–21; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 19

[FAC 2021–07; FAR Case 2020–012; Item III; Docket No. FAR–2020–0012; Sequence No. 1]

RIN 9000–AO16

Federal Acquisition Regulation: Scope of Review by Procurement Center Representatives

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation to implement section 1811 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 to provide procurement center representatives with the discretion to review any acquisition.

DATES: Effective September 10, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Malissa Jones, Procurement Analyst, at 703–605–2815, or by email at Malissa.jones@gsa.gov, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or GSARegSec@gsa.gov. Please cite FAC 2021–07, FAR Case 2020–012.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are amending the Federal Acquisition Regulation (FAR) to implement section 1811 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328, 15 U.S.C. 644(l)(9)(A)). Section 1811 allows procurement center representatives to review any solicitation for a contract or task order without regard as to whether the contract or order is set aside for small business concerns, or reserved in the case of a multiple-award contract, or whether or not the solicitation would result in a bundled or consolidated contract or order. The Small Business Administration (SBA) issued a final rule at 84 FR 65647, dated November 29, 2019, to implement section 1811 of the NDAA for FY 2017. In their final rule, SBA amended 13 CFR 125.2(b)(1)(i)(A) to allow procurement center

representatives to review any acquisition, regardless of whether it is set aside, partially set aside, or reserved for small business or other socioeconomic categories.

II. Discussion and Analysis

The changes to the FAR and the rationale for the changes are summarized in the following paragraphs.

A. Contracting Officer Requirements for Review of Acquisitions

Section 19.202–1, Encouraging small business participation in acquisitions, is amended to require that contracting officers provide the procurement center representative a copy of any proposed acquisition package and other reasonably obtainable information related to the acquisition, if the procurement center representative exercises their discretion to review any proposed acquisition. The specific procedures are typically articulated in agreements between procuring activities and procurement center representatives. Section 19.202–1 is also amended to clarify the acquisitions for which the contracting officer must provide the statement described in paragraph (e)(2). In addition, changes are made to paragraph (d) of section 19.501, General, to provide that SBA procurement center representatives may review any proposed acquisition in excess of the micro-purchase threshold.

B. Duties of Procurement Center Representatives

Section 19.402, Small Business Administration procurement center representatives, is amended to update the description of a procurement center representative's duties to better reflect SBA's regulation at 13 CFR 125.2(b). Specifically, changes to FAR 19.402(c) are made to provide that procurement center representatives may recommend the set-aside or sole-source award to a small business; the breakout of discrete components, items, and requirements for competition; and ways to improve competition. Paragraph (c)(7) in section 19.402 is relocated from section 19.403, Small Business Administration breakout procurement center representatives. This paragraph describes the appeal a procurement center representative may file if a contracting activity does not adopt the procurement center representative's recommendation.

C. Duties of Breakout Procurement Center Representative

The text of section 19.403, Small Business Administration breakout procurement center representatives, is

removed and marked “Reserved.” Paragraph (c)(8) in this section is relocated to section 19.402 (see section II.B. of this preamble). Breakout procurement center representatives were removed from the Small Business Act (15 U.S.C. 644) by section 1621 of the NDAA for FY 2013 (Pub. L. 112–239). Therefore, section 19.403 is no longer needed.

D. Technical Amendments

Section 19.502–8, Rejecting Small Business Administration recommendations, has a two working-day appeals period. There is a different appeals period for the HUBZone, Service-Disabled Veteran-Owned Small Business, and Women-Owned Small Business Programs, of five working days; therefore, a reference is added to FAR 19.502–8(b) for those sections.

III. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the FAR is 41 U.S.C. 1707 entitled “Publication of Proposed Regulations.” Paragraph (a)(1) of the statute requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because it amends requirements related to the review of proposed acquisitions by SBA's procurement center representatives. These requirements affect only the internal operating procedures of the Government.

IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule amends FAR part 19, Small Business Programs. The objective of this rule is to update requirements for contracting officers with regard to reviews of proposed acquisitions by SBA's procurement center representatives, to align with section 1811 of the NDAA for FY 2017 (Pub. L. 114–328, 15 U.S.C. 644(l)(9)(A)). This rule does not change the applicability or text of any FAR solicitation provisions or contract clauses.

V. Expected Impact of the Rule

The changes in this rule will affect Government operations, but not contractor operations.

As a result of this rule, contracting officers may have to provide additional acquisition packages to procurement center representatives for review prior to issuance of the solicitation. The number of additional acquisitions to be reviewed by PCRs is unknown, as the reviews will be conducted at the discretion of the procurement center representatives.

The cost impact for the Government will depend on how many additional acquisition packages contracting officers provide to procurement center representatives for review. This rule will have no cost impact for contractors.

VI. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VII. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD, GSA, and NASA will send the rule and the “Submission of Federal Rules Under the Congressional Review Act” form to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804.

VIII. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section III of this preamble), the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612) are not applicable. Accordingly, no regulatory flexibility

analysis is required, and none has been prepared.

IX. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

List of Subjects in 48 CFR Part 19

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR part 19 as set forth below:

PART 19—SMALL BUSINESS PROGRAMS

■ 1. The authority citation for 48 CFR part 19 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

■ 2. Amend section 19.202–1 by—

■ a. In paragraph (e)(1)(ii) removing “; or” and adding “;” in its place;

■ b. In paragraph (e)(1)(iii) removing “Utilization.” and adding “Utilization; or” in its place;

■ c. Adding paragraph (e)(1)(iv); and

■ d. Revising paragraph (e)(2) introductory text.

The addition and revision read as follows:

19.202–1 Encouraging small business participation in acquisitions.

* * * * *

(e)(1) * * *

(iv) The acquisition will be reviewed at the PCR’s discretion.

(2) For acquisitions described in paragraph (e)(1)(i) through (iii) of this section, provide a statement explaining why the—

* * * * *

■ 3. Amend section 19.402 by—

■ a. Revising paragraph (c)(1)(i);

■ b. Removing from the end of paragraph (c)(1)(ii) “and”;

■ c. Revising paragraph (c)(1)(iii); and

■ d. Adding paragraphs (c)(1)(iv) and (c)(7).

The revisions and additions read as follows:

19.402 Small Business Administration procurement center representatives.

* * * * *

(c) * * *

(1) * * *

(i) The set-aside or sole-source award to a small business of selected acquisitions;

* * * * *

(iii) Breakout of discrete components, items, and requirements for competitive acquisitions; and

(iv) Ways to improve competition.

* * * * *

(7) Appealing a contracting officer’s rejection of PCR’s recommendation. Such appeal must be in writing and shall be filed and processed in accordance with the appeal procedures set out in 19.502–8.

19.403 [Removed and Reserved]

■ 4. Remove and reserve section 19.403.

■ 5. Amend section 19.501 by revising paragraph (d) to read as follows:

19.501 General.

* * * * *

(d) At the request of an SBA PCR (or, if a PCR is not assigned, see 19.402(a)), the contracting officer shall make available for review at the contracting office (to the extent of the SBA representative’s security clearance) any proposed acquisition in excess of the micro-purchase threshold.

* * * * *

■ 6. In section 19.502–8 amend paragraph (b) by revising the first sentence to read as follows:

19.502–8 Rejecting Small Business Administration recommendations.

* * * * *

(b) The SBA PCR (or, if a PCR is not assigned, see 19.402(a)) may appeal the contracting officer’s rejection to the head of the contracting activity within 2 working days after receiving the notice (except see 19.1305(d), 19.1405(d), and 19.1505(g)). * * *

* * * * *

[FR Doc. 2021–16365 Filed 8–10–21; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 19, 42, and 52

[FAC 2021–07; FAR Case 2019–004; Item IV; Docket No. FAR–2019–0030, Sequence No. 1]

RIN 9000–AN87

Federal Acquisition Regulation: Good Faith in Small Business Subcontracting

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation to implement a section of the National Defense Authorization Act for Fiscal Year 2017, which requires examples of failure to make good faith efforts to comply with a small business subcontracting plan.

DATES: Effective September 10, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Dana Bowman, Procurement Analyst, at 202–803–3188, or by email at dana.bowman@gsa.gov, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755 or GSARegSec@gsa.gov. Please cite FAC 2021–07, FAR Case 2019–004.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule on June 3, 2020, at 85 FR 34155, to implement section 1821 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (section 1821(c) of Pub. L. 114–328; 15 U.S.C. 637 note). Section 1821 requires the Small Business Administration (SBA) to amend its regulations to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. SBA issued a final rule at 84 FR 65647, dated November 29, 2019, to implement section 1821 of the NDAA for FY 2017. In its final rule, SBA amended 13 CFR 125.3(d)(3) to provide guidance on evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan and a list of examples of activities

reflective of a failure to make a good faith effort.

Additionally, SBA revised 13 CFR 125.3(c)(1)(iv) to require that prime contractors with commercial subcontracting plans include indirect costs in their subcontracting goals. Other than small business concerns that have a commercial subcontracting plan report on performance through a summary subcontract report (SSR). Prior to the publication of its final rule, SBA's regulations required that contractors using a commercial subcontracting plan must include all indirect costs in their SSRs, but did not require these contractors to include indirect costs in their subcontracting goals, which led to inconsistencies when comparing the data reported in the SSR to the goals in the commercial subcontracting plan.

Small business subcontracting plans are required from large prime contractors when a contract is expected to exceed \$750,000 (\$1.5 million for construction) and has subcontracting possibilities. FAR 19.704 lists the elements of the plan, which include the contractor's goals for subcontracting to small business concerns and a description of the efforts the contractor will make to ensure that small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns have an equitable opportunity to compete for subcontracts. Failure to make a good faith effort to comply with the plan may result in the assessment of liquidated damages per FAR 52.219–16, Liquidated Damages—Subcontracting Plan.

This final FAR rule requires that all indirect costs, with certain exceptions, are included in commercial plans and SSRs.

FAR 19.705–7 contains examples of a good faith effort, and examples of a failure to make a good faith effort.

Four respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments received and any changes made to the rule as a result of the public comments are provided as follows:

A. Summary of Significant Changes From the Proposed Rule

There are no changes made to the final rule.

B. Analysis of Public Comments

1. Clarify Applicability to Subcontracts for Commercial Items and Commercially Available Off-the-Shelf (COTS) Items

Comment: One respondent commented that the rule should clarify that the “good faith” requirement is not applicable to subcontracts for commercial and COTS items under prime contracts. The respondent commented that the proposed rule does not address FAR 52.219–9(j), which states that subcontracting plans are not required from subcontractors when the prime contract contains the clause at 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, or when the subcontractor provides a commercial item subject to the clause at 52.244–6, Subcontracts for Commercial Items, under a prime contract.

Response: This rule does not revise the conditions for when a subcontracting plan is required. If a subcontracting plan is not required, then the examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan are not applicable. No changes were made to the final rule as a result of this comment.

2. Material Breach

a. FAR Language Broader Than SBA Language

Comment: One respondent stated that the proposed FAR language at 19.705–7(d) is much broader than the SBA final rule and is unclear on whether “material breach” refers to the subcontracting plan or a breach of the contract itself.

Response: FAR 19.705–5(a)(5) requires that the subcontracting plan become a “material part of the contract upon award.” The final rule text at FAR 19.705–7(d), similar to the SBA final rule, cites FAR 52.219–16, Liquidated Damages—Subcontracting Plan, which provides the corrective actions available to all Federal Government contracting officers when a contractor fails to make a good faith effort to comply with the subcontracting plan, while also giving consideration to other Federal contracting regulations. In this context, a failure to make a good faith effort to comply with a subcontracting plan is a material breach, sufficient for the assessment of liquidated damages, and also for other remedies the Government may have. No changes were made to the final rule as a result of this comment.

b. Recommended Language To Be Added to Final Rule

Comment: One respondent requested the proposed FAR language at 19.705–7(d) include language to indicate that the contractor has an opportunity to rebut and appeal before a determination of noncompliance is rendered and provided recommended text.

Response: The clause at FAR 52.219–16, Liquidated Damages—Subcontracting Plan, which is cited in proposed FAR text 19.705–7(d), specifically 52.219–16(c), allows the contractor an opportunity to demonstrate what good faith efforts have been made and to discuss the matter, before the contracting officer’s final decision. No changes were made to the final rule as a result of this comment.

3. Clarifications

a. Ensure Consistency Between FAR 52.219–16 and Proposed FAR 19.705–7(b)(2)

Comment: One respondent recommended that to remain consistent, the proposed language at FAR 19.705–7(b)(2) should either include the language contained in 52.219–16 or include references to the intent of 52.219–16, as the examples provided at FAR 19.705–7(b)(2) may occur without willful or intentional behavior. The respondent also recommended that intent and examples should be read together providing that an occurrence of the examples without intent would not constitute a violation. Specifically, failure to make a good faith effort must meet the “willful or intentional” standard. The respondent also provided various reasons why the FAR should make it clear that an occurrence of the examples without intent would not constitute a violation.

Response: This final rule is implementing current SBA regulation. SBA’s language at 13 CFR 125.3(d)(3) provides guidance on evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan. This language parallels the language in SBA’s rule providing contracting officers with examples to consider, in the context of the contractor’s total effort, as possible indicators of a failure to make a good faith effort. SBA’s rule does not reference the “willful and intentional” language. The FAR text will not be revised to incorporate the requested language as the “willful and intentional” language already appears in the definition of “failure to make a good faith effort to comply with the subcontracting plan” at both FAR

19.701 and in the clause at FAR 52.219–16. No changes were made to the final rule as a result of this comment.

b. Clarify the Intent of the Proposed Language at FAR 19.705–7(b)(2)(vi)

Comment: One respondent stated FAR 19.705–7(b)(2)(vi), as written, could be misinterpreted to hold a lower-tier contractor to the terms of a prime contractor’s contract with the Government and recommended a revision to provide the intent of the text is to ensure a contractor pays its small business subcontractors in accordance with the terms of their contract with the small business.

Response: The current text states, “Failure to pay small business subcontractors in accordance with the terms of the contract with the prime contractor,” and provides that the intent pertains to the subcontractor’s contract with the prime contractor. The final rule FAR text will not be revised to include the recommended text.

c. Clarify Intent of FAR 19.705–7(b)(2)(vii)

Comment: One respondent stated that the language at FAR 19.705–7(b)(2)(vii) should be revised to expressly require prime contractors to attend training as a remedy to any performance review findings. The respondent further stated that this is necessary given that a failure to attend the training offered by the Government could be perceived as a failure to make a good faith effort. The respondent provided recommended revisions to 19.705–7(b)(2)(vii).

Response: The respondent’s interpretation of the language at FAR 19.705–7(b)(2)(vii) is correct. If a contractor does not either correct substantiated findings or participate in subcontracting plan management training offered by the Government, it could be perceived by the contracting officer as a failure to make a good faith effort. This is not all inclusive of failure to make a good faith effort, but is one of many instances and examples used to show a lack of good faith effort on behalf of the prime contractor. Additionally, the contracting officer has the choice of requiring or recommending other corrective remedies as deemed necessary. The respondent’s recommended language is more restrictive by suggesting “and” instead of “or” as written in the SBA rule. The final rule FAR text will not be revised to include the recommended text.

d. Clarify Applicability to Contracts at or Below the Simplified Acquisition Threshold

Comment: One respondent stated that the preamble to the proposed rule indicates that the FAR Council is considering expanding the scope of the rule to include contracts at or below the simplified acquisition threshold (SAT) and recommended that the final FAR rule under this case should specify that it does not apply to contracts at or below the SAT. The respondent further stated that contracts at or below the SAT must be exempt from any policy or regulatory requirements pertaining to Small Business Plans.

Response: Section 8(d) of the Small Business Act (15 U.S.C. 637(d)) requires subcontracting plans only for acquisitions valued above \$750,000 (\$1.5 million for construction contracts). As stated in section III of this preamble, the requirements of section 1821 of the NDAA for FY 2017 (Pub. L. 114–328; 15 U.S.C 637 note) do not apply to contracts at or below the SAT.

e. Clarify Intent of FAR 19.705–7(b)(1)(v)

Comment: One respondent stated that the language at FAR 19.705–7(b)(1)(v) does not make clear how a contracting officer would make a determination that a contractor has “negotiated in good faith with interested small business.” The respondent also states that it is not clear how a contractor would negotiate with a small business that is merely interested in participating as a subcontractor.

Response: The language at FAR 19.705–7(b)(1)(v) is broadly written, as the intent is not to restrict or limit the contracting officer’s authority or ability to determine the prime contractor’s effort to negotiate in good faith. No changes were made to the FAR final rule as a result of this comment.

4. Outside the Scope of This Rule

Comment: One respondent had no issue with the proposed changes and clarifications in the language (FAR text) and agreed that the requirements should be consistent. However, the respondent disagreed with commercial subcontracting plans allowing large businesses to “capture and be credited for small dollars spent” that have nothing to do with the specific awarded Federal contract. The respondent recommended a maximum cap proposed at 0.5 percent to the large business and that any remaining credit or subcontracting expenditure allowed be with the small business directly involved and subcontracted to the

specific awarded Federal contract. The respondent further reiterated the original intent of the subcontracting law was to encourage large business primes to work and subcontract with small businesses in support of the Federal contract awarded and not to receive credit for unrelated work. Another respondent acknowledged the importance of prime contractors making a good faith effort to comply with SBA's small business subcontracting plan. The respondent further stated that the country is in the midst of a deadly pandemic and offered additional political commentary irrelevant to the subject FAR case.

Response: The comments are outside the scope of this rule. The intent of this rule is to provide guidance on evaluating whether a prime contractor made a good faith effort to comply with its small business subcontracting plan and to provide a list of examples of activities reflective of a failure to make a good faith effort. Additionally, this rule is amending the FAR to require that all indirect costs, minus certain exceptions, are included in both commercial plans and summary subcontract reports.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule implements a statutory requirement to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. The Federal Acquisition Regulatory Council (FAR Council) does not intend to apply the requirements of section 1821 of the NDAA for FY 2017 (Pub. L. 114–328; 15 U.S.C 637 note) to contracts at or below the SAT, but intends to apply those requirements to contracts for the acquisition of commercial items, including COTS items. The clauses at FAR 52.219–9 and 52.219–16 are revised by this rule.

A. Applicability to Contracts at or Below the SAT

Pursuant to 41 U.S.C. 1905, a provision of law is not applicable to acquisitions at or below the SAT unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1905 and states that the law applies to acquisitions at or below the SAT; or (iii) the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT. If

none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to acquisitions at or below the SAT.

The purpose of this rule is to implement section 1821 of the NDAA for FY 2017. Section 1821 requires SBA to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan.

The FAR Council does not intend to apply this rule to acquisitions at or below the SAT.

B. Applicability to Contracts for the Acquisition of Commercial Items

Pursuant to 41 U.S.C. 1906, acquisitions of commercial items (other than acquisitions of COTS items, which are addressed in 41 U.S.C. 1907) are exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1906 and states that the law applies to acquisitions of commercial items; or (iii) the FAR Council makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of commercial items from the provision of law. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to the acquisition of commercial items.

The purpose of this rule is to implement section 1821 of the NDAA for FY 2017 and SBA's implementing regulations. Section 1821 requires SBA to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. Both the FAR and SBA's regulations require contractors with small business subcontracting plans—including commercial plans—to make a good faith effort to comply with the plans. SBA's final rule did not exempt the acquisition of commercial items.

Section 1821 furthers the Administration's goal of supporting small business. It advances the interests of small business subcontractors by promoting good faith efforts by large prime contractors to find and use small business concerns as subcontractors, thereby providing valuable opportunities for small business concerns.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of this rule to the acquisition of commercial items.

C. Applicability to Contracts for the Acquisition of COTS Items

Pursuant to 41 U.S.C. 1907, acquisitions of COTS items will be exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1907 and states that the law applies to acquisitions of COTS items; (iii) concerns authorities or responsibilities under the Small Business Act (15 U.S.C. 644) or bid protest procedures developed under the authority of 31 U.S.C. 3551 *et seq.*, 10 U.S.C. 2305(e) and (f), or 41 U.S.C. 3706 and 3707; or (iv) the Administrator for Federal Procurement Policy makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items from the provision of law. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to the acquisition of COTS items.

The purpose of this rule is to implement section 1821 of the NDAA for FY 2017 and SBA's implementing regulations. Section 1821 requires SBA to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. Both the FAR and SBA's regulations require contractors with small business subcontracting plans—including commercial plans—to make a good faith effort to comply with the plans. SBA's final rule did not exempt the acquisition of COTS items.

Section 1821 furthers the Administration's goal of supporting small business. It advances the interests of small business subcontractors by promoting good faith efforts by large prime contractors to find and use small business concerns as subcontractors, thereby providing valuable opportunities for small business concerns.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of this rule to the acquisition of COTS items.

IV. Expected Impact of the Rule

This rule provides examples of activities that contracting officers may consider when evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan. The contracting officers also have consistent and uniform examples to identify and hold large prime contractors accountable for failing to make a good faith effort to

comply with their subcontracting plans. Encouraging large prime contractors to meet their subcontracting goals may have a positive economic impact on any small business entity that wishes to participate in Federal procurement as a subcontractor.

The final rule also requires prime contractors with commercial subcontracting plans to include indirect costs, with certain exceptions, in their subcontracting goals. This will ensure that the data reported in the summary subcontract report is consistent with the goals in the commercial subcontracting plan.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD, GSA, and NASA will send the rule and the “Submission of Federal Rules Under the Congressional Review Act” form to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601–612. The FRFA is summarized as follows:

The objective of this final rule is to implement section 1821 of the NDAA for FY 2017 and SBA’s implementing regulations, which provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. SBA amended 13 CFR 125.3(d)(3) to provide guidance on evaluating whether the prime contractor made a good

faith effort to comply with its small business subcontracting plan and a list of examples of activities reflective of a failure to make a good faith effort.

Additionally, SBA amended 13 CFR 125.3(c)(1)(iv) to require that large prime contractors with commercial subcontracting plans include indirect costs in the commercial subcontracting plan goals. Large prime contractors that have a commercial subcontracting plan report on performance through a Summary Subcontract Report (SSR) in the Electronic Subcontracting Reporting System (eSRS). The FAR currently requires—as SBA’s regulations required prior to publication of SBA’s final rule—that a contractor using a commercial subcontracting plan include all indirect costs in its SSR. However, these regulations did not require contractors to include indirect costs in their commercial subcontracting plan goals, which leads to inconsistencies when comparing the data reported in the SSR to the goals in the commercial subcontracting plan.

There were no significant issues raised by the public comments in response to the initial regulatory flexibility analysis.

This rule may have a positive economic impact on any small entity that wishes to participate in Federal procurement as a subcontractor.

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities. This rule provides guidance to the contracting officer on evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan and a list of examples of activities reflective of a failure to make a good faith effort.

By providing examples of a failure to make a good faith effort to comply with small business subcontracting plans, the FAR will enable contracting officers to determine more easily whether large prime contractors have made a good faith effort to comply with their subcontracting plans and to hold large prime contractors accountable for failing to make a good faith effort to comply with their subcontracting plans. More diligence in developing and meeting subcontracting goals on the part of large prime contractors could have a positive impact of giving small business concerns more opportunities to subcontract on Federal contracts.

Data from the Federal Procurement Data System for fiscal years 2018 through 2020 indicate that there were 7,656 entities with 30,414 new awards that required subcontracting plans. Of the 30,414 new awards, 18 percent or 5,399 required commercial subcontracting plans. Additionally, 31 percent or 2,318 of the 7,656 unique awardees required commercial subcontracting plans. According to the Federal Funding Accountability and Transparency Act Subaward Reporting System (FSRS), there are 19,596 unique entities who are subcontractors. Approximately 80 percent of the entities registered in the System for Award Management are small entities. Therefore, we estimate that 80 percent (15,677) of the subcontractors in FSRS are small entities. These small entities may benefit from this rule.

This final rule requires a large prime contractor with a commercial subcontracting plan to include indirect costs in its subcontracting goals. The benefit of requiring that indirect costs be included in subcontracting goals in commercial subcontracting plans is that it will increase the small business subcontracting goal and thus, increase the amount of funds the prime contractor will subcontract to small business concerns, providing more opportunities for subcontract awards to small business concerns.

This final rule does not include any new reporting, recordkeeping, or other compliance requirements for small entities.

There are no known significant alternative approaches that would accomplish the stated objectives of the applicable statute.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. 3501–3521) applies to this rule; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0007, Subcontracting Plans.

List of Subjects in 48 CFR Parts 19, 42, and 52

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 19, 42, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 19, 42, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 19—SMALL BUSINESS PROGRAMS

- 2. Amend section 19.704 by—
- a. In paragraph (a)(6) removing the phrase “subcontracting goals” and adding the phrase “subcontracting goals (for commercial plans, see paragraph (d) of this section)” in its place;
- b. Revising paragraph (d) introductory text; and
- c. In paragraph (d)(4) removing the phrase “one SSR” and adding the phrase “one SSR that includes all indirect costs, except as described in paragraph (d) of this section,” in its place.

The revision reads as follows:

19.704 Subcontracting plan requirements.

* * * * *

(d) A commercial plan (as defined in 19.701) is the preferred type of subcontracting plan for contractors furnishing commercial items. The subcontracting goals established for a commercial plan shall include all indirect costs with the exception of those such as the following: Employee salaries and benefits; payments for petty cash; depreciation; interest; income taxes; property taxes; lease payments; bank fees; fines, claims, and dues; original equipment manufacturer relationships during warranty periods (negotiated up front with the product); utilities and other services purchased from a municipality or an entity solely authorized by the municipality to provide those services in a particular geographical region; and philanthropic contributions. Once a contractor's commercial plan has been approved, the Government shall not require another subcontracting plan from the same contractor while the plan remains in effect, as long as the product or service being provided by the contractor continues to meet the definition of a commercial item. The contractor shall—

* * * * *

19.705–4 [Amended]

■ 3. In section 19.705–4 amend paragraph (c), in the fourth sentence, by removing the phrase “faith effort” and adding the phrase “faith effort (see 19.705–7)” in its place.

■ 4. Amend section 19.705–6 by revising paragraphs (g)(1), (h), and (i) to read as follows:

19.705–6 Postaward responsibilities of the contracting officer.

* * * * *

(g) * * *

(1) Assess whether the prime contractor made a good faith effort to comply with its small business subcontracting plan. See 19.705–7(b) for more information on the determination of good faith effort.

* * * * *

(h) Initiate action to assess liquidated damages in accordance with 19.705–7 upon a recommendation by the administrative contracting officer, if one is assigned, or receipt of other reliable evidence to indicate that assessing liquidated damages is warranted.

(i) Take action to enforce the terms of the contract upon receipt of a notice from the contract administration office under 19.706(f).

* * * * *

■ 5. Amend section 19.705–7 by—

■ a. Revising the section heading;

■ b. In paragraph (a)—

■ i. Adding a paragraph heading;

■ ii. Removing the phrase “small disadvantaged business” and adding the phrase “small disadvantaged business,” in its place;

■ c. Revising paragraphs (b), (c), (d), and (e);

■ d. Adding a paragraph heading to the introductory text of paragraph (f);

■ e. Removing paragraph (g); and

■ f. Redesignating paragraph (h) as paragraph (f)(5).

The revisions and additions read as follows:

19.705–7 Compliance with the subcontracting plan.

(a) *General.* * * *

(b) *Determination of good faith effort.*

(1) In determining whether a contractor failed to make a good faith effort to comply with its subcontracting plan, a contracting officer must look to the totality of the contractor's actions, consistent with the information and assurances provided in its plan. The fact that the contractor failed to meet its subcontracting goals does not, in and of itself, constitute a failure to make a good faith effort (see 19.701). For example, notwithstanding a contractor's diligent effort to identify and solicit offers from any of the small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, factors such as unavailability of anticipated sources or unreasonable prices may frustrate achievement of the contractor's subcontracting goals. The contracting officer may consider any of the following, though not all inclusive, to be indicators of a good faith effort:

(i) Breaking out work to be subcontracted into economically feasible units, as appropriate, to facilitate small business participation.

(ii) Conducting market research to identify potential small business subcontractors through all reasonable means, such as searching SAM, posting notices or solicitations on SBA's SUBNet, participating in business matchmaking events, and attending preproposal conferences.

(iii) Soliciting small business concerns as early in the acquisition process as practicable to allow them sufficient time to submit a timely offer for the subcontract.

(iv) Providing interested small businesses with adequate and timely information about plans, specifications, and requirements for performance of the

prime contract to assist them in submitting a timely offer for the subcontract.

(v) Negotiating in good faith with interested small businesses.

(vi) Directing small businesses that need additional assistance to SBA.

(vii) Assisting interested small businesses in obtaining bonding, lines of credit, required insurance, necessary equipment, supplies, materials, or services.

(viii) Utilizing the available services of small business associations; local, state, and Federal small business assistance offices; and other organizations.

(ix) Participating in a formal mentor-protégé program with one or more small business protégés that results in developmental assistance to the protégés.

(x) Although failing to meet the subcontracting goal in one socioeconomic category, exceeding the goal by an equal or greater amount in one or more of the other categories.

(xi) Fulfilling all of the requirements of the subcontracting plan.

(2) When considered in the context of the contractor's total effort in accordance with its plan, the contracting officer may consider any of the following, though not all inclusive, to be indicators of a failure to make a good faith effort:

(i) Failure to attempt through market research to identify, contact, solicit, or consider for contract award small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business concerns, through all reasonable means including outreach, industry days, or the use of Federal systems such as SBA's Dynamic Small Business Search or SUBNet systems.

(ii) Failure to designate and maintain a company official to administer the subcontracting program and monitor and enforce compliance with the plan.

(iii) Failure to submit an acceptable ISR, or the SSR, using the eSRS, or as provided in agency regulations, by the report due dates specified in 52.219–9, Small Business Subcontracting Plan.

(iv) Failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan including subcontracting flowdown requirements.

(v) Adoption of company policies or documented procedures that have as their objectives the frustration of the objectives of the plan.

(vi) Failure to pay small business subcontractors in accordance with the

terms of the contract with the prime contractor.

(vii) Failure to correct substantiated findings from Federal subcontracting compliance reviews or participate in subcontracting plan management training offered by the Government.

(viii) Failure to provide the contracting officer with a written explanation if the contractor fails to acquire articles, equipment, supplies, services, or materials or obtain the performance of construction work as described in 19.704(a)(12).

(ix) Falsifying records of subcontract awards to small business concerns.

(c) *Documentation of good faith effort.* If, at completion of the basic contract or any option, or in the case of a commercial plan, at the close of the fiscal year for which the plan is applicable, a contractor has failed to comply with the requirements of its subcontracting plan, which includes meeting its subcontracting goals, the contracting officer shall review all available information for an indication that the contractor has not made a good faith effort to comply with the plan. If no such indication is found, the contracting officer shall document the file accordingly.

(d) *Notice of failure to make a good faith effort.* If the contracting officer decides in accordance with paragraph (b) of this section that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall give the contractor written notice in accordance with 52.219–16, Liquidated Damages—Subcontracting Plan, specifying the material breach, which may be included in the contractor's past performance information, advising the contractor of the possibility that the contractor may have to pay to the Government liquidated damages, and providing a period of 15 working days (or longer period as necessary) within which to respond. The notice shall give the contractor an opportunity to demonstrate what good faith efforts have been made before the contracting officer issues the final decision and shall further state that failure of the contractor to respond may be taken as an admission that no valid explanation exists.

(e) *Payment of liquidated damages.* (1) If, after consideration of all the pertinent data, the contracting officer finds that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall issue a final decision to the contractor to that effect and require the payment of liquidated damages in an amount stated. The contracting officer's

final decision shall state that the contractor has the right to appeal under the clause in the contract entitled Disputes. Calculations and procedures shall be in accordance with 52.219–16, Liquidated Damages—Subcontracting Plan.

(2) The amount of damages attributable to the contractor's failure to comply shall be an amount equal to the actual dollar amount by which the contractor failed to achieve each subcontracting goal. For calculations for commercial plans see paragraph (f) of this section.

(3) Liquidated damages shall be in addition to any other remedies that the Government may have.

(f) *Commercial plans.* * * *

19.706 [Amended]

■ 6. In section 19.706 amend paragraph (f) by removing the phrase “subcontracting plan” and adding the phrase “subcontracting plan (see 19.705–7(b) for more information on the determination of good faith effort)” in its place.

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 7. Amend section 42.1501 by redesignating paragraphs (a)(5) thru (a)(7) as paragraphs (a)(6) thru (a)(8) and adding a new paragraph (a)(5) to read as follows:

42.1501 General.

(a) * * *

(5) Complying with the requirements of the small business subcontracting plan (see 19.705–7(b));

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Amend section 52.212–5 by revising the date of the clause and paragraphs (b)(17)(i), (b)(17)(v), and (b)(20) to read 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 (SEP 2021)

* * * * *

(b) * * *

(17)(i) 52.219–9, Small Business Subcontracting Plan (SEP 2021) (15 U.S.C. 637(d)(4)).

* * * * *

(v) Alternate IV (SEP 2021) of 52.219–9.

* * * * *

(20) 52.219–16, Liquidated Damages—Subcontracting Plan (SEP 2021) (15 U.S.C. 637(d)(4)(F)(i)).

* * * * *

■ 9. Amend section 52.219–9 by—

■ a. Revising the date of the clause;

■ b. In paragraph (d)(2)(i) removing the word “subcontracts” and adding the phrase “subcontracts, including all indirect costs except as described in paragraph (g) of this clause,” in its place;

■ c. Adding a new fifth sentence to paragraph (g);

■ d. Revising the date of Alternate IV, and paragraph (d)(2)(i) of Alternate IV.

The revised and added text reads as follows:

52.219–9 Small Business Subcontracting Plan.

* * * * *

Small Business Subcontracting Plan (SEP 2021)

* * * * *

(g) * * * A Contractor authorized to use a commercial subcontracting plan shall include in its subcontracting goals and in its SSR all indirect costs, with the exception of those such as the following: Employee salaries and benefits; payments for petty cash; depreciation; interest; income taxes; property taxes; lease payments; bank fees; fines, claims, and dues; original equipment manufacturer relationships during warranty periods (negotiated up front with the product); utilities and other services purchased from a municipality or an entity solely authorized by the municipality to provide those services in a particular geographical region; and philanthropic contributions. * * *

* * * * *

Alternate IV (SEP 2021). * * *

(d) * * *

(2) * * *

(i) Total dollars planned to be subcontracted for an individual subcontracting plan; or the Contractor's total projected sales, expressed in dollars, and the total value of projected subcontracts to support the sales for a commercial plan, including all indirect costs, with the exception of those such as the following: Employee salaries and benefits; payments for petty cash; depreciation; interest; income taxes; property taxes; lease payments; bank fees; fines, claims, and dues; original equipment manufacturer relationships during warranty periods (negotiated up front with the product); utilities and

other services purchased from a municipality or an entity solely authorized by the municipality to provide those services in a particular geographical region; and philanthropic contributions;

* * * * *

- 10. Amend 52.219–16 by—
- a. Revising the date of the clause; and
- b. In paragraph (b) in the second sentence removing the phrase “plan, established” and adding “plan (see 19.705–7), established” in its place.

The revision reads as follows:

52.219–16 Liquidated Damages—Subcontracting Plan.

* * * * *

Liquidated Damages—Subcontracting Plan (SEP 2021)

* * * * *

[FR Doc. 2021–16366 Filed 8–10–21; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 42 and 52

[FAC 2021–07; Item V; Docket No. FAR–2021–0052; Sequence No. 3]

Federal Acquisition Regulation; Technical Amendments

AGENCY: 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 needed editorial changes.

DATES: Effective September 10, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Lois Mandell, Regulatory Secretariat Division (MVCB), at 202–501–4755 or GSARegSec@gsa.gov. Please cite FAC 2021–07, Technical Amendments.

SUPPLEMENTARY INFORMATION: This document makes editorial changes to 48 CFR parts 42 and 52.

List of Subjects in 48 CFR Parts 42 and 52

Government procurement.

William F. Clark,
Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 42 and 52 as set forth below:

- 1. The authority citation for 48 CFR parts 42 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

42.709–0 through 42.709–6 [Redesignated as 42.709–1 through 42.709–7]

- 2. Redesignate sections 42.709–0 through 42.709–6 as sections 42.709–1 through 42.709–7.

42.709–3 [Amended]

- 3. Amend newly redesignated section 42.709–3 by—
- a. In paragraph (a)(1) removing “42.709–1(a)” and adding “42.709–2(a)” in its place;
- b. In paragraph (a)(2) removing “42.709–5” and adding “42.709–6” in its place; and
- c. In paragraph (b)(1) removing “42.709–1(a)” and adding “42.709–2(a)” in its place.

42.709–4 [Amended]

- 4. Amend newly designated section 42.709–4 by—
- a. In the introductory text removing “42.709–5” and adding “42.709–6” in its place;
- b. In paragraph (a) removing “42.709–1(a)(1)” and adding “42.709–2(a)(1)” in its place; and
- c. In paragraph (b) introductory text removing “42.709–1(a)(2)” and adding “42.709–2(a)(2)” in its place.

42.709–5 [Amended]

- 5. Amend newly designated section 42.709–5 by removing from the introductory text “42.709–1(a)(1)(ii)” and adding “42.709–2(a)(1)(ii)” in its place.

42.709–6 [Amended]

- 6. Amend newly designated section 42.709–6 by—
- a. In the introductory text removing “42.709–1(a)” and adding “42.709–2(a)” in its place; and
- b. In paragraph (b) removing “42.709(b)” and adding “42.709–1(b)” in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 7. Amend section 52.242–3 by—
- a. Removing from the prescription text “42.709–6” and adding “42.709–7” in its place;
- b. Revising the date of the clause;
- c. Removing from paragraph (c) “Subpart” and adding “subpart” in its place; and
- d. Removing from paragraph (g) “42.709–5” and adding “42.709–6” in its place.

The revision reads as follows:

52.242–3 Penalties for Unallowable Costs.

* * * * *

Penalties for Unallowable Costs (SEP 2021)

* * * * *

- 8. Amend section 52.245–1 by—
- a. Revising the date of clause; and
- b. Removing paragraphs (j)(2)(iii)(A) through (G).

The revision reads as follows:

52.245–1 Government Property.

* * * * *

Government Property (SEP 2021)

* * * * *

[FR Doc. 2021–16367 Filed 8–10–21; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR–2021–0051, Sequence No. 4]

Federal Acquisition Regulation; Federal Acquisition Circular 2021–07; Small Entity Compliance Guide

AGENCY: 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 DoD, GSA, and NASA. 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 the rules appearing in Federal Acquisition Circular (FAC) 2021–07, which amends the Federal Acquisition Regulation (FAR).

Interested parties may obtain further information regarding these rules by referring to FAC 2021–07, which precedes this document.

DATES: August 11, 2021.

ADDRESSES: The FAC, including the SECG, is available via the internet at <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact the analyst whose name appears in the table below. Please cite FAC 2021–07 and the

FAR Case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or GSARegSec@gsa.gov. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared.

RULES LISTED IN FAC 2021–07

Item	Subject	FAR Case	Analyst
* I	Section 508-Based Standards in Information and Communication Technology	2017–011	Jackson.
* II	Revision of Limitations on Subcontracting	2016–011	Uddowla.
III	Scope of Review by Procurement Center Representatives	2020–012	Jones.
* IV	Good Faith in Small Business Subcontracting	2019–004	Bowman.
V	Technical Amendments.		

SUPPLEMENTARY INFORMATION:

Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR rules, refer to the specific item numbers and subjects set forth in the documents following these item summaries. FAC 2021–07 amends the FAR as follows:

Item I—Section 508-Based Standards in Information and Communication Technology (FAR Case 2017–011)

This final rule amends the FAR to implement the Access Board’s final rule published January 17, 2017. Section 508 of the Rehabilitation Act of 1973 requires the FAR to incorporate revised accessibility standards developed by the Access Board for information and communication technology (ICT). The Access Board is also known as the Architectural and Transportation Barriers Compliance Board. This rule ensures that Federal employees with disabilities have comparable access to, and use of, such information and data relative to other Federal employees. Section 508 also requires Federal agencies to ensure that members of the public with disabilities have comparable access to publicly available information and data.

Item II—Revision of Limitations on Subcontracting (FAR Case 2016–011)

This rule amends the FAR to implement regulatory changes made by the Small Business Administration (SBA) in its final rule published in the **Federal Register** at 81 FR 34243, on May 31, 2016. SBA’s final rule implements the statutory requirements of section 1651 of the National Defense Authorization Act for Fiscal Year 2013. Section 1651 revised and standardized the limitations on subcontracting, including the nonmanufacturer rule, that apply to small business concerns under FAR part 19 procurements. Section 1651 shifts the limitations on

subcontracting from the concept of a required percentage of work to be performed by a prime contractor to the concept of a limit on the percentage of the overall award amount to be spent by the prime on subcontractors. Significantly, section 1651 excludes from this calculation the percentage of the award amount that the prime contractor spends on subcontractors who are similarly situated entities. This rule implements the revised and standardized limitations on subcontracting through the use of a single FAR clause for every small business program, instead of continuing to implement through multiple FAR clauses that were specific to a particular small business program. This rule also revises the FAR clause implementing the nonmanufacturer rule to reflect the standardized requirements across all the small business programs.

This rule may have a positive economic impact on small businesses. Through the ability to meet the limitations by means of subcontracts with similarly situated entities, this rule will make it possible for small businesses to compete for larger contracts than they could in the past.

Item III—Scope of Review by Procurement Center Representatives (FAR Case 2020–012)

This final rule amends the FAR to implement section 1811 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328), as implemented in the Small Business Administration (SBA) final rule published at 84 FR 65647 on November 29, 2019. Section 1811 allows SBA’s procurement center representatives to review any solicitation for a contract or task order, without regard to whether it is set aside for small business concerns, or reserved in the case of a multiple-award contract, or whether it would

result in a bundled or consolidated contract or order.

Item IV—Good Faith in Small Business Subcontracting (FAR Case 2019–004)

This final rule amends the FAR to implement section 1821(c) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (15 U.S.C 637 note, Pub. L. 114–328), as implemented in the Small Business Administration (SBA) final rule published at 84 FR 65647, dated November 29, 2019.

Specifically, the final FAR rule at FAR 19.705–7 includes examples of a good faith effort to comply with the subcontracting plan, and examples of a failure to make a good faith effort. Failure to make a good faith effort to comply with the plan may result in assessment of liquidated damages.

Additionally, the final rule amends the FAR to require that prime contractors with a commercial subcontracting plan include indirect costs in their subcontracting goals. Previously, prime contractors were required to include indirect costs in the summary subcontract report (SSR) but not in their subcontracting goals, which led to inconsistencies when comparing the SSR to the goals in the commercial subcontracting plan. Including indirect costs in both the SSR and subcontracting goals established in the commercial subcontracting plan will allow for consistency.

Item V—Technical Amendments

Editorial changes are made at FAR 42.709–1 through 42.709–7, 52.242–3, and 52.245–1.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

[FR Doc. 2021–16368 Filed 8–10–21; 8:45 am]

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