

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

The revisions and additions read as follows:

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

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services (DEC 2023)

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

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

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

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

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

Alternate II. (DEC 2023) * * *
 (e)(1) * * *
 (ii) * * *

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

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

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

The revision and addition read as follows:

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

* * * * *

Terms and Conditions-Simplified Acquisitions (Other Than Commercial Products and Commercial Services) (DEC 2023)

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

* * * * *

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

The revision and addition read as follows:

52.244–6 Subcontracts for Commercial Products and Commercial Services.

* * * * *

Subcontracts for Commercial Products and Commercial Services (DEC 2023)

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

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

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

BILLING CODE 6820–14–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 3, 31, and 52

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

RIN 9000–AN32

Federal Acquisition Regulation: Whistleblower Protection for Contractor Employees

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement an act to enhance whistleblower protection for contractor employees. The rule makes permanent the protection for disclosure of certain information. It also clarifies that the prohibition on reimbursement for legal fees accrued in defense against reprisal claims applies to subcontractors, as well as contractors.

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

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

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

SUPPLEMENTARY INFORMATION:

I. Background

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

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

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

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

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

II. Discussion and Analysis

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

A. Summary of Changes From Proposed Rule

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

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

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

B. Analysis of Public Comments

1. Whistleblower Declaration

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

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

2. Compulsory Reinstatement

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

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

3. Ability To Waive Complaint

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

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

4. Standard for Liability

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

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

5. Allowability of Legal Fees

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

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

6. Readability

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

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

7. Support for the Rule

Comment: A respondent stated that they support the rule.

Response: Noted.

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

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

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

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

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

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

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

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

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

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

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

D. Determinations

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

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

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

IV. Expected Impact of the Rule

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

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

V. Executive Orders 12866 and 13563

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

VI. Congressional Review Act

The Congressional Review Act (5 U.S.C. 801–808) requires interim and final rules to be submitted to Congress before the rule takes effect. DoD, GSA, and NASA will send this to each House of the Congress and to the Comptroller General of the United States. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804.

VII. Regulatory Flexibility Act

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

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

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

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

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

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

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

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

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

DoD, GSA, and NASA were unable to identify any alternatives to the rule that would reduce the impact on small entities and still meet the requirements of the statute.

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

VIII. Paperwork Reduction Act

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

List of Subjects in 48 CFR Parts 3, 31, and 52

Government procurement.

William F. Clark,

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

Therefore, DoD, GSA, and NASA amend 48 CFR parts 3, 31, and 52 as set forth below:

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

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

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 2. Revise section 3.900 to read as follows:

3.900 Scope of subpart.

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

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

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

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

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

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

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

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

■ 3. Amend section 3.901 by—

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

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

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

The addition and revision read as follows.

3.901 Definitions.

* * * * *

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

* * * * *

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

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

* * * * *

■ 4. Add section 3.902 to read as follows:

3.902 Classified information.

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

■ 5. Revise section 3.903 to read as follows:

3.903 Policy.

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

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

(ii) A gross waste of Federal funds;

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

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

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

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

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

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

(2) An Inspector General.

(3) The Government Accountability Office.

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

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

(6) A court or grand jury.

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

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

■ 6. Revise section 3.904 to read as follows:

3.904 Complaints.

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

3.904–1 Procedures for filing complaints.

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

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

3.904–2 Procedures for investigating complaints.

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

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

- (1) The complainant and any person acting on the complainant's behalf; and
- (2) The contractor and/or subcontractor alleged to have committed the violation.

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

■ 9. Revise section 3.905 to read as follows:

3.905 Remedies and enforcement of orders.

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

3.905–1 Remedies.

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

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

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

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

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

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

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

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

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

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

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

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

- (1) Within 210 days after the submission of the complaint; or
- (2) Within 30 days after the expiration of an extension of time granted in accordance with 41 U.S.C. 4712(b)(2)(B) for the submission of the report to those stated in 3.904–2(b); and

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

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

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

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

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

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

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

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

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

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

3.905–2 Enforcement of orders.

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

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

■ 12. Revise section 3.906 to read as follows:

3.906 Contract clause.

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

3.907–7 [Amended]

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

3.908 [Removed and Reserved]

- 14. Remove and reserve section 3.908.

3.908–1 through 3.908–9 [Removed]

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

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

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

The revision reads as follows:

31.205–47 Costs related to legal and other proceedings.

* * * * *

(f) * * *

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

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

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

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

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

* * * * *

31.603 [Amended]

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

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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

52.203–17 Contractor Employee Whistleblower Rights.

As prescribed in 3.906, insert the following clause:

Contractor Employee Whistleblower Rights (NOV 2023)

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

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

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

(End of clause)

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

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

* * * * *

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

* * * * *

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

* * * * *

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

The revisions and additions read as follows:

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

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services (NOV 2023)

* * * * *

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

* * * * *

(e)(1) * * *
(ii) 52.203–17, Contractor Employee Whistleblower Rights (NOV 2023) (41 U.S.C. 4712).

* * * * *

Alternate II (NOV2023). * * *

* * * * *

(e)(1) * * *

(ii) * * *

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

* * * * *

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

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

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

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

The revision and addition read as follows:

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

* * * * *

Terms and Conditions—Simplified Acquisitions (Other than Commercial Products and Commercial Services) (NOV 2023)

* * * * *

(b) * * *

(1) * * *

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

* * * * *

■ 22. Amend section 52.244–6 by—

■ a. Revising the date of the clause;

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

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

The revision and addition read as follows:

52.244–6 Subcontracts for Commercial Products and Commercial Services.

* * * * *

Subcontracts for Commercial Products and Commercial Services (NOV 2023)

* * * * *

(c)(1) * * *

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

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

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 19

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

RIN 9000–AO29

Federal Acquisition Regulation: 8(a) Program

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement regulatory changes made by the Small Business Administration to update and clarify requirements associated with the 8(a) program.

DATES: Effective November 6, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Dana Bowman, Procurement Analyst, at 202–803–3188 or by email at dana.bowman@gsa.gov, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or GSARegSec@gsa.gov. Please cite FAC 2023–06, FAR Case 2021–012.

SUPPLEMENTARY INFORMATION:

I. Background

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

One respondent submitted comments in response to the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition

Regulations Council (the Councils) reviewed the public comments in the development of the final rule; however, no changes were made as a result of the public comments received. A discussion of the comments received is provided as follows:

A. Summary of Significant Changes

There are no significant changes from the proposed rule.

B. Analysis of Public Comments

1. Support for the Rule

Comment: The respondent expressed support for the rule.

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

2. Negative Impacts of the Rule

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

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