

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES  
ADMINISTRATION**

**NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION**

**48 CFR Chapter 1**

[Docket No. FAR–2023–0051, Sequence No. 5]

**Federal Acquisition Regulation;  
Federal Acquisition Circular 2023–06;  
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) 2023–06. A  
companion document, the *Small Entity  
Compliance Guide* (SECG), follows this  
FAC.

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

**ADDRESSES:** The FAC, including the  
SECG, is available at [https://  
www.regulations.gov](https://www.regulations.gov).

**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](mailto:GSARegSec@gsa.gov).

**RULES LISTED IN FAC 2023–06**

Item	Subject	FAR case	Analyst
I .....	Implementation of Federal Acquisition Supply Chain Security Act (FASCSA) Orders.	2020–011	Ryba.
II .....	Whistleblower Protection for Contractor Employees .....	2017–005	Jones.
III .....	8(a) Program .....	2021–012	Bowman.
IV .....	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  
2023–06 amends the FAR as follows:

**Item I—Implementation of Federal  
Acquisition Supply Chain Security Act  
(FASCSA) Orders (FAR Case 2020–011)**

This interim rule amends the Federal  
Acquisition Regulation (FAR) to  
implement supply chain risk  
information sharing and exclusion or  
removal orders required by the Federal  
Acquisition Supply Chain Security Act  
of 2018 and a final rule issued by the  
Federal Acquisition Security Council  
(FASC).

The FAR is being amended to  
implement applicable exclusion or  
removal orders recommended by the  
FASC when they are issued by the  
Secretary of Homeland Security, the  
Secretary of Defense, or the Director of  
National Intelligence. Offerors will be  
required to check both the System for  
Award Management and individual  
solicitations for applicable exclusion  
orders.

This rule applies to all acquisitions,  
including acquisitions at or below the  
simplified acquisition threshold and to  
acquisitions of commercial items,  
including commercially available off-  
the-shelf items. It may have a significant

economic impact on a substantial  
number of small entities.

**Item II—Whistleblower Protection for  
Contractor Employees (FAR Case 2017–  
005)**

This final rule amends the FAR to  
implement Public Law 114–261 (41  
U.S.C. 4712). The rule enhances  
whistleblower protection for contractor  
employees by making permanent the  
protection for disclosure of certain  
information. It also clarifies that the  
FAR 31.205–47 prohibition on  
reimbursement for legal fees accrued in  
defense against reprisal claims applies  
to subcontractors, as well as contractors.

DoD, NASA and the Coast Guard have  
a different whistleblower program for  
contractor employees.

This final rule will not have a  
significant economic impact on a  
substantial number of small entities.

**Item III—8(a) Program Changes (FAR  
Case 2021–012)**

This final rule amends the FAR to  
update and clarify requirements  
associated with the Small Business  
Administration’s (SBA) 8(a) program.  
Specifically, this rule clarifies that the  
certificate of competency program is not  
applicable to 8(a) sole-source awards  
and requires that BPAs issued under  
part 13, including orders placed under  
part 13 BPAs under the 8(a) Program,  
must be offered to, and accepted by  
SBA. Additionally, this rule clarifies an  
8(a) participant’s eligibility for award

for a two-step design procurement and  
clarifies that a concern must be a  
current participant in the 8(a) program  
at the time of an 8(a) sole-source award.  
This rule also implements policy that  
allows the SBA to appeal a contracting  
officer’s decision that an acquisition  
previously procured under the 8(a)  
program is a new requirement not  
subject to the release requirements set  
forth in 13 CFR. Furthermore, this rule  
requires the contracting officer to notify  
the SBA when the contracting officer  
decides that a requirement, previously  
procured under the 8(a) program, is a  
new requirement and not a follow-on  
requirement to an 8(a) contract; and  
when the procuring activity intends to  
procure a follow-on requirement using  
an existing limited contracting vehicle  
that is not available to all 8(a)  
participants and the current or previous  
8(a) contract was available to all 8(a)  
participants. Lastly, this rule encourages  
the contracting officer to notify the SBA  
Associate Administrator for Business  
Development at least 30 days prior to  
the end of the contract or order when a  
mandatory source will be used for a  
follow-on requirement to an 8(a)  
contract.

**Item IV—Technical Amendments**

An administrative change is made at FAR 52.212–3.

**William F. Clark,**

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

Federal Acquisition Circular (FAC) 2023–06 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 2023–06 is effective October 5, 2023 except for Item I, which is effective December 4, 2023, and Items II, III, and IV, which are effective November 6, 2023.

**John M. Tenaglia,**

*Principal Director, Defense Pricing and Contracting, Department of Defense.*

**William F. Clark,**

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

**Karla Smith Jackson,**

*Assistant Administrator for Procurement, Senior Procurement Executive/Deputy CAO, National Aeronautics and Space Administration.*

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**BILLING CODE 6820–EP–P**

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 1, 4, 9, 13, 39, and 52**

[FAC 2023–06; FAR Case 2020–011; Item I; Docket No. FAR–2020–0011, Sequence No. 1]

**RIN 9000–AO13**

**Federal Acquisition Regulation:  
Implementation of Federal Acquisition  
Supply Chain Security Act (FASCSA)  
Orders**

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

**ACTION:** Interim rule.

**SUMMARY:** DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement supply chain risk information sharing and exclusion or

removal orders consistent with the Federal Acquisition Supply Chain Security Act of 2018 and a final rule issued by the Federal Acquisition Security Council.

**DATES:**

*Effective date:* December 4, 2023.

*Applicability:* The FAR changes apply to solicitations issued on or after December 4, 2023 in accordance with FAR 1.108(d).

For existing indefinite delivery contracts only, contracting officers shall modify them, in accordance with FAR 1.108(d), to include the FAR clause at 52.204–30, Federal Acquisition Supply Chain Security Act Orders-Prohibition (including any applicable alternate) within 6 months of December 4, 2023, to apply to future orders. However, for Federal Supply Schedules, Governmentwide Acquisition Contracts, and Multi-Agency Contracts, if the FASCSA orders are going to be applied at the order level, then FAR clause 52.204–28 should be included instead, within 6 months of December 4, 2023.

If exercising an option or modifying an existing contract or task or delivery order to extend the period of performance, contracting officers shall include the FAR clause at 52.204–30, Federal Acquisition Supply Chain Security Act Orders-Prohibition (including any applicable alternate). When exercising an option, agencies should consider modifying the existing contract to add the clause in a sufficient amount of time to both provide notice for exercising the option and to provide contractors with adequate time to comply with the clause.

*Comment date:* Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before December 4, 2023 to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments in response to FAC 2023–06, FAR Case 2020–011 to the Federal eRulemaking portal at <https://www.regulations.gov> by searching for “FAR Case 2020–011”. Select the link “Comment Now” that corresponds with FAR Case 2020–011. Follow the instructions provided on the “Comment Now” screen. Please include your name, company name (if any), and “FAR Case 2020–011” on your attached document. If your comment cannot be submitted using <https://www.regulations.gov>, call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

*Instructions:* Please submit comments only and cite “FAR Case 2020–011” in all correspondence related to this case.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal and/or business confidential information provided. Public comments may be submitted as an individual, as an organization, or anonymously (see frequently asked questions at <https://www.regulations.gov/faq>). To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Marissa Ryba, Procurement Analyst, at 314–586–1280 or by email at [Marissa.Ryba@gsa.gov](mailto:Marissa.Ryba@gsa.gov). For information pertaining to status, publication schedules, or alternate instructions for submitting comments if <https://www.regulations.gov> cannot be used, contact the Regulatory Secretariat Division at 202–501–4755 or [GSARegSec@gsa.gov](mailto:GSARegSec@gsa.gov). Please cite FAC 2023–06, FAR Case 2020–011.

**SUPPLEMENTARY INFORMATION:****I. Background**

This interim rule revises the FAR to implement section 202 of the Federal Acquisition Supply Chain Security Act of 2018 (Title II of the SECURE Technology Act, Pub. L. 115–390, Dec. 21, 2018), and a final rule issued by the Federal Acquisition Security Council (FASC) (August 26, 2021, 86 FR 47581, effective September 27, 2021).

Foreign adversaries are increasingly creating and exploiting vulnerabilities in information and communications technology to commit malicious cyber-enabled actions, including economic and industrial espionage against the United States and its citizens. Vulnerabilities may be introduced during any phase of the product or service life cycle, including: design, development and production, distribution, acquisition and deployment, maintenance, and disposal. These vulnerabilities can include the incorporation of malicious software, hardware, and counterfeit components; flawed product designs; and poor manufacturing processes and maintenance procedures.

The U.S. Government’s efforts to evaluate threats to and vulnerabilities in supply chains have historically been undertaken by individual or small groups of agencies to address specific supply chain security risks. Because of the scale of supply chain risks faced by Government agencies, and the need for better coordination among a broader group of agencies, there was an organized effort within the Executive

branch to support Congressional efforts in 2018 to pass new legislation to improve Executive branch coordination, supply chain information sharing, and actions to address supply chain risks.

Title II of the SECURE Technology Act, also referred to as the Federal Acquisition Supply Chain Security Act of 2018, established the Federal Acquisition Security Council (FASC) and authorized it to perform a variety of functions, including making recommendations for orders that would require the removal of covered articles from executive agency information systems or the exclusion of sources or covered articles from executive agency procurement actions. The FASC is an Executive branch interagency council, which is chaired by a senior-level official from the Office of Management and Budget (OMB). The FASC includes representatives from GSA; Department of Homeland Security (DHS); Office of the Director of National Intelligence; DoD; Department of Justice (DOJ); and Department of Commerce (Commerce).

The FASC issued a final rule adding 41 CFR part 201–1, which implements the Federal Acquisition Supply Chain Security Act of 2018 requirements. The FASC final rule establishes procedures that govern the operation of the FASC, the sharing of supply chain risk information, the exercise of its authorities to recommend issuance of orders requiring removal of covered articles from information systems (removal orders), and orders excluding sources or covered articles from future procurements (exclusion orders) that pose a risk to our nation's supply chain. This rule refers to both exclusion and removal orders as "FASCSA orders".

Under the FASC final rule, the FASC will evaluate sources and/or covered articles by addressing a common set of non-exclusive factors that are listed in the FASC final rule. Initiation of the process can begin either by referral of the FASC or any member of the FASC; upon the written request of any U.S. Government body; or based on information submitted to the FASC by any individual or non-Federal entity that the FASC determines to be credible.

The FASC will conduct appropriate due diligence regarding the information that it is considering. If the FASC does not find that recommending a removal or exclusion order is warranted, risk information received and analyzed by the FASC may be shared, as appropriate, in accordance with the FASC final rule. If the FASC decides to issue a recommendation, that recommendation will provide relevant information and analysis for the Secretary of Homeland Security, the Secretary of Defense, and/

or the Director of National Intelligence (DNI), as appropriate, to consider when deciding whether to issue a FASCSA order.

Executive agencies must share relevant supply chain risk information. DHS, acting primarily through the Cybersecurity and Infrastructure Security Agency (CISA), is the information sharing agency (ISA), which will share and disseminate information within the FASC, and other Federal and non-Federal entities, as appropriate.

Collectively, the information sharing requirements and implementation of FASCSA orders will address risks in supply chains by reducing or removing threats and vulnerabilities that may lead to data and intellectual property theft, damage to critical infrastructure, harm to Federal information systems, and otherwise degrade our national security. This rule will also help make Government supply chains and information systems more resilient and less subject to disruptions that could impact Government operations.

## II. Discussion and Analysis

### A. Overview of Rule

This interim rule implements within the FAR the requirements of the Federal Acquisition Supply Chain Security Act of 2018 and the Federal Acquisition Security Council (FASC) final rule for complying with exclusion or removal orders and sharing certain supply chain risk information. Once an order recommended by the FASC is issued by the Secretary of Homeland Security, the Secretary of Defense, and/or the Director of National Intelligence, affected Executive agencies are required to implement the order.

As referred to in this rule, the term FASCSA order may refer to either an exclusion order or removal order. An exclusion order is applicable during the process for awarding a new contract or task or delivery order, as it excludes from the offered supplies or services any products or services subject to a FASCSA order. A removal order requires removal of any products or services from an executive agency information system subject to a FASCSA order. In some instances, a contracting officer may incorporate a contract term to require compliance with a FASCSA order issued after award via a modification that incorporates FAR clause 52.204–28, Federal Acquisition Supply Chain Security Act Orders–Federal Supply Schedules, Governmentwide Acquisition Contracts, and Multi-Agency Contracts, or FAR clause 52.204–30, Federal Acquisition

Supply Chain Security Act Orders–Prohibition.

As a result of this interim rule, contracting officers will now have established procedures to implement FASCSA orders in existing and new Federal contracts and to share relevant information on potential supply chain risk. These procedures reduce exploitations of vulnerabilities, in turn making the supply chain more resilient.

Contractors and offerors will also play a key role in this process by remaining current on FASCSA orders identified in the solicitation and contract. When an offeror submits a new offer in response to a contract solicitation containing the new requirement, the offeror will represent, after conducting a reasonable inquiry, that the offeror does not propose to provide or use any prohibited covered articles or products or services subject to a FASCSA order. These measures are necessary to build resilience in Government supply chains. Further procedures allow an offeror to disclose where they cannot comply with a FASCSA order. The purpose for this disclosure is so that the Government may decide whether to pursue a waiver.

Throughout contract performance, contractors will be required to report to the contracting officer once they become aware that a covered article or product or service subject to a FASCSA order has been delivered to the Government or used in performance of the contract. This reporting requirement applies not just to FASCSA orders incorporated into the contract, but also to new FASCSA orders issued after contract award or added to the contract through modification. Reporting this information to the contracting officer will provide the Government the needed information to assess the risk and make a determination on how to proceed.

### B. Part 1 Updates

The OMB control number for the new information collection required by this interim rule is being added to FAR 1.106.

### C. Part 4 Updates

A new FAR subpart 4.23 titled Federal Acquisition Security Council is being added to implement requirements for FASCSA orders and supply chain risk information sharing.

FAR 4.2301 provides definitions in accordance with the FASC final rule.

FAR 4.2302 requires the contracting officer to work with the cognizant program office or requiring activity in accordance with agency procedures to share relevant supply chain risk information with the FASC if there is a reasonable basis to conclude there exists

a substantial supply chain risk associated with a source or covered article.

FAR 4.2303 identifies the requirements for Executive agencies to implement FASCSA orders when they are issued by the Secretary of Homeland Security, the Secretary of Defense, or the Director of National Intelligence. FASCSA orders for sources or covered articles will be searchable within the System for Award Management (SAM) to make it easier for contractors and Government to identify the products and services subject to a FASCSA order; however, in rare cases additional FASCSA orders, not identified in SAM, will be identified in the solicitation.

If a covered article or the source is subject to a Governmentwide FASCSA order, this section directs Executive agencies responsible for management of the Federal Supply Schedules, Governmentwide acquisition contracts, and multi-agency contracts to remove the covered articles or sources identified in the FASCSA order from such contracts.

FAR 4.2304 provides the procedures for a contracting officer to follow when completing the clause at FAR 52.204–30 identifying applicable FASCSA orders and when a solicitation or contract may be updated to incorporate additional FASCSA orders. In the rare case when a FASCSA order is identified outside of SAM, Executive agencies must follow agency procedures.

Additional specific procedures are outlined for Federal Supply Schedules, Governmentwide acquisition contracts, multi-agency contracts or any other procurement instrument intended for use by multiple agencies. An agency awarding this type of vehicle may decide to apply FASCSA orders in the basic contract or the task order or delivery order.

This section further provides the contracting officer with procedures to determine whether to pursue a waiver, how to identify a full or partial waiver in the solicitation, and who to work with when a contractor submits a report identifying covered articles or sources subject to a FASCSA order.

FAR 4.2305 identifies the procedures for an agency to submit a waiver request that includes all necessary information for the official who issued the FASCSA order (issuing official) to review and evaluate the request, including alternative mitigations to the risks addressed by the order and the ability of an agency to fulfill its mission critical functions. Agencies may reasonably choose not to pursue a waiver and to make award to an offeror that does not

require a waiver in accordance with the procedures at 4.2304.

FAR 4.2306 prescribes new provision at FAR 52.204–29, Federal Acquisition Supply Chain Security Act Orders-Representation and Disclosures, and two new clauses, FAR 52.204–28, Federal Acquisition Supply Chain Security Act Orders-Federal Supply Schedules, Governmentwide Acquisition Contracts, and Multi-Agency Contracts, and FAR 52.204–30, Federal Acquisition Supply Chain Security Act Orders-Prohibition.

The terms “covered article” and “covered entity” in FAR 4.2001 and the clause at FAR 52.204–23 are updated to “Kaspersky Lab covered article” and “Kaspersky Lab covered entity” to avoid confusion with the definition of a covered article excluded or removed under the authority of an issuing official. The definition of “Kaspersky Lab covered entity” was updated to reference the recently adopted name Kaspersky.

#### *D. Part 9 Updates*

Clarification is added at FAR 9.400 that FASCSA orders are covered at FAR subpart 4.23. FAR subpart 9.4 covers debarment and suspension, and exclusions.

#### *E. Part 13 Updates*

FAR 13.201 is updated to include the prohibition on covered articles and sources subject to a FASCSA order for micro-purchases.

#### *F. Part 39 Updates*

The prohibition is being added to FAR 39.101 to ensure members of the acquisition workforce working on information technology procurements are aware of the prohibition.

#### *G. Part 52 Updates*

In addition to the name changes discussed in Part 4, the clause at FAR 52.204–23 is updated to change the reporting time frame for the initial report from 1 business day to 3 business days to align with the reporting time frame at FAR 52.204–30(c)(4) and provide sufficient time for contractors to submit a report.

The new provision at FAR 52.204–29, Federal Acquisition Supply Chain Security Act Orders-Representation and Disclosures, is added prohibiting contractors from providing any covered article, or any products or services produced or provided by a source, including contractor use of covered articles or sources, if the covered article or the source is subject to an applicable FASCSA order identified in the clause at FAR 52.204–30(b)(1). Contractors

must search for FASCSA orders in SAM. To locate the FASCSA orders in SAM, contractors can search by entity information using the search term “FASCSA order” to locate all FASCSA orders or only those that apply to the solicitation. Details about the FASCSA orders will be in the additional comments field. FASCSA orders issued after the date of solicitation are not effective unless the solicitation is amended. In rare cases, a FASCSA order may be identified in the solicitation, and not in SAM.

By submitting an offer, an offeror is representing that it has conducted a reasonable inquiry and is not providing any covered article, or any products or services subject to an applicable FASCSA order identified in the solicitation at FAR 52.204–30(b)(1). If an offeror cannot represent compliance with the prohibition, then the offeror must disclose this and provide the required information in accordance with 52.204–29(e). The Government will use this information to determine whether to seek a waiver or may choose to make an award to an offeror that does not require a waiver.

The new clause at FAR 52.204–28, Federal Acquisition Supply Chain Security Act Orders-Federal Supply Schedules, Governmentwide Acquisition Contracts, and Multi-Agency Contracts, provides contractors with notice that FASCSA orders will be identified in the request for quote or in the notice of intent to place an order. Contractors will be able to identify applicable FASCSA orders in paragraph (b)(1) of FAR 52.204–30, Federal Acquisition Supply Chain Security Act Orders-Prohibition with its Alternate II. Contractors will also be required to remove from the basic contract any covered article or any product or service produced or provided by a source subject to a FASCSA order issued collectively by DHS, DoD, and DNI.

The new clause at FAR 52.204–30, Federal Acquisition Supply Chain Security Act Orders-Prohibition, prohibits contractors from providing any covered article, or any products or services produced or provided by a source, if the covered article or the source is subject to an applicable FASCSA order identified in paragraph (b). In most cases, for solicitations and contracts awarded by DoD, DoD FASCSA orders will apply; and for all other solicitations and contracts, DHS FASCSA orders will apply. The clause, when used with its Alternate I, identifies a different construct for paragraph (b) allowing the contracting officer to select the applicable FASCSA orders (*i.e.* DoD FASCSA order, DHS

FASCSA order, DNI FASCSA order). The clause at FAR 52.204–30 also requires the contractor to review SAM at least once every three months or as advised by the contracting officer, and provide a report in the event the contractor identifies that a covered article, or product or service produced or provided by a source, that is subject to a FASCSA order, was provided to the Government or used during contract performance; or the contractor is notified of such by a subcontractor at any tier or by any other means. The clause, when used with its Alternate II is for Federal Supply Schedules, Governmentwide acquisition contracts and multi-agency contracts when FASCSA orders are applied at the order level.

FAR 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Products and Commercial Services, FAR 52.213–4, Terms and Conditions-Simplified Acquisitions (Other Than Commercial Products and Commercial Services), and FAR 52.244–6, Subcontracts for Commercial Products and Commercial Services are updated to add the requirements of FAR 52.204–30, Federal Acquisition Supply Chain Security Act Orders-Prohibition.

### III. Specific Questions For Comment

DoD, GSA, and NASA welcome input on the following questions regarding anticipated impact on affected parties.

- What additional information or guidance do you view as necessary to effectively comply with this interim rule?
- What challenges do you anticipate facing in effectively complying with this interim rule?

### IV. 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 interim rule adds a new contract clause at FAR 52.204–28, Federal Acquisition Supply Chain Security Act Orders-Federal Supply Schedules, Governmentwide Acquisition Contracts, and Multi-Agency Contracts. The clause is prescribed at FAR 4.2306(a) and is required in the basic solicitation and resultant contract for all Federal Supply Schedules, Governmentwide acquisition contracts, and multi-agency contracts when FASCSA orders are contemplated to be applied at the task or delivery order level. The clause will apply to acquisitions valued at or below the SAT; acquisitions of commercial products,

including COTS items; and acquisition of commercial services.

This interim rule adds a new provision at FAR 52.204–29, Federal Acquisition Supply Chain Security Act Orders-Representation and Disclosures. The provision is prescribed at FAR 4.2306(b) and is for use in all solicitations for contracts, except that for Federal Supply Schedules, Governmentwide acquisition contracts and multi-agency contracts the clause will be inserted in all solicitations for contracts if FASCSA orders apply at the contract level. The provision will apply to acquisitions valued at or below the SAT; acquisitions of commercial products, including COTS items; and acquisition of commercial services.

This interim rule adds a new contract clause at FAR 52.204–30, Federal Acquisition Supply Chain Security Act Orders-Prohibition, including the clause with its Alternate I and Alternate II. The clause is prescribed at FAR 4.2306(c) for use in all solicitations and contracts, except that for Federal Supply Schedules, Governmentwide acquisition contracts, and multi-agency contracts where FASCSA orders are applied at the contract level, the clause must be used with its Alternate I in all solicitations and resultant contracts; or, if FASCSA orders are applied at the order level, the clause shall be used with its Alternate II in all requests for quotations, or in all notices of intent to place an order. The clause will apply to acquisitions valued at or below the SAT; acquisitions of commercial products, including COTS items; and acquisition of commercial services. The above provision and clauses are necessary to implement FASCSA orders authorized by the Federal Acquisition Supply Chain Security Act of 2018 and the Federal Acquisition Supply Chain Security Act final rule.

#### 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 and commercial services contracts the provision of law will apply to contracts 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

While the law does not specifically address acquisitions at or below the SAT, or acquisitions of commercial products or commercial services, including COTS items, there is an unacceptable level of risk for the Government in buying products or services subject to a FASCSA order. This level of risk is not alleviated by the fact that the product or service being acquired has been sold or offered for sale to the general public, either in the same form or a modified form as sold to the Government (*i.e.*, that it is a commercial product or commercial service or COTS item), nor by the small size of the purchase (*i.e.*, at or below the SAT). As a result, agencies may face increased exposure for violating the law and unknowingly acquiring products or services subject to a FASCSA order absent coverage of these types of acquisitions by this interim rule.

## V. Expected Impact of the Rule

Foreign adversaries are increasingly creating and exploiting vulnerabilities in information and communications technology to commit malicious cyber-enabled attacks, including economic and industrial espionage against the United States and its citizens. Vulnerabilities may be introduced during any phase of the product or service life cycle: design, development and production, distribution, acquisition and deployment, maintenance, and disposal. These vulnerabilities can include the

incorporation of malicious software, hardware, and counterfeit components; flawed product designs; and poor manufacturing processes and maintenance procedures.

This rule helps mitigate these supply chain risks by ensuring agencies and contractors are implementing supply chain risk information sharing and FASCSCA orders for covered articles as required by the FASCSCA final rule.

Information sharing by Federal agencies with the FASCSCA will ensure that substantial supply chain risks are communicated with impacted parties

across the Government so agencies can promptly address the risks. Implementation of FASCSCA orders will ensure Federal agencies are not sourcing products or services determined to have a significant supply chain risk (*i.e.* subject to a FASCSCA order).

DoD, GSA, and NASA have performed a regulatory impact analysis (RIA) on this interim rule. The total estimated public costs associated with this FAR rule in millions of dollars calculated over a ten-year period (calculated at a 3-percent and 7-percent discount rate) are as follows:

Estimated costs	3% Discount rate (million)	7% Discount rate (million)
Present Value .....	\$745	\$903
Annualized .....	106	105

The following is a summary from the RIA of the specific compliance requirements and the estimated costs of compliance. The RIA includes a detailed discussion and explanation about the assumptions and methodology used to estimate the cost of this regulatory action, including the specific impact and costs for small businesses. It is available at <https://www.regulations.gov> (search for “FAR Case 2020–011” click “Open Docket,” and view “Supporting Documents”).

The following is a summary of specific compliance requirements that are considered new for Federal offerors, contractors, and subcontractors (hereinafter collectively referred to as “contractors”), as applicable:

- Regulatory familiarization
- Review the System for Award Management (SAM) for FASCSCA orders
- Submission of disclosure information
- Review SAM for covered articles/sources subject to a FASCSCA order
- Review of supply chain for covered articles/source subject to FASCSCA orders
- Submit reporting information identifying covered articles/sources subject to FASCSCA orders

Note, at this time no issuing official has issued any FASCSCA orders; therefore, the assumptions made below are based on other similar cases where a contractor must review their supply chain and provide alternative sources.

### Regulatory Familiarization

It is expected that all contractors will be required to become familiar with these new compliance requirements in the FAR and will be required to update policies and procedures to ensure

compliance with FASCSCA orders and train their contracts, program, and supply chain personnel on the requirements. While this is a new requirement, restrictions on particular sources or articles are not new to the FAR. This should reduce the impact on contractors from having to establish entirely new processes and procedures, but rather update current ones to add covered articles subject to new FASCSCA orders, or any products or services produced or provided by an excluded source. Regulatory familiarization is only expected to have a regulatory impact during the first year of implementation.

### Review the System for Award Management (SAM) for FASCSCA Orders

In accordance with 52.204–29, offerors must search SAM for any covered articles, or any products or services produced or provided by a source subject to a FASCSCA order, as identified in the solicitation.

All offerors will need to review SAM for any applicable FASCSCA orders using the search term “FASCSCA order”. Offerors and contractors are familiar with SAM and searching for other exclusions such as telecommunications equipment and services established under Section 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Public Law 115–232. The frequency of which an offeror will search SAM will likely be based on the number of contracts and orders that they manage. Some offerors may choose to regularly review SAM for new FASCSCA orders on a corporate level and notify applicable personnel when a new order is issued, while others may choose to review SAM with each proposal, likely

at least once when the solicitation comes out and once prior to submitting the proposal to ensure compliance with the representation before submission. The frequency with which offerors review SAM will also be based on the number and frequency that FASCSCA orders are issued; however at this time no FASCSCA orders have been issued.

### Submission of Disclosure Information

Once the offeror reviews SAM, they must identify if they cannot represent compliance and intend to propose any covered article or any products or services produced or provided by a source subject to a FASCSCA order, in response to the solicitation. If the offeror identifies such items, they must disclose the following information to the Government:

- (1) Name of the product or service provided to the Government;
- (2) Name of the covered article or source subject to a FASCSCA order;
- (3) If applicable, name of the vendor, including the Commercial and Government Entity code and unique entity identifier (if known), that supplied the covered article or the product or service to the Offeror;
- (4) Brand;
- (5) Model number (original equipment manufacturer number, manufacturer part number, or wholesaler number);
- (6) Item description;
- (7) Reason why the applicable covered article or the product or service is being provided or used.

Depending on the issuing agency, FASCSCA orders will only affect some companies and some contracts.



### *Reviewing SAM for Excluded Articles/Sources*

In accordance with FAR 52.204–30, contractors must review SAM, at least once every three months or as advised by the contracting officer, for any covered articles, or any products or services produced or provided by a source subject to a FASCSA order issued after the date of solicitation. The need to review SAM can also be completed when contractors review SAM as part of their normal business dealings including this rule, which requires review during the solicitation phase. Therefore, the cost impact is already accounted for in this rule; however, the cost impact of submitting a report once a new FASCSA order is identified is accounted for separately below.

### *Review of Supply Chain for Covered Articles/Source for FASCSA Orders*

In accordance with FAR 52.204–30, when a contractor identifies that a covered article or product or service produced or provided by a source is subject to a new FASCSA order, contractors will have to evaluate their supply chain to determine whether it was provided to the Government or used during contract performance.

### *Submit Reporting Information Identifying Excluded Articles/Sources*

In accordance with paragraph (c) of FAR 52.204–30, when a contractor identifies that a covered article or product or service produced or provided by a source is subject to a new FASCSA order and was provided to the Government or used during contract performance, then the contractor must notify the Government within 3 business days and provide the following information:

- Contract number
- Order number(s), if applicable
- Name of the product or service provided to the Government or used during contract performance
- Name of the covered article or source subject to a FASCSA order
- If applicable, name of the vendor, including the Commercial and Government Entity code and unique entity identifier (if known), that supplied the covered article or the product or service to the Contractor
- Brand
- Model number (original equipment manufacturer number, manufacturer part number, or wholesaler number)
- Item description
- Any readily available information about mitigation actions undertaken or recommended.

Within 10 business days of submitting the previous information, the contractor must provide information on mitigation actions taken and actions taken to prevent future submissions of or use of covered articles or sources.

### **VI. Executive Orders 12866 and 13563**

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

### **VII. Congressional Review Act**

As required by the Congressional Review Act (5 U.S.C. 801–808), 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 rule that qualifies under the definition in 5 U.S.C. 804(2) 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 rule qualifies under the definition in 5 U.S.C. 804(2).

### **VIII. Regulatory Flexibility Act**

DoD, GSA, and NASA expect that this 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. An Initial Regulatory Flexibility Analysis (IRFA) has been performed, and is summarized as follows:

DoD, GSA, and NASA are issuing an interim rule amending the FAR to implement supply chain risk information sharing requirements and exclusion or removal orders consistent with the Federal Acquisition Supply Chain Security Act of 2018 and a final rule issued by the Federal Acquisition Security Council (FASC).

The objective of this interim rule is to implement supply chain risk information sharing and FASCSA orders.

The legal basis for the rule is the Federal Acquisition Supply Chain Security Act of 2018 (title II of the SECURE Technology Act, Pub. L. 115–390, Dec. 21, 2018), and the final rule issued by the Federal Acquisition

Security Council (August 26, 2021, 86 FR 47581, effective September 27, 2021). Promulgation of the FAR is authorized by 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

The interim rule will impact all small entities that are prime contractors and all small entities that are subcontractors. Data from the Federal Procurement Data System (FPDS) for fiscal years (FYs) 2019 through 2021 was used. On average per year the Government awards contracts and orders for supplies and services to 94,035 unique contractors, of which approximately 65 percent or 61,797 are small businesses.

This interim rule will require small entities to: (1) become familiar with the new regulatory requirements; (2) review the System for Award Management (SAM) for FASCSA orders; (3) submit disclosure information; (4) review SAM for excluded articles or sources; (5) review their supply chain for covered articles or sources prohibited by a FASCSA order; and (6) submit a report identifying if a prohibited article or source was delivered to the government in the performance of the contract.

To comply with the new regulatory requirements, it is expected that all small entities, or 61,797 will need to become familiar with FASCSA orders. Additionally, this regulatory familiarization may also include updating policies and procedures to ensure compliance. However, exclusions are not new to the FAR making the impact less.

Once a small entity intends to respond to a solicitation, they will need to review the solicitation to identify which FASCSA orders apply to the current solicitation and subsequent contract, and search SAM for more information on applicable FASCSA orders. It is estimated that all small entities, 61,797, will review SAM for FASCSA orders when responding to a solicitation.

It is estimated that a small number of small entities, 10 percent or 3,090, will not be able to represent compliance with the prohibition and therefore must disclose to the Government that they intend to propose a covered article or source prohibited by an applicable FASCSA order. Failure to comply with the prohibition poses risk for the contractor in not being awarded a contract if a waiver from the requirement is not obtained.

Small entities will be required to review SAM for any covered articles or any products or services produced or provided by a source, including contractor use of covered articles or sources, subject to a FASCSA order during the performance of the contract. This is not expected to create any additional impact because small entities are already searching SAM as part of this rule when responding to a solicitation.

When a new FASCSA order is issued, small entities may have to review their supply chain to determine whether a covered article or any products or services produced or provided by a source subject to a FASCSA order were used or provided to the Government during the performance of the contract. This is estimated to impact approximately half of small entities, 30,899

because not all FASCSA orders will apply to every contract or contractor.

It is estimated that a very small subset of small entities, 3 percent or 927, may identify a covered article or any products or services produced or provided by a source subject to a FASCSA order that were delivered during the performance of the contract, and be required to submit a report to the Government.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

It was contemplated during the development of this rule to create a representation requirement in SAM for contractors to complete annually and then update on a solicitation-by-solicitation basis, if necessary. The current process reduces the impact by replacing the SAM representation with a representation by submission of the offer. There are no other available alternatives to the proposed rule to accomplish the desired objective of the statute.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2020–011), in correspondence.

## IX. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521) applies. The rule contains information collection requirements. The PRA provides that an agency generally cannot conduct or sponsor a collection of information, and no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, unless that collection has obtained OMB approval and displays a currently valid OMB Control Number.

DoD, GSA, and NASA are requesting emergency processing of the collection of information involved in this rule, consistent with 5 CFR 1320.13. DoD, GSA, and NASA have determined the following conditions have been met:

a. The collection of information is needed prior to the expiration of time periods normally associated with a routine submission for review under the provisions of the PRA, because agencies subject to the FAR would not have a mechanism to implement any FASCSA orders issued by the FASC.

b. The collection of information is essential to the mission of the agencies to protect the Government supply chain from vulnerabilities posed by acquiring products or services that violate a FASCSA order issued under the authority of the Federal Acquisition Supply Chain Security Act of 2018 and the final rule issued by the FASC.

c. Moreover, DoD, GSA, and NASA cannot comply with the normal clearance procedures because public harm is reasonably likely to result if current clearance procedures are followed. Authorizing collection of this information will ensure that agencies have a mechanism to implement FASCSA orders and address vulnerabilities in supply chains that can enable data and intellectual property theft, loss of confidence in integrity, or exploitation that causes system and network failure.

DoD, GSA, and NASA will publish a separate 30-day notice in the **Federal Register** requesting public comment on the proposed emergency information collections contained within this rule under OMB Control Number 9000–0205, Implementation of Federal Acquisition Supply Chain Security Act (FASCSA) Orders.

### Public Reporting Burden

Public reporting burden for this collection of information is estimated to average 2 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden is estimated as follows:

*Respondents:* 6,113.

*Total Annual Responses:* 6,113.

*Total Burden Hours:* 12,226.

## X. Determination To Issue an Interim Rule

Pursuant to 41 U.S.C. 1707(d), a determination has been made under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. It is critical that the FAR is revised promptly to reflect the current requirements of the law, which prohibits the Federal Government from acquiring products or services that violate the prohibition of an exclusion or removal order issued pursuant to the Federal Acquisition Supply Chain Security Act (FASCSA) of 2018 and the final rule issued by the FASC.

The Secretary of Homeland Security, the Secretary of Defense, and the Director of National Intelligence may issue a FASCSA order at any time. For this reason, this FAR rule must take effect without awaiting the delay associated with solicitation, review, and response to public comments to ensure agencies and contractors are able to promptly implement supply chain risk information sharing and FASCSA orders. If a FASCSA order is issued agencies are required to implement that order. In the absence of issuing this FAR rule immediately, agencies will be forced to issue individual agency policies and procedures including drafting contract provisions for inclusion in all agency contracts. Due to the complexity of this novel requirement, it has taken several years to draft and develop the framework of this FAR rule and involved many Government agencies in the process. Each agency would now be required to start this process over and develop their own agency policies and procedures, further delaying the implementation of FASCSA orders and likely resulting in inconsistent contract terms and implementation across multiple agencies and gaps in compliance.

Failure to implement FASCSA orders uniformly across the Government would adversely impact national security making it critical to implement this FAR rule without delay. Vulnerabilities in supply chains for covered articles can enable data and intellectual property theft, loss of confidence in integrity, or exploitation to cause system and network failure. The cost to our nation comes not only in lost innovation, jobs, and economic advantage, but also in reduced military strength. Delaying implementation of this interim rule would increase national security risks to the Government posed by covered articles subject to a FASCSA order. Therefore, a Governmentwide FAR rule is the best tool available now to provide a consistent and reliable implementation across agencies.

Consistent with the Congressional Review Act (CRA) (5 U.S.C. 801–808), this rule will not take effect until 60 days after it is published in the **Federal Register**, allowing Congress time to review this interim rule. This short delay in the effective date is beneficial to both contracting agencies and industry to provide the necessary time to assess and prepare to implement the new requirements. Both contracting agencies and industry will need to develop and implement new policies and procedures, notify and train their workforce on the new requirements, and update contract writing systems to



incorporate the new provisions and clause. This 60-day delay associated with the CRA is significantly shorter than the delay associated with issuing a proposed rule, and thus avoids the risks associated with extended delay highlighted above.

Pursuant to 41 U.S.C. 1707 and FAR 1.501–3(b), the Department of Defense, General Services Administration, and National Aeronautics and Space Administration will consider public comments received in response to this interim rule in the formation of the final rule.

#### List of Subjects in 48 CFR Parts 1, 4, 9, 13, 39, 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 1, 4, 9, 13, 39, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 4, 9, 13, 39, and 52 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

#### PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

■ 2. In section 1.106, amend the table by adding in numerical order entries for 4.23, 52.204–29, and 52.204–30 to read as follows:

##### 1.106 OMB approval under the Paperwork Reduction Act.

FAR segment				OMB control No.	
4.23	.....			9000–0205	
52.204–29	.....			9000–0205	
52.204–30	.....			9000–0205	

#### PART 4—ADMINISTRATIVE AND INFORMATION MATTERS

■ 3. Revise section 4.2001 to read as follows:

##### 4.2001 Definitions.

As used in this subpart—

*Kaspersky Lab covered article* means any hardware, software, or service that—

(1) Is developed or provided by a Kaspersky Lab covered entity;

(2) Includes any hardware, software, or service developed or provided in whole or in part by a Kaspersky Lab covered entity; or

(3) Contains components using any hardware or software developed in whole or in part by a Kaspersky Lab covered entity.

*Kaspersky Lab covered entity* means—

(1) Kaspersky Lab;

(2) Any successor entity to Kaspersky Lab, including any change in name, *e.g.*, “Kaspersky”;

(3) Any entity that controls, is controlled by, or is under common control with Kaspersky Lab; or

(4) Any entity of which Kaspersky Lab has a majority ownership.

##### 4.2002 [Amended]

■ 4. Amend section 4.2002 by removing from paragraphs (a) and (b) the word “covered” and adding “Kaspersky Lab covered” in its place.

##### 4.2004 [Amended]

■ 5. Amend section 4.2004 by removing “Kaspersky Lab and Other Covered” and adding “Kaspersky Lab Covered” in its place.

■ 6. Add subpart 4.23 to read as follows:

#### Subpart 4.23—Federal Acquisition Security Council

Sec.

4.2300 Scope of subpart.

2301 Definitions.

4.2302 Sharing supply chain risk information.

4.2303 FASCSA orders.

4.2304 Procedures.

4.2305 Waivers.

4.2306 Solicitation provision and contract clauses.

#### Subpart 4.23—Federal Acquisition Security Council

##### 4.2300 Scope of subpart.

This subpart implements the Federal Acquisition Supply Chain Security Act of 2018 (title II of Pub. L. 115–390) and the Federal Acquisition Security Council (FASC) regulation at 41 CFR part 201–1. The authority provided in this subpart expires on December 31, 2033 (see 41 U.S.C. 1328).

##### 4.2301 Definitions.

As used in this subpart—  
*Covered article*, as defined in 41 U.S.C. 4713(k), means—

(1) Information technology, as defined in 40 U.S.C. 11101, including cloud computing services of all types;

(2) Telecommunications equipment or telecommunications service, as those terms are defined in section 3 of the

Communications Act of 1934 (47 U.S.C. 153);

(3) The processing of information on a Federal or non-Federal information system, subject to the requirements of the Controlled Unclassified Information program (see 32 CFR part 2002); or

(4) Hardware, systems, devices, software, or services that include embedded or incidental information technology.

*FASCSA order* means any of the following orders issued under the Federal Acquisition Supply Chain Security Act (FASCSA) requiring the removal of covered articles from executive agency information systems or the exclusion of one or more named sources or named covered articles from executive agency procurement actions, as described in 41 CFR 201–1.303(d) and (e):

(1) The Secretary of Homeland Security may issue FASCSA orders applicable to civilian agencies, to the extent not covered by paragraph (2) or (3) of this definition. This type of FASCSA order may be referred to as a Department of Homeland Security (DHS) FASCSA order.

(2) The Secretary of Defense may issue FASCSA orders applicable to the Department of Defense (DoD) and national security systems other than sensitive compartmented information systems. This type of FASCSA order may be referred to as a DoD FASCSA order.

(3) The Director of National Intelligence (DNI) may issue FASCSA orders applicable to the intelligence community and sensitive compartmented information systems, to the extent not covered by paragraph (2) of this definition. This type of FASCSA order may be referred to as a DNI FASCSA order.

*Federal Acquisition Security Council (FASC)* means the Council established pursuant to 41 U.S.C. 1322(a).

*Intelligence community*, as defined by 50 U.S.C. 3003(4), means the following—

(1) The Office of the Director of National Intelligence;

(2) The Central Intelligence Agency;

(3) The National Security Agency;

(4) The Defense Intelligence Agency;

(5) The National Geospatial-

Intelligence Agency;

(6) The National Reconnaissance Office;

(7) Other offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs;

(8) The intelligence elements of the Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, the

Federal Bureau of Investigation, the Drug Enforcement Administration, and the Department of Energy;

(9) The Bureau of Intelligence and Research of the Department of State;

(10) The Office of Intelligence and Analysis of the Department of the Treasury;

(11) The Office of Intelligence and Analysis of the Department of Homeland Security; or

(12) Such other elements of any department or agency as may be designated by the President, or designated jointly by the Director of National Intelligence and the head of the department or agency concerned, as an element of the intelligence community.

*National security system*, as defined in 44 U.S.C. 3552, means any information system (including any telecommunications system) used or operated by an agency or by a contractor of an agency, or other organization on behalf of an agency—

(1) The function, operation, or use of which involves intelligence activities; involves cryptologic activities related to national security; involves command and control of military forces; involves equipment that is an integral part of a weapon or weapons system; or is critical to the direct fulfillment of military or intelligence missions, but does not include a system that is to be used for routine administrative and business applications (including payroll, finance, logistics, and personnel management applications); or

(2) Is protected at all times by procedures established for information that have been specifically authorized under criteria established by an Executive order or an Act of Congress to be kept classified in the interest of national defense or foreign policy.

*Reasonable inquiry* means an inquiry designed to uncover any information in the entity's possession about the identity of any covered articles, or any products or services produced or provided by a source. This applies when the covered article or the source is subject to an applicable FASCSA order. A reasonable inquiry excludes the need to include an internal or third-party audit.

*Sensitive compartmented information* means classified information concerning or derived from intelligence sources, methods, or analytical processes, which is required to be handled within formal access control systems established by the Director of National Intelligence.

*Sensitive compartmented information system* means a national security system authorized to process or store sensitive compartmented information.

*Source* means a non-Federal supplier, or potential supplier, of products or services, at any tier.

*Supply chain risk*, as defined in 41 U.S.C. 4713(k), means the risk that any person may sabotage, maliciously introduce unwanted functionality, extract data, or otherwise manipulate the design, integrity, manufacturing, production, distribution, installation, operation, maintenance, disposition, or retirement of covered articles so as to surveil, deny, disrupt, or otherwise manipulate the function, use, or operation of the covered articles or information stored or transmitted on the covered articles.

*Supply chain risk information* includes, but is not limited to, information that describes or identifies:

- (1) Functionality and features of covered articles, including access to data and information system privileges;
- (2) The user environment where a covered article is used or installed;
- (3) The ability of a source to produce and deliver covered articles as expected;
- (4) Foreign control of, or influence over, a source or covered article (e.g., foreign ownership, personal and professional ties between a source and any foreign entity, legal regime of any foreign country in which a source is headquartered or conducts operations);
- (5) Implications to government mission(s) or assets, national security, homeland security, or critical functions associated with use of a covered source or covered article;
- (6) Vulnerability of Federal systems, programs, or facilities;
- (7) Market alternatives to the covered source;
- (8) Potential impact or harm caused by the possible loss, damage, or compromise of a product, material, or service to an organization's operations or mission; and
- (9) Likelihood of a potential impact or harm, or the exploitability of a system;

(10) Security, authenticity, and integrity of covered articles and their supply and compilation chain;

(11) Capacity to mitigate risks identified;

(12) Factors that may reflect upon the reliability of other supply chain risk information; and

(13) Any other considerations that would factor into an analysis of the security, integrity, resilience, quality, trustworthiness, or authenticity of covered articles or sources.

#### **4.2302 Sharing supply chain risk information.**

(a) Executive agencies are required to share relevant supply chain risk information with the FASC if the

executive agency has determined there is a reasonable basis to conclude a substantial supply chain risk associated with a source or covered article exists (see 41 CFR 201–1.201).

(b) In support of information sharing described in paragraph (a) of this section, the contracting officer shall work with the program office or requiring activity in accordance with agency procedures regarding the sharing of relevant information on actual or potential supply chain risk determined to exist during the procurement process.

#### **4.2303 FASCSA orders.**

(a) Executive agencies are prohibited from procuring or obtaining, or extending or renewing a contract to procure or obtain, any covered article, or any products or services produced or provided by a source, including contractor use of covered articles or sources, if that prohibition is established by an applicable FASCSA order issued by the Director of National Intelligence, Secretary of Defense, or Secretary of Homeland Security (the “issuing official”) (see 41 CFR 201–1.304(a)).

(b) If a covered article or the source is subject to an applicable Governmentwide FASCSA order issued collectively by the Director of National Intelligence, Secretary of Defense, and Secretary of Homeland Security, executive agencies responsible for management of the Federal Supply Schedules, Governmentwide acquisition contracts, and multi-agency contracts shall facilitate implementation of a collective FASCSA order by removing the covered articles or sources identified in the FASCSA order from such contracts (see 41 CFR 201–1.303(g)).

(c)(1) FASCSA orders regarding sources or covered articles will be found in the System for Award Management (SAM), by searching for the phrase “FASCSA order”. SAM may be updated as new FASCSA orders are issued.

(2) Some FASCSA orders will not be identified in SAM and will need to be identified in the solicitation to be effective for that acquisition. The requiring activity or program office will identify these FASCSA orders to the contracting officer (see 4.2304(d)).

(3) The contracting officer shall work with the program office or requiring activity to identify which FASCSA orders apply to the acquisition.

#### **4.2304 Procedures.**

(a) *Identifying applicable FASCSA orders.* The applicability of FASCSA orders to a particular acquisition depends on the contracting office's agency, the scope of the FASCSA order,

the funding, and whether the requirement involves certain types of information systems (see the definition of FASCSA order at 4.2301). The contracting officer shall coordinate with the program office or requiring activity to identify the FASCSA order(s) that apply to the acquisition as follows:

(1) Unless the program office or requiring activity instructs the contracting officer otherwise, FASCSA orders apply as follows: contracts awarded by civilian agencies will be subject to DHS FASCSA orders, and contracts awarded by the Department of Defense will be subject to DoD FASCSA orders. See paragraph (b) of 52.204–30, Federal Acquisition Supply Chain Security Act Orders—Prohibition.

(2) For acquisitions where the program office or the requiring activity instructs the contracting officer to select specific FASCSA orders, the contracting officer must select “yes” or “no” for each applicable type of FASCSA order (*i.e.*, “DHS FASCSA Order” “DoD FASCSA Order” or “DNI FASCSA Order”). See paragraph (b)(1) of 52.204–30, Federal Acquisition Supply Chain Security Act Orders—Prohibition, with its Alternate I.

(b) *Federal Supply Schedules, Governmentwide acquisition contracts, multi-agency contracts specific procedures*—(1) *Applying FASCSA orders*. An agency awarding this type of contract may choose to apply FASCSA orders in accordance with agency policy as follows:

(i) *Application at the contract level*. The agency awarding the basic contract may choose to apply FASCSA orders to the basic contract award. This is the preferred method, especially if small value orders or orders without a request for quotation (RFQ) are expected. Ordering activity contracting officers may use this contract vehicle without taking further steps to identify applicable FASCSA orders in the order. The contracting officer awarding the basic contract would select “yes” for all FASCSA orders (*i.e.*, “DHS FASCSA Order” “DoD FASCSA Order” and “DNI FASCSA Order”) (see paragraph (b)(1) of 52.204–30, Federal Acquisition Supply Chain Security Act Orders—Prohibition, with its Alternate I). If the contracting officer becomes aware of a newly issued applicable FASCSA order, then the agency awarding the basic contract shall modify the basic contract to remove any covered article, or any products or services produced or provided by a source, prohibited by the newly issued FASCSA order.

(ii) *Application at the order level*. The agency awarding the basic contract may choose to apply FASCSA orders at the

order level, as implemented by the ordering activity contracting officer.

(2) *Collective FASCSA orders*. If a new FASCSA order is issued collectively by the Secretary of Homeland Security, Secretary of Defense, and Director of National Intelligence, then the contracting officer shall modify the basic contract based upon the requirements of the order, removing any covered article, or any products or services produced or provided by a source (see 4.2303(b)).

(3) *Interagency acquisitions*. For an interagency acquisition (see subpart 17.5) where the funding agency differs from the awarding agency, the funding agency shall determine the applicable FASCSA orders.

(4) *Inconsistencies*. If any inconsistency is identified between the basic contract and the order, then the FASCSA orders identified in the order will take precedence.

(c) *Updating the solicitation or contract for new FASCSA orders*. The contracting officer shall update a solicitation or contract if the program office or requiring activity determines it is necessary to:

(1) Amend the solicitation to incorporate FASCSA orders in effect after the date the solicitation was issued but prior to contract award; or

(2) Modify the contract to incorporate FASCSA orders issued after the date of contract award.

(i) Any such modification should take place within a reasonable amount of time, but no later than 6 months from the determination of the program office or requiring activity.

(ii) If the contract is not modified within the time specified in paragraph (c)(2)(i) of this section, then the contract file shall be documented providing rationale why the contract could not be modified within this timeframe.

(d) *Agency specific procedures*. The contracting officer shall follow agency procedures for implementing FASCSA orders not identified in SAM (see 4.2303(c)(2)).

(e) *Disclosures*. If an offeror provides a disclosure pursuant to paragraph (e) of 52.204–29, Federal Acquisition Supply Chain Security Act Orders—Representation and Disclosures, the contracting officer shall engage with the program office or requiring activity to determine whether to pursue a waiver, if available, in accordance with 4.2305 and agency procedures or not award to that offeror. For FASCSA orders handled at the order level, the disclosures language is found at paragraph (b)(5) of 52.204–30, Federal Acquisition Supply Chain Security Act

Orders—Prohibition, with its Alternate II.

(f) *Waiver*. An acquisition may be either fully or partially covered by a waiver. Partial waiver coverage occurs when only portions of the products or services being procured or provided by a source are covered by an applicable waiver. If the requiring activity notifies the contracting officer that the acquisition is partially covered by an approved individual waiver or class waiver under 4.2305, then the contracting officer shall work with the program office or requiring activity to identify in the solicitation, RFQ, or order, the covered articles or services produced by or provided by a source that are subject to the waiver (see 41 CFR 201–1.304(b)).

(g) *Reporting*. If a contractor provides a report pursuant to paragraph (c) of 52.204–30, Federal Acquisition Supply Chain Security Act Orders—Prohibition, the contracting officer shall engage with the agency supply chain risk management program in accordance with agency procedures.

#### 4.2305 Waivers.

(a) An executive agency required to comply with a FASCSA order may submit a request that the order or some of its provisions not apply to—

(1) The agency;

(2) Specific actions of the agency or a specific class of acquisitions;

(3) Actions of the agency for a period of time before compliance with the order is practicable; or

(4) Other activities, as appropriate, that the requesting agency identifies.

(b) A request for waiver shall be submitted by the executive agency in writing to the official that issued the order, unless other instructions for submission are provided by the applicable FASCSA order.

(c) The request for waiver shall provide the following information for the issuing official to review and evaluate the request, including—

(1) Identification of the applicable FASCSA order;

(2) A description of the exception sought, including, if limited to only a portion of the order, a description of the order provisions from which an exception is sought;

(3) The name or a description sufficient to identify the covered article or the product or service provided by a source that is subject to the order from which an exception is sought;

(4) Compelling justification for why an exception should be granted, such as the impact of the order on the agency's ability to fulfill its mission-critical functions, or considerations related to

the national interest, including national security reviews, national security investigations, or national security agreements;

(5) Any alternative mitigations to be undertaken to reduce the risks addressed by the FASCSA order; and

(6) Any other information requested by the issuing official.

(d) The contracting officer, in accordance with agency procedures and working with the program office or requiring activity, shall decide whether to pursue a waiver or to make award to an offeror that does not require a waiver in accordance with the procedures at 4.2304(f). If a waiver is being pursued, then the contracting officer may not make an award until written approval is obtained that the waiver has been granted.

#### **4.2306 Solicitation provision and contract clauses.**

(a) In all Federal Supply Schedules, Governmentwide acquisition contracts, and multi-agency contracts where FASCSA orders are applied at the order level, the contracting officer shall insert the clause at 52.204–28, Federal Acquisition Supply Chain Security Act Orders—Federal Supply Schedules, Governmentwide Acquisition Contracts, and Multi-Agency Contracts, in the basic contract solicitation and resultant contract (see 4.2304(b)(1)(ii)).

(b) The contracting officer shall insert the provision at 52.204–29, Federal Acquisition Supply Chain Security Act Orders—Representation and Disclosures—

(1) In all solicitations, except for Federal Supply Schedules, Governmentwide acquisition contracts, and multi-agency contracts.

(2) In all solicitations for Federal Supply Schedules, Governmentwide acquisition contracts, and multi-agency contracts, if FASCSA orders are applied at the contract level (see 4.2304(b)(1)(i)).

(c) The contracting officer shall insert the clause at 52.204–30, Federal Acquisition Supply Chain Security Act Orders—Prohibition—

(1) In solicitations and contracts if the conditions specified at 4.2304(a)(1) apply, except for Federal Supply Schedules, Governmentwide acquisition contracts, and multi-agency contracts. For acquisitions where conditions specified at 4.2304(a)(2) apply, then the contracting officer shall use the clause with its Alternate I.

(2) In Federal Supply Schedules, Governmentwide acquisition contracts, and multi-agency contracts—

(i) Where FASCSA orders are applied at the contract level, with its Alternate

I in all solicitations and resultant contracts. See 4.2304(b)(1)(i).

(ii) Where FASCSA orders are applied at the order level, with its Alternate II in all RFQs, or in all notices of intent to place an order. See 4.2304(b)(1)(ii).

### **PART 9—CONTRACTOR QUALIFICATIONS**

■ 7. Amend section 9.400 by adding paragraph (c) to read as follows:

#### **9.400 Scope of subpart.**

\* \* \* \* \*

(c) For Federal Acquisition Supply Chain Security Act (FASCSA) orders, see subpart 4.23.

### **PART 13—SIMPLIFIED ACQUISITION PROCEDURES**

■ 8. Amend section 13.201 by adding paragraph (l) to read as follows:

#### **13.201 General.**

\* \* \* \* \*

(l) Do not procure or obtain, or extend or renew a contract to procure or obtain, any covered article, or any products or services produced or provided by a source, including contractor use of covered articles or sources, if prohibited from doing so by an applicable Federal Acquisition Supply Chain Security Act (FASCSA) order issued by the Director of National Intelligence, Secretary of Defense, or Secretary of Homeland Security (see 4.2303).

### **PART 39—ACQUISITION OF INFORMATION TECHNOLOGY**

■ 9. Amend section 39.101 by adding paragraph (h) to read as follows:

#### **39.101 Policy.**

\* \* \* \* \*

(h) Executive agencies are prohibited from procuring or obtaining, or extending or renewing a contract to procure or obtain, any covered article, or any products or services produced or provided by a source, including contractor use of covered articles or sources, if prohibited from doing so by an applicable FASCSA order issued by the Director of National Intelligence, Secretary of Defense, or Secretary of Homeland Security (see 4.2303).

### **PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 10. Amend section 52.204–23 by—

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

■ b. In paragraph (a):

■ i. Removing the definition “Covered article” and adding the definition of

“Kaspersky Lab covered article” in its place; and

■ ii. Removing the definition “Covered entity” and adding the definition “Kaspersky Lab covered entity” in its place;

■ c. In paragraph (b) removing “covered article” wherever it appears and adding “Kaspersky Lab covered article” in its place, respectively;

■ d. Removing from the first sentence in paragraph (c)(1) “identifies a covered article” and adding “identifies a Kaspersky Lab covered article” in its place;

■ e. Removing from paragraph (c)(2)(i) “1 business day” and adding “3 business days” in its place; and

■ f. Removing from paragraph (c)(2)(ii) “covered article” wherever it appears and adding “Kaspersky Lab covered article” in its place and removing from the end of the paragraph “covered articles” and adding “Kaspersky Lab covered articles” in its place.

The revisions and additions read as follows:

#### **52.204–23 Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab Covered Entities.**

\* \* \* \* \*

#### **Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab Covered Entities (DEC 2023)**

(a) \* \* \*

*Kaspersky Lab covered article* means any hardware, software, or service that—

(1) Is developed or provided by a Kaspersky Lab covered entity;

(2) Includes any hardware, software, or service developed or provided in whole or in part by a Kaspersky Lab covered entity; or

(3) Contains components using any hardware or software developed in whole or in part by a Kaspersky Lab covered entity.

*Kaspersky Lab covered entity* means—

(1) Kaspersky Lab;

(2) Any successor entity to Kaspersky Lab, including any change in name, e.g., “Kaspersky”;

(3) Any entity that controls, is controlled by, or is under common control with Kaspersky Lab; or

(4) Any entity of which Kaspersky Lab has a majority ownership.

\* \* \* \* \*

■ 11. Add sections 52.204–28, 52.204–29, and 52.204–30 to read as follows:

Sec. \* \* \* \* \*

52.204–28 Federal Acquisition Supply Chain Security Act Orders—Federal Supply Schedules, Governmentwide Acquisition Contracts, and Multi-Agency Contracts.

52.204–29 Federal Acquisition Supply Chain Security Act Orders—Representation and Disclosures.

52.204–30 Federal Acquisition Supply Chain Security Act Orders—Prohibition.

\* \* \* \* \*

**52.204–28 Federal Acquisition Supply Chain Security Act Orders—Federal Supply Schedules, Governmentwide Acquisition Contracts, and Multi-Agency Contracts.**

As prescribed in 4.2306(a), insert the following clause:

**Federal Acquisition Supply Chain Security Act Orders—Federal Supply Schedules, Governmentwide Acquisition Contracts, and Multi-Agency Contracts (DEC 2023)**

(a) *Definitions.* As used in this clause—  
*Covered article*, as defined in 41 U.S.C. 4713(k), means—

(1) Information technology, as defined in 40 U.S.C. 11101, including cloud computing services of all types;

(2) Telecommunications equipment or telecommunications service, as those terms are defined in section 3 of the Communications Act of 1934 (47 U.S.C. 153);

(3) The processing of information on a Federal or non-Federal information system, subject to the requirements of the Controlled Unclassified Information program (see 32 CFR part 2002); or

(4) Hardware, systems, devices, software, or services that include embedded or incidental information technology.

*FASCSA order* means any of the following orders issued under the Federal Acquisition Supply Chain Security Act (FASCSA) requiring the removal of covered articles from executive agency information systems or the exclusion of one or more named sources or named covered articles from executive agency procurement actions, as described in 41 CFR 201–1.303(d) and (e):

(1) The Secretary of Homeland Security may issue FASCSA orders applicable to civilian agencies, to the extent not covered by paragraph (2) or (3) of this definition. This type of FASCSA order may be referred to as a Department of Homeland Security (DHS) FASCSA order.

(2) The Secretary of Defense may issue FASCSA orders applicable to the Department of Defense (DoD) and national security systems other than sensitive compartmented information systems. This type of FASCSA order may be referred to as a DoD FASCSA order.

(3) The Director of National Intelligence (DNI) may issue FASCSA orders applicable to the intelligence community and sensitive compartmented information systems, to the extent not covered by paragraph (2) of this definition. This type of FASCSA order may be referred to as a DNI FASCSA order.

*Intelligence community*, as defined by 50 U.S.C. 3003(4), means the following—

(1) The Office of the Director of National Intelligence;

(2) The Central Intelligence Agency;

(3) The National Security Agency;

(4) The Defense Intelligence Agency;

(5) The National Geospatial-Intelligence Agency;

(6) The National Reconnaissance Office;

(7) Other offices within the Department of Defense for the collection of specialized

national intelligence through reconnaissance programs;

(8) The intelligence elements of the Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Department of Energy;

(9) The Bureau of Intelligence and Research of the Department of State;

(10) The Office of Intelligence and Analysis of the Department of the Treasury;

(11) The Office of Intelligence and Analysis of the Department of Homeland Security; or

(12) Such other elements of any department or agency as may be designated by the President, or designated jointly by the Director of National Intelligence and the head of the department or agency concerned, as an element of the intelligence community.

*National security system*, as defined in 44 U.S.C. 3552, means any information system (including any telecommunications system) used or operated by an agency or by a contractor of an agency, or other organization on behalf of an agency—

(1) The function, operation, or use of which involves intelligence activities; involves cryptologic activities related to national security; involves command and control of military forces; involves equipment that is an integral part of a weapon or weapons system; or is critical to the direct fulfillment of military or intelligence missions, but does not include a system that is to be used for routine administrative and business applications (including payroll, finance, logistics, and personnel management applications); or

(2) Is protected at all times by procedures established for information that have been specifically authorized under criteria established by an Executive order or an Act of Congress to be kept classified in the interest of national defense or foreign policy.

*Sensitive compartmented information* means classified information concerning or derived from intelligence sources, methods, or analytical processes, which is required to be handled within formal access control systems established by the Director of National Intelligence.

*Sensitive compartmented information system* means a national security system authorized to process or store sensitive compartmented information.

*Source* means a non-Federal supplier, or potential supplier, of products or services, at any tier.

(b) *Notice.* During contract performance, the Contractor shall be required to comply with any of the following that apply: DHS FASCSA orders, DoD FASCSA orders, or DNI FASCSA orders. The applicable FASCSA order(s) will be identified in the request for quotation (see 8.405–2), or in the notice of intent to place an order (see 16.505(b)). FASCSA orders will be identified in paragraph (b)(1) of FAR 52.204–30, Federal Acquisition Supply Chain Security Act Orders—Prohibition, with its Alternate II.

(c) *Removal.* Upon notification from the contracting officer, during the performance of the contract, the Contractor shall promptly make any necessary changes or modifications to remove any covered article or any product

or service produced or provided by a source that is subject to an applicable Governmentwide FASCSA order (see FAR 4.2303(b)).

(End of clause)

**52.204–29 Federal Acquisition Supply Chain Security Act Orders—Representation and Disclosures.**

As prescribed in 4.2306(b), insert the following provision:

**Federal Acquisition Supply Chain Security Act Orders—Representation and Disclosures (DEC 2023)**

(a) *Definitions.* As used in this provision, *Covered article*, *FASCSA order*, *Intelligence community*, *National security system*, *Reasonable inquiry*, *Sensitive compartmented information*, *Sensitive compartmented information system*, and *Source* have the meaning provided in the clause 52.204–30, Federal Acquisition Supply Chain Security Act Orders—Prohibition.

(b) *Prohibition.* Contractors are prohibited from providing or using as part of the performance of the contract any covered article, or any products or services produced or provided by a source, if the prohibition is set out in an applicable Federal Acquisition Supply Chain Security Act (FASCSA) order, as described in paragraph (b)(1) of FAR 52.204–30, Federal Acquisition Supply Chain Security Act Orders—Prohibition.

(c) *Procedures.* (1) The Offeror shall search for the phrase “FASCSA order” in the System for Award Management (SAM)(<https://www.sam.gov>) for any covered article, or any products or services produced or provided by a source, if there is an applicable FASCSA order described in paragraph (b)(1) of FAR 52.204–30, Federal Acquisition Supply Chain Security Act Orders—Prohibition.

(2) The Offeror shall review the solicitation for any FASCSA orders that are not in SAM, but are effective and do apply to the solicitation and resultant contract (see FAR 4.2303(c)(2)).

(3) FASCSA orders issued after the date of solicitation do not apply unless added by an amendment to the solicitation.

(d) *Representation.* By submission of this offer, the offeror represents that it has conducted a reasonable inquiry, and that the offeror does not propose to provide or use in response to this solicitation any covered article, or any products or services produced or provided by a source, if the covered article or the source is prohibited by an applicable FASCSA order in effect on the date the solicitation was issued, except as waived by the solicitation, or as disclosed in paragraph (e).

(e) *Disclosures.* The purpose for this disclosure is so the Government may decide whether to issue a waiver. For any covered article, or any products or services produced or provided by a source, if the covered article or the source is subject to an applicable FASCSA order, and the Offeror is unable to represent compliance, then the Offeror shall provide the following information as part of the offer:

(1) Name of the product or service provided to the Government;

(2) Name of the covered article or source subject to a FASCSA order;

(3) If applicable, name of the vendor, including the Commercial and Government Entity code and unique entity identifier (if known), that supplied the covered article or the product or service to the Offeror;

(4) Brand;

(5) Model number (original equipment manufacturer number, manufacturer part number, or wholesaler number);

(6) Item description;

(7) Reason why the applicable covered article or the product or service is being provided or used;

(f) *Executive agency review of disclosures.* The contracting officer will review disclosures provided in paragraph (e) to determine if any waiver may be sought. A contracting officer may choose not to pursue a waiver for covered articles or sources otherwise subject to a FASCSA order and may instead make an award to an offeror that does not require a waiver.

(End of provision)

#### 52.204–30 Federal Acquisition Supply Chain Security Act Orders—Prohibition.

As prescribed in 4.2306(c), insert the following clause:

#### Federal Acquisition Supply Chain Security Act Orders—Prohibition (DEC 2023)

(a) *Definitions.* As used in this clause—  
*Covered article*, as defined in 41 U.S.C. 4713(k), means—

(1) Information technology, as defined in 40 U.S.C. 11101, including cloud computing services of all types;

(2) Telecommunications equipment or telecommunications service, as those terms are defined in section 3 of the Communications Act of 1934 (47 U.S.C. 153);

(3) The processing of information on a Federal or non-Federal information system, subject to the requirements of the Controlled Unclassified Information program (see 32 CFR part 2002); or

(4) Hardware, systems, devices, software, or services that include embedded or incidental information technology.

*FASCSA order* means any of the following orders issued under the Federal Acquisition Supply Chain Security Act (FASCSA) requiring the removal of covered articles from executive agency information systems or the exclusion of one or more named sources or named covered articles from executive agency procurement actions, as described in 41 CFR 201–1.303(d) and (e):

(1) The Secretary of Homeland Security may issue FASCSA orders applicable to civilian agencies, to the extent not covered by paragraph (2) or (3) of this definition. This type of FASCSA order may be referred to as a Department of Homeland Security (DHS) FASCSA order.

(2) The Secretary of Defense may issue FASCSA orders applicable to the Department of Defense (DoD) and national security systems other than sensitive compartmented information systems. This type of FASCSA

order may be referred to as a DoD FASCSA order.

(3) The Director of National Intelligence (DNI) may issue FASCSA orders applicable to the intelligence community and sensitive compartmented information systems, to the extent not covered by paragraph (2) of this definition. This type of FASCSA order may be referred to as a DNI FASCSA order.

*Intelligence community*, as defined by 50 U.S.C. 3003(4), means the following—

(1) The Office of the Director of National Intelligence;

(2) The Central Intelligence Agency;

(3) The National Security Agency;

(4) The Defense Intelligence Agency;

(5) The National Geospatial-Intelligence Agency;

(6) The National Reconnaissance Office;

(7) Other offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs;

(8) The intelligence elements of the Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Department of Energy;

(9) The Bureau of Intelligence and Research of the Department of State;

(10) The Office of Intelligence and Analysis of the Department of the Treasury;

(11) The Office of Intelligence and Analysis of the Department of Homeland Security; or

(12) Such other elements of any department or agency as may be designated by the President, or designated jointly by the Director of National Intelligence and the head of the department or agency concerned, as an element of the intelligence community.

*National security system*, as defined in 44 U.S.C. 3552, means any information system (including any telecommunications system) used or operated by an agency or by a contractor of an agency, or other organization on behalf of an agency—

(1) The function, operation, or use of which involves intelligence activities; involves cryptologic activities related to national security; involves command and control of military forces; involves equipment that is an integral part of a weapon or weapons system; or is critical to the direct fulfillment of military or intelligence missions, but does not include a system that is to be used for routine administrative and business applications (including payroll, finance, logistics, and personnel management applications); or

(2) Is protected at all times by procedures established for information that have been specifically authorized under criteria established by an Executive order or an Act of Congress to be kept classified in the interest of national defense or foreign policy.

*Reasonable inquiry* means an inquiry designed to uncover any information in the entity's possession about the identity of any covered articles, or any products or services produced or provided by a source. This applies when the covered article or the source is subject to an applicable FASCSA order. A reasonable inquiry excludes the need to include an internal or third-party audit.

*Sensitive compartmented information* means classified information concerning or derived from intelligence sources, methods, or analytical processes, which is required to be handled within formal access control systems established by the Director of National Intelligence.

*Sensitive compartmented information system* means a national security system authorized to process or store sensitive compartmented information.

*Source* means a non-Federal supplier, or potential supplier, of products or services, at any tier.

(b) *Prohibition.* (1) Unless an applicable waiver has been issued by the issuing official, Contractors shall not provide or use as part of the performance of the contract any covered article, or any products or services produced or provided by a source, if the covered article or the source is prohibited by an applicable FASCSA orders as follows:

(i) For solicitations and contracts awarded by a Department of Defense contracting office, DoD FASCSA orders apply.

(ii) For all other solicitations and contracts DHS FASCSA orders apply.

(2) The Contractor shall search for the phrase “FASCSA order” in the System for Award Management (SAM) at <https://www.sam.gov> to locate applicable FASCSA orders identified in paragraph (b)(1).

(3) The Government may identify in the solicitation additional FASCSA orders that are not in SAM, which are effective and apply to the solicitation and resultant contract.

(4) A FASCSA order issued after the date of solicitation applies to this contract only if added by an amendment to the solicitation or modification to the contract (see FAR 4.2304(c)). However, see paragraph (c) of this clause.

(5)(i) If the contractor wishes to ask for a waiver of the requirements of a new FASCSA order being applied through modification, then the Contractor shall disclose the following:

(A) Name of the product or service provided to the Government;

(B) Name of the covered article or source subject to a FASCSA order;

(C) If applicable, name of the vendor, including the Commercial and Government Entity code and unique entity identifier (if known), that supplied or supplies the covered article or the product or service to the Offeror;

(D) Brand;

(E) Model number (original equipment manufacturer number, manufacturer part number, or wholesaler number);

(F) Item description;

(G) Reason why the applicable covered article or the product or service is being provided or used;

(ii) *Executive agency review of disclosures.* The contracting officer will review disclosures provided in paragraph (b)(5)(i) to determine if any waiver is warranted. A contracting officer may choose not to pursue a waiver for covered articles or sources otherwise covered by a FASCSA order and to instead pursue other appropriate action.

(c) *Notice and reporting requirement.* (1) During contract performance, the Contractor



shall review *SAM.gov* at least once every three months, or as advised by the Contracting Officer, to check for covered articles subject to FASCSA order(s), or for products or services produced by a source subject to FASCSA order(s) not currently identified under paragraph (b) of this clause.

(2) If the Contractor identifies a new FASCSA order(s) that could impact their supply chain, then the Contractor shall conduct a reasonable inquiry to identify whether a covered article or product or service produced or provided by a source subject to the FASCSA order(s) was provided to the Government or used during contract performance.

(3)(i) The Contractor shall submit a report to the contracting office as identified in paragraph (c)(3)(ii) of this clause, if the Contractor identifies, including through any notification by a subcontractor at any tier, that a covered article or product or service produced or provided by a source was provided to the Government or used during contract performance and is subject to a FASCSA order(s) identified in paragraph (b) of this clause, or a new FASCSA order identified in paragraph (c)(2) of this clause. For indefinite delivery contracts, the Contractor shall report to both the contracting office for the indefinite delivery contract and the contracting office for any affected order.

(ii) If a report is required to be submitted to a contracting office under (c)(3)(i) of this clause, the Contractor shall submit the report as follows:

(A) If a Department of Defense contracting office, the Contractor shall report to the website at <https://dibnet.dod.mil>.

(B) For all other contracting offices, the Contractor shall report to the Contracting Officer.

(4) The Contractor shall report the following information for each covered article or each product or service produced or provided by a source, where the covered article or source is subject to a FASCSA order, pursuant to paragraph (c)(3)(i) of this clause:

(i) Within 3 business days from the date of such identification or notification:

(A) Contract number;

(B) Order number(s), if applicable;

(C) Name of the product or service provided to the Government or used during performance of the contract;

(D) Name of the covered article or source subject to a FASCSA order;

(E) If applicable, name of the vendor, including the Commercial and Government Entity code and unique entity identifier (if known), that supplied the covered article or the product or service to the Contractor;

(F) Brand;

(G) Model number (original equipment manufacturer number, manufacturer part number, or wholesaler number);

(H) Item description; and

(I) Any readily available information about mitigation actions undertaken or recommended.

(ii) Within 10 business days of submitting the information in paragraph (c)(4)(i) of this clause:

(A) Any further available information about mitigation actions undertaken or recommended.

(B) In addition, the Contractor shall describe the efforts it undertook to prevent submission or use of the covered article or the product or service produced or provided by a source subject to an applicable FASCSA order, and any additional efforts that will be incorporated to prevent future submission or use of the covered article or the product or service produced or provided by a source that is subject to an applicable FASCSA order.

(d) *Removal.* For Federal Supply Schedules, Governmentwide acquisition contracts, multi-agency contracts or any other procurement instrument intended for use by multiple agencies, upon notification from the Contracting Officer, during the performance of the contract, the Contractor shall promptly make any necessary changes or modifications to remove any product or service produced or provided by a source that is subject to an applicable FASCSA order.

(e) *Subcontracts.* (1) The Contractor shall insert the substance of this clause, including this paragraph (e) and excluding paragraph (c)(1) of this clause, in all subcontracts and other contractual instruments, including subcontracts for the acquisition of commercial products and commercial services.

(2) The Government may identify in the solicitation additional FASCSA orders that are not in SAM, which are effective and apply to the contract and any subcontracts and other contractual instruments under the contract. The Contractor or higher-tier subcontractor shall notify their subcontractors, and suppliers under other contractual instruments, that the FASCSA orders in the solicitation that are not in SAM apply to the contract and all subcontracts.

*Alternate I (DEC 2023).* As prescribed in 4.2306(c), substitute the following paragraph (b)(1) for paragraph (b)(1) of the basic clause:

(b) *Prohibition.* (1) Contractors are prohibited from providing or using as part of the performance of the contract any covered article, or any products or services produced or provided by a source, if the covered article or the source is prohibited by any applicable FASCSA orders identified by the checkbox(es) in this paragraph (b)(1).

[Contracting Officer must select either “yes” or “no” for each of the following types of FASCSA orders:]

Yes ☐ No ☐ DHS FASCSA Order

Yes ☐ No ☐ DoD FASCSA Order

Yes ☐ No ☐ DNI FASCSA Order

*Alternate II (DEC 2023).* As prescribed in 4.2306(c)(2)(ii), substitute the following paragraph (b) in place of paragraph (b) of the basic clause. This clause applies to each order as identified by the Contracting Officer.

(b) *Prohibition.* (1) Contractors are prohibited from providing or using as part of the performance of the contract any covered article, or any products or services produced or provided by a source, if the covered article or the source is prohibited by any applicable FASCSA orders identified by the checkbox(es) in this paragraph (b)(1).

[Contracting Officer must select either “yes” or “no” for each of the following types of FASCSA orders:]

Yes ☐ No ☐ DHS FASCSA Order

Yes ☐ No ☐ DoD FASCSA Order

Yes ☐ No ☐ DNI FASCSA Order

(2) The Contractor shall search for the phrase “FASCSA order” in the System for Award Management (SAM) at <https://www.sam.gov> to locate applicable FASCSA orders identified in paragraph (b)(1) of this clause.

(3) The Government may identify in the request for quotation (RFQ) or in the notice of intent to place an order additional FASCSA orders that are not in SAM, but are effective and apply to the order.

(4) A FASCSA order issued after the date of the RFQ or the notice of intent to place an order applies to this contract only if added by an amendment to the RFQ or in the notice of intent to place an order or added by modification to the order (see FAR 4.2304(c)). However, see paragraph (c) of this clause.

(5)(i) If the contractor wishes to ask for a waiver, the Contractor shall disclose the following:

(A) Name of the product or service provided to the Government;

(B) Name of the covered article or source subject to a FASCSA order;

(C) If applicable, name of the vendor, including the Commercial and Government Entity code and unique entity identifier (if known), that supplied the covered article or the product or service to the Offeror;

(D) Brand;

(E) Model number (original equipment manufacturer number, manufacturer part number, or wholesaler number);

(F) Item description;

(G) Reason why the applicable covered article or the product or service is being provided or used;

(ii) *Executive agency review of disclosures.* The contracting officer will review disclosures provided in paragraph (b)(5)(i) of this clause to determine if any waiver may be sought. A contracting officer may choose not to pursue a waiver for covered articles or sources otherwise covered by a FASCSA order and may instead make award to an offeror that does not require a waiver.

(End of clause)

■ 12. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Removing from paragraph (a)(2) “Lab and Other Covered Entities (NOV 2021)” and adding “Lab Covered Entities (DEC 2023)” in its place;

■ c. Redesignating paragraphs (b)(9) through (64) as paragraphs (b)(11) through (66) and adding new paragraphs (b)(9) and (10);

■ d. Removing from paragraph (e)(1)(iii) “Lab and Other Covered Entities (NOV 2021)” and adding “Lab Covered Entities (DEC 2023)” in its place;

■ e. Redesignating paragraphs (e)(1)(vi) through (xxiv) as paragraphs (e)(1)(vii) through (xxv) and adding a new paragraph (e)(1)(vi); and

■ f. In Alternate II—

- i. Revising the date of the alternate;
- ii. Removing from paragraph (e)(1)(ii)(C) “Lab and Other Covered Entities (NOV 2021)” and adding “Lab Covered Entities (DEC 2023)” in its place; and
- iii. Redesignating paragraphs (e)(1)(ii)(F) through (W) as paragraphs (e)(1)(ii)(G) through (X) and adding a new paragraph (e)(1)(ii)(F).

The revisions and additions 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 (DEC 2023)**

(b) \* \* \*

\_\_ (9) 52.204–28, Federal Acquisition Supply Chain Security Act Orders—Federal Supply Schedules, Governmentwide Acquisition Contracts, and Multi-Agency Contracts. (DEC 2023) (Pub. L. 115–390, title II).

\_\_ (10)(i) 52.204–30, Federal Acquisition Supply Chain Security Act Orders—Prohibition. (DEC 2023) (Pub. L. 115–390, title II).

\_\_ (ii) Alternate I (DEC 2023) of 52.204–30.

(e)(1) \* \* \*

(vi)(A) 52.204–30, Federal Acquisition Supply Chain Security Act Orders—Prohibition. (DEC 2023) (Pub. L. 115–390, title II).

(B) Alternate I (DEC 2023) of 52.204–30.

\* \* \* \* \*

Alternate II. (DEC 2023) \* \* \*

(e)(1) \* \* \*

(ii) \* \* \*

(F)(1) 52.204–30, Federal Acquisition Supply Chain Security Act Orders—Prohibition. (DEC 2023) (Pub. L. 115–390, title II).

(2) Alternate I (DEC 2023) of 52.204–30.

\* \* \* \* \*

- 13. Amend section 52.213–4 by—
- a. Revising the date of the clause;
- b. Removing from paragraph (a)(1)(ii) “Lab and Other Covered Entities (NOV 2021)” and adding “Lab Covered Entities (DEC 2023)” in its place;
- c. Redesignating paragraphs (a)(1)(v) through (xi) as paragraphs (a)(1)(vi) through (xii) and adding a new paragraph (a)(1)(v); and
- d. Removing from paragraph (a)(2)(vii) “(SEP 2023)” and adding “(DEC 2023)” in its place.

The revision and addition read 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) (DEC 2023)**

\* \* \* \* \*

(a) \* \* \*

(1) \* \* \*

(v) 52.204–30, Federal Acquisition Supply Chain Security Act Orders—Prohibition. (DEC 2023) (Pub. L. 115–390, title II).

\* \* \* \* \*

- 14. Amend section 52.244–6 by—
- a. Revising the date of the clause;
- b. Removing from paragraph (c)(1)(v) “Lab and Other Covered Entities (NOV 2021)” and adding “Lab Covered Entities (DEC 2023)” in its place; and
- c. Redesignating paragraphs (c)(1)(viii) through (xxi) as paragraphs (c)(1)(ix) through (xxii) and adding a new paragraph (c)(1)(viii) in its place.

The revision and addition read as follows:

**52.244–6 Subcontracts for Commercial Products and Commercial Services.**

\* \* \* \* \*

**Subcontracts for Commercial Products and Commercial Services (DEC 2023)**

\* \* \* \* \*

(c)(1) \* \* \*

(viii)(A) 52.204–30, Federal Acquisition Supply Chain Security Act Orders—Prohibition. (DEC 2023) (Pub. L. 115–390, title II).

(B) Alternate I (DEC 2023) of 52.204–30.

\* \* \* \* \*

[FR Doc. 2023–21320 Filed 10–4–23; 8:45 am]

BILLING CODE 6820–14–P

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 3, 31, and 52**

[FAC 2023–06, FAR Case 2017–005, Item II; Docket No. 2017–0005; Sequence No. 1]

RIN 9000–AN32

**Federal Acquisition Regulation: Whistleblower Protection for Contractor Employees**

**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 an act to enhance whistleblower protection for contractor employees. The rule makes permanent the protection for disclosure of certain information. It also clarifies that the prohibition on reimbursement for legal fees accrued in defense against reprisal claims applies to subcontractors, as well as contractors.

**DATES:** *Effective date:* November 6, 2023.

*Applicability:* At the time of any major modification to a contract, the agency shall make best efforts to include 52.203–17 in a contract that does not already contain it.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Malissa Jones, Procurement Analyst, at 571–886–4687 or by email at [malissa.jones@gsa.gov](mailto:malissa.jones@gsa.gov). For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or [GSARegSec@gsa.gov](mailto:GSARegSec@gsa.gov). Please cite FAC 2023–06, FAR Case 2017–005.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 83 FR 66223 on December 26, 2018, to amend the FAR to implement an act to enhance whistleblower protection for contractor and grantee employees, including employees of subcontractors (Pub. L. 114–261), enacted December 14, 2016. Although the statute addresses both contractor and grantee employees, including employees of subcontractors, the FAR only directly covers contracts and contractors, and indirectly covers subcontracts and subcontractors with flowdown requirements. Grants are covered in title 2 of the Code of Federal Regulations.

This statute also amends 41 U.S.C. 4712 to make permanent the pilot program for enhancement of contractor protection from reprisal for sharing certain information. This program does not apply to DoD, NASA, or the Coast Guard, where similar permanent enhanced whistleblower protections for contractor employees were enacted by section 827 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112–239, 10 U.S.C. 2409). Neither program applies to certain elements of the intelligence community (10 U.S.C. 2409(e) and 41 U.S.C. 4712(f)).

The four-year pilot program was enacted on January 2, 2013, by section 828 of the NDAA for FY 2013, with an

effective period of four years from the date of enactment (*i.e.*, January 2, 2013, through January 1, 2017). Section 1091(e) of the NDAA for FY 2014 (Pub. L. 113–66) modified the effective period of the pilot program to be four years from the date that is 180 days after the date of enactment (*i.e.*, July 1, 2013, through June 30, 2017). However, the program did not expire as it became permanent on December 14, 2016, before either of those expiration dates.

Public Law 114–261 also clarifies that the cost principles at 10 U.S.C. 2324(k) and 41 U.S.C. 4304 and 4310 that prohibit reimbursement for legal fees accrued in defense against reprisal claims apply to costs incurred by a contractor, subcontractor, or personal services contractor. Personal services contractors are contractors, and the cost principles generally already apply in the same way to costs incurred by subcontractors as to costs incurred by contractors. Three respondents submitted comments on the proposed rule.

## II. Discussion and Analysis

DoD, GSA, and NASA reviewed the public comments in the development of the final rule. The comments did not recommend changes to the rule; instead, they expressed concerns regarding the underlying intent of the statute. While DoD, GSA, and NASA recognize the concerns identified in the public comments, the public comments are not within the scope of the rule. A discussion of the comments received is provided as follows:

### A. Summary of Changes From Proposed Rule

No changes were made to the rule as a result of the public comments.

A minor change was made from the proposed rule regarding the applicability of FAR 52.203–17. The proposed rule prescribed the clause in acquisitions above the simplified acquisition threshold (SAT). The final rule changes the prescription of clause 52.203–17 to apply to all solicitations and contracts, including those at or below the SAT. The clause implements 41 U.S.C. 4712(d), which requires contractors and subcontractors to notify their employees of their whistleblower protections. The employee protections of the whistleblower program are applicable to all contracts regardless if expressly stated in the awarded contract. By changing the clause prescription to include solicitations and contracts at or below the SAT, contractors and subcontractors will have greater awareness of this responsibility

and employees also will be more aware of the whistleblower protections.

### B. Analysis of Public Comments

#### 1. Whistleblower Declaration

*Comment:* A respondent stated that there should be a requirement for the whistleblower to declare they are blowing the whistle.

*Response:* Changing the statutory requirement is outside the scope of the rule.

#### 2. Compulsory Reinstatement

*Comment:* A respondent stated that the current requirement to reinstate an employee if the IG or agency determine the whistleblower was retaliated against should not be compulsory.

*Response:* Changing the statutory requirement at 41 U.S.C. 4712(c) is outside the scope of the rule.

#### 3. Ability To Waive Complaint

*Comment:* A respondent stated that FAR 3.905–1 should clarify whether or not whistleblower cases are exempt from employment agreements that waive the right to a jury trial or arbitration.

*Response:* FAR 3.905–1(d) states there is no waiver: “No waiver. The rights and remedies provided for in 41 U.S.C. 4712 may not be waived by any agreement, policy, form, or condition of employment.” The source of this text is 41 U.S.C. 4712(c)(7). Also see 41 U.S.C. 4712(c) for the right to a jury trial.

#### 4. Standard for Liability

*Comment:* A respondent stated that the statutory standard for determining liability should be changed from an event that “contributed” to the negative employment action to one that “substantially contributed” or “primarily contributed” to the negative employment action.

*Response:* 41 U.S.C. 4712(a) states that “an employee . . . may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing . . .”. The statute does not require a showing that the event substantially or primarily contributed to the negative employment action.

#### 5. Allowability of Legal Fees

*Comment:* A respondent stated that the statutory requirement should include allowability of legal fees to settle *de minimis* suits and for suits when a contractor successfully defends itself from the whistleblower, as well as requiring the plaintiff to bear their own litigation costs unless the IG finds the whistleblowing “substantially” or “primarily” contributed to the retaliatory action.

*Response:* Some of these costs are already allowable, see FAR 31.205–47. Changing the statutory requirements is outside the scope of the rule.

#### 6. Readability

*Comment:* A respondent stated that some of the changes in the rule make the text insufficiently readable. The respondent stated that the definition of “abuse of authority” and the text at FAR 3.903(a) and (c) have a low readability score.

*Response:* The definition of “abuse of authority” in the proposed rule was taken verbatim from 41 U.S.C. 4712(g)(1) and previously included in the FAR at 3.908–2. The text at 3.903(a) was substantively drawn from 41 U.S.C. 4712(a)(1) and reframed in active voice as a prohibition that applies to contractors and subcontractors. The text at 3.903(c) was taken verbatim from 41 U.S.C. 4712(a)(3)(A), with the exception of omitting references to grants. Because these are the words of the statute, no changes will be made.

#### 7. Support for the Rule

*Comment:* A respondent stated that they support the rule.

*Response:* Noted.

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

Based on the determinations by the FAR signatories (DoD, GSA, and NASA) and the Administrator for Federal Procurement Policy, in accordance with 41 U.S.C. 1905, 1906, and 1907, this rule applies to all solicitations and resultant contracts, including contracts and subcontracts for acquisitions at or below the SAT, and contracts and subcontracts for the acquisition of commercial services and commercial products, including COTS items.

As explained below, the underlying statutory requirements that this rule implements are applicable to all Government contracts and subcontracts by operation of law. The FAR is being amended to include the clause, 52.203–17, Contractor Employee Whistleblower Rights, which implements 41 U.S.C. 4712, in all prime contracts and subcontracts. The discretion that the FAR signatories and the Administrator are exercising is essentially limited to the determination to incorporate the clauses established by this rule into contracts and subcontracts below the SAT and contracts and subcontracts for commercial products, commercial services, and COTS items. The FAR

Council is not determining when the whistleblower law applies but rather when the clause would be included in contracts and subcontracts. The clause does not apply to DoD, NASA and the Coast Guard, or applicable elements of the intelligence community.

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

Pursuant to 41 U.S.C. 1905, contracts or subcontracts in amounts not greater than the SAT will be exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1905 and states that the law applies to contracts and subcontracts in amounts not greater than the SAT; or (iii) the Federal Acquisition Regulatory Council (FAR Council) makes a written determination and finding (D&F) 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. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to contracts and subcontracts in amounts not greater than the SAT.

#### *B. Applicability to Contracts for the Acquisition of Commercial Products and Commercial Services*

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

#### *C. Applicability to Contracts for Commercially Available Off-the-Shelf Items*

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

U.S.C. 1907 and states that the law applies to acquisitions of COTS items; (iii) concerns authorities or responsibilities under the Small Business Act (15 U.S.C. 644) or bid protest procedures developed under the authority of 31 U.S.C. 3511 *et seq.*; 10 U.S.C. 3308; or 41 U.S.C. 3706 and 3707; or (iv) the Administrator for Federal Procurement Policy makes a written determination that it would not be in the best interest of the Federal Government to exempt contracts and subcontracts for the procurement of COTS items from the provision of law.

#### *D. Determinations*

The requirements of FAR 52.203–17, Contractor Employee Whistleblower Rights, ensures that all contractor and subcontractor employees are covered by the whistleblower rights and remedies. Having the clause in all Federal Government contracts is beneficial to contractor and subcontractor employees, and the public. Employees benefit from having whistleblower rights and remedies so they can report potential wrongdoing without fear of reprisal. The public benefits from employees reporting wrongdoing which may result in actions to hold firms responsible for unlawful acts. It is in the best interest of the Government to apply whistleblower protections through a clause in all Federal Government contracts.

For these reasons, the FAR Council has determined that it is in the best interest of the Government to apply the final rule to contracts and subcontracts at or below the SAT and for the acquisition of commercial products and commercial services.

Similarly, the Administrator for Federal Procurement Policy has determined that it is in the best interest of the Government to apply this rule to contracts and subcontracts for the acquisition of COTS items. It should be noted that the pilot program applied the clause to all commercial products, commercial services, and COTS acquisitions through 52.212–4(r), but only above the SAT for noncommercial acquisitions.

#### **IV. Expected Impact of the Rule**

The rule enhances whistleblower protection for contractor employees by making permanent the protection for disclosure of certain information, and by applying the requirement for contractors and subcontractors to inform their employees of the whistleblower protections through the inclusion of FAR clause 52.203–17 in acquisitions at or below the SAT. It also clarifies that FAR 31.205–47 prohibition on

reimbursement for legal fees accrued in defense against reprisal claims applies to subcontractors, as well as contractors. DoD, NASA, and the Coast Guard have a different whistleblower program for contractor employees.

#### **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**

The Congressional Review Act (5 U.S.C. 801–808) requires interim and final rules to be submitted to Congress before the rule takes effect. DoD, GSA, and NASA will send this 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:

This rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612.

This rule implements Public Law 114–261, which was enacted December 14, 2016. The objective of this rule is to enhance whistleblower protection for contractor employees, by making permanent the protection for disclosure of certain information and ensuring that the prohibition on reimbursement for certain legal costs applies to subcontractors, as well as contractors, as required by Public Law 114–261.

This rule makes minor changes to the pilot program, along with making it a permanent program. In the final rule, the clause 52.203–17 will apply to all solicitations and contracts. The pilot program applied the clause to all commercial products and commercial services and COTS acquisitions through 52.212–4(r), but only above the SAT for non-commercial acquisitions. The FAR Council made a determination to apply the

clause to contracts at or below the SAT because the contractor employee protections apply regardless of contract value. By changing the clause prescription to include solicitations and contracts at or below the SAT, this makes clearer the rights and protections employees have.

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

The program does not apply to DoD, NASA, and the Coast Guard, nor to certain elements of the intelligence community. Based on Federal Procurement Data System (FPDS) data for fiscal year 2020–2022, there were an average 146,242 new contract awards by agencies other than DoD, NASA, and the Coast Guard, including commercial awards and awards at or below the SAT that were awarded to small businesses (to an average of 23,984 unique vendors).

Regarding the amendment to the cost principles, addition of the words “or subcontractor” in multiple places throughout FAR 31.205–47 has no or a de minimis impact, because the cost principles generally already apply in the same way to costs incurred by subcontractors as to costs incurred by contractors.

There are no reporting, recordkeeping, or other compliance requirements in this rule.

DoD, GSA, and NASA were unable to identify any alternatives to the rule that would reduce the impact on small entities and still meet the requirements of the 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 3, 31, 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 3, 31, and 52 as set forth below:

■ **1.** The authority citation for 48 CFR parts 3, 31, and 52 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

## PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ **2.** Revise section 3.900 to read as follows:

### 3.900 Scope of subpart.

This subpart implements various statutory whistleblower programs. This subpart does not implement 10 U.S.C. 4701, which is applicable only to DoD, NASA, and the Coast Guard.

(a) 41 U.S.C. 4712 is implemented in 3.900 through 3.906. These sections do not apply to—

(1) DoD, NASA, and the Coast Guard; or

(2) Any element of the intelligence community, as defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 3003(4)). Sections 3.900 through 3.906 do not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure—

(i) Relates to an activity of an element of the intelligence community; or

(ii) Was discovered during contract or subcontract services provided to an element of the intelligence community.

(b) Section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions), is implemented in 3.909, which is applicable to all agencies.

(c) Section 3.907 of this subpart implements section 1553 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5), and applies to all contracts funded in whole or in part by that Act.

■ **3.** Amend section 3.901 by—

■ **a.** Adding in alphabetical order a definition for “Abuse of authority”;

■ **b.** Removing the definition of “Authorized official of an agency”; and

■ **c.** Revising the definition of “Inspector General”.

The addition and revision read as follows.

### 3.901 Definitions.

\* \* \* \* \*

*Abuse of authority* means an arbitrary and capricious exercise of authority that is inconsistent with the mission of the executive agency concerned or the successful performance of a contract of such agency.

\* \* \* \* \*

*Inspector General* means an Inspector General appointed under chapter 4 of title 5 of the United States Code and any Inspector General that receives funding

from, or has oversight over contracts awarded for, or on behalf of, the executive agency concerned. This definition does not apply to 3.907.

\* \* \* \* \*

■ **4.** Add section 3.902 to read as follows:

### 3.902 Classified information.

41 U.S.C. 4712 does not provide any right to disclose classified information not otherwise provided by law.

■ **5.** Revise section 3.903 to read as follows:

### 3.903 Policy.

(a)(1) Contractors and subcontractors are prohibited from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the entities listed at paragraph (b) of this section, information that the employee reasonably believes is—

(i) Evidence of gross mismanagement of a Federal contract;

(ii) A gross waste of Federal funds;

(iii) An abuse of authority relating to a Federal contract;

(iv) A substantial and specific danger to public health or safety; or

(v) A violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract).

(2) A reprisal is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

(b) Disclosure may be made to the following entities:

(1) A Member of Congress or a representative of a committee of Congress.

(2) An Inspector General.

(3) The Government Accountability Office.

(4) A Federal employee responsible for contract oversight or management at the relevant agency.

(5) An authorized official of the Department of Justice or other law enforcement agency.

(6) A court or grand jury.

(7) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.

(c) An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Federal contract shall be deemed to have made a disclosure.

■ 6. Revise section 3.904 to read as follows:

**3.904 Complaints.**

■ 7. Add section 3.904–1 to read as follows:

**3.904–1 Procedures for filing complaints.**

A contractor or subcontractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 3.903 may submit a complaint with the Inspector General of the agency concerned. Procedures for submitting fraud, waste, abuse, and whistleblower complaints are generally accessible on agency Office of Inspector General hotline or whistleblower internet sites or the complainant may directly contact the cognizant Office of the Inspector General for submission instructions. A complaint by the employee may not be brought under 41 U.S.C. 4712 more than three years after the date on which the alleged reprisal took place.

■ 8. Add section 3.904–2 to read as follows:

**3.904–2 Procedures for investigating complaints.**

(a) Investigation of complaints will be in accordance with 41 U.S.C. 4712(b).

(b) Upon completion of the investigation, the head of the agency shall ensure that the report of findings has been provided by the Inspector General to the head of the agency and to—

(1) The complainant and any person acting on the complainant's behalf; and

(2) The contractor and/or subcontractor alleged to have committed the violation.

(c) The complainant, contractor, and/or subcontractor shall be afforded the opportunity to submit a written response to the report of findings to the head of the agency and the Office of Inspector General in a time and manner that permits the agency head to take action not later than 30 days after receiving the report, as required by 3.905–1(a).

■ 9. Revise section 3.905 to read as follows:

**3.905 Remedies and enforcement of orders.**

■ 10. Add section 3.905–1 to read as follows:

**3.905–1 Remedies.**

(a) *Agency response to Inspector General report.* Not later than 30 days after receiving a report pursuant to 3.904–2, the head of the agency shall—

(1) Determine whether sufficient basis exists to conclude that the contractor or

subcontractor has subjected the employee who submitted the complaint to a reprisal as prohibited by 3.903; and

(2) Either issue an order denying relief or take one or more of the following actions:

(i) Order the contractor or subcontractor to take affirmative action to abate the reprisal.

(ii) Order the contractor or subcontractor to reinstate the complainant employee to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(iii) Order the contractor or subcontractor to pay the complainant employee an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency.

(iv) Consider disciplinary or corrective action against any official of the executive agency, if appropriate.

(b) *Complainant's right to go to court.*

(1) Paragraph (b)(2) of this section applies if—

(i) The head of the agency issues an order denying relief; or

(ii)(A) The head of the agency has not issued an order—

(1) Within 210 days after the submission of the complaint; or

(2) Within 30 days after the expiration of an extension of time granted in accordance with 41 U.S.C. 4712(b)(2)(B) for the submission of the report to those stated in 3.904–2(b); and

(B) There is no showing that such delay is due to the bad faith of the complainant.

(2) If the conditions in either paragraph (b)(1)(i) or (ii) of this section are met—

(i) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(ii) The complainant may bring a *de novo* action at law or equity against the contractor or subcontractor to seek compensatory damages and other relief available under 41 U.S.C. 4712 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(A) Such an action shall, at the request of either party to the action, be tried by the court with a jury.

(B) An action under this authority may not be brought more than 2 years

after the date on which remedies are deemed to have been exhausted.

(c) *Admissibility in evidence.* An Inspector General determination and an agency head order denying relief under this section shall be admissible in evidence in any *de novo* action at law or equity brought pursuant to 41 U.S.C. 4712.

(d) *No waiver.* The rights and remedies provided for in 41 U.S.C. 4712 may not be waived by any agreement, policy, form, or condition of employment.

■ 11. Add section 3.905–2 to read as follows:

**3.905–2 Enforcement of orders.**

(a) Whenever a contractor or subcontractor fails to comply with an order issued under 3.905–1(a)(2), the head of the agency concerned shall file an action for enforcement of the order in the U.S. district court for a district in which the reprisal was found to have occurred. In any action brought pursuant to this authority, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and attorney fees and costs. The complainant employee upon whose behalf an order was issued may also file such an action or join in an action filed by the head of the agency.

(b) Any person adversely affected or aggrieved by an order issued under 3.905–1(a)(2) may obtain review of the order's conformance with 41 U.S.C. 4712 and its implementing regulations, in the U.S. court of appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency. Filing such an appeal shall not act to stay the enforcement of the order of the head of an agency, unless a stay is specifically entered by the court.

■ 12. Revise section 3.906 to read as follows:

**3.906 Contract clause.**

The contracting officer shall insert the clause at 52.203–17, Contractor Employee Whistleblower Rights, in all solicitations and contracts, except solicitations and contracts of DoD, NASA, the Coast Guard, or applicable elements of the intelligence community (see 3.900(a)).

**3.907–7 [Amended]**

■ 13. Amend section 3.907–7 by removing “Reinvestment Act of 2009 in” and adding “Reinvestment Act of 2009, in” in its place.



**3.908 [Removed and Reserved]**

- 14. Remove and reserve section 3.908.

**3.908–1 through 3.908–9 [Removed]**

- 15. Remove sections 3.908–1 through 3.908–9.

**PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES**

- 16. Amend section 31.205–47—
- a. In paragraph (a), in the definition of “Costs” by removing “or others retained by the contractor to assist it;” and adding “or others retained by the contractor or subcontractor to assist it;” in its place;
- b. In paragraph (b) introductory text by removing “law or regulation by the contractor” and adding “law or regulation by the contractor or subcontractor” in its place;
- c. In paragraph (b)(2) by removing “either a finding of contractor liability” and adding “either a finding of contractor or subcontractor liability” in its place;
- d. In paragraph (b)(3)(i) by removing “the contractor;” and adding “the contractor or subcontractor;” in its place;
- e. In paragraph (c)(1) by removing “between the contractor” and adding “between the contractor or subcontractor” in its place;
- f. In paragraph (c)(2)(i) by removing “incurred by the contractor” and adding “incurred by the contractor or subcontractor” in its place;
- g. In paragraph (d)(1) by removing “Federal contract; or” and adding “Federal contract or subcontract; or” in its place;
- h. In paragraph (f) introductory text by removing “connection with” and adding “connection with the following” in its place;
- i. In paragraph (f)(4) by removing “the contractor” wherever it appears and adding “the contractor or subcontractor” in its place;
- j. Revising paragraph (f)(5);
- k. In paragraph (f)(6) by removing “contract” and adding “contract or subcontract” in its place;
- l. In paragraph (f)(7) by removing “the contractor is” and adding “the contractor or subcontractor is” in its place; and
- m. In paragraph (g) by removing “the contractor” wherever it appears and adding “the contractor or subcontractor” in its place.

The revision reads as follows:

**31.205–47 Costs related to legal and other proceedings.**

(f) \* \* \*

(5) Costs of legal, accounting, and consultant services and directly associated costs incurred in connection with the defense or prosecution of lawsuits or appeals between contractors or subcontractors arising from either—

(i) An agreement or contract concerning a teaming arrangement, a joint venture, or similar arrangement of shared interest; or

(ii) Dual sourcing, coproduction, or similar programs, are unallowable, except when—

(A) Incurred as a result of compliance with specific terms and conditions of the contract or subcontract or written instructions from the contracting officer; or

(B) When agreed to in writing by the contracting officer.

\* \* \* \*

**31.603 [Amended]**

- 17. Amend section 31.603 by removing from paragraph (b)(15) “incurred by a contractor” and “regulation by the contractor” and adding “incurred by a contractor or subcontractor” and “regulation by the contractor or subcontractor” in their place, respectively.

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

- 18. Revise section 52.203–17 to read as follows:

**52.203–17 Contractor Employee Whistleblower Rights.**

As prescribed in 3.906, insert the following clause:

**Contractor Employee Whistleblower Rights (NOV 2023)**

(a) This contract and employees working on this contract will be subject to the whistleblower rights and remedies established at 41 U.S.C. 4712 and Federal Acquisition Regulation (FAR) 3.900 through 3.905.

(b) The Contractor shall inform its employees in writing, in the predominant language of the workforce, of employee whistleblower rights and protections under 41 U.S.C. 4712, as described in FAR 3.900 through 3.905.

(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in all subcontracts.

(End of clause)

- 19. Amend section 52.212–4 by revising the date of the clause and paragraph (r) to read as follows:

**52.212–4 Contract Terms and Conditions—Commercial Products and Commercial Services.**

\* \* \* \*

**Contract Terms and Conditions—Commercial Products and Commercial Services (NOV 2023)**

\* \* \* \*

(r) *Compliance with laws unique to Government contracts.* The Contractor agrees to comply with 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracts; 18 U.S.C. 431 relating to officials not to benefit; 40 U.S.C. chapter 37, Contract Work Hours and Safety Standards; 41 U.S.C. chapter 87, Kickbacks; 49 U.S.C. 40118, Fly American; and 41 U.S.C. chapter 21 relating to procurement integrity.

\* \* \* \*

- 20. Amend section 52.212–5 by—
- a. Revising the date of the clause;
- b. Redesignating paragraphs (b)(4) through (64) as paragraphs (b)(5) through (65);
- c. Adding a new paragraph (b)(4);
- d. Redesignating paragraphs (e)(1)(ii) through (xxiv) as paragraphs (e)(1)(iii) through (xxv);
- e. Adding a new paragraph (e)(1)(ii); and
- f. In Alternate II:
- i. Revising the date of the alternate;
- ii. Redesignating paragraphs (e)(1)(ii)(C) through (W) as paragraphs (e)(1)(ii)(D) through (X); and
- iii. Adding a new paragraph (e)(1)(ii)(C).

The revisions and additions 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 (NOV 2023)**

\* \* \* \*

(b) \* \* \*

(4) 52.203–17, Contractor Employee Whistleblower Rights (NOV 2023) (41 U.S.C. 4712); this clause does not apply to contracts of DoD, NASA, the Coast Guard, or applicable elements of the intelligence community—see FAR 3.900(a).

\* \* \* \*

(e)(1) \* \* \*

(ii) 52.203–17, Contractor Employee Whistleblower Rights (NOV 2023) (41 U.S.C. 4712).

\* \* \* \*

Alternate II (NOV2023). \* \* \*

\* \* \* \*

(e)(1) \* \* \*

(ii) \* \* \*

(C) 52.203–17, Contractor Employee Whistleblower Rights (NOV 2023) (41 U.S.C. 4712).

\* \* \* \*

- 21. Amend section 52.213–4 by—
- a. Revising the date of the clause;

■ b. Removing from paragraph (a)(2)(vii) “(SEP 2023)” and adding “(NOV 2023)” in its place;

■ c. Redesignating paragraphs (b)(1)(i) through (xxi) as paragraphs (b)(1)(ii) through (xxii); and

■ d. Adding a new paragraph (b)(1)(i).

The revision and addition read 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) (NOV 2023)**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(i) 52.203–17, Contractor Employee Whistleblower Rights (NOV 2023) (41 U.S.C. 4712); this clause does not apply to contracts of DoD, NASA, the Coast Guard, or applicable elements of the intelligence community—see FAR 3.900(a).

\* \* \* \* \*

■ 22. Amend section 52.244–6 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraphs (c)(1)(iii) through (xxi) as paragraphs (c)(1)(iv) through (xxii); and

■ c. Adding a new paragraph (c)(1)(iii).

The revision and addition read as follows:

**52.244–6 Subcontracts for Commercial Products and Commercial Services.**

\* \* \* \* \*

**Subcontracts for Commercial Products and Commercial Services (NOV 2023)**

\* \* \* \* \*

(c)(1) \* \* \*

(iii) 52.203–17, Contractor Employee Whistleblower Rights (NOV 2023) (41 U.S.C. 4712); this clause does not apply to contracts of DoD, NASA, the Coast Guard, or applicable elements of the intelligence community—see FAR 3.900(a).

\* \* \* \* \*

[FR Doc. 2023–21321 Filed 10–4–23; 8:45 am]

**BILLING CODE P**

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Part 19**

[FAC 2023–06, FAR Case 2021–012, Item III; Docket No. FAR–2021–0012; Sequence No. 1]

RIN 9000–AO29

**Federal Acquisition Regulation: 8(a) 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 regulatory changes made by the Small Business Administration to update and clarify requirements associated with the 8(a) program.

**DATES:** Effective November 6, 2023.

**FOR FURTHER INFORMATION CONTACT:** Ms. Dana Bowman, Procurement Analyst, at 202–803–3188 or by email at [dana.bowman@gsa.gov](mailto: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](mailto:GSARegSec@gsa.gov). Please cite FAC 2023–06, FAR Case 2021–012.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD, GSA, and NASA published a proposed rule at 87 FR 76598 on December 15, 2022, to implement regulatory changes made by the Small Business Administration (SBA), in its final rule published in the **Federal Register** at 85 FR 66146 on October 16, 2020. SBA initiated a review of its regulations in response to the prior administration’s Governmentwide regulatory reform initiative. As a result, SBA revised the 8(a) program regulations to more clearly articulate SBA’s intent with regard to certain aspects of the 8(a) program to eliminate confusion and decrease burdens on procuring activities and 8(a) participants.

One respondent submitted 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*

There are no significant changes from the proposed rule.

*B. Analysis of Public Comments*

*1. Support for the Rule*

*Comment:* The respondent expressed support for the rule.

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

*2. Negative Impacts of the Rule*

*Comment:* The respondent indicated that moving contracts from the 8(a) Program inflicts harm on small businesses that are dependent upon those contracts for their growth and viability. The respondent indicated that it has had its contracts moved out of the 8(a) program into “new” contracts or limited competition contract vehicles, not available to all 8(a) program participants. The respondent indicated further that it is not always aware that a contract was to be moved to a limited competition contract, and if it was not a contract holder on that contract, then it could not pursue the opportunity. The respondent indicated that this can cause serious harm to small businesses that are counting on that revenue. The respondent stated that requiring notification to the SBA that a contract is being removed from the 8(a) Program is a positive step, but that it does not decrease the harm being done to a small business that is losing the contract. The respondent concluded that, overall, the proposed revisions are positive, but removing contracts from the 8(a) Program is detrimental to small businesses that are the backbone of the defense industrial base.

*Response:* The Councils acknowledge the respondent’s concerns regarding the impact of moving contracts out of the 8(a) Program. This rule implements SBA’s regulatory changes made in its final rule published at 85 FR 66146 on October 16, 2020, that clarified certain aspects of the 8(a) Program. To ensure procurements are not removed from the 8(a) Program without SBA consent, this rule adds a requirement for contracting officers to notify SBA of follow-on, non-8(a) procurements, and specifies that contracting officers should notify SBA when a mandatory source will be utilized for a follow-on to an 8(a) contract. This rule also clarifies that

SBA may appeal a contracting officer's decision that an acquisition previously procured under the 8(a) Program is a new requirement not subject to the release requirements. However, and as stated in SBA's preamble, these changes do not modify existing 8(a) Program requirements; instead, they emphasize the requirement for SBA to agree to release a requirement from the 8(a) Program.

#### C. Other Changes

Minor editorial changes to the proposed rule were made at FAR 19.815(d), (e), and (f).

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

#### IV. Expected Impact of the Rule

This rule updates and clarifies requirements associated with the 8(a) program to eliminate confusion among 8(a) concerns and procuring activities. Contracting officers are required to submit blanket purchase agreements (BPAs) issued under FAR part 13 and FAR part 13 BPA orders in the 8(a) Program to SBA for acceptance. Contracting officers are also required to notify SBA of follow-on, non-8(a) procurements, and should notify SBA when a mandatory source will be utilized for a follow-on to an 8(a) contract. Additionally, the SBA certificate of competency program does not apply to 8(a) sole-source awards; therefore, contracting officers will no longer be required to submit these actions to SBA. The impact of these changes is expected to be beneficial to the Government, contractors, and offerors as 8(a) program requirements are clarified, and ambiguities are reduced for small business entities and procuring activities. Any cost to the Government is not expected to be significant.

#### 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

The Congressional Review Act (5 U.S.C. 801–808) requires interim and final rules to be submitted to Congress before the rule takes effect. DoD, GSA, and NASA will send this rule 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 to amend the Federal Acquisition Regulation (FAR) to implement regulatory changes made by the Small Business Administration (SBA) to the 8(a) Program in its final rule dated October 16, 2020 (85 FR 66146). SBA revised its 8(a) program regulations to eliminate confusion among small businesses and procuring activities. The final rule clarifies that the certificate of competency program is not applicable to 8(a) sole-source awards. Additionally, the final rule adds a requirement for the contracting officer to submit an offering letter for blanket purchase agreements (BPAs) and orders placed under BPAs under the 8(a) Program to SBA, and for SBA to accept such offers. The rule also clarifies an 8(a) concern's eligibility for two-step design build acquisitions and sole-source awards made under the 8(a) program. The rule also requires the procuring activity to submit a notification to SBA when a contracting officer determines that a procurement, previously procured under the 8(a) program, is a new requirement that is not subject to SBA release requirements. The rule also requires a notification when the procuring activity intends to procure a follow-on to an 8(a) procurement using an existing limited competition contract vehicle, not available to all 8(a) program participants, when the current or previous 8(a) contract was available to all 8(a) participants. This rule also specifies that SBA reserves the right to appeal these decisions.

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

This final rule will impact 8(a) Program participants and the Government by clarifying the 8(a) Program regulations and ensuring follow-on requirements to 8(a) procurements remain in the 8(a) Program when appropriate. Based on data in the

System for Award Management, the estimated number of 8(a) small businesses is 5,217, and the estimated number of 8(a) joint ventures is 384. Therefore, the estimated number of total small entities to which the rule applies is 5,601. According to the Federal Procurement Data System, 7,473 8(a) sole-source awards and 1,088 competitive 8(a) awards were made in FY 2020, and 6,369 8(a) sole-source awards and 1,251 competitive 8(a) awards were made in FY 2021, and 5,752 8(a) sole-source awards and 1,056 competitive 8(a) awards were made in FY 2022. This averages out to 6,531 8(a) sole-source awards and 1,132 competitive 8(a) awards made in the last three fiscal years.

This 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.

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 Part 19

Government procurement.

#### William F. Clark,

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

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

### PART 19—SMALL BUSINESS PROGRAMS

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

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

#### 19.601 [Amended]

■ 2. Amend section 19.601 by—

■ a. Removing from paragraph (b) the phrase “Small Business Administration (SBA)” and adding “SBA” in its place; and

■ b. Removing from the first sentence of paragraph (c) the phrase “Government acquisitions” and adding “Government acquisitions except for 8(a) sole-source awards” in its place and removing from the second sentence of paragraph (c) the word “also”.

■ 3. Revise section 19.804–5 to read as follows:

**19.804–5 Basic ordering agreements and blanket purchase agreements.**

(a) The contracting officer shall submit an offering letter for, and SBA must accept, each order under a basic ordering agreement (BOA) or a blanket purchase agreement (BPA) issued under part 13 (see 13.303), in addition to the agency offering and SBA accepting the BOA or BPA itself.

(b) SBA will not accept for award on a sole-source basis any order that would cause the total dollar amount of orders issued under a specific BOA or BPA to exceed the competitive threshold amount in 19.805–1.

(c) Once an 8(a) participant's program term expires, the participant otherwise exits the 8(a) program, or becomes other than small for the NAICS code assigned under the BOA or the BPA, SBA will not accept new orders under the BOA or BPA for the participant.

■ 4. Amend section 19.805–2 by—

- a. Revising the second sentence in paragraph (b) introductory text;
- b. Redesignating paragraph (b)(2) as paragraph (b)(3); and
- c. Adding a new paragraph (b)(2).

The revision and addition read as follows:

**19.805–2 Procedures.**

\* \* \* \* \*

(b) \* \* \* Eligibility is based on section 8(a) program criteria (see 13 CFR 124.501(g) and 19.816(c)). \* \* \*

(2) For a two-step design-build procurement, an 8(a) participant must be eligible for award under the 8(a) program on the initial date for receipt of phase one offers specified in the solicitation (see 13 CFR 124.507(d)(3)).

\* \* \* \* \*

■ 5. Amend section 19.808–1 by—

- a. Redesignating paragraph (e) as paragraph (f);
- b. Adding a new paragraph (e); and
- c. Removing from the newly redesignated paragraph (f) the phrase “sole source award” and adding “sole-source award” in its place.

The addition reads as follows:

**19.808–1 Sole source.**

\* \* \* \* \*

(e) A concern must be a current participant in the 8(a) program at the time of an 8(a) sole-source award.

\* \* \* \* \*

■ 6. Revise section 19.808–2 to read as follows:

**19.808–2 Competitive.**

In competitive 8(a) acquisitions, including follow-on 8(a) acquisitions,

subject to part 15, the contracting officer conducts negotiations directly with the competing 8(a) participants. Conducting competitive negotiations among eligible 8(a) participants prior to SBA's formal acceptance of the acquisition for the 8(a) program may be grounds for the SBA's not accepting the acquisition for the 8(a) program.

■ 7. Amend section 19.810 by adding paragraph (a)(4) to read as follows:

**19.810 SBA appeals.**

(a) \* \* \*

(4) A contracting officer's decision that an acquisition previously procured under the 8(a) program is a new requirement not subject to the release requirements at 13 CFR 124.504(d)(1) (see 19.815(a) and (d)(1)).

\* \* \* \* \*

■ 8. Amend section 19.815 by—

- a. Revising the section heading and paragraph (a);
- b. Removing from paragraph (b) the phrase “a non-8(a) procurement” and adding “a follow-on, non-8(a) procurement,” in its place; and
- c. Adding paragraphs (d) through (f).

The revisions and additions read as follows:

**19.815 Release and notification requirements for non-8(a) procurement.**

(a) Once a requirement has been accepted by SBA into the 8(a) program, any follow-on requirements (see definition at 13 CFR 124.3) shall remain in the 8(a) program unless—

(1) SBA agrees to release the requirement from the 8(a) program for a follow-on, non-8(a) procurement in accordance with 13 CFR 124.504(d) (see paragraph (b) of this section); or

(2) There is a mandatory source (see 8.002 or 8.003; also see paragraph (f) of this section).

\* \* \* \* \*

(d)(1) When a contracting officer decides that a requirement previously procured under the 8(a) program is a new requirement and not a follow-on requirement to an 8(a) contract(s), the contracting officer shall coordinate with and submit a written notice to the SBA District Office servicing the 8(a) incumbent firm and to the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) indicating that the agency intends to procure the requirement outside the 8(a) program (see 19.810(a)(4)).

(2) The written notice shall include a copy of the acquisition plan, if available; the performance work statement (PWS), statement of work (SOW), or statement of objectives (SOO)

for the new contract requirement; and the values of the existing 8(a) contract(s) and the new contract requirement.

(e)(1) When a contracting officer decides to procure a follow-on requirement to an 8(a) contract using an existing, limited competition contracting vehicle that is not available to all 8(a) participants, and the current or previous 8(a) contract was available to all 8(a) participants, the contracting officer shall coordinate with and submit a written notice to the SBA District Office servicing the 8(a) incumbent firm and to the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) indicating the intent to do so.

(2) The written notice shall include a copy of the acquisition plan, if available; the PWS, SOW, or SOO for the new contract requirement; and the values of both contracts.

(f)(1) When a mandatory source will be used for a follow-on requirement to an 8(a) contract, the contracting officer should submit a written notice to the SBA Associate Administrator for Business Development of the intent to do so at least 30 days prior to the end of the contract or order in accordance with 13 CFR 124.504(d)(4)(ii).

(2) The written notice should include a written determination that a mandatory source will be used to fulfill the requirement.

**19.816 [Amended]**

■ 9. Amend section 19.816 by removing from paragraph (c) the word “criteria” and adding “criteria (see 13 CFR 124.507(d))” in its place.

[FR Doc. 2023–21322 Filed 10–4–23; 8:45 am]

BILLING CODE 6820–EP–P

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES  
ADMINISTRATION**

**NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION**

**48 CFR Part 52**

[FAC 2023–06; Item IV; Docket No. FAR–2023–0052; Sequence No. 4]

**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 an amendment to the Federal Acquisition



Regulation (FAR) in order to make needed editorial changes.

**DATES:** Effective November 6, 2023.

**FOR FURTHER INFORMATION CONTACT:** Ms. Lois Mandell, Regulatory Secretariat Division (MVCB), at 202–501–4755 or [GSARegSec@gsa.gov](mailto:GSARegSec@gsa.gov). Please cite FAC 2023–06, Technical Amendments.

**SUPPLEMENTARY INFORMATION:** This document makes editorial changes to 48 CFR part 52.

#### List of Subjects in 48 CFR Part 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 part 52 as set forth below:

#### PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

■ 2. Amend section 52.212–3 by—

- a. Revising the date of the provision;
- b. Removing from paragraph (k)(1) introductory text “(1) ☐ Maintenance”

and adding “☐ (1) Maintenance” in its place; and

■ c. Removing from paragraph (k)(2) introductory text “(2) ☐ Certain” and adding “☐ (2) Certain” in its place.

The revision reads as follows:

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

\* \* \* \* \*

#### Offeror Representations and Certifications—Commercial Products and Commercial Services (NOV 2023)

\* \* \* \* \*

[FR Doc. 2023–21323 Filed 10–4–23; 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–2023–0051, Sequence No. 5]

#### Federal Acquisition Regulation; Federal Acquisition Circular 2023–06; Small Entity Compliance Guide

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

#### RULES LISTED IN FAC 2023–06

Item	Subject	FAR case	Analyst
I * .....	Implementation of Federal Acquisition Supply Chain Security Act (FASCSA) Orders.	2020–011	Ryba.
II * .....	Whistleblower Protection for Contractor Employees .....	2017–005	Jones.
III * .....	8(a) Program .....	2021–012	Bowman.
IV .....	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 2023–06 amends the FAR as follows:

#### Item I—Implementation of Federal Acquisition Supply Chain Security Act (FASCSA) Orders (FAR Case 2020–011)

This interim rule amends the Federal Acquisition Regulation (FAR) to implement supply chain risk information sharing and exclusion or removal orders required by the Federal Acquisition Supply Chain Security Act of 2018 and a final rule issued by the Federal Acquisition Security Council (FASC).

The FAR is being amended to implement applicable exclusion or removal orders recommended by the FASC when they are issued by the Secretary of Homeland Security, the Secretary of Defense, or the Director of National Intelligence. Offerors will be required to check both the System for Award Management and individual solicitations for applicable exclusion orders.

This rule applies to all acquisitions, including acquisitions at or below the simplified acquisition threshold and to acquisitions of commercial items, including commercially available off-the-shelf items. It may have a significant economic impact on a substantial number of small entities.

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) 2023–06, which amends the Federal Acquisition Regulation (FAR). Interested parties may obtain further information regarding these rules by referring to FAC 2023–06, which precedes this document.

**DATES:** October 5, 2023.

**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 2023–06 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](mailto:GSARegSec@gsa.gov). An asterisk (\*) next to a rule indicates that a regulatory flexibility analysis has been prepared.

#### Item II—Whistleblower Protection for Contractor Employees (FAR Case 2017–005)

This final rule amends the FAR to implement Public Law 114–261 (41 U.S.C. 4712). The rule enhances whistleblower protection for contractor employees by making permanent the protection for disclosure of certain information. It also clarifies that the FAR 31.205–47 prohibition on reimbursement for legal fees accrued in defense against reprisal claims applies to subcontractors, as well as contractors.

DoD, NASA and the Coast Guard have a different whistleblower program for contractor employees.

This final rule will not have a significant economic impact on a substantial number of small entities.

**Item III—8(a) Program Changes (FAR Case 2021–012)**

This final rule amends the FAR to update and clarify requirements associated with the Small Business Administration's (SBA) 8(a) program. Specifically, this rule clarifies that the certificate of competency program is not applicable to 8(a) sole-source awards and requires that BPAs issued under part 13, including orders placed under part 13 BPAs under the 8(a) Program, must be offered to, and accepted by SBA. Additionally, this rule clarifies an 8(a) participant's eligibility for award for a two-step design procurement and clarifies that a concern must be a current participant in the 8(a) program at the time of an 8(a) sole-source award.

This rule also implements policy that allows the SBA to appeal a contracting officer's decision that an acquisition previously procured under the 8(a) program is a new requirement not subject to the release requirements set forth in 13 CFR. Furthermore, this rule requires the contracting officer to notify the SBA when the contracting officer decides that a requirement, previously procured under the 8(a) program, is a new requirement and not a follow-on requirement to an 8(a) contract; and when the procuring activity intends to procure a follow-on requirement using an existing limited contracting vehicle that is not available to all 8(a) participants and the current or previous 8(a) contract was available to all 8(a)

participants. Lastly, this rule encourages the contracting officer to notify the SBA Associate Administrator for Business Development at least 30 days prior to the end of the contract or order when a mandatory source will be used for a follow-on requirement to an 8(a) contract.

**Item IV—Technical Amendments**

An administrative change is made at FAR 52.212–3.

**William F. Clark,**

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

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