

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR–2022–0051, Sequence No. 5]

Federal Acquisition Regulation; Federal Acquisition Circular 2022–08; 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) 2022–08. 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 2022–08

Item	Subject	FAR case	Analyst
I	Policy on Joint Ventures	2017–019	Jones.
II	Construction Contract Administration	2018–020	Bowman.
III	Update of Historically Underutilized Business Zone Program.	2019–007	Jones.
IV	Certification of Women-Owned Small Businesses	2020–013	Jones.
V	Technical Amendments.		

ADDRESSES: The FAC, including the
SECG, is available at [https://
www.regulations.gov](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
2022–08 amends the FAR as follows:

Item I—Policy on Joint Ventures (FAR Case 2017–019)

This final rule amends the Federal
Acquisition Regulation (FAR) to align
with the Small Business Administration
(SBA) regulations regarding mentor-
protégé joint ventures and to provide
clarification regarding joint ventures
under the 8(a) Program. The changes
will allow mentor-protégé joint ventures
to qualify as small businesses, or to
qualify under a socioeconomic program
for the purposes of participation in
procurements under FAR part 19. In
addition, this rule provides consistent
guidance to contracting officers on how
to handle joint ventures under the 8(a)
Program and the small business
socioeconomic programs.

Item II—Construction Contract Administration (FAR Case 2018–020)

This final rule amends the FAR to
implement section 855 of the of the John
S. McCain National Defense
Authorization Act for Fiscal Year 2019

(Pub. L. 115–232), codified at 15 U.S.C.
644(w) in the Small Business Act.
Section 855 requires Federal agencies to
provide a notice, along with
solicitations for construction contracts
anticipated to be awarded to small
businesses, to prospective offerors that
includes information about the agency’s
policies or practices in complying with
FAR requirements related to the timely
definitization of requests for equitable
adjustment on construction contracts.
The notice must include data regarding
the time it took the agency to definitize
requests for equitable adjustment on
construction contracts for the three-year
period preceding the issuance of the
notice.

The final FAR rule requires
contracting officers to transmit in the
solicitation notice on the
Governmentwide point of entry
information in construction solicitations
anticipated to be awarded to a small
business pursuant to part 19, that
includes a description of agency-
specific policies or procedures regarding
definitization of equitable adjustments
for change orders under construction
contracts. Additionally, agencies are
required to include past performance
data in the solicitation notice, for the
three fiscal years preceding the issuance
of the solicitation notice, regarding the
time required to definitize equitable
adjustments for change orders under
construction contracts using the table
format provided in the FAR text, or

provide the address of an agency-
specific, publicly accessible website
containing this information. The final
rule also describes an adequate change
order definitization proposal as
containing sufficient information to
enable the contracting officer to conduct
meaningful analyses and audits of the
information contained in the proposal.

Item III—Update of Historically Underutilized Business Zone Program (FAR Case 2019–007)

This final rule amends the FAR to
implement changes to the SBA
regulations for the Historically
Underutilized Business Zone
(HUBZone) Program. This rule specifies
that SBA now certifies HUBZone small
business concerns and HUBZone
entities are no longer required to
represent their HUBZone status with
each offer. In addition, contracting
officers may now award HUBZone set-
aside and sole-source contracts at or
below the simplified acquisition
threshold. This rule also makes minor
changes to the HUBZone protest
procedures.

Item IV—Certification of Women- Owned Small Businesses (FAR Case 2020–013)

This final rule amends the FAR to
align with SBA’s regulations regarding
certification of economically
disadvantaged women-owned small
business (EDWOSB) concerns and

women-owned small business (WOSB) concerns. This rule requires EDWOSBs and WOSBs participating in the Women-Owned Small Business Program (the Program) to apply for certification through SBA or a SBA-approved third-party certifier to be eligible for WOSB or EDWOSB set-aside or sole-source contracts. EDWOSB and WOSB concerns that are not certified will not be eligible for set-aside and sole-source contracts under the Program. WOSBs that do not participate in the Program may continue to represent their status, be awarded contracts outside the Program, and these contracts will continue to count toward an agency's goal for awards to WOSBs.

Item V—Technical Amendments

Administrative changes are made at FAR 4.1202, 19.102, and 19.309. The date change is to provide additional time to implement the policy addressing the assignment of North American Industry Classification System codes to orders placed under multiple award contracts, as covered by changes made by FAR case 2014–002, Set-Asides Under Multiple Award Contracts.

William F. Clark,

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

Federal Acquisition Circular (FAC) 2022–08 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 2022–08 is effective September 23, 2022 except for Items I through IV, which are effective October 28, 2022.

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, Senior Procurement Executive, National Aeronautics and Space Administration.

[FR Doc. 2022–20339 Filed 9–22–22; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 9, 15, 19, and 52

[FAC 2022–08; FAR Case 2017–019; Item I; Docket No. FAR–2017–019, Sequence No. 1]

RIN 9000–AN59

Federal Acquisition Regulation: Policy on Joint Ventures

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 statutory and regulatory changes regarding joint ventures made by the Small Business Administration (SBA) in its final rule published in the **Federal Register** on July 25, 2016, and to clarify that 8(a) joint ventures are not certified into the 8(a) program. Additionally, the rule implements SBA's statutory and regulatory changes that eliminated SBA approval of joint venture agreements for competitive 8(a) awards.

DATES: Effective October 28, 2022.

FOR FURTHER INFORMATION CONTACT: Ms. Malissa Jones, Procurement Analyst, at 571–882–4687 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 2022–08, FAR Case 2017–019.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 85 FR 34561 on June 5, 2020, to revise the FAR to implement statutory and regulatory changes made by the SBA regarding joint ventures. These changes allow a joint venture comprised of a protégé and its mentor to qualify as a small business or under a socioeconomic program (e.g., 8(a)) for which the protégé qualifies. These changes also provide updated requirements for other joint ventures to qualify as small businesses or to qualify under a socioeconomic program.

Section 1347 of the Small Business Jobs Act of 2010 (Pub. L. 111–240) and

section 1641 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112–239; 15 U.S.C. 657r) authorized the SBA Administrator to establish mentor-protégé programs for small business concerns, service-disabled veteran owned small business (SDVOSB) concerns, women-owned small business concerns in the Women-Owned Small Business (WOSB) Program, and HUBZone small business concerns modeled after the mentor-protégé program under section 8(a) of the Small Business Act (15 U.S.C. 637(a)). On July 25, 2016, SBA issued a final rule (81 FR 48558) that implemented the mentor-protégé programs at 13 CFR 125.9. SBA's final rule allows a joint venture comprised of a protégé and its mentor to seek any type of small business contract, including a contract under a socioeconomic program, for which the protégé qualifies.

Additionally, this rule implements SBA's final rule published on October 16, 2020, at 85 FR 66146, which implemented statutory and regulatory changes that eliminated SBA approval of joint venture agreements for competitive 8(a) awards.

For further details see Section IV of this preamble, and see Section II of the proposed rule.

Seven 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; however, no changes were made as a result of the public comments received. A discussion of the comments received, and the changes made to the rule as a result of SBA's final rule (85 FR 66146) published October 16, 2020, are provided as follows:

A. Summary of Significant Changes From the Proposed Rule

This final rule makes changes to paragraph (a) at FAR 19.703, Eligibility requirements for participating in the program, to add HUBZone small business to paragraphs (2)(i) and (ii). The proposed language at FAR 19.805–2(d)(2) is revised to clarify that SBA does not approve joint ventures for competitive awards, and the proposed language regarding SBA approval of joint ventures at 19.805–2(d)(2) and (e) is removed. Conforming changes are made to 52.219–18. These changes are required to resolve conflicts between the changes in the proposed rule and SBA's

final rule at 85 FR 66146, published October 16, 2020. In SBA's final rule, SBA specified that it no longer approves joint venture agreements for competitive 8(a) awards. As a result, changes are made to the text in this final rule.

B. Analysis of Public Comments

1. Support for the Rule

Comment: Three respondents expressed support for the rule.

Response: The Councils acknowledge the respondents' support for the rule.

2. Outside the Scope of This Rule

Comment: One respondent recommended adding the verbiage "need only be approved by the SBA prior to the contract award" to the pre-award timeline.

Response: This final rule amends the FAR to implement statutory and regulatory changes regarding joint ventures made by the SBA. Editing or revising the pre-award timeline is outside the scope of this rule.

Comment: One respondent stated that there is no cost effective mechanism under the General Services Administration Federal Supply Schedule (FSS) program (referenced by the respondent as the Multiple Award Schedule) to track "the requirement that certain small business or socioeconomic parties to a joint venture perform 40 percent of the work performed by the joint venture and that the work performed must be more than administrative functions."

Response: The purpose of this rule is to implement SBA's final rule issued on July 25, 2016, at 81 FR 48558, which established the requirement that certain small business parties to a joint venture perform 40 percent of all work done by the joint venture and that work performed is more than merely performing administrative functions. GSA uses Industrial Operations Analysts to ensure contractors are complying with terms and conditions of Multiple Award Schedule contracts.

3. Negative Impacts of the Rule

Comment: Two respondents expressed concern regarding the potential negative impacts of the rule. One respondent believes that the new rule will undermine small businesses. Under the proposed rule, a large business affiliated under a joint venture with a small business can collectively utilize a combined past performance, making the small business a "front" for the large business. The respondent believes this rule should be retired and not entered into the FAR. Another respondent stated that the rule places

the joint venture in an unfair advantage over other small businesses when considering past performance as an evaluation factor for source selection. The respondent further stated that the joint venture should receive a neutral rating if it has no past performance.

Response: This rule is expected to have an overall positive impact on small businesses by creating new opportunities under the mentor-protégé program. All mentors and protégés are subject to the requirements and limitations of the mentor-protégé program and, in accordance with 13 CFR 121.103(h)(1)(ii), only mentor-protégé joint ventures are eligible for set-aside opportunities, including those where a large business is a mentor. This final rule requires the small business protégé or 8(a) participant to perform at least 40 percent of the work done by the joint venture in accordance with 13 CFR 125.8. This rule recognizes that joint ventures perform work through their members, not as independent entities. Furthermore, this rule requires contracting officers to consider the past performance of each party to the joint venture if the joint venture does not demonstrate past performance.

4. Clarification Needed

a. Clarify SBA Requirements for Evaluating a Mentor-Protégé Joint Venture's Past Performance

Comment: One respondent requested that this case address solicitation language indicating that the managing member must provide relevant past performance information. The respondent believes requesting past performance from a joint venture managing partner does not allow protégés to gain experience using their mentor's past performance.

Response: This rule implements SBA's final rule, 81 FR 48558, which requires the contracting officer to consider the past performance of the protégé when a joint venture under the mentor-protégé program does not have past performance. This change is made in subpart 9.1, Responsible Prospective Contractors, and in subpart 15.3, Source Selection.

b. Clarify Definition of Small Business Concern/Size Status Determination

Comment: One respondent stated that the amended definition of small business concern does not directly specify whether the contracting officer or SBA is authorized to make the size status determination of a concern. The respondent provided the following suggested language to provide clarity, "Contractors shall self-certify size

status. Questions of a contractor's size status shall be determined by the Small Business Administration."

Response: FAR subpart 19.3, Determination of Small Business Size and Status for Small Business Programs, specifies that SBA makes a size status determination. Therefore, it is not necessary to modify the definition of small business concern.

c. Clarify Joint Venture Applicability Under the GSA Federal Supply Schedules

Comment: One respondent requested clarification of the applicability of joint ventures to the GSA FSS Program. The respondent believes that the limited duration of a joint venture creates a conflict for its use in the FSS program. According to the respondent, under the FSS program contracts may be awarded for up to 20 years, in 5-year increments, and joint ventures are set up to bid on a specific job and may last up to six years, including one extension.

Response: This rule implements SBA's final rule at 85 FR 66146, published on October 16, 2020, which provides further clarification regarding the requirements for joint venture formation and duration. SBA's regulations do not prohibit a small business joint venture from performing the full length of their FSS contract and do not include a maximum time limitation on a joint venture.

d. Clarify Supplementary Information in Background Section

Comment: One respondent suggested that the adjective "improper" be replaced with "unintended" in the sentence that appeared in the last paragraph of the Background section under the Supplementary Information in the **Federal Register** Notice for the proposed rule: "This rule proposes clarifications to prevent the improper elimination of 8(a) joint venture proposals in the future."

Response: As noted in the **Federal Register** notice for the proposed rule, the clarification that 8(a) joint venture agreements need only be approved by the SBA prior to contract award is necessary because the Government Accountability Office (GAO) sustained a protest (BGI-Fiore JV, LLC, B-409520, May 29, 2014) in which an agency rejected an 8(a) joint venture's proposal on the basis that the 8(a) joint venture had not been certified by the SBA prior to submission of proposals. As stated in GAO's decision, GAO affirmed the protestor's argument that the agency improperly rejected its proposal. The use of the adjective "improper" in the **Federal Register** notice for the proposed

rule is derived directly from the text of the GAO decision. Further, the adjective suggested by the respondent, “unintended”, does not have the same meaning as “improper” and is not an appropriate substitution in this context. Finally, the suggested revision has no effect on the text of the rule; therefore, the final rule is unchanged.

e. Clarify SBA Joint Venture Review Timeline

Comment: One respondent asked to clarify the amount of time the SBA Associate Administrator for Business Development has to review the joint venture agreement.

Response: The final rule makes changes to the proposed rule FAR text at 19.805–2 to remove the proposed paragraph (e), which referred to the SBA Associate Administrator for Business Development review of the joint venture agreement. SBA’s final rule at 85 FR 66146 published on October 16, 2020, specified that SBA no longer approves joint venture agreements for competitive 8(a) awards. As a result, changes are made to the text in this final rule.

Comment: One respondent was concerned about “certification of the joint venture as an 8(a)” participant and how to properly address this situation given the workload of the SBA Business Opportunity Specialist. The respondent stated that the two proposals his joint venture proposed required a certification letter, which they did not have due to the joint venture not being approved. The respondent provided that his SBA office and Business Opportunity Specialist will not review any joint ventures unless a contracting officer or agency is willing to make an award, which is well after the proposal process is completed. To address this situation, the respondent recommended that the SBA conduct preliminary reviews prior to the submission of a contract effort and possibly when the joint venture is formed (approve the joint venture agreement and/or certify the joint venture is small) then conduct a full review at contract award. The respondent believes this approach will reduce the risk to the members of the joint venture of having to go through the proposal process only to be disqualified by the SBA.

Response: The Councils acknowledge the respondents concern with certification of the joint venture as an 8(a) participant and the differing interpretations of FAR clause 52.219–18, Notification of Competition Limited to Eligible 8(a) Concerns. Some have interpreted this clause to mean that 8(a) joint ventures that submitted an offer for an 8(a) contract needed to be “certified”

by the SBA and the joint venture agreement needed to be approved by the SBA by “the time of submission of offer.” This interpretation of the FAR clause is incorrect. This final rule amends the FAR to clarify that 8(a) joint ventures are not certified into the 8(a) program, and that 8(a) joint venture agreements need only be approved by the SBA prior to the award of an 8(a) sole source contract to prevent the improper elimination of 8(a) joint venture proposals in the future.

f. Clarify Size Status for Mentor-Protégé Joint Ventures

Comment: One respondent asked to clarify if a joint venture between a prime contractor and protégé in a socioeconomic program is considered a small business concern within that socioeconomic program. The respondent also asked to clarify if a joint venture between a mentor and a protégé (other than small business mentor and small business protégé) is a “small business joint venture.”

Response: The SBA regulations at 13 CFR 121.103(h) and 125.8(a) and (b) specify the requirements for joint ventures to qualify as a small business concern. The final rule amends FAR 19.3, Determination of Small Business Status for Small Business Programs, to address how a joint venture may qualify for an award as a small business concern under the socioeconomic programs. A joint venture may qualify as a small business concern if each participant in the joint venture qualifies as small under the size standard for the solicitation, or the protégé is small under the size standard for the solicitation in a joint venture comprised of a mentor and protégé with an approved agreement under a SBA mentor protégé program. A joint venture may qualify under socioeconomic programs when the joint venture qualifies as a small business joint venture and one of the parties to the joint venture qualifies under one or more of the socioeconomic programs. Therefore, an offer submitted by the joint venture made up of a mentor and protégé will be considered small. The language in the final rule is consistent with SBA’s regulations.

g. Clarify 8(a) Certification Requirements for a Small Business Joint Venture Party

Comment: Two respondents requested clarification regarding section 8(a) certification requirements for small business joint ventures prior to proposal submission. Additionally, one respondent requested that the specific requirements be provided. The

respondent also stated that since SBA does not certify joint ventures into the 8(a) program, once a firm outgrows its small business status for the size standard for its primary NAICS code, it should no longer be eligible for contracting benefits from its mentor-protégé relationship.

Response: In accordance with 13 CFR 124.513(e)(1), for 8(a) sole-source awards, SBA approves the joint venture agreement prior to award. SBA’s final rule at 85 FR 66146 published on October 16, 2020, amended 13 CFR 124.513(e)(1) to specify that SBA will not approve joint ventures in connection with competitive 8(a) awards (but see 13 CFR 124.501(g) for SBA’s determination of participant eligibility). As a result, changes are made to the text in this final rule at FAR 19.805–2(d).

h. Clarify the Method Used To Determine the Percentage of Work Performed in the Rule

Comment: One respondent asked to clarify how the Councils determined the requirement that certain small business parties to the joint venture must perform 40% of non-administrative work performed by the joint venture.

Response: This case implements SBA’s final rule published on July 25, 2016 at 81 FR 48558. SBA’s final rule established the requirement that certain small business parties to the joint venture perform 40% of all work done by the joint venture, and that work performed is more than merely administrative work.

C. Other Changes

Changes have been made to FAR 19.1503(f)(2) to clarify at least one party to the joint venture is an EDWOSB for an EDWOSB joint venture, or at least one party to the joint venture is a WOSB for a WOSB joint venture. Additionally, conforming changes have been made to FAR clauses 52.219–3, Notice of HUBZone Set-aside or Sole-Source Award and 52.219–4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns, and paragraph numbers for FAR clauses 52.219–27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside, 52.219–29, Notice of Set-Aside for, or Sole-Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns, and 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, were revised due to baseline changes.

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

This rule amends the provisions and clauses at FAR 52.212–3, 52.212–5, 52.213–4, 52.219–1, 52.219–3, 52.219–4, 52.219–8, 52.219–9, 52.219–14, 52.219–18, 52.219–27, 52.219–28, 52.219–29, 52.219–30, and 52.244–6. However, this rule does not change the application to solicitations and contracts at or below the SAT or for commercial products (including COTS items) or for commercial services. The provisions and clauses continue to apply to acquisitions for commercial products (including COTS items), to acquisitions for commercial services, and acquisitions at or below the SAT.

A. Applicability to Contracts at or Below the SAT

41 U.S.C. 1905 governs the applicability of laws to acquisitions at or below the SAT. Section 1905 generally limits the applicability of new laws when agencies are making acquisitions at or below the SAT, but provides that such acquisitions will not be exempt from a provision of law under certain circumstances, including when the Federal Acquisition Regulatory Council (FAR Council) makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts and subcontracts in amounts not greater than the SAT from the provision of law.

The FAR Council has made a determination to apply this statute to acquisitions at or below the SAT. Application of section 1641 to SAT procurements will further the Administration's efforts to advance equity in procurement, consistent with Executive Order 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, and promote "maximum practicable opportunities" for small businesses, consistent with the longstanding policy expressed in FAR 19.201. Although acquisitions under the SAT are set aside for small businesses by law, some awards are made to other than small businesses because small businesses are not able to meet the performance requirements. Section 1641 advances the interests of small business concerns by allowing for more joint ventures that include a small business to qualify as a small business or under a socioeconomic program. This access allows such small businesses to perform

work under SAT set-asides as part of a joint venture that they cannot perform as stand-alone entities. Exclusion of a large segment of Federal contracting, such as acquisitions under the SAT, will limit the full implementation of these objectives.

B. Applicability to Contracts for the Acquisition of Commercial Products (Including Commercially Available Off-the-Shelf Items) and for Commercial Services

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial products or commercial services, and is intended to limit the applicability of laws to those contracts. Section 1906 provides that if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts and subcontracts for commercial products or commercial services, the provision of law will apply to them.

41 U.S.C. 1907 states that acquisitions of COTS items will be exempt from a provision of law unless certain circumstances apply, including if 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.

The FAR Council has made a determination to apply this statute to acquisitions for commercial products or commercial services. The Administrator for Federal Procurement Policy has made a determination to apply this statute to acquisitions for COTS items. Application of section 1641 to acquisitions of commercial products and commercial services, including COTS items, would further the Administration's efforts to advance equity in procurement, consistent with Executive Order 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, and promote "maximum practicable opportunities" for small businesses, consistent with the longstanding policy expressed in FAR 19.201. Section 1641 advances the interests of small business concerns by allowing for more joint ventures that include a small business to qualify as a small business or under a socioeconomic program. This access allows such small businesses to perform work under set-aside procurements of commercial products and services, including COTS items, as part of a joint venture that they cannot perform as stand-alone entities. Exclusion of a large

segment of Federal contracting, such as acquisitions of commercial products and commercial services, including COTS items, will limit the full implementation of these objectives.

IV. Expected Impact of the Rule

This final rule will allow joint ventures to qualify as small if all parties to the joint venture qualify as small under the size standard associated with the NAICS code for the solicitation, or if the joint venture is comprised of a mentor and protégé in the SBA Mentor-Protégé Program. Additionally, this rule allows a joint venture to qualify for one of the socioeconomic programs if the joint venture qualifies as a small business joint venture and one of the parties to the joint venture meets the associated requirements of the socioeconomic program. The joint venture will identify its size and socioeconomic status in accordance with FAR 52.212–3, Offeror Representations and Certifications—Commercial Products and Commercial Services, and 52.219–1, Small Business Program Representations.

This rule requires agencies to consider the past performance of each party to a joint venture if the joint venture is not able to demonstrate past performance for an offer for award. Currently, agencies are not required to review the past performance of each party to a joint venture; therefore, this rule is expected to help joint ventures to have qualifying past performance for award when a joint venture does not have qualifying past performance. This additional requirement is beneficial to joint ventures that are in the initial stages of their agreement and do not have past performance experience.

This rule revises the FAR to align 8(a) joint venture requirements with SBA's regulations, which is expected to decrease the number of protests. This rule clarifies that SBA does not approve joint ventures for competitive 8(a) awards. In addition, this rule revises the FAR to include SBA's requirement that small business parties to a joint venture must perform 40% of the work done by the joint venture and that the work performed must be more than merely administrative.

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. 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:

DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement section 1347 of the Small Business Jobs Act of 2010 (Pub. L. 111–240) and section 1641 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112–239; 15 U.S.C. 657r) regarding joint ventures as implemented by the Small Business Administration (SBA) in its final rule at 81 FR 48558, published on July 25, 2016. The rule also implements SBA’s final rule published on October 16, 2020, at 85 FR 66146. The statutory and regulatory changes establish the mentor-protégé program, clarify that 8(a) joint ventures are not certified into the 8(a) program, and specify that SBA no longer approves joint venture agreements for competitive 8(a) awards.

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

The final rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612. This rule will impact small business joint ventures and small business entities in a SBA mentor-protégé program. Based on joint venture data in the System for Award Management, the estimated number of small business joint ventures is 3,347. Assuming that each joint venture includes 2 small businesses, the number of small entities impacted is 6,694. According to SBA’s final rule, there are an estimated 2,000 pairs of mentors and protégés that may be impacted. Therefore, the estimated number of total small entities to which the rule applies is 8,694.

This final rule does not include any recordkeeping or other compliance requirements for small businesses.

Joint ventures will be required to represent themselves as small businesses in accordance with the updated representation provisions at FAR 52.212–3 or 52.219–1. Representation is currently required for all small entities doing business with the Government; however, representation is not a new requirement. The number of options for the entities to select from has merely increased to include joint venture options. Therefore, the potential impact is de minimis.

The final rule may have a positive economic impact on small entities. The updated SBA regulations allow for more joint ventures that include a small business to qualify as a small business or under a socioeconomic program; and therefore, more small businesses can qualify for set-aside procurements.

There are no known significant alternative approaches to the final rule.

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. 3501–3521) applies to the information collection requirements in the provision at FAR 52.212–3, Offeror Representations and Certifications—Commercial Products and Commercial Services; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Numbers 9000–0136 and 9000–0007.

List of Subjects in 48 CFR Parts 2, 9, 15, 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 amend 48 CFR parts 2, 9, 15, 19, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 9, 15, 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 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101, in paragraph (b)(2), by revising paragraph (1) of the definition of “Small business concern” to read as follows:

2.101 Definitions.

* * * * *

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

Small business concern—

(1) Means a concern, including its affiliates, that is independently owned and operated, not dominant in its field of operation, and qualified as a small business under the criteria and size standards in 13 CFR part 121 (see 19.102).

* * * * *

PART 9—CONTRACTOR QUALIFICATIONS

■ 3. Amend section 9.104–3 by redesignating paragraph (c) as paragraph (c)(1) and adding paragraph (c)(2) to read as follows:

9.104–3 Application of standards.

* * * * *

(c)(1) * * *

(2) *Joint ventures.* For a prospective contractor that is a joint venture, the contracting officer shall consider the past performance of the joint venture. If the joint venture does not demonstrate past performance for award, the contracting officer shall consider the past performance of each party to the joint venture.

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

■ 4. Amend section 15.305 by adding paragraph (a)(2)(vi) to read as follows:

15.305 Proposal evaluation.

(a) * * *

(2) * * *

(vi) For offerors that are joint ventures, the evaluation shall take into account past performance of the joint venture. If the joint venture does not demonstrate past performance for award, the contracting officer shall consider the past performance of each party to the joint venture.

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

■ 5. Amend section 19.301–1 by revising paragraph (a) to read as follows:

19.301–1 Representation by the offeror.

(a)(1) To be eligible for award as a small business concern identified in 19.000(a)(3), an offeror is required to represent in good faith—

(i)(A) That it meets the small business size standard corresponding to the North American Industry Classification System (NAICS) code identified in the solicitation; or

(B) For a multiple-award contract where there is more than one NAICS

code assigned, that it meets the small business size standard for each distinct portion or category (e.g., line item numbers, Special Item Numbers (SINs), sectors, functional areas, or the equivalent) for which it submits an offer. If the small business concern submits an offer for the entire multiple-award contract, it must meet the size standard for each distinct portion or category (e.g., line item number, SIN, sector, functional area, or equivalent); and

(ii) The Small Business Administration (SBA) has not issued a written determination stating otherwise pursuant to 13 CFR 121.1009.

(2)(i) A joint venture may qualify as a small business concern if the joint venture complies with the requirements of 13 CFR 121.103(h) and 13 CFR 125.8(a) and (b) and if—

(A) Each party to the joint venture qualifies as small under the size standard for the solicitation; or

(B) The protégé is small under the size standard for the solicitation in a joint venture comprised of a mentor and protégé with an approved mentor-protégé agreement under an SBA mentor-protégé program.

(ii) A joint venture may qualify for an award under the socioeconomic programs as described in subparts 19.8, 19.13, 19.14, and 19.15.

* * * * *

■ 6. Amend section 19.703 by—

■ a. Removing from paragraph (a)(2)(i) and paragraph (a)(2)(ii) introductory text, the phrase “small business, or” and adding the phrase “small business, HUBZone small business, or” in its place, respectively; and

■ b. Revising paragraph (d).

The revision reads as follows:

19.703 Eligibility requirements for participating in the program.

* * * * *

(d) Protests challenging the socioeconomic status of a HUBZone small business concern must be filed in accordance with 13 CFR 126.801.

* * * * *

■ 7. Amend section 19.804–3 in paragraph (c) introductory text by adding a sentence to the end of the paragraph to read as follows:

19.804–3 SBA acceptance.

* * * * *

(c) * * * For a joint venture, SBA will determine eligibility as part of its acceptance of a sole-source requirement and will approve the joint venture agreement prior to award in accordance with 13 CFR 124.513(e).

* * * * *

■ 8. Amend section 19.805–2 by revising paragraph (b) introductory text and adding paragraph (d) to read as follows:

19.805–2 Procedures.

* * * * *

(b) The SBA will determine the eligibility of the apparent successful offeror. Eligibility is based on section 8(a) program criteria. See paragraph (d) of this section regarding eligibility of joint ventures.

* * * * *

(d)(1) SBA does not certify joint ventures, as entities, into the 8(a) program.

(2) A contracting officer may consider a joint venture for contract award. SBA does not approve joint ventures for competitive awards (but see 13 CFR 124.501(g) for SBA’s determination of participant eligibility).

■ 9. Amend section 19.1303 by revising paragraph (c) to read as follows:

19.1303 Status as a HUBZone small business concern.

* * * * *

(c) A joint venture may be considered a HUBZone small business concern if—

(1) The joint venture qualifies as small under 19.301–1(a)(2)(i);

(2) At least one party to the joint venture is a HUBZone small business concern; and

(3) The joint venture complies with 13 CFR 126.616(a) through (c).

* * * * *

■ 10. Amend section 19.1403 by revising paragraph (c) to read as follows:

19.1403 Status as a service-disabled veteran-owned small business concern.

* * * * *

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

(1) The joint venture qualifies as small under 19.301–1(a)(2)(i);

(2) At least one party to the joint venture is a service-disabled veteran-owned small business concern, and makes the representations in paragraph (b) of this section; and

(3) The joint venture complies with the requirements of 13 CFR 125.18(b).

* * * * *

■ 11. Amend section 19.1503 by revising paragraph (f) to read as follows:

19.1503 Status.

* * * * *

(f) A joint venture may be considered an EDWOSB concern or WOSB concern eligible under the WOSB Program if—

(1) The joint venture qualifies as small under 19.301–1(a)(2)(i);

(2)(i) At least one party to the joint venture is an EDWOSB for an EDWOSB joint venture, or at least one party to the joint venture is a WOSB for a WOSB joint venture; and

(ii) That party complies with the criteria in paragraph (b) of this section; and

(3) The joint venture complies with the requirements of 13 CFR 127.506(a) through (c).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 12. Amend section 52.212–3 by—

■ a. Revising the date of the provision;

■ b. Removing from the introductory text of the provision the phrase “(c) through (v)” and adding the phrase “(c) through (v)” in its place;

■ c. In paragraph (a), revising paragraph (1) of the definition “Small business concern”;

■ d. Revising paragraphs (c)(1) and (3);

■ e. Removing from the end of paragraph (c)(6)(i) the word “and” and adding the word “or” in its place;

■ f. Revising paragraph (c)(6)(ii);

■ g. Removing from the end of paragraph (c)(7)(i) the word “and” and adding the word “or” in its place;

■ h. Revising paragraph (c)(7)(ii);

■ i. Revising the bracketed sentence in paragraph (c)(10);

■ j. Removing from the end of paragraph (c)(10)(i) the phrase “13 CFR Part 126; and” and adding the phrase “13 CFR 126.200; or” in its place; and

■ k. Revising paragraph (c)(10)(ii).

The revisions read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Products and Commercial Services.

* * * * *

Offeror Representations and Certifications—Commercial Products and Commercial Services (OCT 2022)

* * * * *

(a) * * *

Small business concern—(1) Means a concern, including its affiliates, that is independently owned and operated, not dominant in its field of operation, and qualified as a small business under the criteria in 13 CFR part 121 and size standards in this solicitation.

* * * * *

(c) * * *

(1) *Small business concern*. The offeror represents as part of its offer that—

(i) It ☐ is, ☐ is not a small business concern; or

(ii) It ☐ is, ☐ is not a small business joint venture that complies with the requirements of 13 CFR 121.103(h) and 13 CFR 125.8(a) and (b). [The offeror shall enter the name and unique entity identifier of each party to the joint venture: ____.]

* * * * *

(3) *Service-disabled veteran-owned small business concern.* [Complete only if the offeror represented itself as a veteran-owned small business concern in paragraph (c)(2) of this provision.] The offeror represents as part of its offer that—

(i) It ☐ is, ☐ is not a service-disabled veteran-owned small business concern; or
(ii) It ☐ is, ☐ is not a joint venture that complies with the requirements of 13 CFR 125.18(b)(1) and (2). [The offeror shall enter the name and unique entity identifier of each party to the joint venture: ____.] Each service-disabled veteran-owned small business concern participating in the joint venture shall provide representation of its service-disabled veteran-owned small business concern status.

* * * * *

(6) * * *

(ii) It ☐ is, ☐ is not a joint venture that complies with the requirements of 13 CFR 127.506(a) through (c). [The offeror shall enter the name and unique entity identifier of each party to the joint venture: ____.] Each WOSB concern eligible under the WOSB Program participating in the joint venture shall provide representation of its WOSB status.

(7) * * *

(ii) It ☐ is, ☐ is not a joint venture that complies with the requirements of 13 CFR 127.506(a) through (c). [The offeror shall enter the name and unique entity identifier of each party to the joint venture: ____.] Each EDWOSB concern participating in the joint venture shall provide representation of its EDWOSB status.

Note to Paragraphs (c)(8) and (9):

Complete paragraphs (c)(8) and (9) only if this solicitation is expected to exceed the simplified acquisition threshold.

* * * * *

(10) * * * [Complete only if the offeror represented itself as a small business concern in paragraph (c)(1) of this provision.] * * *

* * * * *

(ii) It ☐ is, ☐ is not a HUBZone joint venture that complies with the requirements of 13 CFR 126.616(a) through (c). [The offeror shall enter the name and unique entity identifier of each party to the joint venture: ____.] Each HUBZone small business concern participating in the HUBZone joint venture shall provide representation of its HUBZone status.

* * * * *

■ 13. Amend section 52.212–5 by—

- a. Revising the date of the clause;
- b. Removing from paragraph (b)(11) the date “(SEP 2021)” and adding the date “(OCT 2022)” in its place;
- c. Removing from paragraph (b)(12) the date “(SEP 2021)” and adding the date “(OCT 2022)” in its place;
- d. Removing from paragraph (b)(16) the date “(OCT 2018)” and adding the date “(OCT 2022)” in its place;
- e. Removing from paragraph (b)(17)(i) the date “(NOV 2021)” and adding the date “(OCT 2022)” in its place;

■ f. Removing from paragraph (b)(19) the date “(SEP 2021)” and adding the date “(OCT 2022)” in its place;

■ g. Removing from paragraph (b)(21) the date “(SEP 2021)” and adding the date “(OCT 2022)” in its place;

■ h. Removing from paragraph (b)(22)(i) the date “(SEP 2021)” and adding the date “(OCT 2022)” in its place;

■ i. Removing from paragraph (b)(23) the date “(SEP 2021)” and adding the date “(OCT 2022)” in its place;

■ j. Removing from paragraph (b)(24) the date “(SEP 2021)” and adding the date “(OCT 2022)” in its place;

■ k. Removing from paragraph (e)(1)(v) the date “(OCT 2018)” and adding the date “(OCT 2022)” in its place;

■ l. Revising the date of Alternate II; and

■ m. Removing from paragraph (e)(1)(ii)(E) of Alternate II the date “(OCT 2018)” and adding the date “(OCT 2022)” in its place.

The revisions read as follows:

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

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services (OCT 2022)

* * * * *

Alternate II (OCT 2022). * * *

* * * * *

■ 14. Amend section 52.213–4 by—

- a. Revising the date of the clause; and
- b. Removing from paragraph (a)(2)(viii) the date “(JAN 2022)” and adding the date “(OCT 2022)” in its place.

The revision reads as follows:

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

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services) (OCT 2022)

* * * * *

■ 15. Amend section 52.219–1 by—

- a. Revising the date of the provision;
- b. In paragraph (a), revising paragraph (1) in the definition of “Small business concern”;
- c. Revising paragraph (c)(1);
- d. Removing from the end of paragraph (c)(4)(i) the word “and” and adding the word “or” in its place;
- e. Revising paragraph (c)(4)(ii);
- f. Removing from the end of paragraph (c)(5)(i) the word “and” and adding the word “or” in its place;
- g. Revising paragraphs (c)(5)(ii) and (c)(7);

- h. Removing from the end of paragraph (c)(8)(i) the phrase “13 CFR Part 126; and” and adding the phrase “13 CFR 126.200; or” in its place; and
- i. Revising paragraph (c)(8)(ii).

The revisions read as follows:

52.219–1 Small Business Program Representations.

* * * * *

Small Business Program Representations (OCT 2022)

* * * * *

Small business concern. (1) Means a concern, including its affiliates, that is independently owned and operated, not dominant in its field of operation, and qualified as a small business under the criteria in 13 CFR part 121 and the size standard in paragraph (b) of this provision.

* * * * *

(c) * * *

(1) The offeror represents as part of its offer that—

(i) It ☐ is, ☐ is not a small business concern; or

(ii) It ☐ is, ☐ is not a small business joint venture that complies with the requirements of 13 CFR 121.103(h) and 13 CFR 125.8(a) and (b). [The offeror shall enter the name and unique entity identifier of each party to the joint venture: ____.]

* * * * *

(4) * * *

(ii) It ☐ is, ☐ is not a joint venture that complies with the requirements of 13 CFR 127.506(a) through (c). [The offeror shall enter the name and unique entity identifier of each party to the joint venture: ____.] Each WOSB concern eligible under the WOSB Program participating in the joint venture shall provide representation of its WOSB status.

* * * * *

(5) * * *

(ii) It ☐ is, ☐ is not a joint venture that complies with the requirements of 13 CFR 127.506(a) through (c). [The offeror shall enter the name and unique entity identifier of each party to the joint venture: ____.] Each EDWOSB concern participating in the joint venture shall provide representation of its EDWOSB status.

* * * * *

(7) [Complete only if the offeror represented itself as a veteran-owned small business concern in paragraph (c)(6) of this provision.] The offeror represents as part of its offer that—

(i) It ☐ is, ☐ is not a service-disabled veteran-owned small business concern; or

(ii) It ☐ is, ☐ is not a service-disabled veteran-owned joint venture that complies with the requirements of 13 CFR 125.18(b)(1) and (2). [The offeror shall enter the name and unique entity identifier of each party to the joint venture: ____.] Each service-disabled veteran-owned small business concern participating in the joint venture shall provide representation of its service-disabled veteran-owned small business concern status.

(8) * * *

(ii) It ☐ is, ☐ is not a HUBZone joint venture that complies with the requirements

of 13 CFR 126.616(a) through (c). [The offeror shall enter the name and unique entity identifier of each party to the joint venture: ____.] Each HUBZone small business concern participating in the HUBZone joint venture shall provide representation of its HUBZone status.

* * * * *

■ 16. Amend section 52.219–3 by revising the date of the clause and adding paragraphs (e) and (f) to read as follows:

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

* * * * *

Notice of HUBZone Set-Aside or Sole-Source Award (OCT 2022)

* * * * *

(e) *Joint venture.* A joint venture may be considered a HUBZone concern if—

(1) At least one party to the joint venture is a HUBZone small business concern and complies with 13 CFR 126.616(c); and

(2) Each party to the joint venture qualifies as small under the size standard for the solicitation, or the protégé is small under the size standard for the solicitation in a joint venture comprised of a mentor and protégé with an approved mentor-protégé agreement under the SBA mentor-protégé program.

(f) A HUBZone joint venture agrees that, in the performance of the contract, at least 40 percent of the aggregate work performed by the joint venture shall be completed by the HUBZone small business parties to the joint venture. Work performed by the HUBZone small business party or parties to the joint venture must be more than administrative functions.

* * * * *

■ 17. Amend section 52.219–4 by revising the clause title and date and adding paragraph (d) to read 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 (OCT 2022)

* * * * *

(d) A HUBZone joint venture agrees that, in the performance of the contract, at least 40 percent of the aggregate work performed by the joint venture shall be completed by the HUBZone small business parties to the joint venture. Work performed by the HUBZone small business parties to the joint venture must be more than administrative functions.

* * * * *

■ 18. Amend section 52.219–8 by—
 ■ a. Revising the date of the clause;
 ■ b. In paragraph (a), revising the definition of “Small business concern”;
 ■ c. Redesignating paragraphs (c) and (d) as paragraphs (d) and (e) and adding a new paragraph (c); and
 ■ d. Revising newly redesignated paragraph (e)(5) introductory text.

The revisions read as follows:

52.219–8 Utilization of Small Business Concerns.

* * * * *

Utilization of Small Business Concerns (OCT 2022)

* * * * *

(a) * * *
Small business concern means a concern, including its affiliates, that is independently owned and operated, not dominant in its field of operation and qualified as a small business under the criteria and size standards in 13 CFR part 121, including the size standard that corresponds to the NAICS code assigned to the contract or subcontract.

* * * * *

(c)(1) A joint venture qualifies as a small business concern if—

(i) Each party to the joint venture qualifies as small under the size standard for the solicitation; or

(ii) The protégé is small under the size standard for the solicitation in a joint venture comprised of a mentor and protégé with an approved mentor-protégé agreement under a SBA mentor-protégé program.

(2) A joint venture qualifies as—

(i) A service-disabled veteran-owned small business concern if it complies with the requirements in 13 CFR part 125; or

(ii) A HUBZone small business concern if it complies with the requirements in 13 CFR 126.616(a) through (c).

* * * * *

(e) * * *

(5) The Contractor shall confirm that a subcontractor representing itself as a HUBZone small business concern is certified by SBA as a HUBZone small business concern. If the subcontractor is a joint venture, the Contractor shall confirm that at least one party to the joint venture is certified by SBA as a HUBZone small business concern. The Contractor may confirm the representation by accessing the System for Award Management or contacting SBA. Options for contacting the SBA include—

* * * * *

■ 19. Amend section 52.219–9 by—

■ a. Revising the date of the clause; and
 ■ b. Removing from paragraph (e)(4) the phrase “52.219–8(d)(2)” and adding the phrase “52.219–8(e)(2)” in its place.

The revision reads as follows:

52.219–9 Small Business Subcontracting Plan.

* * * * *

Small Business Subcontracting Plan (OCT 2022)

* * * * *

■ 20. Amend section 52.219–14 by revising the date of the clause and paragraph (g) to read as follows:

52.219–14 Limitations on Subcontracting.

* * * * *

Limitations on Subcontracting (OCT 2022)

* * * * *

(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.

(1) In a joint venture comprised of a small business protégé and its mentor approved by the Small Business Administration, the small business protégé shall perform at least 40 percent of the work performed by the joint venture. Work performed by the small business protégé in the joint venture must be more than administrative functions.

(2) In an 8(a) joint venture, the 8(a) participant(s) shall perform at least 40 percent of the work performed by the joint venture. Work performed by the 8(a) participants in the joint venture must be more than administrative functions.

* * * * *

■ 21. Amend section 52.219–18 by—
 ■ a. Revising the date of the clause and paragraph (a);

■ b. Removing from paragraph (b) the phrase “all of the” and adding the phrase “the applicable” in its place;

■ c. Adding a sentence to the end of paragraph (c); and

■ d. Revising Alternate I.

The revisions and addition read as follows:

52.219–18 Notification of Competition Limited to Eligible 8(a) Participants.

* * * * *

Notification of Competition Limited to Eligible 8(a) Participants (OCT 2022)

(a) Offers are solicited only from—

(1) Small business concerns expressly certified by the Small Business Administration (SBA) for participation in SBA’s 8(a) program and which meet the following criteria at the time of submission of offer—

(i) The Offeror is in conformance with the 8(a) support limitation set forth in its approved business plan; and

(ii) The Offeror is in conformance with the Business Activity Targets set forth in its approved business plan or any remedial action directed by SBA;

(2) A joint venture, in which at least one of the 8(a) program participants that is a party to the joint venture complies with the criteria set forth in paragraph (a)(1) of this clause, that complies with 13 CFR 124.513(c); or

(3) A joint venture—

(i) That is comprised of a mentor and an 8(a) protégé with an approved mentor-protégé agreement under the 8(a) program;

(ii) In which at least one of the 8(a) program participants that is a party to the joint venture complies with the criteria set forth in paragraph (a)(1) of this clause; and

(iii) That complies with 13 CFR 124.513(c).

* * * * *

(c) * * * A contracting officer may consider a joint venture for contract award. SBA does not approve joint ventures for competitive awards, but see 13 CFR 124.501(g) for SBA’s determination of participant eligibility.

* * * * *

Alternate I (OCT 2022). If the competition is to be limited to 8(a) participants within one or more specific SBA regions or districts, add the following paragraph (a)(1)(iii) to paragraph (a) of the clause:

(iii) The offeror's approved business plan is on the file and serviced by _____ [Contracting Officer completes by inserting the appropriate SBA District and/or Regional Office(s) as identified by the SBA].

■ 22. Amend section 52.219–27 by revising the date of the clause and paragraph (d) and adding paragraph (e) to 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 (OCT 2022)

* * * * *

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

(1) At least one party to the joint venture complies with the criteria defined in paragraph (a) of this clause and 13 CFR 125.18(b)(2); and

(2) Each party to the joint venture is small under the size standard corresponding to the NAICS code assigned to the procurement, or the protégé is small under the size standard corresponding to the NAICS code assigned to the procurement in a joint venture comprised of a mentor and protégé with an approved mentor-protégé agreement under an SBA mentor-protégé program.

(e) In a joint venture that complies with paragraph (f) of this clause, the service-disabled veteran-owned small business party or parties to the joint venture shall perform at least 40 percent of the work performed by the joint venture. Work performed by the service-disabled veteran-owned small business party or parties to the joint venture must be more than administrative functions.

* * * * *

■ 23. Amend section 52.219–28 by revising the date of the clause, and in paragraph (a) revising paragraph (1) of the definition of “Small business concern” to read as follows:

52.219–28 Post-Award Small Business Program Rerepresentation.

* * * * *

Post-Award Small Business Program Rerepresentation (OCT 2022)

(a) * * *

Small business concern—

(1) Means a concern, including its affiliates, that is independently owned and operated, not dominant in its field of operation, and qualified as a small business under the criteria in 13 CFR part 121 and the size standard in paragraph (d) of this clause.

* * * * *

■ 24. Amend section 52.219–29 by—
 ■ a. Revising the date of the clause;
 ■ b. In paragraph (a), in the definition “Economically disadvantaged women-

owned small business (EDWOSB)” removing the phrase “It automatically” and adding the phrase “An EDWOSB concern automatically” in its place;

■ c. Revising paragraph (d); and
 ■ d. Adding paragraph (e).

The revisions and addition read 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 (OCT 2022)

* * * * *

(d) *Joint Venture*. A joint venture may be considered an EDWOSB concern if—

(1) At least one party to the joint venture complies with the criteria defined in paragraph (a) and paragraph (c)(3) of this clause, and 13 CFR 127.506(c); and

(2) Each party to the joint venture qualifies as small under the size standard for the solicitation, or the protégé is small under the size standard for the solicitation in a joint venture comprised of a mentor and protégé with an approved mentor-protégé agreement under the SBA mentor-protégé program.

(e) In a joint venture that complies with paragraph (d) of this clause, the EDWOSB party or parties to the joint venture shall perform at least 40 percent of the work performed by the joint venture. Work performed by the EDWOSB party or parties to the joint venture must be more than administrative functions.

* * * * *

■ 25. Amend section 52.219–30 by revising the date of the clause and paragraph (d) and adding paragraph (e) to 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 (OCT 2022)

* * * * *

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

(1) At least one party to the joint venture complies with the criteria defined in paragraph (a) and (c)(3) of this clause, and 13 CFR 127.506(c); and

(2) Each party to the joint venture qualifies as small under the size standard for the solicitation, or the protégé is small under the size standard for the solicitation in a joint venture comprised of a mentor and protégé with an approved mentor-protégé agreement under the SBA mentor-protégé program.

(e) In a joint venture that complies with paragraph (d) of this clause, the WOSB party

or parties to the joint venture shall perform at least 40 percent of the work performed by the joint venture. Work performed by the WOSB party or parties to the joint venture must be more than administrative functions.

* * * * *

■ 26. Amend section 52.244–6 by—
 ■ a. Revising the date of the clause; and
 ■ b. Removing from paragraph (c)(1)(vii) the date “(OCT 2018)” and adding the date “(OCT 2022)” in its place.

The revision reads as follows:

52.244–6 Subcontracts for Commercial Products and Commercial Services.

* * * * *

Subcontracts for Commercial Products and Commercial Services (OCT 2022)

* * * * *

[FR Doc. 2022–20340 Filed 9–22–22; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 5, 12, 19, 36, and 43

[FAC 2022–08; FAR Case 2018–020; Item II; Docket No. FAR–2018–0020, Sequence No. 1]

RIN 9000–AN78

Federal Acquisition Regulation: Construction Contract Administration

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 a section of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, to require agencies to provide a notice along with the solicitation to prospective bidders and offerors regarding definitization of requests for equitable adjustment related to change orders under construction contracts.

DATES: Effective October 28, 2022.

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 Division at 202–501–4755 or GSARegSec@gsa.gov. Please cite FAC 2022–08, FAR Case 2018–020.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD, GSA, and NASA published a proposed rule at 85 FR 18181 on April 1, 2020, to implement section 855 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232), codified at 15 U.S.C. 644(w) in the Small Business Act.

Section 855 requires Federal agencies to provide a notice, along with solicitations for construction contracts anticipated to be awarded to small businesses, to prospective offerors that includes information about the agency's policies or practices in complying with FAR requirements related to the timely definitization of requests for equitable adjustment on construction contracts. Definitization of requests for equitable adjustment occurs after the contracting officer receives, reviews, and conducts an analysis and audit of the information contained in a change order proposal, and results in an executed contractual action. The notice must also include data regarding the time it took the agency to definitize requests for equitable adjustment on construction contracts for the three-year period preceding the issuance of the notice.

FAR 36.211 requires agencies to furnish data for the three fiscal years preceding the issuance of the solicitation notice.

Six 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

The following significant changes from the proposed rule are made in the final rule:

(1) Removal of Provision 52.236–XX; Replaced by Solicitation Notice

The final rule FAR text removes the proposed solicitation provision 52.236–XX, Notice Regarding Administration of Change Orders for Construction. The provision is replaced with an instruction to the contracting officer at FAR subpart 5.2, Synopses of Proposed Contract Actions. Specifically, 5.205(h), Special situations, requires contracting

officers to transmit a notice in the solicitation notice on the Governmentwide point of entry (GPE) to meet the requirements of section 855 (15 U.S.C. 644(w)).

The final rule FAR text removes the proposed text at FAR subpart 36.5, Contract Clauses, and replaces it with text at subpart 36.2, Special Aspects of Contracting for Construction. Specifically, paragraph (b) is added to FAR section 36.211 to coincide with FAR 5.205(h) and to provide specifics on the information required in the solicitation notice. This change will allow agencies more flexibility to share their specific guidance or to provide explanatory commentary. The text from the removed provision, 52.236–XX, is converted into the text for the solicitation notice.

(2) Removal of “publicly accessible website” and “website to be determined”; Replaced with “agency specific, publicly accessible website” and “follow agency procedures”

FAR 36.211(b) requires contracting officers to provide a description of applicable policies or procedures in the notice or through “an address of an agency-specific, publicly accessible website” containing this information rather than through a provision to be filled in or a “publicly accessible website.” The agency's past performance data will be included in the table format provided at FAR 36.211(b) or on an agency-specific, publicly accessible website in lieu of a “website to be determined” as stated in the proposed rule.

This change will allow agencies more flexibility in how to share their specific guidance, and to provide explanatory commentary when appropriate.

(3) Clarifications

The final rule makes revisions at FAR part 43, Contract Modifications. Specifically, FAR 43.204(b)(3)(ii), regarding recording and maintaining data for definitizing equitable adjustments, is moved to paragraph (b)(1)(ii) to clarify that the requirement applies to all change orders. This paragraph replaces in two places the phrase “shall use [website to be determined]” with a reference to agency procedures to allow more flexibility in recording and maintaining the required data.

(4) Measurement of the Definitization of Equitable Adjustments

The final rule revises FAR 43.204(b)(1)(ii), previously FAR 43.204(b)(3)(ii) in the proposed rule, to identify the measurement of the

definitization of equitable adjustments by including the following sentence: “The definitization of an equitable adjustment begins upon receipt of an adequate change order definitization proposal by the contracting officer and ends upon the contracting officer's execution of a contractual action to definitize the change order.”

B. Analysis of Public Comments**1. Applicability/Authority for Appropriations**

Comment: One respondent stated that NDAA appropriations are not applicable to non-DoD agencies. The respondent stated that the law should be incorporated into the Defense Federal Acquisition Regulation Supplement (DFARS) instead of the FAR.

Response: Congress often uses the annual NDAA as a vehicle for making Governmentwide acquisition law changes. In this instance, Congress amended section 15 of the Small Business Act (15 U.S.C. 644) in section 855 of the John S. McCain NDAA for FY 2019 (Pub. L. 115–232). The new requirements are codified at 15 U.S.C. 644(w). Since section 15 of the Small Business Act (15 U.S.C. 644) has Governmentwide applicability, it is appropriate for the requirements to be implemented in the FAR. No changes were made to the final rule as a result of this comment.

2. Past Performance Data

Comment: One respondent stated that the rule should allow agencies an opportunity to explain factors contributing to the time required to resolve equitable adjustments as the reasons are often beyond the Government's control. The respondent stated that historical data without context is irrelevant to predicting future time frames and otherwise makes the data meaningless.

Another respondent noted that construction contracts are usually administered by individual construction contract administration offices near the project site. The respondent stated that collecting agency-wide past performance data is not indicative of future time frames and cannot be correlated to accurately anticipate future conduct of an administering office. The respondent stated that the rule should be amended to allow agencies an opportunity to account for a contract change's specific facts and circumstances; otherwise, the data is meaningless.

A third respondent stated that allowing an “explanatory commentary” section in either the solicitation or a

public website for agencies to explain the metric or means used to compile or report the types of equitable adjustments included or excluded from the metrics would be helpful.

Response: While primary data without context has value, the Councils acknowledge context could enhance the value of historical data in some situations and that agencies should have the opportunity to provide additional relevant information. The FAR text is revised to remove the proposed provision 52.236–XX, Notice Regarding Administration of Change Orders for Construction, and replace it with a requirement for contracting officers to transmit a notice on the GPE in the solicitation notice as required by FAR part 5 to meet the requirements of section 855 (15 U.S.C. 644(w)). Additional text is added at FAR 5.205(h) to include the requirement for a solicitation notice on the GPE. Also, FAR 36.524 is replaced by FAR 36.211 to coincide with FAR 5.205(h) and to provide specifics on the information required in the solicitation notice (previously in the removed provision).

As previously included in paragraph (b) of the removed provision, contracting officers will include in the notice a description of the agency's applicable policies and procedures or the address of an agency-specific, publicly accessible website containing the information that applies to definitization of equitable adjustments for change orders under construction contracts. Additionally, the final rule revises “publicly accessible website” from paragraph (b) of the now removed provision to “an agency-specific, publicly accessible website” at 36.211(b)(1) and (2) to allow more flexibility for agencies to share their specific guidance or to provide explanatory commentary.

Also, the proposed rule text at FAR 43.204(b)(3)(ii) regarding recording and maintaining data for definitizing requests for equitable adjustment is moved to FAR 43.204(b)(1)(ii) to clarify that the requirement applies to all change orders. This paragraph replaces in two places “[website to be determined]” with a reference to “agency procedures” to allow more flexibility in recording and maintaining the required data.

3. Definitizing Equitable Adjustments

a. Equitable Adjustments in General Versus Unpriced Change Orders

Comment: One respondent stated that it was unclear if the intent was to disclose all equitable adjustments in general or only those for unpriced

change orders. The respondent stated that the rule should be limited to disclosing past performance data accounting for the time associated with definitization of equitable adjustments for unpriced change orders and not the time associated with the resolution of equitable adjustments in general. The respondent indicated section 855 discusses the definitization process but is not applicable to undefinitized equitable adjustments and stated that the FAR rule should be revised to clearly and precisely reflect the definitization process.

Response: This final rule implements section 855 of the John S. McCain NDAA for FY 2019, which requires notification to prospective bidders and offerors regarding administration of change orders for construction and does not exclude any type of change order. For clarification purposes, the final rule moves the proposed text at 43.204(b)(3)(ii) to 43.204(b)(1)(ii) to clarify that applicability is to all change orders.

b. Incorporate Broader Definition for Clarification

Comment: One respondent stated that agencies have different standards for definitizing equitable adjustments and the FAR does not adequately define “equitable adjustment;” therefore, any resultant data reporting from Federal agencies will differ. The respondent stated that the rule should require agencies to incorporate the “broadest possible definition” in reporting the time to definitize an equitable adjustment. A second respondent stated that broadening the definition of a request for equitable adjustment to include contract modifications that result from either unilateral or bilateral changes would be helpful.

Response: FAR 43.204 and agency supplements provide the standard for definitizing equitable adjustments, while this rule adds the requirement for providing a notice to prospective bidders or offerors regarding definitization of change orders for construction. Also, the notice requirements at FAR 36.211(b)(1) (previously at FAR 36.524 and the removed provision) allows the agency issuing the solicitation to share the policies and procedures that apply to definitization of equitable adjustments for change orders under construction contracts. With this information all offerors will have the same understanding of each solicitation. A broader definition is not necessary considering the guidance that is already available in the FAR, agency

supplements, and agency policies and procedures.

For clarification purposes, the final rule includes at FAR 43.204(b)(1)(ii) (previously at FAR 43.204(b)(3)(ii)) the parameter, per section 855 of the John S. McCain NDAA for FY 2019, that the measurement of definitizing equitable adjustments begins upon receipt of an adequate change order definitization proposal by the contracting officer and ends upon the contracting officer's execution of a contractual action to definitize the change order.

c. Measurement of Change Order Process

Comment: One respondent stated that measurement of the change order process should start when the contractor provides the contracting officer with an estimate of cost or provides schedule impacting decisions and the cost or changes are validated by the contracting officer as being within the scope of the contract.

Response: This FAR rule implements section 855 of the John S. McCain NDAA for FY 2019, which requires that measurement of the change order process begin upon receipt of a request for an equitable adjustment. For clarification purposes, the final rule identifies at FAR 43.204(b)(1)(ii) (previously at FAR 43.204(b)(3)(ii)) the measurement of the definitization of requests for equitable adjustment by including the following sentence, “The definitization of an equitable adjustment begins upon receipt of an adequate change order definitization proposal by the contracting officer and ends upon the contracting officer's execution of a contractual action to definitize the change order.”

4. Cost/Administrative Burden

a. Collection Process Without Corresponding Benefits

Comment: One respondent stated that the transparency required by the FAR rule places undue costs and administrative burdens on agencies without corresponding benefits. The respondent also stated that by requiring disclosure of historical past performance data, the FAR rule will serve as a deterrent to some small business offerors and may cause small business offerors to inflate construction prices to mitigate possible lengthy equitable adjustment timeframes.

Response: The FAR rule is not intended to place undue costs and administrative burden on agencies or to deter small business contractors. In contrast, the rule provides small business contractors with useful

information that will allow them to make informed decisions and to properly plan and prepare proposals, thus providing agencies with corresponding benefits. Also, the disclosure of an agency's historical past performance data on the timeliness of definitization of equitable adjustments will provide potential small business offerors with data that can be used in deciding whether to submit a proposal and the knowledge to plan financially for possible incurred costs if delays are experienced in the definitization of equitable adjustments. As with the initial contract, contracting officers are required to negotiate equitable adjustments resulting from change orders to ensure the Government receives fair and reasonable pricing. Therefore, the final rule is unchanged as a result of this comment.

b. Centralized Tracking Website

Comment: One respondent stated that agencies are unlikely to have a centralized tool to track the required past performance data. The respondent stated that the rule should not be finalized until adequate funding is identified and a tracking tool can be designed, constructed, implemented, operated, and maintained.

Response: The Government does not intend to develop a centralized tool to track the past performance data required under this rule. Instead, the final rule, at FAR 43.204(b)(1)(ii) (previously at FAR 43.204 (b)(3)(ii)), replaces “[website to be determined]” with “follow agency procedures” to clarify the recording and maintenance of data; and revises the next to last sentence of FAR 43.204(b)(1)(ii) to state, “The contracting officer shall ensure the data is recorded promptly in accordance with agency procedures.” Additionally, the data (previously required by the removed provision) to be disclosed to offerors is required in the table provided at FAR 36.211(b)(2).

5. Support for the Rule

Comment: Two respondents expressed support for the rule.

Response: The Councils acknowledge the respondents' support for the rule.

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

This rule implements a statutory requirement for Federal agencies to provide a notice, along with solicitations for construction contracts anticipated to be awarded to small

businesses, to prospective offerors regarding agency policies or practices related to, and agency past performance in, complying with FAR requirements related to the timely definitization of requests for equitable adjustment resulting from change orders under construction contracts.

This rule does not create new solicitation provisions or contract clauses or impact any existing provisions or clauses.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to acquisitions at or below the SAT. Section 1905 generally limits the applicability of new laws when agencies are making acquisitions at or below the SAT, but provides that such acquisitions will not be exempt from a provision of law under certain circumstances, including when the Federal Acquisition Regulatory Council (FAR Council) makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts and subcontracts in amounts not greater than the SAT from the provision of law. The FAR Council has made a determination to apply 41 U.S.C 1905 to acquisitions at or below the SAT.

B. Applicability to Contracts for the Acquisition of Commercial Products, Including Commercially Available Off-The-Shelf (COTS) Items, or for Commercial Services

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial products or services and is intended to limit the applicability of laws to those contracts. Section 1906 provides that if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial product or commercial service contracts and subcontracts, the provision of law will apply to those contracts and subcontracts.

41 U.S.C. 1907 states that acquisitions of COTS items will be exempt from certain provisions of law unless the Administrator for Federal Procurement Policy makes a written determination and finds that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items.

The FAR Council did not make a determination to apply 41 U.S.C. 1906 to acquisitions for commercial products or commercial services. The Administrator for Federal Procurement Policy did not make a determination to

apply 41 U.S.C. 1907 to acquisitions of COTS items.

IV. Expected Impact of the Rule

This rule requires agencies to provide a notice that includes information about the agency's policies or practices in complying with FAR requirements related to the timely definitization of equitable adjustments under construction contracts, along with solicitations for construction contracts anticipated to be awarded to small businesses. The notice will provide potential small business offerors with information that may be useful to them as they prepare, or decide whether to prepare and submit, a proposal in response to an agency's solicitation for construction. For example, if an agency has a poor history of definitizing equitable adjustments, potential small business offerors may reconsider whether to submit a proposal in response to that agency's solicitation. Alternately, when preparing their proposals, small business offerors may consider the additional costs that could be incurred if they were to experience delays in the timely definitization of equitable adjustments. Additionally, contracting offices and contract administration offices are required to collect data on the time required to definitize change orders for construction contracts. There will be no cost impact to the public other than a de minimis cost to read the notice. The notice is for informational purposes and does not require any action on the part of the public.

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:

This rule is necessary to implement section 855 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232, codified at 15 U.S.C. 644(w)). Section 855 requires Federal agencies to provide a notice, along with solicitations for construction contracts anticipated to be awarded to small businesses, to prospective offerors regarding agency policies or practices in complying with FAR requirements related to the timely definitization of requests for equitable adjustment on construction contracts. The notice must also include data on the amount of time it took the agency to definitize requests for equitable adjustment on construction contracts during the three-year period preceding the issuance of the notice. FAR 36.211 requires agencies to furnish data for the three fiscal years preceding the issuance of the solicitation notice.

The objective of this rule is to provide contractors with information about an agency's past performance in definitizing equitable adjustments under construction contract change orders as required by section 855 of the NDAA for FY 2019.

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

DoD, GSA, and NASA do not expect this change to have a significant economic impact on a substantial number of small entities because this rule is aimed primarily at Federal agencies, requiring them to provide a notice of their past performance on definitizing equitable adjustments for change orders under construction contracts. The notice will provide potential small business offerors with information that may be useful to them as they prepare, or decide whether to prepare, and submit a proposal in response to an agency's solicitation for construction. For example, if an agency has a poor history of definitizing equitable adjustments, potential small business offerors may reconsider whether to submit a proposal in response to that agency's solicitation. Alternately, when preparing their proposals, small business offerors may consider the additional costs that could be incurred if they were to experience delays in the timely definitization of equitable adjustments.

An analysis of the Federal Procurement Data System reveals that an average of 2,280 unique entities per year were awarded construction contracts during FY 2017, FY 2018, and FY 2019. Of those, 1,797 were

small entities. The number of construction contracts awarded in FY 2017, FY 2018, and FY 2019 averaged 4,349 per year, of which 3,323 were awarded to small entities. Additionally, during these same years, an average of 3,659 construction-related task orders were awarded each year to approximately 1,054 unique entities; 2,991 of those task orders were awarded to 838 small entities. On average, over FY 2017, FY 2018, and FY 2019, 6,422 modifications were issued each year to approximately 1,542 entities for change orders or definitization of change orders under construction contracts. Of those, approximately 3,702 modifications were issued to 1,125 small entities.

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 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 5, 12, 19, 36, and 43

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 5, 12, 19, 36, and 43 as set forth below:

■ 1. The authority citation for 48 CFR parts 5, 12, 19, 36, and 43 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 5—PUBLICIZING CONTRACT ACTIONS

■ 2. Amend section 5.205 by adding paragraph (h) to read as follows:

5.205 Special situations.

* * * * *

(h) *Notice regarding timely definitization of equitable adjustments for change orders under construction contracts.* When the contracting officer anticipates award of a contract to a small business pursuant to a solicitation for construction, the contracting officer must transmit in the solicitation notice

on the GPE information regarding definitization of equitable adjustments for change orders under construction contracts (see 36.211).

PART 12—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

■ 3. Amend section 12.503 by adding paragraph (a)(10) to read as follows:

12.503 Applicability of certain laws to Executive agency contracts for the acquisition of commercial products and commercial services.

(a) * * *

(10) 15 U.S.C. 644(w), Solicitation Notice Regarding Administration of Change Orders for Construction (see 36.211).

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

■ 4. Add section 19.502–11 to read as follows:

19.502–11 Solicitation notice regarding administration of change orders for construction.

See 36.211 for the requirement to provide a notice to offerors regarding definitization of equitable adjustments for change orders under construction contracts.

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

■ 5. Revise section 36.211 to read as follows:

36.211 Distribution of advance notices and solicitations.

(a) Advance notices and solicitations should be distributed to reach as many prospective offerors as practicable. Contracting officers may send notices and solicitations to organizations that maintain, without charge to the public, display rooms for the benefit of prospective offerors, subcontractors, and material suppliers. If requested by such organizations, this may be done for all or a stated class of construction projects on an annual or semiannual basis. Contracting officers may determine the geographical extent of distribution of advance notices and solicitations on a case-by-case basis.

(b) As required by 15 U.S.C. 644(w), the contracting officer shall transmit to the Governmentwide point of entry (GPE) a notice (see 5.205(h), in solicitation notices posted at the GPE for construction contracts anticipated to be awarded to a small business pursuant to part 19. The notice shall include certain information regarding the agency's

definitization of equitable adjustments for change orders under construction contracts. This information includes:

(1) A description of agency policies or procedures, in addition to that outlined in FAR 43.204, that apply to definitization of equitable adjustments for change orders under construction contracts. This description may be provided in a notice by including an address of an agency-specific, publicly accessible website containing this

information. If no agency-specific additional policies and procedures exist, the notice shall include a statement to that effect.

(2) Data on the agency's past performance, for the prior 3 fiscal years, regarding the time required to definitize equitable adjustments for change orders under construction contracts (see 43.204). If fewer than 3 fiscal years of data are available, agencies shall provide data for the number of fiscal

years that are available. Data shall be provided in the solicitation notice as shown in the following table, or provide the address of an agency-specific, publicly accessible website containing this information. An adequate change order definitization proposal shall contain sufficient information to enable the contracting officer to conduct meaningful analyses and audits of the information contained in the proposal.

TABLE 1 TO PARAGRAPH (b)(2)

Time to definitize after receipt of an adequate change order definitization proposal under construction contracts	Number of change order proposals definitized under construction contracts
30 days or less	
31 to 60 days	
61 to 90 days	
91 to 180 days	
181 to 365 days	
366 or more days	
After completion of contract performance via a contract modification addressing all undefinitized equitable adjustments received during contract performance.	

■ 6. Revise section 36.500 to read as follows:

36.500 Scope of subpart.

(a) This subpart prescribes provisions and clauses for insertion in solicitations and contracts for—

(1) Construction; and
(2) Dismantling, demolition, or removal of improvements contracts.

(b) Provisions and clauses prescribed elsewhere in the Federal Acquisition Regulation (FAR) shall also be used in such solicitations and contracts when the conditions specified in the prescriptions for the provisions and clauses are applicable.

PART 43—CONTRACT MODIFICATIONS

■ 7. Amend section 43.204 by redesignating paragraph (b)(1) as paragraph (b)(1)(i) and adding paragraph (b)(1)(ii) to read as follows:

43.204 Administration.

(b) * * *
(1)(i) * * *

(ii) Agencies shall, in accordance with agency procedures, record and maintain data regarding the time required to definitize equitable adjustments associated with change orders for construction. The definitization of an equitable adjustment begins upon receipt of an adequate change order definitization proposal by the contracting officer, and ends upon the contracting officer's execution of a contractual action to definitize the change order. The contracting officer shall ensure the data is recorded

promptly in accordance with agency procedures. See 36.211(b).

* * * * *

[FR Doc. 2022–20341 Filed 9–22–22; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 5, 6, 13, 19, and 52

[FAC 2022–08; FAR Case 2019–007; Item III; Docket No. FAR–2019–0007, Sequence No. 1]

RIN 9000–AN90

Federal Acquisition Regulation: Update of Historically Underutilized Business Zone Program

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 changes to the Small Business Administration's regulations for the Historically Underutilized Business Zone Program to reflect current policies, eliminate ambiguities, and reduce burdens on small businesses and procuring agencies.

DATES: Effective October 28, 2022.

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 2022–08, FAR Case 2019–007.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 86 FR 31468 on June 14, 2021, to implement regulatory changes made by the Small Business Administration (SBA) to the Historically Underutilized Business Zone (HUBZone) Program. Following a review of its HUBZone program regulations, SBA issued a final rule on November 26, 2019, at 84 FR 65222, to update its regulations to reflect current policies, eliminate ambiguities, and reduce burdens on small businesses and procuring agencies. For details see the proposed rule and Section IV below.

Two 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; however, no changes were made as a result of the public comments received. A discussion

of the comments received is provided as follows:

A. Summary of Significant Changes From The Proposed Rule

There are no significant changes from the proposed rule.

B. Analysis of Public Comments

1. Support for the Rule

Comment: One respondent expressed support for the rule.

Response: The Councils acknowledge the respondent's support for the rule.

2. Clarifications

Comment: One respondent questioned the need for a checkbox for HUBZone "self-certification" in the representations at FAR 52.212–3(c)(10)(i) and 52.219–1(c)(8)(i) if a firm's HUBZone status is determined by the Small Business Administration (SBA).

Response: This rule implements SBA's final rule published November 26, 2019, at 84 FR 65222, which modified the HUBZone certification process to reduce the burden on HUBZone small business concerns. As a result, HUBZone entities are certified by SBA annually, which will allow entities to remain eligible for future HUBZone contracts for the entire year, rather than having to represent its status with each offer. However, the checkbox in the representations is still necessary, as a HUBZone entity must represent whether it is or is not a HUBZone small business concern certified by SBA in the Dynamic Small Business Search (DSBS) and represent that it will attempt to maintain an employment rate of HUBZone residents of 35 percent of its employees during performance of a HUBZone contract in accordance with 13 CFR 126.200(e)(1).

3. Outside the Scope of the Rule

Comment: One respondent recommended increasing the number of HUBZone small business set-asides.

Response: This is outside the scope of this rule.

C. Other Changes

This rule makes minor editorial changes from the proposed rule in FAR parts 2 and 19, in the provisions at FAR 52.212–3, Offeror Representations and Certifications—Commercial Products and Commercial Services, and 52.219–1, Small Business Program Representations, and in the clauses at 52.219–8, Utilization of Small Business Concerns, and 52.219–9, Small Business Subcontracting Plan.

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

This rule amends the provision and clauses at FAR 52.212–3, 52.212–5, 52.213–4, 52.219–1, 52.219–3, 52.219–4, 52.219–8, 52.219–9, and 52.244–6. The provisions and clauses associated with implementation of the HUBZone program continue to apply to acquisitions for commercial products, including COTS items, or for commercial services. As explained below, this rule also applies all HUBZone program provisions and clauses to acquisitions at or below the SAT.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to acquisitions at or below the SAT. Section 1905 generally limits the applicability of new laws when agencies are making acquisitions at or below the SAT, but provides that such acquisitions will not be exempt from a provision of law under certain circumstances, including when the Federal Acquisition Regulatory Council (FAR Council) makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts and subcontracts in amounts not greater than the SAT from the provision of law. The FAR Council has made a determination to apply this statute to acquisitions at or below the SAT.

B. Determination

The HUBZone Act of 1997, including 15 U.S.C. 657a, tasks SBA with administering a program to assist participating small businesses located in areas with low income levels, high poverty and high unemployment rates, Indian reservations, closed military bases, or disaster areas with contracting opportunities in the form of set-asides, sole-source awards, and price-evaluation preferences. Its primary objectives are job creation and increased capital investment in distressed communities.

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.

The FAR Council implemented the SBA's HUBZone program, which implemented the HUBZone Act, through an interim rule published on December 18, 1998 and effective on January 4, 1999 (63 FR 70265). A final rule was published on September 24, 1999 (64 FR 51830). The FAR rule added the HUBZone Act to the list of laws inapplicable to contracts and subcontracts at or below the SAT at FAR 13.005. This final rule removes the HUBZone Act from the list of laws inapplicable to contracts and subcontracts at or below the SAT at FAR 13.005 and makes other conforming changes.

Applying the rule to acquisitions at or below the SAT furthers the longstanding policy expressed in FAR 19.201 of promoting "maximum practicable opportunities" to HUBZone contractors in Government contracting and the Administration's express commitment, reflected in E.O. 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, to advance equity for underserved communities.

According to the Federal Procurement Data System, an average of 108,233 contracts per year resulted from FAR part 19 set-asides and sole-source awards at or below the SAT during fiscal years 2019 through 2021. Failure to apply the HUBZone Act to the significant number of acquisitions that are conducted each year at or below the SAT would prevent agencies from using the authorities of this program to maximize opportunities for HUBZone small businesses in the Federal marketplace. The Federal Government has a policy of promoting HUBZone participation in Government contracting. The Small Business Act (Section 15(g)(1), 15 U.S.C. 644(g)(1)) includes a 3% annual HUBZone contracting goal for all prime contracts and subcontract awards each fiscal year. Historically, the Federal Government has not achieved the HUBZone goal. Application of the HUBZone Act to procurements at or below the SAT will aid Federal agencies in achieving the HUBZone contracting goal.

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.

IV. Expected Impact of the Rule

This final rule will impact the operations of the Government and HUBZone entities as described in this section. This rule specifies that SBA

now certifies firms as HUBZone small business concerns in DSBS. As a result, HUBZone entities are certified by SBA annually, which will allow HUBZone entities to remain eligible for HUBZone contracts for the entire year rather than being required to represent their status for each offer. HUBZone small business certification data contained in DSBS is also available in the System for Award Management (SAM); therefore, contracting officers may use DSBS or SAM to identify certified HUBZone small business concerns.

Contracting officers may award HUBZone set-aside and sole-source contracts at or below the simplified acquisition threshold. This change will increase the benefits from HUBZone set-aside and sole-source contracts and increase HUBZone small businesses' opportunities in the Federal marketplace.

Additionally, minor changes are made to the processing of HUBZone status protests.

This final rule is not expected to result in any costs to contractors or offerors.

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**. This rule 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:

DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement revisions the Small Business Administration (SBA) made in its regulations for the Historically Underutilized Business Zone (HUBZone) Program. Following a review of its HUBZone program regulations, SBA issued a final rule on November 26, 2019, at 84 FR 65222, to update its regulations to reflect current policies, eliminate ambiguities, and reduce burdens on small businesses and procuring agencies. This final FAR rule updates terminology and processes to correspond with SBA's changes, such as updating the definition of HUBZone small business concern and procedures for filing and processing HUBZone protests. This rule also removes the restriction against applying the HUBZone Act of 1997 (15 U.S.C. 657a) to contracts and subcontracts at or below the simplified acquisition threshold (SAT).

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 small entities that qualify for the HUBZone program and that are interested in participating in Federal procurement. By reducing the burden on firms interested in becoming HUBZone small business concerns, more firms may participate in and benefit from the program. SBA's Dynamic Small Business Search database includes 6,417 small business concerns with active HUBZone certifications. In fiscal years 2019, 2020, and 2021, the Federal Government made approximately 177,166 awards to SBA certified HUBZone small business concerns. Approximately 9,104 of these were awarded to 2,416 unique entities through a HUBZone set-aside under the HUBZone program; 584 were awarded to 408 unique entities on a sole-source basis under the HUBZone program; and 54 were awarded to 47 unique entities using the HUBZone price evaluation preference. Approximately 58,750 were awarded to HUBZone small businesses in open competition with other firms.

According to the Federal Procurement Data System, an average of 108,233 contracts per year resulted from FAR part 19 set-asides and sole-source awards at or below the SAT during fiscal years 2019, 2020, and 2021. Contracting officers will now be able to award HUBZone set-aside and sole-source contracts at or below the simplified acquisition threshold. Application of the HUBZone Act of 1997, 15 U.S.C. 657a, to acquisitions at or below the SAT will increase the benefits from HUBZone set-aside and sole-source contracts and increase HUBZone small businesses' opportunities in the Federal marketplace.

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

There are no known significant alternative approaches to the final rule.

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 the information collection described in this rule; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Numbers 9000–0136, Commercial Acquisitions and 9000–0007, Subcontracting Plans.

List of Subjects in 48 CFR Parts 2, 5, 6, 13, 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 amend 48 CFR parts 2, 5, 6, 13, 19, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 5, 6, 13, 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 2—DEFINITIONS OF WORDS AND TERMS

- 2. Amend section 2.101 in paragraph (b)(2) by—
 - a. In the definition “HUBZone” removing the phrase “or redesignated areas,” and adding the phrase “redesignated areas, governor-designated covered areas, or qualified disaster areas,” in its place;
 - b. In the definition “HUBZone contract” removing from paragraph (1) the phrase “sole source” and adding the phrase “sole-source” in its place; and
 - c. Revising the definition “HUBZone small business concern”.

The revision reads as follows:

2.101 Definitions.
* * * * *
(b) * * *
(2) * * *

HUBZone small business concern means a small business concern that meets the requirements described in 13 CFR 126.200, is certified by the Small Business Administration (SBA) and designated by SBA as a HUBZone small business concern in the Dynamic Small Business Search (DSBS) (13 CFR 126.103). SBA's designation also appears in SAM.
* * * * *

PART 5—PUBLICIZING CONTRACT ACTIONS

5.206 [Amended]

- 3. Amend section 5.206 in paragraph (a) introductory text, by removing the word “qualified”.

PART 6—COMPETITION REQUIREMENTS

- 4. Amend section 6.205 by revising paragraph (a) and removing from paragraph (b) the word “qualified”.

The revision reads as follows:

6.205 Set-asides for HUBZone small business concerns.

(a) To fulfill the statutory requirements relating to the HUBZone Act of 1997 (15 U.S.C. 631 note), contracting officers may set aside solicitations to allow only HUBZone small business concerns to compete (see 19.1305).

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

13.003 [Amended]

- 5. Amend section 13.003 in paragraph (b)(2)(ii) by removing the phrase “and 19.1306(a)(4)”.

13.005 [Amended]

- 6. Amend section 13.005 by removing paragraph (a)(5), and redesignating paragraphs (a)(6) through (8) as paragraphs (a)(5) through (7), respectively.

PART 19—SMALL BUSINESS PROGRAMS

19.301–1 [Amended]

- 7. Amend section 19.301–1 in paragraph (d) by removing the phrase “concern both at the time of initial offer and at the time of contract award” and adding the phrase “concern at the time of initial offer” in its place.

- 8. Amend section 19.306 by—

- a. Revising paragraph (b);
- b. In paragraph (c) removing the phrase “HUBZone qualifying” and adding the phrase “HUBZone eligibility” in its place;
- c. Revising paragraph (d);
- d. In paragraph (e)—
- i. Revising the heading;
- ii. Removing from paragraph (e)(1) introductory text the word “protest” and adding the words “written protest” in its place;
- e. Revising paragraphs (f) and (h)(1)(ii);
- f. Removing paragraph (h)(3);
- g. In paragraph (i)—

- i. Removing from the introductory text “The HUBZone Program Director” and “(AA/GCBD)” and adding “SBA” and “(AA/GC&BD)” in their places, respectively;

- ii. Revising the second sentence of paragraph (i)(1);

- iii. Removing from paragraph (i)(2) “AA/GCBD” and adding “AA/GC&BD” in its place;

- iv. Revising paragraph (i)(3);

- v. Removing from paragraph (i)(4) “(h)(1)(ii) or (h)(3)” and in two places removing “(AA/GCBD)” and adding “(h)(1)(ii)(B)”, and “(AA/GC&BD)” in their places, respectively; and

- vi. Revising paragraph (i)(5).

- h. In paragraph (l)—

- i. Adding to the end of paragraph (l)(1)(i) the word “and”;

- ii. Removing paragraph (l)(1)(ii) and redesignating paragraph (l)(1)(iii) as paragraph (l)(1)(ii); and

- iii. Removing from paragraph (l)(2) “Director/HUB’s decision” and adding “HUBZone Program Director’s determination” in its place; and
- i. Removing from paragraph (m) “AA/GCBD” and adding “AA/GC&BD” in its place and removing “AA/GCBD’s” and adding “AA/GC&BD’s” in its place.

The revisions read as follows:

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

* * * * *

(b)(1) For sole-source procurements, SBA or the contracting officer may protest the prospective contractor’s certified HUBZone status; for all other procurements, SBA, the contracting officer, or any other interested party may protest the apparent successful offeror’s certified HUBZone status (see 13 CFR 126.800).

(2) The Director of SBA’s Office of the HUBZone Program will determine whether the concern has certified HUBZone status. If SBA upholds the protest, SBA will remove the concern’s HUBZone status in the Dynamic Small Business Search (DSBS). SBA’s protest regulations are found in subpart H “Protests” at 13 CFR 126.800 through 126.805.

* * * * *

(d)(1) All protests must be in writing and must state all specific grounds for the protest (*i.e.*, why the protested concern did not meet the eligibility requirements at 13 CFR 126.200 at the time of the concern’s application to SBA for certification as a HUBZone small business concern or at the time SBA certified or last recertified the concern as a HUBZone small business concern). Assertions that a protested concern is not a HUBZone small business concern, without setting forth specific facts or

allegations, will not be considered by SBA (see 13 CFR 126.801(b)).

(2) Protests filed against a HUBZone joint venture must state one or, if applicable, both of the following:

(i) Why the HUBZone small business party to the joint venture did not meet the eligibility requirements at 13 CFR 126.200 at the time of its application to SBA for certification or at the time SBA certified or last recertified the concern as a HUBZone small business concern.

(ii) Why the joint venture did not meet the requirements at 13 CFR 126.616 at the time of submission of its offer for a HUBZone contract.

(e) *Submission of a protest.* * * *

* * * * *

(f) The contracting officer shall forward all protests with a referral letter to the Director of SBA’s Office of the HUBZone Program, by email to hzprotests@sba.gov. The referral letter shall include the following—

(1) The solicitation number;

(2) The contracting officer’s name and contact information;

(3) The type of HUBZone contract (*i.e.*, sole-source, set-aside, full and open competition with a HUBZone price evaluation preference, or reserve for HUBZone small business concerns under a multiple-award contract);

(4) For a procurement conducted using full and open competition with a HUBZone price evaluation preference, whether the protester’s opportunity for award was affected by the preference;

(5) For a HUBZone set-aside, whether the protester submitted an offer;

(6) Whether the protested concern was the apparent successful offeror;

(7) Whether the procurement was conducted using sealed bid or negotiated procedures;

(8) The bid opening date, if applicable;

(9) The date the protester was notified of the apparent successful offeror;

(10) The date the contracting officer received the protest;

(11) The date the protested concern submitted its initial offer or quote to the contracting officer; and

(12) Whether a contract has been awarded, and if so, the date of award and contract number.

* * * * *

(h) * * *

(1) * * *

(ii) Award the contract if—

(A) SBA does not issue its decision within 15 business days after receipt of the protest; and

(B) The contracting officer determines in writing that there is an immediate need to award the contract and that

waiting for SBA's determination will be disadvantageous to the Government.

* * * * *

(i) * * *

(1) * * *. If the AA/GC&BD subsequently overturns the initial determination or dismissal, the contracting officer may apply the AA/GC&BD decision to the procurement in question.

* * * * *

(3) If the contracting officer has made a written determination in accordance with (h)(1)(ii)(B) of this section, awarded the contract, and the Director of SBA's Office of the HUBZone Program's ruling sustaining the protest is received after award—

(i) The contracting officer shall either—

(A) Terminate the contract; or
(B)(1) Make a written determination that termination is not in the best interests of the Government; and

(2) Not exercise any options or award further task or delivery orders under the contract.

(ii) SBA will remove the concern's designation as a certified HUBZone small business concern in the Dynamic Small Business Search (DSBS). The concern is not permitted to submit an offer as a HUBZone small business concern until SBA issues a decision that the ineligibility is resolved; and

(iii) After SBA updates the concern's designation as a HUBZone small business in DSBS, the contracting officer shall update the Federal Procurement Data System (FPDS) to reflect the final decision of the HUBZone Program Director if no appeal is filed.

* * * * *

(5) If the AA/GC&BD affirms the decision of the HUBZone Program Director, finding the protested concern is ineligible, and contract award has occurred—

(i) The contracting officer shall either—

(A) Terminate the contract; or
(B)(1) Make a written determination that termination is not in the best interests of the Government; and

(2) Not exercise any options or award further task or delivery orders under the contract;

(ii) SBA will remove the concern's designation as a certified HUBZone small business concern in DSBS. The concern is not permitted to submit an offer as a HUBZone small business concern until SBA issues a decision that the ineligibility is resolved or the AA/GC&BD finds the concern is eligible on appeal; and

(iii) After SBA updates the concern's designation as a HUBZone small

business in DSBS, the contracting officer shall update FPDS to reflect the AA/GC&BD decision.

* * * * *

19.1302 [Removed and Reserved]

■ 9. Remove and reserve section 19.1302.

■ 10. Amend section 19.1303 by revising paragraphs (b) and (d) to read as follows:

19.1303 Status as a HUBZone small business concern.

* * * * *

(b) If SBA determines that a concern is a HUBZone small business, it will designate the concern as a HUBZone small business in the Dynamic Small Business Search (DSBS) at https://web.sba.gov/pro-net/search/dsp_dsbs.cfm. SBA's designation also appears in SAM. Only firms designated in DSBS and SAM as HUBZone small business concerns are eligible for HUBZone preferences. HUBZone preferences are not contingent on the place of performance.

* * * * *

(d) To be eligible for a HUBZone contract under this section, a HUBZone small business concern must be a HUBZone small business concern at the time of its initial offer.

19.1304 [Amended]

■ 11. Amend section 19.1304 by—

■ a. Adding to the end of paragraph (d) the word “or”;

■ b. Removing paragraph (e); and

■ c. Redesignating paragraph (f) as paragraph (e).

19.1305 [Amended]

■ 12. Amend section 19.1305 by—

■ a. Removing from paragraph (a)(3) the phrase “sole source” and adding the phrase “sole-source” in its place;

■ b. Removing from paragraph (c) the word “qualified”;

■ c. In paragraph (d)—

■ i. Removing from the introductory text the phrase “, except for acquisitions not exceeding the simplified acquisition threshold,”; and

■ ii. Removing from paragraph (d)(2) the word “acquisition” and adding the phrase “acquisition until the head of the contracting activity issues a written decision on the appeal,” in its place.

■ 13. Amend section 19.1306 by—

■ a. Revising the section heading;

■ b. In paragraph (a)—

■ i. Removing from the introductory text the phrase “sole source” and adding the phrase “sole-source” in its place;

■ ii. Removing paragraph (a)(4);

■ iii. Redesignating paragraphs (a)(5) and (6) as paragraphs (a)(4) and (5); and

■ c. Removing from paragraph (b) the phrase “sole source award” and adding the phrase “sole-source award (see 13 CFR 126.610)” in its place.

The revision reads as follows:

19.1306 HUBZone sole-source awards.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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

52.212–3 Offeror Representations and Certifications—Commercial Products and Services.

* * * * *

Offeror Representations and Certifications—Commercial Products and Services (Oct 2022)

* * * * *

(c) * * *

(10) * * *

(i) It ☐ is, ☐ is not a HUBZone small business concern listed, on the date of this representation, as having been certified by SBA as a HUBZone small business concern in the Dynamic Small Business Search and SAM, and will attempt to maintain an employment rate of HUBZone residents of 35 percent of its employees during performance of a HUBZone contract (see 13 CFR 126.200(e)(1)); and

* * * * *

■ 15. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Removing from paragraph (b)(11) the date “(SEP 2021)” and adding the date “(OCT 2022)” in its place;

■ c. Removing from paragraph (b)(12) the date “(SEP 2021)” and adding the date “(OCT 2022)” in its place;

■ d. Removing from paragraph (b)(16) the date “(OCT 2018)” and adding the date “(OCT 2022)” in its place;

■ e. Removing from paragraph (b)(17)(i) the date “(NOV 2021)” and adding the date “(OCT 2022)” in its place;

■ f. In paragraph (e)(1)—

■ i. Removing from the introductory text the phrase “(e)(1) of this paragraph” and adding the phrase “(e)(1),” in its place; and

■ ii. Removing from paragraph (e)(1)(v) the date “(OCT 2018)” and adding the date “(OCT 2022)” in its place;

■ g. In Alternate II—

■ i. Revising the date; and

■ ii. In paragraph (e)(1)(ii)(E) removing the date “(OCT 2018)” and adding the date “(OCT 2022)” in its place.

The revisions read as follows:

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

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services (OCT 2022)

* * * * *

Alternate II (OCT 2022). * * *

* * * * *

■ 16. Amend section 52.213–4 by revising the date of the clause and removing from paragraph (a)(2)(viii) the date “(JAN 2022)” and adding the date “(OCT 2022)” in its place.

The revision reads as follows:

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

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services) (Oct 2022)

* * * * *

■ 17. Amend section 52.219–1 by revising the date of the provision and paragraph (c)(8)(i) to read as follows:

52.219–1 Small Business Program Representations.

* * * * *

Small Business Program Representations (Oct 2022)

* * * * *

(c) * * *

(8) * * *

(i) It ☐ is, ☐ is not a HUBZone small business concern listed, on the date of this representation, as having been certified by SBA as a HUBZone small business concern in the Dynamic Small Business Search and SAM, and will attempt to maintain an employment rate of HUBZone residents of 35 percent of its employees during performance of a HUBZone contract (see 13 CFR 126.200(e)(1)); and

* * * * *

■ 18. Amend section 52.219–3 by—
 ■ a. Revising the date of the clause;
 ■ b. Revising paragraph (d) and (e); and
 ■ c. Removing paragraph (f).

The revisions read as follows:

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

* * * * *

Notice of HUBZone Set-Aside or Sole-Source Award (Oct 2022)

* * * * *

(d) *Joint venture.* A joint venture may be considered a HUBZone concern if—

(1) At least one party to the joint venture is a HUBZone small business concern and complies with 13 CFR 126.616(c); and

(2) Each party to the joint venture qualifies as small under the size standard for the solicitation, or the protégé is small under the size standard for the solicitation in a joint venture comprised of a mentor and protégé with an approved mentor-protégé agreement under the SBA mentor-protégé program.

(e) A HUBZone joint venture agrees that, in the performance of the contract, at least 40 percent of the aggregate work performed by the joint venture shall be completed by the HUBZone small business parties to the joint venture. Work performed by the HUBZone small business party or parties to the joint venture must be more than administrative functions.

* * * * *

■ 19. Amend section 52.219–4 by—

■ a. Revising the date of the clause;
 ■ b. Revising paragraph (c); and
 ■ c. Removing paragraph (d).

The revisions read 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 (OCT 2022)

* * * * *

(c) *Joint venture.* A HUBZone joint venture agrees that, in the performance of the contract, at least 40 percent of the aggregate work performed by the joint venture shall be completed by the HUBZone small business parties to the joint venture. Work performed by the HUBZone small business parties to the joint venture must be more than administrative functions.

■ 20. Amend section 52.219–8 by—

■ a. Revising the date of the clause;
 ■ b. In paragraph (a), revising the definition “HUBZone small business concern”; and
 ■ c. Revising paragraph (e)(5).

The revisions read as follows:

52.219–8 Utilization of Small Business Concerns.

* * * * *

Utilization of Small Business Concerns (OCT 2022)

(a) * * *

HUBZone small business concern means a small business concern that meets the requirements described in 13 CFR 126.200, certified by the Small Business Administration (SBA) and designated by SBA as a HUBZone small business concern in the Dynamic Small Business Search (DSBS) and SAM.

* * * * *

(e) * * *

(5) The Contractor shall confirm that a subcontractor representing itself as a HUBZone small business concern is certified by SBA as a HUBZone small business concern by accessing SAM or by accessing DSBS at https://web.sba.gov/pro-net/search/dsp_dsbs.cfm. If the subcontractor is a joint venture, the Contractor shall confirm that at least one party to the joint venture is certified by SBA as a HUBZone small business concern. The Contractor may confirm the representation by accessing SAM.

* * * * *

■ 21. Amend section 52.219–9 by revising the date of the clause and paragraph (e)(4) to read as follows:

52.219–9 Small Business Subcontracting Plan.

* * * * *

Small Business Subcontracting Plan (OCT 2022)

* * * * *

(e) * * *

(4) Confirm that a subcontractor representing itself as a HUBZone small business concern is certified by SBA as a HUBZone small business concern by accessing SAM or by accessing the Dynamic Small Business Search (DSBS) at https://web.sba.gov/pro-net/search/dsp_dsbs.cfm.

* * * * *

■ 22. Amend section 52.244–6 by—

■ a. Revising the date of the clause; and
 ■ b. Removing from paragraph (c)(1)(vii) the date “(Oct 2018)” and adding the date “(OCT 2022)” in its place.

The revision reads as follows:

52.244–6 Subcontracts for Commercial Products and Commercial Services.

* * * * *

Subcontracts for Commercial Products and Commercial Services (OCT 2022)

* * * * *

[FR Doc. 2022–20342 Filed 9–22–22; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 19, and 52

[FAC 2022–08; FAR Case 2020–013; Item IV; Docket No. FAR–2021–0009, Sequence No. 1]

RIN 9000–AO17

Federal Acquisition Regulation: Certification of Women-Owned Small Businesses

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 to amend the Federal Acquisition Regulation (FAR) to implement the final rule published by the Small Business Administration implementing a section of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year (FY) 2015.

DATES: Effective October 28, 2022.

FOR FURTHER INFORMATION CONTACT: Ms. Malissa Jones, Procurement Analyst, at 571–882–4687, 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 2022–08, FAR Case 2020–013.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 86 FR 55769 on October 7, 2021, to amend the FAR to implement section 825(a)(1) of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 (Pub. L. 113–291), which amended 15 U.S.C. 637(m), and the Small Business Administration (SBA) final rule at 85 FR 27650 issued on May 11, 2020, implementing section 825(a)(1). Five 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 and as a result, a clarifying change has been made to 19.1505(d); however, there are no significant changes from the proposed rule. A discussion of the comments received is provided as follows:

A. Summary of Significant Changes From the Proposed Rule

There are no significant changes from the proposed rule.

B. Analysis of Public Comments

1. Support for the Rule

Comment: One respondent expressed support for the rule.

Response: The Councils acknowledge the respondent’s support for the rule.

2. Women-Owned Small Business Certification Process

Comment: Two respondents expressed concern regarding the changes to the women-owned small business (WOSB) certification process, indicating it is overly complex and is a barrier to entry into the Federal marketplace for WOSB concerns. One respondent also indicated that the new process will extend award times by requiring contracting officers to check the Dynamic Small Business Search (DSBS) to verify the certification status of WOSB concerns.

Response: This rule implements SBA’s final rule at 85 FR 27650, issued on May 11, 2020, implementing section 825(a)(1) of the NDAA for FY 2015, which amended 15 U.S.C. 637(m). In its final rule, SBA amended 13 CFR part 127 to require WOSB and EDWOSB concerns to be certified by SBA or an SBA-approved third-party certifier in accordance with 13 CFR 127.300. The statutory language mandates the methods for certification; therefore, SBA has no authority to retain representation as an option for concerns seeking to compete for WOSB and EDWOSB sole-source and set-aside procurements. The WOSB and EDWOSB certification requirement applies only to those businesses wishing to compete for set-aside or sole-source contracts under the WOSB Program (the Program). Other WOSB concerns that do not participate in the Program may continue to represent their status and receive contract awards outside the Program. This rule does not change existing documentation requirements for certification. WOSBs will submit the documentation to SBA through certify.SBA.gov or to SBA-approved third-party certifiers. In addition, a concern’s status will appear in the System for Award Management (SAM); therefore, this rule will not delay award since contracting officers are already required to verify contractor information in SAM prior to award.

3. Clarifications

Comment: One respondent indicated that the Background section of the proposed rule incorrectly stated that WOSBs would be able to be certified by State governments and that this statement did not align with the FAR text of the proposed rule and SBA’s final rule. The respondent indicated that SBA’s final rule implementing section 825(a)(1) of the NDAA for FY 2015 does not authorize WOSB and EDWOSB concerns to be certified by a State government. The respondent indicated that the proposed rule FAR text accurately captures the program requirements as implemented by SBA.

Response: The Councils acknowledge the inaccuracy of the statement included in the background section of the proposed rule and clarify that WOSB and EDWOSB concerns are certified by SBA or a SBA-approved third-party certifier.

Comment: One respondent indicated that the proposed rule does not clearly indicate “when the EDWOSB or WOSB concern must have been designated as a certified concern or have a pending application for certification in DSBS” to be eligible for award.

Response: As a result of the comment received, the FAR text at 19.1505(d) has been revised to clarify when an offeror is eligible for consideration.

4. Outside the Scope of the Rule

Comment: One respondent indicated that the proposed rule’s language at FAR 19.1503(c) differs from SBA’s regulations regarding when a contracting officer must, or may, terminate a contract.

Response: This comment is outside the scope of the rule. SBA’s regulations at 13 CFR 137.604(f) correspond to the FAR coverage at 19.308 on protests, not 19.1503, which addresses an entity’s status as a WOSB or EDWOSB. The questioned phrase “the contracting officer may terminate” already appears at FAR 19.1503(e), and is only being renumbered as paragraph (c).

Comment: One respondent recommended that the North American Industry Classification System codes be revised to increase the dollar thresholds to allow WOSB concerns to qualify for large or high dollar value set-aside contracts.

Response: This comment is outside the scope of this rule.

Comment: Three respondents submitted comments outside the scope of the rule.

Response: These comments are outside the scope of this rule.

C. Other Changes

FAR 19.1503(b)(2), 19.1505(e), and 19.1505(f) have been changed to clarify the systems that reflect an EDWOSB and WOSB concern’s certification status. Conforming changes have been made to the definition of Economically disadvantaged women-owned small business (EDWOSB) concern in FAR clause 52.212–3, Offeror Representations and Certifications—Commercial Products and Commercial Services.

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

This rule amends the following provisions and clauses: provision 52.212–3, clause 52.212–5, provision 52.219–1, clause 52.219–28, clause 52.219–29, clause 52.219–30. While the provisions and clauses are being amended, this rule does not change the application to contracts at or below the SAT or for commercial products or for commercial services, including COTS items. The provisions and clauses continue to apply to acquisitions for

commercial products or for commercial services, including COTS items, and acquisitions at or below the SAT.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to acquisitions at or below the SAT. Section 1905 generally limits the applicability of new laws when agencies are making acquisitions at or below the SAT, but provides that such acquisitions will not be exempt from a provision of law under certain circumstances, including when the Federal Acquisition Regulatory Council (FAR Council) makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts and subcontracts in amounts not greater than the SAT from the provision of law. The FAR Council has made a determination to apply this statute to acquisitions at or below the SAT.

B. Applicability to Contracts for the Acquisition of Commercial Products and Commercial Services, Including Commercially Available Off-the-Shelf (COTS) Items

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial products and commercial services, and is intended to limit the applicability of laws to contracts for the acquisition of commercial products and commercial services. Section 1906 provides that if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial products or commercial services contracts and subcontracts, the provision of law will apply to contracts and subcontracts for the acquisition of commercial products and commercial services.

41 U.S.C. 1907 states that acquisitions of COTS items will be exempt from certain provisions of law unless the Administrator for Federal Procurement Policy makes a written determination and finds that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items.

The FAR Council has made a determination to apply this statute to acquisitions for commercial products and commercial services. The Administrator for Federal Procurement Policy has made a determination to apply this statute to acquisitions for COTS items.

C. Determinations

This rule implements section 825(a)(1) of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 and SBA’s implementing regulation. Section 825 requires women-owned small business concerns and economically disadvantaged women-owned small business concerns to be certified to be eligible under the WOSB Program for set-aside or sole-source awards (see 13 CFR 127.300).

Section 825 is silent on the applicability of these requirements for 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. Section 825(a)(1) is silent on applicability to acquisitions of commercial products and commercial services. The statute does not provide for civil or criminal penalties. Therefore, it does not apply to acquisitions of commercial products and commercial services unless the FAR Council makes a written determination as provided in 41 U.S.C. 1906. Additionally, the law is silent on the applicability of this requirement to acquisitions of COTS items and does not independently provide for criminal or civil penalties; nor does it include terms making express reference to 41 U.S.C. 1907 and its application to acquisitions of COTS items. Therefore, it does not apply to acquisition of COTS items unless the Administrator for Federal Procurement Policy makes a written determination as provided at 41 U.S.C. 1907.

Failure to apply section 825(a)(1) to acquisitions at or below the SAT, acquisitions of commercial products or commercial services, including COTS items, would prevent contracting officers from using WOSB set-asides or making sole-source awards to WOSB or EDWOSB concerns based on their socioeconomic status. This limitation would restrict opportunities for WOSB and EDWOSB concerns in the Federal marketplace which is contrary to the longstanding policy expressed in FAR 19.201 of promoting “maximum practicable opportunities” in Government contracting, as well as the Administration’s express commitment reflected in Executive Order 13985, *Advancing Racial Equity and Support for Underserved Communities Through*

the Federal Government, to advance equity for underserved communities.

Application of the law to acquisitions at or below the SAT and acquisitions of commercial products and commercial services, including COTS items, will maximize the positive impact set-aside and sole-source contracts provide for WOSB and EDWOSB concerns by increasing WOSB opportunities in the Federal marketplace.

The Federal Government has a policy of promoting WOSB and EDWOSB participation in Government contracting; therefore, applying the requirement to acquisitions at or below the SAT and acquisitions of commercial products and commercial services, including COTS items, will help Federal agencies achieve WOSB goals.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of this rule to acquisitions at or below the SAT and to acquisitions of commercial products and commercial services and COTS items.

IV. Expected Impact of the Rule

As a result of this rule, contracting officers will be required to check SAM to determine if an EDWOSB or WOSB concern is certified or if the concern has a pending application for certification in DSBS, instead of checking that all required documentation has been submitted to the now defunct WOSB Repository. For EDWOSB or WOSB set-asides and sole-source awards, awards can only be made to an EDWOSB or WOSB certified concern. For EDWOSB or WOSB set-aside awards, if the apparently successful offeror’s EDWOSB or WOSB certification is pending, the contracting officer will be required to notify SBA’s Director/Government Contracting, and request SBA’s status determination. Within 15 calendar days from the date of contracting officer notification, SBA will make a determination regarding the offeror’s status as an EDWOSB or WOSB eligible under the WOSB program. If SBA does not provide the contracting officer with a determination within 15 days, the contracting officer may provide SBA additional time to make a determination, or may proceed with award to the next highest evaluated offeror.

The changes in this rule will affect contractor operations by requiring WOSB and EDWOSB concerns to be certified by SBA or a SBA-approved third-party certifier. However, the requirement to submit documentation (i.e., articles of incorporation, bylaws, stock ledgers or certificates, tax records, etc.) to SBA through *certify.SBA.gov* or

to SBA approved third-party certifiers already exists and remains unchanged.

The public cost associated with obtaining the WOSB or EDWOSB certification from SBA or a third-party certifier is accounted for under the SBA final rule implementing the Program certification requirements (85 FR 27650). In addition, the SBA final rule advises concerns that only a certified WOSB or EDWOSB may seek a specific sole-source requirement under the Program and that only a certified WOSB or EDWOSB, or a concern that has a pending application for certification under the Program may submit an offer on a specific EDWOSB or WOSB set-aside requirement.

Given SBA's notice to small business concerns, the cost to the public associated with this rule is not a significant impact, and is limited to the cost of regulatory familiarization, or the cost associated with reading this rule and understanding the revised solicitation provision.

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:

DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement section 825(a)(1) of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 (Pub. L. 113–291) which amended 15 U.S.C. 637(m), and SBA's final rule at 85 FR 27650 issued on May 11, 2020, to require that women-owned small business (WOSBs) concerns and economically disadvantaged women-owned small business (EDWOSBs) concerns participating in the WOSB Program (the Program) be certified by SBA or by a SBA-approved third-party certifier. EDWOSB and WOSB concerns that are not certified will not be eligible for contracts under the Program. The certification requirement applies only to participants wishing to compete for set-aside or sole-source contracts under the Program. EDWOSB and WOSB concerns that do not participate in the Program may continue to represent their status, receive contract awards outside the Program, and the awards may count toward an agency's goal for awards to WOSBs.

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

This rule will require EDWOSB and WOSB concerns to apply for certification through SBA or a SBA-approved third-party certifier and to be certified in order to be eligible for WOSB or EDWOSB set-aside or sole-source contracts under the Program. This rule is anticipated to impact 9,000–12,000 WOSB concerns. This estimate reflects the approximate number of WOSB concerns in the predecessor system SBA used to maintain WOSB certifications. The assumption is that the majority of those entities will seek certification from SBA or a third-party under the new certification process.

Data taken from the Federal Procurement Data System as of February 8, 2022, revealed that 8,599 set-aside or sole-source awards were made to WOSB and EDWOSB concerns from FY 2019 to FY 2021. Of the 8,599 awards made, 625 or approximately 7 percent, were WOSB and EDWOSB sole-source awards. This exemplifies the number of opportunities an offeror would potentially miss out on if they are not a certified EDWOSB or WOSB concern.

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

The Small Business Administration currently collects information to carry out its statutory mandate to provide oversight of certification related to SBA's WOSB Federal Contract Program (OMB Control Number 3245–0374, Certification for the Women-Owned Small Business Federal Contract Program). Certified EDWOSB or WOSB concerns need to update their certification information with SBA once a year to maintain their status with the WOSB Federal Contract program.

There are no known significant alternative approaches to the final rule.

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

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 Parts 2, 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 amend 48 CFR parts 2, 19, and 52 as set forth below:

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

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

PART 2—DEFINITIONS OF WORDS AND TERMS

2.101 [Amended]

■ 2. In section 2.101, in paragraph (b)(2), amend the definition of “Women-Owned Small Business (WOSB) Program” by:

■ a. In paragraph (1) introductory text, removing the phrase “sole source” and adding the phrase “sole-source” in its place;

■ b. In paragraph (2), removing the phrase “13 CFR part 127” and adding the phrase “13 CFR part 127, and the concern is certified by SBA or an approved third-party certifier in accordance with 13 CFR 127.300” in its place; and

■ c. In paragraph (3), removing the phrase “(13 CFR part 127)” and adding the phrase “, and the concern is certified by SBA or an approved third-party certifier in accordance with 13 CFR 127.300” in its place.

PART 19—SMALL BUSINESS PROGRAMS

■ 3. Amend section 19.308 by:

■ a. Removing from paragraph (d)(1)(ii) the phrase “women, when” and adding the phrase “women who are United States citizens, when” in its place;

■ b. Removing paragraph (d)(2);

■ c. Redesignating paragraph (d)(3) as (d)(2);

■ d. Removing from the newly designated paragraph (d)(2) the words

“not a” and adding the words “not an” in its place;

■ e. Revising paragraph (f)(1);

■ f. Revising paragraphs (i)(3)(iii) and (i)(5)(iii);

■ g. Removing from paragraph (l)(2) the phrase “409 Third Street SW, Washington, DC 20416, facsimile 202–205–6390” and adding the phrase “by email at *wosbprotest@sba.gov*” in its place; and

■ h. Removing from paragraph (l)(4) the phrase “facsimile 202–205–6873.”

The revisions read as follows:

19.308 Protesting a firm’s status as an economically disadvantaged women-owned small business concern or women-owned small business concern eligible under the Women-Owned Small Business Program.

* * * * *

(f)(1) The contracting officer shall forward all protests to SBA. The protests are to be submitted to SBA’s Director for Government Contracting by email at *wosbprotest@sba.gov*.

* * * * *

(i) * * *

(3) * * *

(iii) SBA will remove the concern’s designation in the Dynamic Small Business Search (DSBS) as an EDWOSB or WOSB concern eligible under the WOSB Program. The concern shall not submit an offer as an EDWOSB concern or WOSB concern eligible under the WOSB Program, until SBA issues a decision that the ineligibility is resolved.

* * * * *

(5) * * *

(iii) SBA will remove the concern’s designation in DSBS as an EDWOSB or WOSB concern eligible under the WOSB Program. The concern shall not submit an offer as an EDWOSB concern or WOSB concern eligible under the WOSB Program, until SBA issues a decision that the ineligibility is resolved or OHA finds the concern is eligible on appeal.

* * * * *

19.502–8 [Amended]

■ 4. Amend section 19.502–8 in paragraph (b) by removing “19.1505(g)” and adding “19.1505(i)” in its place.

■ 5. Amend section 19.1500 by revising paragraph (c) to read as follows:

19.1500 General.

* * * * *

(c) An economically disadvantaged women-owned small business (EDWOSB) concern and a WOSB concern eligible under the WOSB Program are subcategories of “women-owned small business concern” as defined in section 2.101.

19.1501 [Removed and Reserved]

■ 6. Remove and reserve section 19.1501.

■ 7. Revise section 19.1503 to read as follows:

19.1503 Status.

(a) Status as an EDWOSB concern or WOSB concern eligible under the WOSB Program is determined by the Small Business Administration in accordance with 13 CFR part 127.

(b) For a WOSB that seeks a WOSB or EDWOSB set-aside or sole-source contract, the contracting officer shall verify that the offeror—

(1) Is registered in the System for Award Management (SAM); and

(2) Is designated as a certified EDWOSB or WOSB concern in SAM (see 19.1505(d) for set aside procedures). Pending applications for certification are only in the Dynamic Small Business Search (DSBS) at https://web.sba.gov/pro-net/search/dsp_dsbs.cfm.

(c) If there is a decision issued by SBA as a result of a current eligibility examination finding that the concern did not qualify as an EDWOSB concern or WOSB concern eligible under the WOSB Program, the contracting officer may terminate the contract, and shall not exercise any option, or award further task or delivery orders. Agencies shall not count or include the award toward the small business goals for an EDWOSB concern or WOSB concern eligible under the WOSB Program and must update FPDS from the date of award to reflect the final SBA decision.

(d) A joint venture may be considered an EDWOSB concern or WOSB concern eligible under the WOSB Program if the EDWOSB or WOSB participant is certified in SAM (see section 19.1505(d) for set-aside procedures) and the joint venture meets the requirements of 13 CFR 127.506.

■ 8. Amend section 19.1504 by revising paragraph (b) to read as follows:

19.1504 Exclusions.

* * * * *

(b) Requirements that can be satisfied through award to mandatory Government sources (see section 8.002);

* * * * *

■ 9. Amend section 19.1505 by:

■ a. Revising paragraph (a)(2);

■ b. Redesignating paragraphs (f) and (g) as paragraphs (h) and (i);

■ c. Redesignating paragraph (d) as paragraph (g);

■ d. Removing paragraph (e);

■ e. Adding new paragraphs (d) through (f); and

■ f. Revising newly redesignated paragraphs (i) introductory text and (i)(1).

The revisions and addition read as follows:

19.1505 Set-aside procedures.

(a) * * *

(2)(i) May set aside acquisitions exceeding the micro-purchase threshold for competition restricted to EDWOSB concerns when the acquisition is assigned a NAICS code in which SBA has determined that WOSB concerns are underrepresented in Federal procurement; or

(ii) May set aside acquisitions exceeding the micro-purchase threshold for competition restricted to WOSB concerns eligible under the WOSB Program when the acquisition is assigned a NAICS code in which SBA has determined that WOSB concerns are substantially underrepresented in Federal procurement, as specified on SBA’s website at <http://www.sba.gov/WOSB>.

* * * * *

(d) An EDWOSB or WOSB concern may submit an offer under an EDWOSB or WOSB set-aside when the offeror—

(1) Qualifies as a small business concern under the size standard corresponding to the NAICS code assigned to the contract; and

(2)(i) For an EDWOSB set-aside, is certified pursuant to 13 CFR 127.300 as an EDWOSB or has a pending application for EDWOSB certification in the DSBS (see 13 CFR 127.504(a)); or

(ii) For a WOSB set-aside, is certified pursuant to 13 CFR 127.300 as an EDWOSB or WOSB, or has a pending application for EDWOSB or WOSB certification in the DSBS (see 13 CFR 127.504(a)).

(e) The contracting officer shall verify that offers received are eligible for consideration for award by checking SAM to see if the EDWOSB or WOSB concern is designated as a certified concern or checking DSBS for a pending application for certification.

(1) If the offeror is designated as certified in SAM or has a pending application for certification in DSBS, proceed with the offer evaluation.

(2) Unless the offeror is designated as certified in SAM or has a pending application for certification in DSBS, the offer is not eligible for award and shall be removed from consideration.

(f) Prior to award, the contracting officer shall verify the apparently successful offeror is certified in SAM, or has a pending application for certification in DSBS. If the apparently successful offeror’s EDWOSB or WOSB certification is pending in DSBS, the

contracting officer shall notify SBA's Director/Government Contracting by email at WOSBpendingcertification@sba.gov, and request SBA's status determination. The contracting officer shall provide SBA with the offeror's name, unique entity identifier, type of set-aside, NAICS code, and solicitation number.

(1) Within 15 calendar days from the date of the contracting officer's notification, SBA will make a determination regarding the offeror's status as an EDWOSB or WOSB eligible under the WOSB program.

(2) If the contracting officer does not receive a determination from SBA within 15 calendar days, the contracting officer at their discretion, may provide SBA additional time to make a determination, or may proceed with award to the next highest evaluated offeror.

(3) The contracting officer shall not make award to an offeror who is not a certified EDWOSB or WOSB concern eligible under the WOSB program.

* * * * *

(i) The SBA procurement center representative (PCR) may recommend use of the WOSB Program. If the contracting officer rejects a recommendation by SBA's PCR—

(1) The contracting officer shall notify the PCR as soon as practicable;

* * * * *

- 10. Amend section 19.1506 by:
 - a. Revising the section heading;
 - b. In paragraphs (a) introductory text and (b) introductory text removing the phrase “sole source” and adding the phrase “sole-source” in its place;
 - c. Redesignating paragraph (d) as paragraph (e);
 - d. Adding a new paragraph (d); and
 - e. In newly redesignated paragraph (e), removing the phrase “sole source” and adding the phrase “sole-source” in its place.

The revision and addition read as follows:

19.1506 Women-Owned Small Business Program sole-source awards.

* * * * *

(d) A contracting officer shall only award a sole-source contract to a concern that has been certified pursuant to 13 CFR 127.300 as an EDWOSB or WOSB eligible under the WOSB program. Contracting officers shall not request a status determination from SBA on pending applications for certification for EDWOSB or WOSB sole-source awards.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 11. Amend section 52.212–3 by:
 - a. Revising the date of the provision;
 - b. In paragraph (a):
 - i. In the definition “Economically disadvantaged women-owned small business (EDWOSB) concern” removing the phrase “13 CFR part 127” and adding the phrase “13 CFR part 127, and the concern is certified by SBA or an approved third-party certifier in accordance with 13 CFR 127.300” in its place;
 - ii. Revise the definition “Women-owned small business (WOSB) concern eligible under the WOSB Program”; and
 - c. Revising paragraphs (c)(6) and (7);
- The revisions read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Products and Commercial Services.

* * * * *

Offeror Representations and Certifications—Commercial Products and Commercial Services (Oct 2022)

* * * * *

(a) * * *
Women-owned small business (WOSB) concern eligible under the WOSB Program (in accordance with 13 CFR part 127), means a small business concern that is at least 51 percent directly and unconditionally owned by, and the management and daily business operations of which are controlled by, one or more women who are citizens of the United States, and the concern is certified by SBA or an approved third-party certifier in accordance with 13 CFR 127.300.

* * * * *

(c) * * *
 (6) *WOSB joint venture eligible under the WOSB Program.* The offeror represents that it ☐ is, ☐ is not a joint venture that complies with the requirements of 13 CFR 127.506(a) through (c). [*The offeror shall enter the name and unique entity identifier of each party to the joint venture: ____.*]

(7) *Economically disadvantaged women-owned small business (EDWOSB) joint venture.* The offeror represents that it ☐ is, ☐ is not a joint venture that complies with the requirements of 13 CFR 127.506(a) through (c). [*The offeror shall enter the name and unique entity identifier of each party to the joint venture: ____.*]

* * * * *

- 12. Amend section 52.212–5 by:
 - a. Revising the date of the clause;
 - b. In paragraph (b)(23), removing the date “(SEP 2021)” and adding the date “(OCT 2022)” in its place; and
 - c. In paragraph (b)(24), removing the date “(SEP 2021)” and adding the date “(OCT 2022)” in its place.

The revision reads as follows:

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

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services (OCT 2022)

* * * * *

- 13. Amend section 52.219–1 by:
 - a. Revising the date of the provision;
 - b. In paragraph (a), revising the definitions “Economically disadvantaged women-owned small business (EDWOSB) concern” and “Women-owned small business (WOSB) concern eligible under the WOSB Program”; and
 - c. Revising paragraphs (c)(4) and (5).
- The revisions read as follows:

52.219–1 Small Business Program Representations.

* * * * *

Small Business Program Representations (Oct 2022)

(a) * * *
Economically disadvantaged women-owned small business (EDWOSB) concern means a small business concern that is at least 51 percent directly and unconditionally owned by, and the management and daily business operations of which are controlled by, one or more women who are citizens of the United States and who are economically disadvantaged in accordance with 13 CFR part 127, and the concern is certified by SBA or an approved third-party certifier in accordance with 13 CFR 127.300. It automatically qualifies as a women-owned small business concern eligible under the WOSB Program.

* * * * *

Women-owned small business (WOSB) concern eligible under the WOSB Program (in accordance with 13 CFR part 127) means a small business concern that is at least 51 percent directly and unconditionally owned by, and the management and daily business operations of which are controlled by, one or more women who are citizens of the United States, and the concern is certified by SBA or an approved third-party certifier in accordance with 13 CFR 127.300.

* * * * *

(c) * * *
 (4) *Women-owned small business (WOSB) joint venture eligible under the WOSB Program.* The offeror represents as part of its offer that it ☐ is, ☐ is not a joint venture that complies with the requirements of 13 CFR 127.506(a) through (c). [*The offeror shall enter the name and unique entity identifier of each party to the joint venture: ____.*]

(5) *Economically disadvantaged women-owned small business (EDWOSB) joint venture.* The offeror represents as part of its offer that it ☐ is, ☐ is not a joint venture that complies with the requirements of 13 CFR

127.506(a) through (c). [The offeror shall enter the name and unique entity identifier of each party to the joint venture: ____.]

* * * * *

■ 14. Amend section 52.219–28 by revising the date of the clause and paragraphs (h)(4) and (5) to read as follows:

52.219–28 Post-Award Small Business Program Rerepresentation.

* * * * *

Post-Award Small Business Program Rerepresentation (Oct 2022)

* * * * *

(h) * * *

(4) Women-owned small business (WOSB) joint venture eligible under the WOSB Program. The Contractor represents that it ☐ is, ☐ is not a joint venture that complies with the requirements of 13 CFR 127.506(a) through (c). [The Contractor shall enter the name and unique entity identifier of each party to the joint venture: ____.]

(5) Economically disadvantaged women-owned small business (EDWOSB) joint venture. The Contractor represents that it ☐ is, ☐ is not a joint venture that complies with the requirements of 13 CFR 127.506(a) through (c). [The Contractor shall enter the name and unique entity identifier of each party to the joint venture: ____.]

* * * * *

■ 15. Amend section 52.219–29 by revising the date of the clause, paragraphs (a) and (c), and the paragraph (d) subject heading to read 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 (Oct 2022)

(a) *Definition.* Economically disadvantaged women-owned small business (EDWOSB) concern, as used in this clause, means a small business concern that is at least 51 percent directly and unconditionally owned by, and the management and daily business operations of which are controlled by, one or more women who are citizens of the United States and who are economically disadvantaged in accordance with 13 CFR part 127, and is certified pursuant to 13 CFR 127.300 as an EDWOSB. It automatically qualifies as a women-owned small business (WOSB) concern eligible under the WOSB Program.

* * * * *

(c) *General.* (1) For EDWOSB set-aside procurements, offers are solicited only from certified EDWOSB concerns or EDWOSB concerns with a pending application for certification in the Dynamic Small Business Search (DSBS).

(2) For EDWOSB sole-source awards, offers are solicited only from certified EDWOSB concerns.

(3) Offers received from other concerns will not be considered.

(4) Any award resulting from this solicitation will be made to a certified EDWOSB concern.

(d) *Joint venture.* * * *

* * * * *

■ 16. Amend section 52.219–30 by revising the date of the clause, paragraphs (a) and (c), and the paragraph (d) subject heading to 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 (Oct 2022)

(a) *Definition.* Women-owned small business (WOSB) concern eligible under the WOSB Program (in accordance with 13 CFR part 127), as used in this clause, means a small business concern that is at least 51 percent directly and unconditionally owned by, and the management and daily business operations of which are controlled by, one or more women who are citizens of the United States, and the concern is certified by SBA or an approved third-party certifier in accordance with 13 CFR 127.300 as a WOSB. A certified EDWOSB is automatically eligible as a certified WOSB.

* * * * *

(c) *General.* (1) For WOSB set-aside procurements, offers are solicited only from certified WOSB concerns eligible under the WOSB Program or WOSB concerns with a pending application for certification status in the Dynamic Small Business Search (DSBS).

(2) For WOSB sole-source awards, offers are solicited only from certified WOSB concerns.

(3) Offers received from other concerns shall not be considered.

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

(d) *Joint venture.* * * *

* * * * *

[FR Doc. 2022–20343 Filed 9–22–22; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4 and 19

[FAC 2022–08; Item V; Docket No. FAR–2022–0052; 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 address an internal administrative action.

DATES: Effective September 23, 2022.

FOR FURTHER INFORMATION CONTACT: Ms. Lois Mandell, Regulatory Secretariat Division (MVCB), at 202–501–4755 or GSARegSec@gsa.gov. Please cite FAC 2022–08, Technical Amendments.

SUPPLEMENTARY INFORMATION: This document makes administrative changes to 48 CFR parts 4 and 19. The date change is to provide additional time to implement the policy addressing the assignment of North American Industry Classification System codes to orders placed under multiple award contracts, as covered by changes made by FAR Case 2014–002 Set-Asides Under Multiple Award Contracts, 85 FR 11746.

List of Subjects in 48 CFR Parts 4 and 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 parts 4 and 19 as set forth below:

■ 1. The authority citation for 48 CFR parts 4 and 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.

PART 4—ADMINISTRATIVE AND INFORMATION MATTERS

4.1202 [Amended]

■ 2. Amend section 4.1202 by removing from paragraph (a) introductory text the date “October 1, 2022” and adding the date “October 1, 2025” in its place.

PART 19—SMALL BUSINESS PROGRAMS

19.102 [Amended]

■ 3. Amend section 19.102 by removing from paragraphs (b)(2)(i) and (b)(2)(ii) introductory text the date “October 1, 2022” and adding the date “October 1, 2025” in their places, respectively.

19.309 [Amended]

■ 4. Amend section 19.309 by removing from paragraphs (a)(3) and (c)(2) the date “October 1, 2022” and adding the date “October 1, 2025” in their places, respectively.

[FR Doc. 2022–20345 Filed 9–22–22; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR–2022–0051, Sequence No. 5]

Federal Acquisition Regulation; Federal Acquisition Circular 2022–08; 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 (SECG).

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) 2022–08, which amends the Federal Acquisition Regulation (FAR). Interested parties may obtain further information regarding these rules by referring to FAC 2022–08, which precedes this document.

DATES: September 23, 2022.

ADDRESSES: The FAC, including the SECG, is available 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 2022–08 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 2022–08

Item	Subject	FAR case	Analyst
* I	Policy on Joint Ventures	2017–019	Jones.
* II	Construction Contract Administration	2018–020	Bowman.
* III	Update of Historically Underutilized Business Zone Program	2019–007	Jones.
* IV	Certification of Women-Owned Small Business	2020–013	Jones.
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 2022–08 amends the FAR as follows:

Item I—Policy on Joint Ventures (FAR Case 2017–019)

This final rule amends the Federal Acquisition Regulation (FAR) to align with the Small Business Administration (SBA) regulations regarding mentor-protégé joint ventures and to provide clarification regarding joint ventures under the 8(a) Program. The changes will allow mentor-protégé joint ventures to qualify as small businesses, or to qualify under a socioeconomic program for the purposes of participation in procurements under FAR part 19. In addition, this rule provides consistent guidance to contracting officers on how to handle joint ventures under the 8(a) Program and the small business socioeconomic programs.

Item II—Construction Contract Administration (FAR Case 2018–020)

This final rule amends the FAR to implement section 855 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232), codified at 15 U.S.C. 644(w) in the Small Business Act. Section 855 requires Federal agencies to provide a notice, along with solicitations for construction contracts anticipated to be awarded to small businesses, to prospective offerors that includes information about the agency’s policies or practices in complying with FAR requirements related to the timely definitization of requests for equitable adjustment on construction contracts. The notice must include data regarding the time it took the agency to definitize requests for equitable adjustment on construction contracts for the three-year period preceding the issuance of the notice.

The final FAR rule requires contracting officers to transmit in the solicitation notice on the Governmentwide point of entry information in construction solicitations anticipated to be awarded to a small

business pursuant to part 19, that includes a description of agency-specific policies or procedures regarding definitization of equitable adjustments for change orders under construction contracts. Additionally, agencies are required to include past performance data in the solicitation notice, for the three fiscal years preceding the issuance of the solicitation notice, regarding the time required to definitize equitable adjustments for change orders under construction contracts using the table format provided in the FAR text, or provide the address of an agency-specific, publicly accessible website containing this information. The final rule also describes an adequate change order definitization proposal as containing sufficient information to enable the contracting officer to conduct meaningful analyses and audits of the information contained in the proposal.

Item III—Update of Historically Underutilized Business Zone Program (FAR Case 2019–007)

This final rule amends the FAR to implement changes to the SBA regulations for the Historically

Underutilized Business Zone (HUBZone) Program. This rule specifies that SBA now certifies HUBZone small business concerns and HUBZone entities are no longer required to represent their HUBZone status with each offer. In addition, contracting officers may now award HUBZone set-aside and sole-source contracts at or below the simplified acquisition threshold. This rule also makes minor changes to the HUBZone protest procedures.

Item IV—Certification of Women-Owned Small Businesses (FAR Case 2020–013)

This final rule amends the FAR to align with SBA's regulations regarding certification of economically

disadvantaged women-owned small business (EDWOSB) concerns and women-owned small business (WOSB) concerns. This rule requires EDWOSBs and WOSBs participating in the Women-Owned Small Business Program (the Program) to apply for certification through SBA or a SBA-approved third-party certifier to be eligible for WOSB or EDWOSB set-aside or sole-source contracts. EDWOSB and WOSB concerns that are not certified will not be eligible for set-aside and sole-source contracts under the Program. WOSBs that do not participate in the Program may continue to represent their status, be awarded contracts outside the Program, and these contracts will continue to count toward an agency's goal for awards to WOSBs.

Item V—Technical Amendments

Administrative changes are made at FAR 4.1202, 19.102, and 19.309. The date change is to provide additional time to implement the policy addressing the assignment of North American Industry Classification System codes to orders placed under multiple award contracts, as covered by changes made by FAR case 2014–002, Set-Asides Under Multiple Award Contracts.

William F. Clark,

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

[FR Doc. 2022–20346 Filed 9–22–22; 8:45 am]

BILLING CODE 6820–EP–P