

TABLE 1 TO PARAGRAPH (A) EPA-APPROVED NORTH DAKOTA SDWA § 1422 UNDERGROUND INJECTION CONTROL PROGRAM STATUTES AND REGULATIONS FOR WELL CLASSES I, III, IV, V AND VI—Continued

State citation	Title/subject	State effective date	EPA approval date
North Dakota Administrative Code Sections 43–05–01–01—43–05–01–20.	Geologic Storage of Carbon Dioxide.	2013	April 24, 2018, 83 FR 17761.

(b) * * *

(2) North Dakota Administrative Code Article 33–22 (Practice and Procedure) (1983).

(c) The Memorandum of Agreement for the Class I, III, IV, and V Underground Injection Control Program between EPA Region VIII and the North Dakota Department of Environmental Quality, signed by the EPA Regional Administrator on September 18, 2018.

(d) The statement of legal authority, “Class I, III, IV, and V Underground Injection Control Program, Attorney General’s Statement,” signed by the Assistant Attorney General of North Dakota on July 30, 2018, and “Supplement to the Attorney General Statements Relating to Programs Being Transferred to the North Dakota Department of Environmental Quality” signed by the Assistant Attorney General of North Dakota on October 23, 2018.

(e) The Class I, III, IV, and V Underground Injection Control Program Description and any other materials submitted as part of the program revision or as supplements thereto.

(f) The Memorandum of Agreement for the Class VI Underground Injection Control Program between EPA Region VIII and the North Dakota Industrial Commission, signed by the EPA Regional Administrator on October 28, 2013.

(g) The Memorandum of Understanding for Class VI between the North Dakota Industrial Commission, Department of Mineral Resources, Oil and Gas Division and the North Dakota Department of Health, Water Quality Division Related to the Underground Injection Control Program, signed on June 19, 2013.

(h) The statement of legal authority, “Class VI Underground Injection Control Program, Attorney General’s Statement,” signed by the Attorney General of North Dakota on January 22, 2013.

(i) The Class VI Underground Injection Control Program Description and any other materials submitted as part of the program revision or as supplements thereto.

[FR Doc. 2018–25893 Filed 12–3–18; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 19 and 52

[FAR Case 2016–011; Docket No. 2016–0011, Sequence No. 1]

RIN 9000–AN35

Federal Acquisition Regulation: Revision of Limitations on Subcontracting

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

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement the final rule published by the Small Business Administration implementing section 1651 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013, which revised and standardized the limitations on subcontracting, including the nonmanufacturer rule, that apply to small business concerns under FAR part 19 procurements.

DATES: Interested parties should submit comments to the Regulatory Secretariat Division at one of the addresses shown below on or before February 4, 2019 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments in response to FAR Case 2016–011 by any of the following methods:

- *Regulations.gov*: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by entering “FAR Case 2016–011” under the heading “Enter Keyword or ID” and selecting “Search.” Select the link “Comment Now” that corresponds with “FAR Case 2016–011.” Follow the instructions provided on the screen. Please include your name, company name (if any), and “FAR Case 2016–011” on your attached document.

- *Mail:* General Services

Administration, Regulatory-Secretariat Division (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd floor, Washington, DC 20405.

Instructions: Please submit comments only and cite “FAR case 2016–011” in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Mahruba Uddowla, Procurement Analyst, at 703–605–2868. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite “FAR Case 2016–011.”

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to revise the FAR to implement regulatory changes made by the SBA in its final rule published in the **Federal Register** at 81 FR 34243 on May 31, 2016. SBA’s final rule implements the statutory requirements of section 1651 of the NDAA for FY 2013 (15 U.S.C. 657s). Section 1651 revised and standardized the limitations on subcontracting, including the nonmanufacturer rule, that apply to small business concerns under FAR part 19 procurements. SBA’s final rule became effective on June 30, 2016.

Prior to passage of section 1651 of the NDAA for FY 2013, the limitations on subcontracting and the nonmanufacturer rule were inconsistent across the small business programs. For example, for awards under some small business programs, the prime contractor was required to perform a certain percentage of work itself, whereas under other programs, the prime contractor could include subcontracts to “similarly situated entities” in the percentage of work it performed. The method for

calculating compliance with the limitations on subcontracting also varied across small business programs.

Section 1651 of the NDAA for FY 2013 changed the focus of the limitations on subcontracting rules. Instead of requiring a percentage of work to be performed by a prime contractor, the limitations on subcontracting rules now limit subcontracting to a percentage of the overall award amount to be spent by the prime on subcontractors. As a result, the prime contractor no longer has to track the percentage of costs incurred that it spends performing work itself; it only has to track the percentage of the overall award amount (*i.e.*, contract price) that it spends on subcontractors. For small businesses, this change will reduce a substantial burden associated with tracking and demonstrating compliance with the limitations on subcontracting.

In addition, the percentage of the award amount that the prime contractor spends on subcontractors who are similarly situated entities is not considered subcontracted for purposes of compliance with the limitations on subcontracting. The statute and SBA's implementing regulations define "similarly situated entity" as a subcontractor that has the same small business program status as that which qualified the prime contractor for the award and that is considered small for the North American Industry Classification System (NAICS) code the prime contractor assigned to the subcontract the subcontractor will perform. Work performed by similarly situated entities is counted as if it were performed by the prime contractor in determining compliance with the limitations on subcontracting.

These important changes give small businesses greater flexibility on how they choose to comply with the limitations on subcontracting. Under the current FAR clauses, there is only one way for a small business to comply with the limitations: It must spend the required amount on work performed in-house. As proposed in this rule, there will be more than one way to comply with the limitations, and the small business will be able to choose how to comply. For example, a small business that is in compliance with the existing FAR clause will be able to comply with the new limitations on subcontracting. Alternatively, a small business can decide to subcontract more than it did before, and it will be able to comply with the new limitations where it would not have complied before, as long as the amount spent on subcontracts does not exceed 50 percent of the price of the prime contract, for other than

construction contracts; different percentages apply for construction contracts. Finally, a small business can decide to subcontract work to a similarly situated entity, in any amount of its choosing, that it previously subcontracted or performed in-house, and it will be in compliance with the new limitations on subcontracting because work performed by a similarly situated entity is counted as if it were performed by the prime contractor. In short, the new rules will make it easier for prime contractors to do business with Federal agencies by giving them more, and less burdensome, options for pursuing and winning larger contracts than before.

SBA's final rule specified that similarly situated entities must also comply with the limitations on subcontracting. Requiring prime contractors and their similarly situated entity subcontractors to comply with the limitations on subcontracting will ensure that the benefits from small business and socioeconomic set-aside and sole-source contracts flow to the intended parties. SBA's final rule also provided updated guidance on the nonmanufacturer rule, including the process for obtaining waivers to the nonmanufacturer rule and the proper application of these waivers to procurements.

The SBA rule also clarified that the limitations on subcontracting and the nonmanufacturer rule do not apply to small business set-aside contracts valued at or below \$150,000, but do apply to set-aside and sole-source awards under the other small business programs regardless of dollar value. This proposed rule reflects the same clarification. Thus, this rule provides that the limitations on subcontracting and the nonmanufacturer rule clauses are prescribed for small business set-asides that are expected to exceed \$150,000, and for requirements set aside for or awarded on a sole-source basis to 8(a) participants, Historically Underutilized Business Zone (HUBZone) small business, service-disabled veteran-owned small business (SDVOSB), economically disadvantaged women-owned small business (EDWOSB), or Women-Owned Small Business (WOSB) concerns eligible under the WOSB program.

II. Discussion and Analysis

This proposed rule would amend FAR parts 19 and 52. This rule implements the revised and standardized limitations on subcontracting through a single FAR clause applicable to every small business program, instead of continuing to implement through multiple FAR

clauses that were specific to particular small business programs. Similarly, this proposed rule creates a new FAR clause implementing the revised and standardized the nonmanufacturer rule across all the small business programs.

These changes are summarized in the following paragraphs:

A. *Nonmanufacturer rule implementation.* Paragraph (f) in section 19.102 is deleted, and 19.502-2 and 19.1303(e) are revised to remove the outdated nonmanufacturer rule guidance. New section 19.103, Nonmanufacturer rule, provides full and updated guidance on the application of the nonmanufacturer rule, including the requirements associated with the nonmanufacturer rule and the circumstances and procedures related to waivers. This section clarifies that the nonmanufacturer rule does not apply to small business set-aside acquisitions at or below \$150,000, but does apply to 8(a), HUBZone, SDVOSB, EDWOSB, and WOSB set-aside and sole-source acquisitions regardless of dollar value. Previous references to 19.102(f) at 19.303 and 19.1403 have been updated to refer to the new 19.103 section.

New clause 52.219-XX, Nonmanufacturer Rule, implements the requirements in solicitations and contracts. The prescription for this clause is added at 19.508(g). References to this prescription were added at 19.811-3(f), 19.1309(d), 19.1407(c), and 19.1507(d). The outdated nonmanufacturer rule has been removed from the clauses at 52.219-3, 52.219-6 and its Alternate I, 52.219-7 and its Alternate I, 52.219-18 and its Alternate II, 52.219-27, 52.219-29, and 52.219-30. The prescriptions have been removed from subparts 19.5 and 19.8 for the following clauses: Alternate I of 52.219-6, Alternate I of 52.219-7, and Alternate II of 52.219-18. However, paragraph (f) of the clause at 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns, is not revised because the application of the nonmanufacturer rule to acquisitions in which the HUBZone price evaluation preference is used is still under review.

The following provisions and clause are updated to clarify when the size standard for nonmanufacturers applies: 52.204-8, 52.212-1, 52.219-1, and 52.219-28. Additionally, the definition of "nonmanufacturer rule" is deleted from 19.001.

B. *Limitations on subcontracting implementation.* The clause at 52.219-14, Limitations on Subcontracting, is revised to implement the updated limitations on subcontracting requirements in solicitations and

contracts. The prescription for this clause at 19.508(e) is revised to apply to all small business programs. References to this prescription were added at 19.1309(c), 19.1407(b), and 19.1507(c), and revised at 19.811–3(e). Additionally, the clause at 52.219–4 is revised to reflect the updated limitations on subcontracting.

The outdated limitations on subcontracting guidance is removed from the following clauses: 52.219–3, 52.219–27, 52.219–29, and 52.219–30. The following clauses have been deleted: Alternate I of 52.219–3 and Alternate I of 52.219–4. In addition, the prescriptions for these clauses at 19.1309 have been deleted. The outdated limitations on subcontracting text at 19.1308 is deleted.

Lastly, the definition of “similarly situated entity” is added to 19.001 to support the implementation of the updated limitations on subcontracting.

C. Conforming changes. The clause at 52.212–5 is revised to include 52.219–XX, Nonmanufacturer Rule, and to update the dates of clauses revised in this rule.

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

The Federal Acquisition Regulatory (FAR) Council has made the following preliminary determinations with respect to the proposed rule’s application of section 1651 of the NDAA for FY 2013 to contracts at or below the simplified acquisition threshold (SAT) and for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items. Discussion of these preliminary determinations is set forth below. The FAR Council will consider public feedback before making a final determination on the scope of the final rule.

A. Applicability to Contracts at or Below the SAT.

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

law that are inapplicable to acquisitions at or below the SAT.

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

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

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

Application of the law to acquisitions at or below the SAT will maximize the positive impact set-aside and sole-source contracts provide for small businesses in the socioeconomic programs (e.g., HUBZone, 8(a), service-disabled veteran-owned, and women-owned small business programs) by ensuring these benefits extend to the many contracts valued below the SAT. According to fiscal year 2015 data from the Federal Procurement Data System (FPDS), more than 70 percent of the number of acquisitions that were set aside or sole-sourced under the socioeconomic programs were in amounts at or below the SAT. Failure to apply section 1651 to the maximum extent possible would exclude a significant number of acquisitions, which would not advance the interests of small businesses and increase their opportunities in the Federal

marketplace. Further, the primary FAR clauses implementing the limitations on subcontracting and the nonmanufacturer rule are currently prescribed for use in solicitations and contracts at or below the SAT that are set aside for, or awarded on a sole-source basis to, 8(a) program participants, HUBZone, service-disabled veteran-owned, women-owned, or economically disadvantaged women-owned small business concerns. This rule merely revises these clauses to implement the requirements of section 1651. Exclusion of these acquisitions would create confusion among contractors and the Federal contracting workforce. Under the FAR clauses amended by this rule, contractors are already required to comply with the limitations on subcontracting and the nonmanufacturer rule. The new requirements will result in substantial savings for contractors.

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

B. Applicability to Contracts for the Acquisition of Commercial Items

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

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

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

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

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

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

C. Applicability to Contracts for the Acquisition of COTS Items

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

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

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

The law is silent on the applicability of these requirements to acquisitions of COTS items and does not independently provide for criminal or civil penalties; nor does it 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 at 41 U.S.C. 1907.

The law furthers the Administration's goal of simplifying the acquisition process and facilitating easier access to the Federal marketplace, in this case for small business contractors who make up an important component of the Government's industrial base. It

advances the interests of small business prime contractors by making it easier to comply with the limitations on subcontracting, which makes it possible for those contractors to compete for larger contracts than they could in the past. The law also advances the interests of small business subcontractors by encouraging small business prime contractors to award more subcontracts to similarly situated small businesses. Exclusion of a large segment of Federal contracting, such as acquisitions for COTS items, will limit the full implementation of these objectives. Further, the primary FAR clauses implementing the limitations on subcontracting and the nonmanufacturer rule are currently prescribed for use in solicitations and contracts for COTS items. Exclusion of acquisitions for COTS items from these requirements would create confusion among contractors and the Federal contracting workforce. The burden on contractors would not increase significantly if the requirements of section 1651 were applied to acquisitions for COTS items. Under the FAR clauses amended by this rule, contractors are already required to comply with the limitations on subcontracting and the nonmanufacturer rule. The new requirements will result in substantial savings for contractors.

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

IV. Expected Cost Savings

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

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

In addition, the basis of the limitations on subcontracting has

changed. Prior to section 1651, the limitations on subcontracting were calculated as a percentage of work to be performed by a prime contractor; the calculation was based on the contractor's costs to perform the contract (e.g., salaries and other allowable costs under FAR part 31). As a result of section 1651, the limitations on subcontracting will be calculated as a percentage of the overall contract or order amount (i.e., the contract price, including costs and profit or fee) to be spent by the prime contractor on subcontractors. For small businesses, this change will reduce the burden associated with tracking and documenting compliance with the limitations on subcontracting.

Section 1651 also applied the concept of "similarly situated entities" to all small business programs. A similarly situated entity is a small business subcontractor that has the same small business program status as that which qualified the prime contractor for the prime contract. The percentage of the

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

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

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

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

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

For example, the small business can subcontract \$500 to any business and spend \$300 on its own employees, or subcontract \$500 to any business, \$100 to a similarly situated entity, and spend only \$200 on its own employees.

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

- The nonmanufacturer rule does not apply to small business set-asides at or below \$150,000. Note that currently, the FAR applies the nonmanufacturer rule to small business set-asides above \$25,000.
- Waivers of the nonmanufacturer rule will now be allowed for procurements under the HUBZone Program. Such waivers allow a HUBZone small business to provide the product of any size business.
- In the event SBA grants a nonmanufacturer rule waiver after the issuance of a solicitation, but before

award, contracting officers are required to amend that solicitation to notify potential offerors of the waiver and to give them more time to submit proposals.

The above changes drive both costs and savings; however, the rule is expected to result in net savings to small entities, as well as to the Government. Since the rule will only revise regulations under the various small business programs, there will be no costs or savings to large businesses.

The following is a summary of the estimated public cost savings calculated in perpetuity in 2016 dollars at a 7-percent discount rate:

Present Value at 7 percent	-\$271,391,140
Annualized 7 percent	-\$18,997,380

The full cost analysis narrative can be accessed at <http://www.regulations.gov>.

V. Executive Orders 12866 and 13563

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

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

VI. Executive Order 13771

This rule is considered to be an E.O. 13771 deregulatory action. Details on the estimated cost savings can be found in section IV. of this preamble.

VII. Regulatory Flexibility Act

The change 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, *et seq.* The Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

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

The objectives of this proposed rule are to apply the limitations on subcontracting consistently to the small business concerns identified in FAR 19.000(a)(3) and to change the method of calculation to the percentage of the award amount to be spent on subcontractors. The legal basis for the rule is section 1651 of the NDAA for FY 2013, codified at section 46 of the Small Business Act (15 U.S.C. 657s).

This rule may have a positive economic impact on small businesses, because it will make application of the limitations on subcontracting and the nonmanufacturer rule uniform across all small business programs and make it easier to calculate compliance with the limitations on subcontracting. Through the ability to meet the limitations by means of subcontracts with similarly situated entities, this rule will make it possible for small businesses to compete for larger contracts than they could in the past. The rule will encourage small business prime contractors to award subcontracts to other, similarly situated, small businesses. Analysis of the System for Award Management (SAM) indicates there are over 321,938 small

business registrants. Firms looking to be prime contractors of Government contracts are required to register in SAM. However, firms do not need to register in SAM to participate in subcontracting. Thus, the number of small business firms impacted by this rule may be greater than the number of firms registered in SAM.

This proposed rule does not include any new reporting or recordkeeping requirements for small entities. This rule does not include any new compliance requirements. The FAR already required compliance with the limitations on subcontracting and the nonmanufacturer rule for small business prime contractors receiving awards pursuant to set-aside and sole-source acquisitions under part 19. This rule simply revises the limitations on subcontracting and the nonmanufacturer rule to match that required by section 1651 of the NDAA for FY 2013. According to the Federal Procurement Data System (FPDS), in fiscal year 2015 there were 45,963 small business prime contractors performing on acquisitions to which the limitations on subcontracting or the nonmanufacturer rule would apply.

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

There are no known significant alternative approaches to the proposed rule that would meet the requirements of the applicable 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 this rule consistent with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2016–011) in correspondence.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 3245–0374, titled: *Certification for the Women-Owned Small Business Federal Contract Program*.

List of Subjects in 48 CFR Parts 19 and 52

Government procurement.

Dated: November 19, 2018.

William F. Clark,

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

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

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

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

PART 19—SMALL BUSINESS PROGRAMS

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

19.001 Definitions.

* * * * *

“Similarly situated entity” means a first-tier subcontractor, including an independent contractor, that has the same small business program status as that which qualified the prime contractor for the award; and is considered small for the NAICS code the prime contractor assigned to the subcontract the subcontractor will perform. An example of a similarly situated entity is a first-tier subcontractor that is a HUBZone small business concern for a HUBZone set-aside or sole-source award under the HUBZone Program.

19.102 [Amended]

■ 3. Amend section 19.102 by removing paragraph (f).

■ 4. Add section 19.103 to read as follows.

19.103 Nonmanufacturer rule.

(a) *Application.* (1) The nonmanufacturer rule applies to small business set-asides above \$150,000; it does not apply to small business set-asides at or below \$150,000. The nonmanufacturer rule applies to all set-aside and sole-source awards under the 8(a), HUBZone, Service-Disabled Veteran-Owned Small Business, Women-Owned Small Business programs regardless of dollar value.

(2) The nonmanufacturer rule applies to nonmanufacturers in accordance with paragraph (b) and to kit assemblers who are nonmanufacturers in accordance with paragraph (c).

(b) *Nonmanufacturers.* Any concern, including suppliers, that submits an offer for a set-aside or a sole-source award in accordance with part 19, other than on a construction or service

acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce (*i.e.*, a “nonmanufacturer”), is required to—

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

(2) Not exceed 500 employees;

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

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

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

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

(2) At least 50 percent of the total cost of the components of the kit shall be manufactured, processed, or produced in the United States or its outlying areas by business concerns that are small under the size standards for the NAICS codes of the components of the kit.

(d) *Identification of manufacturers.*

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

(e) *Waiver of nonmanufacturer rule.*

(1) SBA may grant an individual or a class waiver to the nonmanufacturer rule to allow a nonmanufacturer to provide the end item of an other than small business without regard to the place of manufacture, processing, or production.

(i) *Class waiver.* An agency may request that SBA waive the requirement at paragraph (b)(1) or (c)(2) of this section for a specific product or class of products. SBA may issue a waiver when SBA has determined that there are no small business manufacturers, processors, or producers in the United States or its outlying areas for a specific product or class of products.

(ii) *Individual waiver.* The contracting officer may request a waiver of the requirements at paragraph (b)(1) or (c)(2) of this section for an individual acquisition once the contracting officer determines through market research that no known small business manufacturers, processors, or producers in the United States or its outlying areas can reasonably be expected to offer an

end item meeting the requirements of the solicitation. An individual waiver applies only to a specific acquisition.

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

(3) *List of class waivers.* The current listing of class waivers is available at <http://www.sba.gov/content/class-waivers>, or contact the SBA Office of Government Contracting.

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

(f) *Multiple-item acquisitions.* (1) If at least 50 percent of the estimated acquisition cost is composed of items that are manufactured, processed, or produced by small business concerns, then a waiver of the nonmanufacturer rule is not required. There is no requirement that each item acquired in a multiple-item acquisition be manufactured, processed, or produced by a small business in the United States or its outlying areas.

(2) If more than 50 percent of the estimated acquisition cost is composed of items manufactured, processed, or produced by other than small business concerns, then a waiver is required. SBA may grant an individual waiver for one or more items in an acquisition in order to ensure that at least 50 percent of the cost of the items to be supplied by the nonmanufacturer comes from small business manufacturers, processors, and producers in the United States or its outlying areas or are subject to a waiver.

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

19.303 [Amended]

■ 5. Amend section 19.303 by removing from paragraph (a)(2) “of 19.102(f)” and adding “of 19.103” in its place.

19.502–2 [Amended]

■ 6. Amend section 19.502–2 by removing paragraph (c).

■ 7. Amend section 19.508 by—

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

■ b. Adding paragraph (g).

The revisions and addition read as follows:

19.508 Solicitation provisions and contract clauses.

* * * * *

(c) The contracting officer shall insert the clause at 52.219–6, Notice of Total Small Business Set-Aside, in solicitations and contracts involving total small business set-asides or reserves. This includes multiple-award contracts when orders may be set aside for any of the small business concerns identified in 19.000(a)(3), as described in 8.405–5 and 16.505(b)(2)(i)(F). Use the clause at 52.219–6 with its Alternate I when including FPI in the competition in accordance with 19.504.

(d) The contracting officer shall insert the clause at 52.219–7, Notice of Partial Small Business Set-Aside, in solicitations and contracts involving partial small business set-asides. This includes part or parts of multiple-award contracts, including those described in 38.101. Use the clause at 52.219–7 with its Alternate I when including FPI in the competition in accordance with 19.504.

(e) The contracting officer shall insert the clause at 52.219–14, Limitations on Subcontracting, in solicitations and contracts for supplies, services, and construction, if any portion of the requirement is to be set aside or reserved for small business and the contract amount is expected to exceed \$150,000, and in any solicitations and contracts that are set aside or awarded on a sole-source basis in accordance with subparts 19.8, 19.13, 19.14, or 19.15, regardless of dollar value. This includes multiple-award contracts when orders may be set aside for small business concerns, as described in 8.405–5 and 16.505(b)(2)(i)(F).

* * * * *

(g)(1) The contracting officer shall insert the clause at 52.219–XX, Nonmanufacturer Rule, in solicitations and contracts when the item being acquired has been assigned a manufacturing or supply NAICS code and—

(i) Any portion of the requirement is set aside for small business and is expected to exceed \$150,000; or

(ii) The requirement is set aside or awarded on a sole-source basis in accordance with subparts 19.8, 19.13, 19.14, or 19.15, regardless of dollar value.

(2) The contracting officer shall not insert the clause at 52.219–XX when SBA has waived the nonmanufacturer rule (see 19.103(e)).

- 8. Amend section 19.811–3 by
- a. Revising paragraphs (d) and (e); and
- b. Adding a new paragraph (f).

The revision and addition read as follows:

19.811–3 Contract clauses.

* * * * *

(d) The contracting officer shall insert the clause at 52.219–18, Notification of Competition Limited to Eligible 8(a) Participants, in competitive solicitations and contracts when the acquisition is accomplished using the procedures of 19.805. Use the clause at 52.219–18 with its Alternate I when competition is to be limited to 8(a) concerns within one or more specific SBA districts pursuant to 19.804–2.

(e) The contracting officer shall insert the clause at 52.219–14, Limitations on Subcontracting, in accordance with the prescription at 19.508(e).

(f) The contracting officer shall insert the clause at 52.219–XX, Nonmanufacturer Rule, in accordance with the prescription at 19.508(g).

- 9. Amend section 19.1303 by revising paragraph (e) to read as follows:

19.1303 Status as a HUBZone small business concern.

* * * * *

(e) A HUBZone small business concern may submit an offer for supplies as a nonmanufacturer if it meets the requirements of the nonmanufacturer rule set forth at 13 CFR 121.406.

19.1308 [Removed and Reserved]

- 10. Remove and reserve section 19.1308.
- 11. Revise section 19.1309 to read as follows:

19.1309 Contract clauses.

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

(b) The contracting officer shall insert the clause at 52.219–4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns, in solicitations and contracts for acquisitions conducted using full and open competition.

(c) The contracting officer shall insert the clause at 52.219–14, Limitations on

Subcontracting, in accordance with the prescription at 19.508(e).

(d) The contracting officer shall insert the clause at 52.219–XX, Nonmanufacturer Rule, in accordance with the prescription at 19.508(g).

19.1403 [Amended]

- 11. Amend section 19.1403 by removing from paragraph (d) “19.102(f)” and adding “19.103” in its place.

- 12. Revise section 19.1407 to read as follows:

19.1407 Contract clauses.

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

(b) The contracting officer shall insert the clause at 52.219–14, Limitations on Subcontracting, in accordance with the prescription at 19.508(e).

(c) The contracting officer shall insert the clause at 52.219–XX, Nonmanufacturer Rule, in accordance with the prescription at 19.508(g).

- 13. Amend section 19.1507 by—
- a. Removing from paragraph (a) “clause 52.219–29” and adding “clause at 52.219–29” in its place;
- b. Removing from paragraph (b) “clause 52.219–30” and adding “clause at 52.219–30” in its place; and
- c. Adding paragraphs (c) and (d) to read as follows:

19.1507 Contract clauses.

* * * * *

(c) The contracting officer shall insert the clause at 52.219–14, Limitations on Subcontracting, in accordance with the prescription at 19.508(e).

(d) The contracting officer shall insert the clause at 52.219–XX, Nonmanufacturer Rule, in accordance with the prescription at 19.508(g).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 14. Amend section 52.204–8 by revising the date of the provision and paragraph (a)(3) to read as follows:

52.204–8 Annual Representations and Certifications.

* * * * *

Annual Representations and Certifications (Date)

* * * * *

(a)(3) If the acquisition is set aside for small business and has a value above \$150,000, or is an 8(a), HUBZone, Service-Disabled Veteran-Owned, Economically Disadvantaged Women-Owned, or Women-Owned Small Business set-aside or sole-source award regardless of dollar value, the small business size standard for a concern that submits an offer for a set-aside or sole-source award in accordance with part 19, other than on a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce is 500 employees.

* * * * *

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

52.212–1 Instructions to Offerors—Commercial Items.

* * * * *

Instructions to Offerors—Commercial Items (Date)

(a) *North American Industry Classification System (NAICS) code and small business size standard.* The NAICS code and small business size standard for this acquisition appear in Block 10 of the solicitation cover sheet (SF 1449). However, if the acquisition is set aside for small business and has a value above \$150,000, or is an 8(a), HUBZone, Service-Disabled Veteran-Owned, Economically Disadvantaged Women-Owned, or Women-Owned Small Business set-aside or sole-source award regardless of dollar value, the small business size standard for a concern that submits an offer for a set-aside or sole-source award in accordance with part 19, other than on a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce is 500 employees.

* * * * *

- 16. Amend section 52.212–5 by—
- a. Revising the date of the clause and paragraphs (b)(11), (b)(12), (b)(14), (b)(15), (b)(19), (b)(21), (b)(22), (b)(23), and (b)(24);
- b. Redesignating paragraphs (b)(25) through (b)(60) as paragraphs (b)(26) through (b)(61), respectively; and
- c. Adding a new paragraph (b)(25).

The revisions and additions 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 (Date)

* * * * *

(b) * * *

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

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

* * * * *

(14)(i) 52.219–6, Notice of Total Small Business Set-Aside (DATE) (15 U.S.C. 644).

(ii) Alternate I (DATE).

(15)(i) 52.219–7, Notice of Partial Small Business Set-Aside (DATE) (15 U.S.C. 644).

(ii) Alternate I (DATE) of 52.219–7.

* * * * *

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

* * * * *

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

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

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

(24) 52.219–30, Notice of Set-Aside for, or Sole-Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program (DATE) (15 U.S.C. 637(m)).

(25) 52.219–XX, Nonmanufacturer Rule (DATE) (15 U.S.C. 657s).

* * * * *

- 17. Amend section 52.219–1 by—
- a. Revising the date of the provision;
- b. Removing from paragraph (b)(1) “—” and adding a space in its place; and
- c. Removing paragraph (b)(3) to read as follows:

52.219–1 Small Business Program Representations.

* * * * *

Small Business Program Representations (Date)

* * * * *

(b) * * *

(3) If the acquisition is set aside for small business and has a value above

\$150,000, or is an 8(a), HUBZone, Service-Disabled Veteran-Owned, Economically Disadvantaged Women-Owned, or Women-Owned Small Business set-aside or sole-source award regardless of dollar value, the small business size standard for a concern that submits an offer, other than on a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce is 500 employees.

* * * * *

- 18. Amend section 52.219–3 by—
- a. Revising the date of the clause;
- b. Revising paragraph (a);
- c. Removing from paragraph (b)(3) “set-aside” and adding “set aside” in its place;
- d. Removing paragraphs (d), (e), and (f);
- e. Redesignating paragraph (g) as paragraph (d); and
- f. Removing Alternate I.

The revision reads as follows:

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

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

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

(a) *Definition.* “HUBZone small business concern,” as used in this clause, means a small business concern, certified by the Small Business Administration (SBA), that appears on the List of Qualified HUBZone Small Business Concerns maintained by the SBA (13 CFR 126.103).

* * * * *

- 19. Amend section 52.219–4 by—
- a. Revising the date of the clause and paragraphs (a), (d) and (e) to read as follows; and
- b. Removing Alternate I.

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

* * * * *

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

(a) *Definition.* “Similarly situated entity,” as used in this clause, means a first-tier subcontractor, including an independent contractor, that has the same small business program status as that which qualified the prime contractor for the award; and is considered small for the NAICS code the prime contractor assigned to the subcontract the subcontractor will perform. An example of a similarly situated entity is a first-tier subcontractor that is a HUBZone small business concern for a HUBZone set-

aside or sole-source award under the HUBZone Program.

* * * * *

(d) *Agreement.* By submission of an offer and execution of a contract, a HUBZone small business concern agrees that, in the case of a contract for—

(1) Services (except construction), it will not pay more than 50 percent of the amount paid by the Government for contract performance to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the 50 percent subcontract amount that cannot be exceeded;

(2) Supplies (other than procurement from a nonmanufacturer of such supplies), it will not pay more than 50 percent of the amount paid by the Government for contract performance, excluding the cost of materials (see 13 CFR 125.1), to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count toward the 50 percent subcontract amount that cannot be exceeded;

(3) General construction, it will not pay more than 85 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the 85 percent subcontract amount that cannot be exceeded; or

(4) Construction by special trade contractors, it will not pay more than 75 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the 75 percent subcontract amount that cannot be exceeded.

(e) A HUBZone joint venture agrees that the aggregate of the HUBZone small business concerns to the joint venture, not each concern separately, will perform the applicable requirements specified in paragraph (d) of this clause.

* * * * *

- 20. Amend section 52.219–6 by—
- a. Revising the date of the clause;
- b. Removing paragraph (d);
- c. Removing Alternate I;
- d. Redesignating Alternate II as Alternate I; and
- e. Revising the date of newly redesignated Alternate I.

The revisions read as follows:

52.219–6 Notice of Total Small Business Set-Aside.

* * * * *

Notice of Total Small Business Set-Aside (Date)

* * * * *

Alternate I (DATE). As prescribed in 19.508(c), substitute the following paragraph (c) for paragraph (c) of the basic clause:

* * * * *

- 21. Amend section 52.219–7 by—
- a. Revising the date of the clause;
- b. Removing paragraph (c);
- c. Removing Alternate I;
- d. Redesignating Alternate II as Alternate I; and
- e. Revising the newly redesignated Alternate I.

The revision reads as follows:

52.219–7 Notice of Partial Small Business Set-Aside.

* * * * *

Notice of Partial Small Business Set-Aside (Date)

* * * * *

Alternate I (Date). As prescribed in 19.508(d), add the following paragraph (c) to the basic clause:

(c) Notwithstanding paragraph (b) of this clause, offers from Federal Prison Industries, Inc., will be solicited and considered for both the set-aside and non-set-aside portion of this requirement.

- 22. Amend section 52.219–14 by—
- a. Removing from the introductory text of the clause “or 19.811–3(e)”;
- b. Revising the date of the clause;
- c. Redesignating paragraph (c) as paragraph (e) and paragraph (b) as paragraph (c);
- d. Revising newly designated paragraphs (c) and (e); and
- e. Adding paragraphs (b), (d), and (f).

The revisions and additions read as follows:

52.219–14 Limitations on Subcontracting.

* * * * *

Limitations on Subcontracting (Date)

* * * * *

(b) *Definition*. “Similarly situated entity,” as used in this clause, means a first-tier subcontractor, including an independent contractor, that has the same small business program status as that which qualified the prime contractor for the award; and is considered small for the NAICS code the prime contractor assigned to the subcontract the subcontractor will perform. An example of a similarly situated entity is a first-tier subcontractor that is a HUBZone small business concern for a HUBZone set-aside or sole-source award under the HUBZone Program.

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

(1) Contracts that have been set aside or reserved any of the small business concerns identified in 19.000(a)(3);

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

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

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

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

(e) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that, in the case of a contract for—

(1) Services (except construction), it will not pay more than 50 percent of the amount paid by the Government for contract performance to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the 50 percent subcontract amount that cannot be exceeded;

(2) Supplies (other than procurement from a nonmanufacturer of such supplies), it will not pay more than 50 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the 50 percent subcontract amount that cannot be exceeded;

(3) General construction, it will not pay more than 85 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the 85 percent subcontract amount that cannot be exceeded; or

(4) Construction by special trade contractors, it will not pay more than 75 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the 75 percent subcontract amount that cannot be exceeded.

(f) A joint venture agrees that, in the performance of the contract, the applicable percentage specified in paragraph (e) of this clause will be

performed by the aggregate of the joint venture participants.

- 23. Amend section 52.219–18 by—
- a. Revising the date of the clause;
- b. Removing paragraph (d)(1), redesignating paragraph (d)(2) as paragraph (d) and
- c. Removing Alternate II.

The revision reads as follows:

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

* * * * *

Notification of Competition Limited to Eligible 8(a) Participants (Date)

* * * * *

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

The revisions read as follows:

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

* * * * *

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

* * * * *

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

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

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

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

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

(3) The joint venture meets the requirements of paragraph 7 of the explanation of Affiliates in 19.101 of the Federal Acquisition Regulation; and

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

* * * * *

- 25. Amend section 52.219–28 by revising the date of the clause and paragraph (d) to read as follows:

52.219–28 Post-Award Small Business Program Rerepresentation.

* * * * *

Post-Award Small Business Program Rerepresentation (Date)

* * * * *

(d) If the acquisition was set aside for small business and has a value above \$150,000, or is an 8(a), HUBZone, Service-Disabled Veteran-Owned, Economically Disadvantaged Women-Owned, or Women-Owned Small Business set-aside or sole-source award regardless of dollar value, the small business size standard for a Contractor providing a product which it does not manufacture, process, or produce itself, for a contract other than a construction or service contract, is 500 employees.

* * * * *

- 26. Amend section 52.219–29 by—
- a. Revising the date of the clause;
- b. Removing from the definition “Economically disadvantaged women-owned small business (EDWOSB)” “means- A small” and adding “means a small” in its place;
- c. Removing from paragraph (c)(3) “contracting officer” and adding “Contracting Officer” in its place;
- d. Removing paragraph (d);
- e. Redesignating paragraph (e) as paragraph (d);
- f. Removing newly redesignated paragraph (d)(4);
- g. Redesignating paragraph (d)(5) as (d)(4) and revising newly redesignated paragraph (d)(4); and
- h. Removing paragraph (f).

The revisions read as follows:

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

* * * * *

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

* * * * *

(d) * * *

(4) The Contracting Officer executes the contract in the name of the EDWOSB or joint venture.

* * * * *

- 27. Amend section 52.219–30 by—
- a. Revising the date of the clause and the introductory text of paragraph (a);
- b. Removing from the second sentence of paragraph (c)(1) “WOSB program” and adding “WOSB Program” in its place;
- c. Removing paragraph (d);
- d. Redesignating paragraph (e) as paragraph (d);
- e. Removing newly redesignated paragraph (d)(4);
- f. Redesignating paragraph (d)(5) as (d)(4) and revising newly redesignated paragraph (d)(4);
- g. Removing paragraph (f).

The revision reads as follows:

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

* * * * *

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

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

* * * * *

(d) * * *

(4) The Contracting Officer executes the contract in the name of the WOSB concern eligible under the WOSB Program or joint venture.

* * * * *

- 28. Add section 52.219–XX to read as follows:

52.219–XX Nonmanufacturer Rule.

As prescribed in 19.508(g), insert the following clause:

Nonmanufacturer Rule (Date)

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

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

(b) *Applicability.*

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

(2) This clause applies to—

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

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

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

(c) *Requirements.*

(1) The Contractor shall—

(i) Provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas; for kit assemblers who are nonmanufacturers, see paragraph (c)(2) of this clause instead;

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

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

(2) When the end item being acquired is a kit of supplies, at least 50 percent of the total cost of the components of the kit shall be manufactured, processed, or produced in the United States or its outlying areas by small business concerns. Where the Government has specified an item for the kit that is not produced by small business concerns in the United States or its outlying areas, such item is excluded from the calculation of total cost.

(End of clause)

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 208, 212, 213, 215, 216, 217, 234, and 237

[Docket DARS–2018–0055]

RIN 0750–AJ74

Defense Federal Acquisition Regulation Supplement: Restrictions on Use of Lowest Priced Technically Acceptable Source Selection Process (DFARS Case 2018–D010)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD proposes to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Acts for Fiscal Years 2017 and 2018 that establish limitations and prohibitions on the use of the lowest price technically source selection process.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before February 4, 2019, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2018–D010, using any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for “DFARS Case 2018–D010.” under the heading “Enter keyword or ID” and selecting “Search.” Select “Comment Now and” follow the instructions provided to submit a comment. Please