

(2) \* \* \*

(viii) 52.244–6, Subcontracts for Commercial Items (JAN 2017).

\* \* \* \* \*

■ 7. Add section 52.224–3 to read as follows:

**52.224–3 Privacy Training.**

As prescribed in 24.302(a), insert the following clause:

**Privacy Training (JAN 2017)**

(a) *Definition.* As used in this clause, *personally identifiable information* means information that can be used to distinguish or trace an individual's identity, either alone or when combined with other information that is linked or linkable to a specific individual. (See Office of Management and Budget (OMB) Circular A–130, Managing Federal Information as a Strategic Resource).

(b) The Contractor shall ensure that initial privacy training, and annual privacy training thereafter, is completed by contractor employees who—

(1) Have access to a system of records;

(2) Create, collect, use, process, store, maintain, disseminate, disclose, dispose, or otherwise handle personally identifiable information on behalf of an agency; or

(3) Design, develop, maintain, or operate a system of records (see also FAR subpart 24.1 and 39.105).

(c)(1) Privacy training shall address the key elements necessary for ensuring the safeguarding of personally identifiable information or a system of records. The training shall be role-based, provide foundational as well as more advanced levels of training, and have measures in place to test the knowledge level of users. At a minimum, the privacy training shall cover—

(i) The provisions of the Privacy Act of 1974 (5 U.S.C. 552a), including penalties for violations of the Act;

(ii) The appropriate handling and safeguarding of personally identifiable information;

(iii) The authorized and official use of a system of records or any other personally identifiable information;

(iv) The restriction on the use of unauthorized equipment to create, collect, use, process, store, maintain, disseminate, disclose, dispose or otherwise access personally identifiable information;

(v) The prohibition against the unauthorized use of a system of records or unauthorized disclosure, access, handling, or use of personally identifiable information; and

(vi) The procedures to be followed in the event of a suspected or confirmed breach of a system of records or the unauthorized disclosure, access, handling, or use of personally identifiable information (see OMB guidance for Preparing for and Responding to a Breach of Personally Identifiable Information).

(2) Completion of an agency-developed or agency-conducted training course shall be deemed to satisfy these elements.

(d) The Contractor shall maintain and, upon request, provide documentation of completion of privacy training to the Contracting Officer.

(e) The Contractor shall not allow any employee access to a system of records, or permit any employee to create, collect, use, process, store, maintain, disseminate, disclose, dispose or otherwise handle personally identifiable information, or to design, develop, maintain, or operate a system of records unless the employee has completed privacy training, as required by this clause.

(f) The substance of this clause, including this paragraph (f), shall be included in all subcontracts under this contract, when subcontractor employees will—

(1) Have access to a system of records;

(2) Create, collect, use, process, store, maintain, disseminate, disclose, dispose, or otherwise handle personally identifiable information; or

(3) Design, develop, maintain, or operate a system of records.

(End of clause)

*Alternate I* (JAN 2017). As prescribed in 24.302(b), if the agency specifies that only its agency-provided training is acceptable, substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) The contracting agency will provide initial privacy training, and annual privacy training thereafter, to Contractor employees for the duration of this contract.

■ 8. Amend section 52.244–6 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraphs (c)(1)(xv) through (xvii) as paragraphs (c)(1)(xvi) through (xviii), respectively; and

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

The revisions and additions read as follows:

**52.244–6 Subcontracts for Commercial Items.**

\* \* \* \* \*

**Subcontracts for Commercial Items (JAN 2017)**

\* \* \* \* \*

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

(xv)(A) 52.224–3, Privacy Training (JAN 2017) (5 U.S.C. 552a) if flow down is required in accordance with 52.224–3(f).

(B) Alternate I (JAN 2017) of 52.224–3, if flow down is required in accordance with 52.224–3(f) and the agency specifies that only its agency-provided training is acceptable).

\* \* \* \* \*

[FR Doc. 2016–30213 Filed 12–19–16; 8:45 am]

BILLING CODE 6820–EP–P

**DEPARTMENT OF DEFENSE****GENERAL SERVICES ADMINISTRATION****NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****48 CFR Parts 1, 19, 42, and 52**

[FAC 2005–94; FAR Case 2014–004; Item II; Docket No. 2014–0004; Sequence No. 1]

RIN 9000–AM98

**Federal Acquisition Regulations; Payment of Subcontractors**

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

**ACTION:** Final rule.

**SUMMARY:** DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the Small Business Jobs Act of 2010. This statute requires contractors to notify the contracting officer, in writing, if the contractor pays a reduced price to a small business subcontractor or if the contractor's payment to a small business subcontractor is more than 90 days past due.

**DATES:** *Effective:* January 19, 2017.

**FOR FURTHER INFORMATION CONTACT:** Mr. Curtis E. Glover, Sr., Procurement Analyst, at 202–501–1448 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2005–94, FAR Case 2014–004.

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

DoD, GSA, and NASA are issuing a final rule to implement section 1334 of the Small Business Jobs Act of 2010 (Pub. L. 111–240, 15 U.S.C. 637(d)(12)) and the Small Business Administration (SBA) final rule published in the **Federal Register** on July 16, 2013 at 78 FR 42391, which require prime contractors to self-report late or reduced payments to their small business subcontractors. The rule also requires contracting officers to record the identity of contractors with a history of late or reduced payments to small business subcontractors in the Federal Awardee Performance and Integrity System (FAPIS). DoD, GSA, and NASA published a proposed rule in the **Federal Register** on January 20, 2016 at 81 FR 3087. Seven respondents

submitted comments on the proposed rule.

## II. Discussion and Analysis

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

### A. Summary of Significant Changes From the Proposed Rule

1. A reporting window of 14 days is added to FAR clause 52.242–5, Payments to Small Business Contractors, for prime contractors to report to the contracting officer an untimely or reduced payment, as defined in the rule, made to their small business subcontractors.

2. The following examples of payment and nonpayment situations not considered to be unjustified are added at FAR 42.1502(g)(2)(ii):

- There is a contract dispute on performance.
- Partial payment is made for amounts not in dispute.
- A payment is reduced due to past overpayments.
- There is an administrative mistake.
- Late performance by the subcontractor leads to later payment by the prime contractor.

3. A reference to FAR clause 52.242–5 was added to paragraph (b) of the clause at FAR 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

### B. Analysis of Public Comments

1. *Definitions.* Multiple respondents commented on the definitions included in the proposed rule.

#### a. Location of Definitions

*Comment:* One respondent requested the location of the definitions for “reduced payment” and “untimely payment” be moved to either FAR subpart 2.1 or included within a new definitions section in FAR subpart 42.15. The respondent also stated that the parenthetical “see 19.701” was contrary to FAR drafting conventions.

*Response:* The two definitions included in the rule are not used substantially throughout the FAR and have only an indirect connection to FAR part 42. Accordingly, the definitions are not added to either FAR part 2 or FAR part 42; they are instead retained in FAR part 19 and section 52.242–5 (as presented in the proposed rule). The

reference in the proposed rule to FAR part 19 (“see 19.701”) does not run contrary to FAR drafting conventions; however, the language is changed to “as defined in 19.701” versus “see 19.701.”

#### b. Revise Definitions

*Comment:* One respondent recommended that the definitions for “reduced payment” and “untimely payment” be revised to include information regarding the statutorily-mandated standards set forth in FAR 52.232–27(c) relating to payment of construction subcontractors and suppliers.

*Response:* The statutorily-mandated standards set forth in FAR 52.232–27(c) stand on their own, are not integral to the explanation or meaning of the terms “reduced payment” and “untimely payment,” and need not be repeated in their respective definitions.

*Comment:* A number of respondents recommended that the definitions of “reduced payment” and “untimely payment” be revised to reflect those instances where the subcontractor has not completed their obligations under the contract. One respondent stated that the SBA rule made this abundantly clear, that the prime contractor should be required to report only those events that arise when the small business subcontractor is otherwise entitled to full and prompt payment (as assessed by the prime contractor), but the prime contractor is unable or unwilling to make such payments. Another respondent stated that under both of these definitions, the determination of whether a prime contractor payment is either reduced or untimely ultimately hinges upon “the terms and conditions of a subcontract.” The terms and conditions concerning how much and when a subcontractor is paid under a subcontract can vary greatly between such contracts. Still, another respondent believed that the proposed rule should contain additional clarification that a payment should not be considered past due if the payment is delayed by the late performance of the subcontractor. According to the respondent, contractors often accept late performance of subcontracts and then accordingly pay later according to the payment terms of the subcontract, but do not necessarily modify the subcontract to reflect the later performance date. Another respondent believed that the proposed rule, as written, provides unclear guidance to contracting officers because the definition of “unjustified reduced or untimely payments” is vague, and asked the FAR Council to provide a more complete definition of what constitutes

an unjustified payment. For example, the rule should clarify the impact of systems errors, third-party errors, or administrative errors. Still another respondent recommended that the Councils define “unjustifiable” late or reduced payments as a material breach of the terms and conditions of the subcontract and provide examples of what constitutes a material breach under Federal case law.

*Response:* The definitions of “reduced payment” and “untimely payment” are meant to convey a reasonable explanation and meaning of those terms. No additional language is necessary in the definition; however, the final rule at FAR 42.1502(g)(2)(ii) includes examples of payment and nonpayment situations that are not considered to be unjustified. Due to privity of contract it is generally not the contracting officer’s responsibility to determine if a material breach of a subcontract has occurred.

#### 2. Existing statutory and regulatory requirements.

*Comment:* One respondent stated that existing statutory and regulatory requirements governing prime contractor and subcontractor payments already satisfy the intent of this regulation.

*Response:* In accordance with section 1334 of the Small Business Jobs Act of 2010, the rule offers additional protections for the small business community in regard to payments from prime contractors and is required by statute. Accordingly, there is no reasonable basis for withdrawing the rule.

#### 3. Reporting requirements.

Multiple respondents commented on the reporting requirements of the proposed rule.

*Comment:* One respondent asked if there was guidance on the time period for the prime contractor to report a late or reduced payment to the contracting officer.

*Response:* The final rule requires the prime contractor to report within 14 days any occurrences of untimely or reduced payments to their small business subcontractors.

*Comment:* Several respondents stated that a different methodology should be used to determine the number of occurrences of late or reduced payments that are reportable in the FAPIIS system. For example, one prime contractor makes 10,000 payments a year, but another makes 10. The history of unjustified payments should not be set at “three”, but should be scalable, proportional to the number of payments made.

*Response:* The final rule is consistent with SBA’s final rule published on July

16, 2013, which defines a history of unjustified untimely or reduced payments as three incidents within a 12-month period. This final rule clarifies at FAR 42.1502(g)(2)(ii) that the incidents are under a single contract.

#### 4. *Subcontracting plan dollar threshold.*

*Comment:* One respondent commented the small business subcontracting plan threshold cited in the analysis for application of the rule was inconsistent (e.g., \$650,000 versus \$700,000).

*Response:* Concur.

#### 5. *Applicability (subcontractor tiers).*

*Comment:* One respondent asked if the proposed rule applied to subcontractor payments at all tiers.

*Response:* The rule applies to prime contractor payments made to first-tier small business subcontractors.

#### 6. *Contracting officer's responsibilities.*

Several respondents commented on the additional contracting officer responsibilities and offered alternate procedures.

*Comment:* Two respondents requested that the agency counsel and not the contracting officer determine whether a late or reduced payment conforms to the terms and conditions of the contract.

*Response:* It is the contracting officer's responsibility to ensure compliance with the terms of the contract; however, per FAR 1.602–2(c), contracting officers can request and consider the advice of specialists in audit, law, engineering, information security, transportation, and other fields, as appropriate, when making a determination regarding a late or reduced payment.

#### 7. *Additional guidance to contracting officers.*

*Comment:* Two respondents stated the rule should provide more guidance to contracting officers in regards to issues that may arise when dealing with the reduced or late payments situation in contracts.

*Response:* This type of additional guidance would largely be non-regulatory, falling under agency procedures and training, which are outside the scope of this rule. As stated previously, per FAR 1.602–2(c), contracting officers can request and consider the advice of specialists in audit, law, engineering, information security, transportation, and other fields, as appropriate, when making a determination regarding a late or reduced payment.

*Comment:* One respondent commented that adding additional responsibilities to the contracting officer while the Government is focused on

ensuring the timely submittal of past performance evaluations will only lead to lesser quality evaluations.

*Response:* There is no basis for concluding that the requirements of this rule will impact the timely submittal of past performance evaluations.

#### 8. *Government-caused delays.*

*Comment:* One respondent requested language to note situations in which the Government causes delays in subcontractor payments by changing the scope of the contract, by making late payments to the prime contractor, etc.

*Response:* The FAR already contains adequate policy on Government-caused delays and changes to contract terms and conditions. In addition, as stated previously, the final rule includes the specific examples of payment and nonpayment situations that are not considered to be unjustified.

#### 9. *Penalties.*

*Comment:* One respondent asked what penalties prime contractors will face for failing to self-report instances of non-compliance.

*Response:* Government penalties are beyond the scope of this rule. However, the requirements of this rule (in addition to other Government rights and remedies) permit the contracting officer to issue an adverse past performance assessment for noncompliance with FAR 52.219–9(a)(15), based upon individual circumstances.

#### 10. *Incentivizing prime contractor compliance.*

*Comment:* One respondent commented that prime contractors should be incentivized to make reduced payments to small business subcontractors, rather than withhold payments when a dispute arises between the prime contractor and small business subcontractor. Unlike a late payment, the proposed rule does not expressly grant a 90-day window in which to resolve a reduced payment that may arise for a legitimate reason (i.e., substandard performance or nonconforming parts).

According to the respondent, because the rule does not address when a prime contractor must report a reduced payment to the contracting officer, one might interpret the rule to require an immediate report by the prime contractor to the contracting officer upon making a reduced payment.

However, requiring the prime contractor to report a reduced payment immediately creates a disincentive for prime contractors to make a reduced rather than late payment, as the obligation to report a late payment does not arise for a minimum of 90 days past the original due date.

*Response:* Reduced payments as a result of a dispute on performance between a prime contractor and a small business contractor would not fall within the definition of “reduced payment.” However, the rule does contain a reporting window of 14 days for prime contractors to report to the contracting officer untimely or reduced payments, as defined in the rule, made to their small business subcontractors. This 14-day reporting timeline was added to the rule as a result of public comments. Moreover, the rule does not prohibit prime contractors from making reduced payments to their small business subcontractors.

#### 11. *Commercial items and commercially available off-the-shelf items.*

*Comment:* Several respondents commented that the FAR Council should reconsider the application of this rule to commercial and COTS item providers. One respondent commented that given the Government's stated preference for “commercial plans” in FAR 52.219–9(g) for commercial item contractors (including commercially available off-the-shelf (COTS) contractors), it is likely that most commercial item and COTS contractors have commercial subcontracting plans. These commercial plans apply to the contractor's entire commercial organization, which in many cases, includes only a minimal amount of sales to the Federal Government. These commercial plans apply to virtually every subcontractor or supplier from which a contractor purchases supplies or services, whether or not those supplies or services are used in the performance of government contracts. Another respondent commented that over the last decade, the procurement community has seen the erosion of commercial item contracting (in accordance with 41 U.S.C. 1906) and the benefits attendant thereto, as well as layering onto the commercial item contracting process Government unique requirements that have increased costs and raised barriers to entry into the Federal marketplace. Another respondent stated that applying the rule to commercial and COTS item providers would not be in the best interests of the Government, and would run contrary to ongoing attempts by Government policy makers to streamline the acquisition process for the acquisition of commercial and COTS items to reduce the number of unique government rules applicable to large and small businesses providing commercial and COTS supplies and services, and to introduce more commercial innovation and

technology into the federal business market.

*Response:* The FAR Council has determined that the rule should, as a matter of policy, apply to contracts for the acquisition of commercial items and COTS items. See section III of this preamble.

*Comment:* One respondent commented that FAR clause 52.242–5 was not added to the list of clauses in FAR 52.212–5 regarding commercial items.

*Response:* The final rule adds FAR clause 52.242–5 to the list of clauses in FAR 52.212–5 regarding application to commercial items.

#### 12. Public burden.

*Comment:* Two respondents stated that the Councils had underestimated the public burden in regards to the proposed rule. One respondent commented that the FAR Council has greatly underestimated the implementation burden on commercial item and COTS item contractors, especially considering the broad definition of “subcontractor” that applies to the proposed rule. The other respondent believed that the estimate of reporting time of only two hours per respondent is grossly underestimated. This negligible amount of time assumes that all contractors can easily identify from their payment systems which subcontractors are small businesses. The respondent believed that this is often not the case, and that the small business size status of a subcontractor may be unknown to the contractor’s other accounting systems. The other respondent commented that since the Small Business Jobs Act of 2010 does not specifically require that the subcontractor payment clause apply to commercial contracts, the respondent recommended that the FAR Council seek additional information about the burden on contractors before a determination is made to apply the payment of subcontractor requirements to commercial item acquisitions. The respondent did not find that the availability of limited information indicated that the burden may not be significant, as described in the proposed rule. Rather, initial feedback from contractors suggested that the burdens associated with reporting under the rule will have a significant impact.

*Response:* The respondents do not offer data with which to support changing the current estimated public burden hours. However, since this is a new rule without an empirical frame of reference, the public reporting burden is reviewed every three years and can be adjusted as necessary.

#### 13. Convene industry working group.

*Comment:* One respondent commented that the FAR Council should convene an industry working group in order to gain a better understanding of some of the more nuanced aspects of the subcontractor payment requirement.

*Response:* The Councils do not concur that such a working group is necessary at this time.

#### C. Other Changes

The following changes were made, not as a result of public comments:

1. FAR 1.106 was amended to add the OMB Control Number associated with FAR clause 52.242–5.

2. Minor editorial changes were made for grammatical reasons or to conform to FAR drafting conventions.

### III. Applicability to Contracts for Commercial Items and Commercially Available Off-the-Shelf Items

The Federal Acquisition Regulatory (FAR) Council has made the following determinations with respect to the rule’s application of Section 1334 of the Small Business Jobs Act of 2010, to contracts for the acquisition of commercial items and contracts for the acquisition of commercially available off-the-shelf (COTS) items.

#### A. Applicability to Contracts for the Acquisition of Commercial Items

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

The purpose of this rule is to implement section 1334 of the Small Business Jobs Act of 2010. Section 1334 requires prime contractors to self-report late or reduced payments to their small business subcontractors. The rule also requires contracting officers to record the identity of contractors with a history of late or reduced payments to small business subcontractors in the Federal Awardee Performance and Integrity System (FAPIIS).

The statutory requirements are reflected in the Small Business Administration’s (SBA’s) final rule published at 78 FR 42391 on July 16, 2013, which did not exempt acquisitions of commercial items.

The law is silent on the applicability of these requirements to acquisitions of commercial items and does not independently provide for criminal or civil penalties; nor does it include terms making express reference to 41 U.S.C. 1906 and its application to acquisitions of commercial items. Therefore, it does not apply to acquisitions of commercial items unless the FAR Council makes a written determination as provided in 41 U.S.C. 1906.

The law furthers the administration’s goal of supporting small business and advances the interests of small business subcontractors by discouraging reduced or untimely payments to small business subcontractors. Exclusion of acquisitions for commercial items from these requirements will limit the full implementation of these subcontracting-related objectives. Further, the primary FAR clauses implementing Federal procurement policies governing subcontracting with small business, FAR 52.219–8, Utilization of Small Business Concerns, and 52.219–9, Small Business Subcontracting Plan, are currently prescribed for use in solicitations for commercial items. Exclusion of acquisitions for commercial items from these requirements would create confusion among contractors and the Federal contracting workforce. Moreover, the rule may also increase the timeliness of payments to small business subcontractors.

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

#### B. Applicability of Contracts for the Acquisition of COTS Items

Pursuant to 41 U.S.C. 1907, acquisitions of COTS items will be exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1907 and states that the law applies to acquisitions of COTS items; (iii) concerns authorities or responsibilities under the Small Business Act (15 U.S.C. 644) or bid protest procedures developed under the authority of 31 U.S.C. 3551 *et seq.*, 10 U.S.C. 2305(e) and (f), or 41 U.S.C. 3706 and 3707; or (iv) the Administrator for Federal Procurement Policy makes a written determination and finding that would not be in the best interest of the Federal Government to exempt contracts

for the procurement of COTS items from the provision of law. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to acquisitions of COTS items.

The purpose of this rule is to implement section 1334 of the Small Business Jobs Act of 2010. Section 1334 requires prime contractors to self-report late or reduced payments to their small business subcontractors. The rule also requires contracting officers to record the identity of contractors with a history of late or reduced payments to small business subcontractors in FAPIIS.

These statutory requirements are reflected in the SBA final rule published at 78 FR 42391 on July 16, 2013, which did not exempt acquisitions of COTS items.

The law is silent on the applicability of these requirements to acquisitions of COTS items and does not independently provide for criminal or civil penalties; nor does it include terms making express reference to 41 U.S.C. 1907 and its application to acquisitions of COTS items. Therefore, it does not apply to acquisitions of COTS items unless the Administrator for Federal Procurement Policy makes a written determination as provided in 41 U.S.C. 1907.

The law furthers the Administration's goal of supporting small business and advances the interests of small business subcontractors by discouraging reduced or untimely payments to small business subcontractors. Exclusion of a large segment of Federal contracting, such as acquisitions for COTS items, will limit the full implementation of these subcontracting-related objectives. Further, the primary FAR clauses implementing Federal procurement policies governing subcontracting with small business, FAR 52.219-8, Utilization of Small Business Concerns, and 52.219-9, Small Business Subcontracting Plan, are currently prescribed for use in solicitations for COTS items. Exclusion of acquisitions for COTS items from these requirements would create confusion among contractors and the Federal contracting workforce. Moreover, the rule may also increase the timeliness of payments to small business subcontractors.

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

#### IV. Executive Orders 12866 and 13563

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

necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### V. Regulatory Flexibility Act

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

Section 1334 of the Small Business Jobs Act of 2010 (Pub. L. 111-240) and the Small Business Administration's final rule at 78 FR 42391, Small Business Subcontracting, published July 16, 2013, require that the prime contractor self-report when the prime contractor makes reduced or untimely payments to small business subcontractors. Section 1334 also requires the contracting officer to record the identity of contractors with a history of unjustified reduced or untimely payments in the Federal Awardee Performance and Integrity System (FAPIIS).

This final rule implements the self-reporting requirements of section 1334 by requiring contracting officers to include FAR clause 52.242-5, Payments to Small Business Subcontractors, in all solicitations and contracts containing the clause at 52.219-9, Small Business Subcontracting Plan. The new FAR clause requires prime contractors to notify the contracting officer of reduced or untimely payments to small business subcontractors.

The rule also amends FAR 42.1503(h) to require contracting officers to report to FAPIIS a contractor that has a history of three or more reduced or untimely payments to small business subcontractors within a 12-month period under a single contract that are unjustified. FAR 42.1503, Table 42-2 is also amended to include unjustified reduced or untimely payments to small business subcontractors as part of the definition of ratings for the "small business subcontracting" past performance evaluation factors.

There were no public comments received on the initial regulatory flexibility analysis.

The final rule applies to payments made to small businesses that are first-tier subcontractors to prime government contractors. There will be no burden on small businesses, as small businesses do not have subcontracting plans. This regulation will benefit small business subcontractors by encouraging large business prime contractors to pay small business subcontractors in a timely manner and the agreed upon contractual price.

This rule imposes new recordkeeping and reporting requirements and contains information collection requirements. Small businesses are not required to report under this information collection because it only applies to prime contractors whose contracts contain the clause 52.219-9, Small Business Subcontracting Plan, which is not applicable to small businesses.

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

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.

#### VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies. The rule contains information collection requirements. OMB has cleared this information collection requirement under OMB Control Number 9000-0196, titled: "Payments to Small Business Subcontractors."

#### List of Subjects in 48 CFR Parts 1, 19, 42, and 52.

Government procurement.

Dated: December 9, 2016.

**William F. Clark,**

*Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.*

Therefore, DoD, GSA, and NASA are amending 48 CFR parts 1, 19, 42, and 52 as set forth below:

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

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

#### PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

##### 1.106 [Amended]

■ 2. Amend section 1.106 by adding to the table, in numerical sequence, FAR segment "52.242-5" and its corresponding OMB Control No. "9000-0196".

#### PART 19—SMALL BUSINESS PROGRAMS

■ 3. Amend section 19.701 by adding, in alphabetical order, the definitions of "Reduced payment" and "Untimely payment" to read as follows:

##### 19.701 Definitions.

\* \* \* \* \*

*Reduced Payment* means a payment that is for less than the amount agreed upon in a subcontract in accordance

with its terms and conditions, for supplies and services for which the Government has paid the prime contractor.

\* \* \* \* \*

*Untimely Payment* means a payment to a subcontractor that is more than 90 days past due under the terms and conditions of a subcontract for supplies and services for which the Government has paid the prime contractor.

- 4. Amend section 19.704 by—
- a. Removing from paragraph (a)(13) “completion; and” and adding “completion;” in its place;
- b. Removing from paragraph (a)(14) “subcontractor.” and adding “subcontractor; and” in its place; and
- c. Adding paragraph (a)(15).

The addition reads as follows:

**19.704 Subcontracting plan requirements.**

(a) \* \* \*

(15) Assurances that the offeror will pay its small business subcontractors on time and in accordance with the terms and conditions of the subcontract, and notify the contracting officer if the offeror pays a reduced or an untimely payment to a small business subcontractor (see 52.242–5).

\* \* \* \* \*

**19.705–4 [Amended]**

- 5. Amend section 19.705–4 by removing from paragraphs (b) and (c) the number “14” and adding “15” in both places.

**PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES**

- 6. Amend section 42.1502 by revising paragraph (g) to read as follows:

**42.1502 Policy.**

\* \* \* \* \*

(g) Past performance evaluations shall include an assessment of the contractor’s—

(1) Performance against, and efforts to achieve, the goals identified in the small business subcontracting plan when the contract includes the clause at 52.219–9, Small Business Subcontracting Plan; and

(2) Reduced or untimely payments (as defined in 19.701), made to small business subcontractors, determined by the contracting officer to be unjustified. The contracting officer shall—

(i) Consider and evaluate a contractor’s written explanation for a reduced or an untimely payment when determining whether the reduced or untimely payment is justified; and

(ii) Determine that a history of unjustified reduced or untimely payments has occurred when the contractor has reported three or more occasions of unjustified reduced or untimely payments under a single contract within a 12-month period (see 42.1503(h)(1)(vi) and the evaluation ratings in Table 42–2). The following payment or nonpayment situations are not considered to be unjustified:

(A) There is a contract dispute on performance.

(B) A partial payment is made for amounts not in dispute.

(C) A payment is reduced due to past overpayments.

(D) There is an administrative mistake.

(E) Late performance by the subcontractor leads to later payment by the prime contractor.

\* \* \* \* \*

- 7. Amend section 42.1503 by—
- a. Revising paragraphs (b)(2)(v) and (b)(2)(vi);
- b. Revising paragraph (h)(1) introductory text;

- c. Revising paragraphs (h)(1)(iv) and (h)(1)(v);

- d. Adding paragraph (h)(1)(vi); and
- e. Revising Table 42–2.

The revisions and addition read as follows:

**42.1503 Procedures.**

\* \* \* \* \*

(b)(1) \* \* \*

(2) \* \* \*

(v) Small business subcontracting, including reduced or untimely payments to small business subcontractors when 19.702(a) requires a subcontracting plan (as applicable, see Table 42–2).

(vi) Other (as applicable) (*e.g.*, trafficking violations, tax delinquency, failure to report in accordance with contract terms and conditions, defective cost or pricing data, terminations, suspension and debarments).

\* \* \* \* \*

(h) \* \* \*

(1) Agencies shall ensure information is accurately reported in the FAPIIS module of CPARS within 3 calendar days after a contracting officer—

\* \* \* \* \*

(iv) Makes a subsequent withdrawal or a conversion of a termination for default to a termination for convenience;

(v) Receives a final determination after an administrative proceeding, in accordance with 22.1704(d)(1), that substantiates an allegation of a violation of the trafficking in persons prohibitions in 22.1703(a) and 52.222–50(b); or

(vi) Determines that a contractor has a history of three or more unjustified reduced or untimely payments to small business subcontractors under a single contract within a 12-month period (see 42.1502(g)(2)).

\* \* \* \* \*

TABLE 42-2—EVALUATION RATINGS DEFINITIONS

[For the small business subcontracting evaluation factor, when 52.219-9 is used]

Rating	Definition	Note
(a) Exceptional .....	Exceeded all statutory goals or goals as negotiated. Had exceptional success with initiatives to assist, promote, and utilize small business (SB), small disadvantaged business (SDB), women-owned small business (WOSB), HUBZone small business, veteran-owned small business (VOSB) and service disabled veteran owned small business (SDVOSB). Complied with FAR 52.219-8, Utilization of Small Business Concerns. Exceeded any other small business participation requirements incorporated in the contract/order, including the use of small businesses in mission critical aspects of the program. Went above and beyond the required elements of the subcontracting plan and other small business requirements of the contract/order. Completed and submitted Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate and timely manner. Did not have a history of three or more unjustified reduced or untimely payments to small business subcontractors within a 12-month period.	To justify an Exceptional rating, identify multiple significant events and state how they were a benefit to small business utilization. A singular benefit, however, could be of such magnitude that it constitutes an Exceptional rating. Small businesses should be given meaningful and innovative work directly related to the contract, and opportunities should not be limited to indirect work such as cleaning offices, supplies, landscaping, etc. Also, there should have been no significant weaknesses identified
(b) Very Good .....	Met all of the statutory goals or goals as negotiated. Had significant success with initiatives to assist, promote and utilize SB, SDB, WOSB, HUBZone, VOSB, and SDVOSB. Complied with FAR 52.219-8, Utilization of Small Business Concerns. Met or exceeded any other small business participation requirements incorporated in the contract/order, including the use of small businesses in mission critical aspects of the program. Endeavored to go above and beyond the required elements of the subcontracting plan. Completed and submitted Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate and timely manner. Did not have a history of three or more unjustified reduced or untimely payments to small business subcontractors within a 12-month period.	To justify a Very Good rating, identify a significant event and state how it was a benefit to small business utilization. Small businesses should be given meaningful and innovative opportunities to participate as subcontractors for work directly related to the contract, and opportunities should not be limited to indirect work such as cleaning offices, supplies, landscaping, etc. There should be no significant weaknesses identified
(c) Satisfactory .....	Demonstrated a good faith effort to meet all of the negotiated subcontracting goals in the various socioeconomic categories for the current period. Complied with FAR 52.219-8, Utilization of Small Business Concerns. Met any other small business participation requirements included in the contract/order. Fulfilled the requirements of the subcontracting plan included in the contract/order. Completed and submitted Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate and timely manner. Did not have a history of three or more unjustified reduced or untimely payments to small business subcontractors within a 12-month period.	To justify a Satisfactory rating, there should have been only minor problems, or major problems the contractor has addressed or taken corrective action. There should have been no significant weaknesses identified. A fundamental principle of assigning ratings is that contractors will not be assessed a rating lower than Satisfactory solely for not performing beyond the requirements of the contract/order
(d) Marginal .....	Deficient in meeting key subcontracting plan elements. Deficient in complying with FAR 52.219-8, Utilization of Small Business Concerns, and any other small business participation requirements in the contract/order. Did not submit Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate or timely manner. Failed to satisfy one or more requirements of a corrective action plan currently in place; however, does show an interest in bringing performance to a satisfactory level and has demonstrated a commitment to apply the necessary resources to do so. Required a corrective action plan. Did not have a history of three or more unjustified reduced or untimely payments to small business subcontractors within a 12-month period.	To justify a Marginal rating, identify a significant event that the contractor had trouble overcoming and how it impacted small business utilization. A Marginal rating should be supported by referencing the actions taken by the Government that notified the contractor of the contractual deficiency.

TABLE 42-2—EVALUATION RATINGS DEFINITIONS—Continued  
 [For the small business subcontracting evaluation factor, when 52.219-9 is used]

Rating	Definition	Note
(e) Unsatisfactory .....	Noncompliant with FAR 52.219-8 and 52.219-9, and any other small business participation requirements in the contract/order. Did not submit Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate or timely manner. Showed little interest in bringing performance to a satisfactory level or is generally uncooperative. Required a corrective action plan. Had a history of three or more unjustified reduced or untimely payments to small business subcontractors within a 12-month period.	To justify an Unsatisfactory rating, identify multiple significant events that the contractor had trouble overcoming and state how it impacted small business utilization. A singular problem, however, could be of such serious magnitude that it alone constitutes an Unsatisfactory rating. An Unsatisfactory rating should be supported by referencing the actions taken by the Government to notify the contractor of the deficiencies. When an Unsatisfactory rating is justified, the contracting officer must consider whether the contractor made a good faith effort to comply with the requirements of the subcontracting plan required by FAR 52.219-9 and follow the procedures outlined in FAR 52.219-16, Liquidated Damages-Subcontracting Plan.

■ 8. Add section 42.1504 to read as follows:

**42.1504 Contract clause.**

Insert the clause at 52.242-5, Payments to Small Business Subcontractors, in all solicitations and contracts containing the clause at 52.219-9, Small Business Subcontracting Plan.

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

■ 9. Amend section 52.212-5 by—

- a. Revising the date of the clause;
- b. Revising the introductory text of paragraph (b)(17)(i);
- c. Redesignating paragraph (b)(60) as (b)(61); and
- d. Adding a new paragraph (b)(60).

The revisions and addition read as follows:

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

\* \* \* \* \*

**Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (JAN 2017)**

(b) \* \* \*

\_\_\_(17)(i) 52.219-9, Small Business Subcontracting Plan (JAN 2017) (15 U.S.C. 637(d)(4)).

\* \* \* \* \*

\_\_\_(60) 52.242-5, Payments to Small Business Subcontractors (JAN 2017)(15 U.S.C. 637(d)(12)).

\* \* \* \* \*

■ 10. Amend section 52.219-9 by—

- a. Revising the date of the clause;
- b. Adding in paragraph (b), in alphabetical order, the definitions of “Reduced payment” and “Untimely payment”;

■ c. Adding paragraph (d)(15);

■ d. In *Alternate III*—

■ 1. Revising the date of the Alternate; and

■ 2. Removing from the introductory paragraph of Alternate III “clause;” and adding “clause;” in its place; and

■ e. In *Alternate IV*—

■ 1. Revising the date of the Alternate; and

■ 2. Adding paragraph (d)(15).

The revisions and additions read as follows:

**52.219-9 Small Business Subcontracting Plan.**

\* \* \* \* \*

**Small Business Subcontracting Plan (JAN 2017)**

(b) \* \* \*

\* \* \* \* \*

*Reduced payment* means a payment that is for less than the amount agreed upon in a subcontract in accordance with its terms and conditions, for supplies and services for which the Government has paid the prime contractor.

\* \* \* \* \*

*Untimely payment* means a payment to a subcontractor that is more than 90 days past due under the terms and conditions of a subcontract for supplies and services for which the Government has paid the prime contractor.

(d) \* \* \*

(15) Assurances that the offeror will pay its small business subcontractors on time and in accordance with the terms and conditions of the underlying subcontract, and notify the contracting officer when the prime contractor makes either a reduced or an untimely payment to a small business subcontractor (see 52.242-5).

\* \* \* \* \*

*Alternate III (JAN 2017).* \* \* \*

\* \* \* \* \*

*Alternate IV (JAN 2017).* \* \* \*

(d) \* \* \*

(15) Assurances that the offeror will pay its small business subcontractors on time and in accordance with the terms and conditions of the underlying subcontract, and notify the contracting officer when the prime contractor makes either a reduced or an untimely payment to a small business subcontractor (see 52.242-5).

■ 11. Add section 52.242-5 to read as follows:

**52.242-5 Payments to Small Business Subcontractors.**

As prescribed in 42.1504, insert the following clause:

**Payments to Small Business Subcontractors (JAN 2017)**

(a) *Definitions.* As used in this clause—  
*Reduced payment* means a payment that is for less than the amount agreed upon in a subcontract in accordance with its terms and conditions, for supplies and services for which the Government has paid the prime contractor.

*Untimely payment* means a payment that is more than 90 days past due under the terms and conditions of a subcontract, for supplies and services for which the Government has paid the prime contractor.

(b) *Notice.* The Contractor shall notify the Contracting Officer, in writing, not later than 14 days after—

- (1) A small business subcontractor was entitled to payment under the terms and conditions of the subcontract; and
- (2) The Contractor—
  - (i) Made a reduced or untimely payment to the small business subcontractor; or
  - (ii) Failed to make a payment, which is now untimely.

(c) *Content of notice.* The Contractor shall include the reason(s) for making the reduced or untimely payment in any notice required under paragraph (b) of this clause.

(End of clause)