

disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format.” 44 U.S.C. 3502(3)(A). The PRA only applies when such collections are “conducted or sponsored by those agencies.” 5 CFR 1320.4(a).

The proposed rule does not involve a collection of information within the meaning of the PRA; rather, it adopts a judicially approved standard for determining joint-employer status under the Act. Outside of administrative proceedings (discussed below), the proposed rule does not require any entity to disclose information to the NLRB, other government agencies, third parties, or the public.

The only circumstance in which the proposed rule could be construed to involve disclosures of information to the Agency, third parties, or the public is when an entity’s status as a joint employer has been alleged in the course of the Board’s administrative proceedings. However, the PRA provides that collections of information related to “an administrative action or investigation involving an agency against specific individuals or entities” are exempt from coverage. 44 U.S.C. 3518(c)(1)(B)(ii). A representation proceeding under section 9 of the Act, as well as an investigation into an unfair labor practice under section 10 of the Act, are administrative actions covered by this exemption.<sup>127</sup> The Board’s decisions in these proceedings are binding on and thereby alter the legal rights of the parties to the proceedings and thus are sufficiently “against” the specific parties to trigger this exemption.<sup>128</sup>

For the foregoing reasons, the proposed rule does not contain information collection requirements that require approval by the Office of Management and Budget under the PRA.

#### List of Subjects in 29 CFR Part 103

Colleges and universities, Election procedures, Health facilities, Jurisdictional standards, Labor management relations, Music, Remedial orders, Sports.

<sup>127</sup> See Representation—Case Procedures, 79 FR 74307, 74468–74469 (Dec. 15, 2014).

<sup>128</sup> Legislative history indicates Congress wrote this exception to broadly cover many types of administrative action, not just those involving “agency proceedings of a prosecutorial nature.” See S. REP. 96–930 at 56, as reprinted in 1980 U.S.C.C.A.N. 6241, 6296. For the reasons more fully explained by the Board in prior rulemaking, 79 FR 74307, 74468–69 (2015), representation proceedings, although not qualifying as adjudications governed by the Administrative Procedure Act, 5 U.S.C. 552b(c)(1), are nonetheless exempt from the PRA under 44 U.S.C. 3518(c)(1)(B)(ii).

#### The Proposed Rule

For the reasons discussed in the preamble, the Board proposes to amend 29 CFR part 103 as follows:

#### PART 103—OTHER RULES

- 1. The authority citation for part 103 continues to read as follows:

**Authority:** 29 U.S.C. 156, in accordance with the procedure set forth in 5 U.S.C. 553.

#### Subpart D—Joint Employers

- 2. Revise § 103.40 to read as follows:

#### § 103.40 Joint Employers.

(a) An employer, as defined by section 2(2) of the National Labor Relations Act (the Act), is an employer of particular employees, as defined by section 2(3) of the Act, if the employer has an employment relationship with those employees under common-law agency principles.

(b) For all purposes under the Act, two or more employers of the same particular employees are joint employers of those employees if the employers share or codetermine those matters governing employees’ essential terms and conditions of employment.

(c) To “share or codetermine those matters governing employees’ essential terms and conditions of employment” means for an employer to possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both), one or more of the employees’ essential terms and conditions of employment.

(d) “Essential terms and conditions of employment” will generally include, but are not limited to: wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance.

(e) Whether an employer possesses the authority to control or exercises the power to control one or more of the employees’ terms and conditions of employment is determined under common-law agency principles. Possessing the authority to control is sufficient to establish status as a joint employer, regardless of whether control is exercised. Exercising the power to control indirectly is sufficient to establish status as a joint employer, regardless of whether the power is exercised directly. Control exercised through an intermediary person or entity is sufficient to establish status as a joint employer.

(f) Evidence of an employer’s control over matters that are immaterial to the existence of an employment relationship under common-law agency principles or control over matters that do not bear on the employees’ essential terms and conditions of employment is not relevant to the determination of whether the employer is a joint employer.

(g) A party asserting that an employer is a joint employer of particular employees has the burden of establishing, by a preponderance of the evidence, that the entity meets the requirements set forth in paragraphs (a) through (f) of this section.

(h) The provisions of this section are intended to be severable. If any paragraph of this section is held to be unlawful, the remaining paragraphs of this section not deemed unlawful shall remain in effect to the fullest extent permitted by law.

Dated: August 31, 2022.

**Roxanne L. Rothschild,**

*Executive Secretary.*

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#### DEPARTMENT OF HOMELAND SECURITY

#### 48 CFR Parts 3049 and 3052

[Docket No. DHS–2022–0046]

RIN 1601–AB08

#### Homeland Security Acquisition Regulation (HSAR); United States Coast Guard Contract Termination Policy (HSAR Case 2020–001)

**AGENCY:** Office of the Chief Procurement Officer, Department of Homeland Security (DHS).

**ACTION:** Proposed rule.

**SUMMARY:** DHS is proposing to amend the Homeland Security Acquisition Regulation (HSAR) to add a new subpart and new contract clause to establish contract termination policy for the United States Coast Guard (USCG) and amend a clause to address the applicability of USCG’s contract termination policy to commercial items.

**DATES:** Interested parties should submit written comments to one of the addresses shown below on or before November 7, 2022, to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments identified by HSAR Case 2020–001, Contract Termination Policy for the United States Coast Guard, using any of the following methods:

• *Regulations.gov*: <https://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by entering “HSAR Case 2020–001” under the heading “Enter Keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “HSAR Case 2020–001.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “HSAR Case 2020–001” on your attached document.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check [www.regulations.gov](https://www.regulations.gov), approximately two to three days after submission to verify posting. The Department is not accepting mailed comments at this time.

**FOR FURTHER INFORMATION CONTACT:** Ms. Linda Stivaletti-Petty, Procurement Analyst, DHS, Office of the Chief Procurement Officer, Acquisition Policy and Legislation at (202) 447–5639 or email [HSAR@hq.dhs.gov](mailto:HSAR@hq.dhs.gov). When using email, include HSAR Case 2020–001 in the “Subject” line.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Federal Acquisition Regulations (FAR), found in 48 CFR part 1, is a uniform regulation regarding the acquisition of goods and services for Federal Government agencies. 48 CFR part 12, “Acquisition of Commercial Products and Commercial Services,” deals with the acquisition of commercial items, while part 49 discusses the termination of contracts or solicitations. Under 48 CFR 49.101 contracts or solicitations may be terminated, either for convenience or default, only when it is in the government’s interest. The use of a termination provision depends on the contract type such as a supply contract, service contract, construction contract, research and development contract and the method of payment, *i.e.*, fixed price or cost type.<sup>1</sup>

Section 3523 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232)(14 U.S.C. 1155(a)) requires that before terminating a procurement or acquisition contract with a total value of more than \$1,000,000, the Commandant of the Coast Guard shall notify each vendor under such contract and require the vendor to maintain all work product

related to the contract until the earlier of— (A) not less than 1 year after the date of the notification; or (B) the date the Commandant notifies the vendor that maintenance of such work product is no longer required.<sup>2</sup>

Specifically, 14 U.S.C. 1155(b) defines “work product” to mean: (1) tangible and intangible items and information produced or possessed as a result of a contract and (2) includes—(A) any completed end items; (B) any uncompleted end items; and (C) any property in the contractor’s possession in which the United States Government has an interest. Section 1155(c) establishes a penalty such that any vendor that fails to maintain the work product is liable to the United States for a civil penalty of not more than \$25,000 for each day on which the work product is unavailable.

Department of Homeland Security (DHS) is proposing to add a new subpart regarding contract termination policy for the United States Coast Guard (USCG) in the Homeland Security Acquisition Regulation (HSAR)<sup>3</sup> to ensure all USCG contractors and subcontractors comply with contract termination policy.

**II. Proposed Changes**

This rule proposes to amend the HSAR to:

Add new subpart 3049.90 Contract Termination (USCG) to part 3049 Termination of Contracts. This new subpart would consist of two sections, section 3049.9001 Policy (USCG) and section 3049.9002 Contract Clause (USCG). The proposed addition of this subpart and sections would align the USCG’s contract termination regulatory requirements with 14 U.S.C. 1155. HSAR 3049.9001 Policy (USCG) would incorporate the provisions laid out in 14 U.S.C. 1155(a), regarding the termination of contracts and maintenance of all work product related to contracts. The proposed policy would require that before terminating a contract with a value of more than \$1,000,000, the Commandant of the Coast Guard shall notify the contractor and the contractor shall be required to maintain all work product related to the

contract until the earlier of—(1) not less than 1 year after the date of the notification; or (2) the date the Commandant notifies the vendor that maintenance of such work product is no longer required. The proposed definition of “Work Product” is also taken from 14 U.S.C. 1155. This proposed new subpart would state that a contractor that fails to maintain a work product is liable to the United States for a civil penalty of not more than \$25,000 for each day on which such work product is unavailable. This subpart would require the USCG to insert this contract termination policy in all contracts, including contracts for commercial items, with a total value of more than \$1,000,000. These proposed revisions to the HSAR are necessary to ensure USCG contractors understand their roles and responsibilities to maintain work product in the event of a termination, as required by 14 U.S.C. 1155.

This proposal would add a new HSAR clause, “3052.249–90 Contract Termination (USCG),” that would implement 3049.9001 Policy (USCG). This clause would be required in all USCG solicitations and contracts, including contracts for commercial items, with a total value of more than \$1,000,000.

This proposed rule would also amend HSAR clause 3052.212–70 “Contract Terms and Conditions Applicable to DHS Acquisition of Commercial Items” to add HSAR clause 3052.249–90 “Contract Termination (USCG) that would implement 3049.9–9001 Policy (USCG)”. This clause would be required in all USCG solicitations and contracts, including contracts for commercial items, with a total value of more than \$1,000,000.

**III. Applicability to Commercial Item Acquisitions, Including Commercially Available Off-the-Shelf (COTS) Items, and Acquisitions Below the Simplified Acquisition Threshold (SAT)**

Section 3523 of the NDAA also provides for a civil penalty and does not limit the application of the requirements of the statute to non-commercial contracts. Consistent with 41 U.S.C. 1905, 1906, and 1907, the DHS Chief Procurement Officer has determined that section 3523 of the NDAA does apply to the acquisition of commercial items, including COTS items. Because 41 U.S.C. 3523 states it applies to contracts with a total value of more than \$1,000,000, the requirements of the statute do not apply to contracts below the SAT.

<sup>2</sup> This section of the NDAA was originally codified at 14 U.S.C. 657. However, section 108(b) of the Frank LoBiondo Coast Guard Authorization Act of 2018 (Pub. L. 115–282) subsequently redesignated § 657 as 14 U.S.C. 1155.

<sup>3</sup> The HSAR is issued for Departmental guidance according to the policy cited in the FAR at 48 CFR 1.301. The HSAR establishes uniform DHS policies and procedures for all acquisition activities within the DHS and is issued by the Chief Procurement Officer who is the DHS Senior Procurement Executive. The HSAR is located at 48 CFR Chapter 30.

<sup>1</sup> See 48 CFR 49.5.

**IV. Executive Orders 12866 and 13563**

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the 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). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

The Office of Management and Budget (OMB) has not designated this proposed rule a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it. A regulatory analysis (RA) follows.

Table 1 presents a summary of impacts of the proposed rule.

**TABLE 1—SUMMARY OF IMPACTS OF THE NPRM**

Category	Summary
Applicability .....	Addition of contract termination and notification requirements for the Coast Guard in Chapter 30 of the HSAR for contracts that are terminated by the Coast Guard, this would apply to new contracts, including contracts for commercial items of more than \$1 million.
Affected Population .....	Contractors and subcontractors whose contracts are terminated by the Coast Guard. Approximately 2 contracts annually.
Costs .....	There are no new costs of the proposed rule as its proposed requirements already exist in other regulations and statutes.
Unquantified Benefits .....	The proposed rule would provide consistency between existing statutes and regulations for contractors and subcontractors whose contracts are terminated by the Coast Guard.

The Federal Government seeks contractual work with the general public when it wishes to purchase, rent, lease, or otherwise obtain supplies or services from non-Federal sources. The FAR defines this process as “contracting.”<sup>4</sup> This proposed rule would revise the HSAR to require Coast Guard to insert termination and notification requirements into its new contracts (this rulemaking would not apply to existing Coast Guard contracts), including contracts for commercial

items, with a total value of more than \$1 million. The Coast Guard incorporates contract termination clauses in accordance with the FAR, the HSAR, the Homeland Security Acquisition Manual (HSAM), and the Coast Guard Acquisition Procedures (CGAP) into contracts as applicable and using this clause when deemed necessary for the Coast Guard to exercise its right to do so. Based on our analysis, we do not estimate that this proposed rule would

impose any new requirements or regulatory costs on contractors and subcontractors who perform contractual work, with a total value of more than \$1 million, for the Federal Government. Our analysis also shows that the Federal Government would not incur any new regulatory costs as a result of this proposed rule. We present a summary of the estimated impacts of the proposed rule in Table 2.

**TABLE 2—PROPOSED CHANGES AND THE ESTIMATED IMPACTS**

HSAR part or subpart affected	Description of proposed change	Basis for no cost impact
3049 .....	Removes the term “Reserved” in the Homeland Security Acquisition Regulation (HSAR). Adds terms to the HSAR: —“Part 3049” to Termination of Contracts. —“Subpart 3049.90 Contract Termination (USCG)”. —“3049.9001 Policy (USCG)”. —“3049.9002 Contract Clause (USCG)”, part and subpart titles.	Administrative, <sup>5</sup> we do not estimate a cost for this item because it contains the insertion of the text, with no requirements, in part 3049 of the HSAR.
3049.90 .....	Adds term “Contract Termination (USCG)”—subpart title, to the HSAR.	Administrative, we do not estimate a cost for this item because it contains the insertion of text, with no requirements, in part 3049 of the HSAR.
3049.9001 .....	Adds term “Policy (USCG)”—title, to the HSAR .....	Administrative, we do not estimate a cost for this item because it contains the insertion of text, with no requirements, in part 3049 of the HSAR.
3049.9001(a) .....	Adds paragraph (a) to the HSAR and would implement requirements of 14 U.S.C. 1155, which provides contract termination policy for procurement or acquisition contracts, including commercial contracts greater than \$1 million.	We do not estimate a cost for this regulatory provision because the FAR, Title 48 of the CFR, currently requires the Federal Government to include similar language in applicable Federal contracts. Termination and notification requirements are addressed in subpart 49.1 of the FAR. The statutory language for contract termination is currently in 14 U.S.C. 1155(a)(1) for all contracts, including commercial contracts, with a total value of more than \$1 million.

<sup>4</sup> Readers should reference the FAR for a full definition of the term “contracting”.

TABLE 2—PROPOSED CHANGES AND THE ESTIMATED IMPACTS—Continued

HSAR part or subpart affected	Description of proposed change	Basis for no cost impact
3049.9001(b) .....	Adds paragraph (b) to the HSAR, “Notification”—title. Paragraph would implement requirements of 14 U.S.C. 1155, which states the Commandant of the Coast Guard must notify the contractor before terminating a procurement or acquisition contract of greater than \$1 million and the contractor must maintain work product as specified in the Code.	We do not estimate a cost for this regulatory provision because subpart 49.1 of the FAR currently contains notification requirements for the Federal Government. The statutory language for notification of contract termination is currently in 14 U.S.C. 1155(a)(1) for procurement or acquisition contracts of more than \$1 million (14 U.S.C. 1155(b) defines work product). Maintaining of records is required by section 4.7 of the FAR. The Federal Government is currently required to include similar language in applicable Federal contracts.
3049.9001(c) .....	Adds paragraph (c) “Work Product Defined”—title, to the HSAR.	Administrative—we do not estimate a cost for the addition of this regulatory provision because there is no requirement, 14 U.S.C. 1155 currently contains the definition of the term “work product”.
3049.9001(d) .....	Adds paragraph (d) “Penalty”—title, to the HSAR .....	We do not estimate a cost for this provision because 14 U.S.C. 1155 currently contains the statutory language for “penalty”. This item has not been levied for past Coast Guard contracts since the statute was enacted in 2019.
3049.9001(e) .....	Adds paragraph (e) to the HSAR, which states the substance of the clause shall be inserted by the contractor in contracts and subcontracts and for commercial items with a total value of more than \$1 million.	We do not estimate a cost for this provision because subpart 49.5 of the FAR requires the contracting officer to insert similar language in applicable contracts. The relevant clauses are in subpart 52.249–1 through 10 of the FAR.
3049.9002 .....	Adds the term “Contract Clause (USCG)”-title, to the HSAR; states Coast Guard contracting officers shall insert the clause at 3052.249–90 in all solicitations and contracts, including commercial items with a total value of more than \$1 million.	Administrative—we do not estimate a cost for the addition of the title to this subpart of the HSAR. We do not estimate a cost for this regulatory provision itself because the contracting officer of the Coast Guard currently inserts similar language in applicable contracts, including contracts for commercial items, with a total value of more than \$1 million.
3052 .....	In subpart 3052.2 of the HSAR, “Texts of Provisions and Clauses”, adds term “3052.249–90 Contract Termination (USCG)”.	Administrative—we do not estimate a cost for this item because it includes the insertion of the regulatory text, with no requirements, in part 3052 of the HSAR.
3052.249–90 .....	—Adds text “Contract Termination (USCG)”-title, to part 3052 of the HSAR. —Adds sentence to part 3052 of the HSAR, “As prescribed in the USCG guidance at (HSAR) 48 CFR 3049.9002, insert the following clause:.” —Adds text “Contract Termination (USCG) (Month 2022)” and paragraphs (a) through (e) to part 3052 of the HSAR.	Administrative—we do not estimate a cost for the insertion of the regulatory text that would be added to part 3052 of the HSAR. We do not estimate costs for the regulatory text in paragraphs (a) through (e) of this subpart because the requirements are currently contained in 49.5 of the FAR. The statutory language currently exists in 14 U.S.C. 1155. The requirements are also in 3049.9001(a) through (e).
3052.212–70 .....	Adds term “3052.249–90 Contract Termination (USCG)” to the HSAR.	Administrative—we do not estimate a cost for this item because it contains the insertion of the regulatory text, with no requirements, in part 3052 of the HSAR.

*Affected Population*

The affected population of this proposed rule is a contractor (if a contractor enters into a contract with a subcontractor, the subcontractor would be counted as part of the main or primary contract) whose contract is terminated by the Coast Guard; this would apply only to a contract, including a commercial contract, with a total value of more than \$1 million.

DHS and the Coast Guard worked collaboratively to provide the information for this regulatory analysis. The Coast Guard collected acquisition data from the Coast Guard’s Office of

Procurement Policy and Oversight to obtain the population or the number of contracts it has acquired over the past 11 years. We used the Federal Procurement Data System-Next Generation (FPDS-NG) database to collect the acquisition data.<sup>6</sup> The Coast Guard acquired a total of 7,228 contracts, including commercial items, with a total value of more than \$1 million, from fiscal year 2010 (FY 2010) through fiscal year 2020 (FY 2020), which ended on September 30, 2020. Included in this number are an unknown number of subcontracts. For accounting purposes, the Coast Guard counts the main contract or the contract it awards as the primary contract, along

with subcontracts, if applicable, as 1 contract.<sup>7</sup> During this period of time, the Coast Guard terminated 25 contracts with a value of more than \$1 million, or an average of about 2.3 contracts a year.

Of the 7,228 total contracts, the Coast Guard awarded contracts to 3,947 small businesses.<sup>8</sup> Out of the 25 contracts,

<sup>7</sup> A fiscal year in the Federal Government is the period of time from October 1 in one calendar year to September 30 of the following calendar year. It is the accounting period when Federal agencies submit budget requests to the Office of Management and Budget (OMB) for planning and operational purposes. The data we collected are through fiscal year 2020; the Coast Guard generally awards contracts, through its budget and acquisition process, in the preceding fiscal year for the following fiscal year.

<sup>8</sup> When a small business wishes to obtain a Federal contract, it can do so by “self-certification” on the Small Business Administration’s (SBA) website before it registers for contract opportunities with the Federal Government. Readers can learn more about this process using the General Services Administration’s (GSA) website at: <https://www.gsa.gov/small-business#gsa-now>. A small

<sup>5</sup> We use the term “administrative” to mean proposed editorial changes or proposed changes to the regulatory text that contain no regulatory requirements or impacts to the affected population of the proposed rule. The provisions we identified as “administrative” in Table 2 do not have quantifiable costs, cost savings, or benefits associated with them. See Table 1 for the unquantified benefits of the proposed rule.

<sup>6</sup> The Federal Government retains data on Federal procurements through the FPDS-NG. Readers can reference the FPDS-NG website for information on the procurement of Federal contracts at: <https://www.gsa.gov/tools-overview/buying-and-selling-tools/federal-procurement-data-system>.

including commercial contracts, with a value of more than \$1 million, that the Coast Guard terminated during this period of time, 8 of them were associated with small businesses. This is an average of less than 1 small business contract termination a year (we discuss the impacts to small entities in Section IV, “Regulatory Flexibility Act”, of this “Regulatory Analysis”).

#### *Cost Analysis of the Proposed Rule*

This proposed rule would not impose any new regulatory costs on contractors, subcontractor, and the Federal Government because the requirements of this proposed rule currently exist in the FAR and in the statute (see 48 CFR chapter 1). We explain our reasoning below for each regulatory provision of this proposed rule. However, the FAR does not contain the penalty clause that exists in 14 U.S.C. 1155 that we would implement in section 3049.9001, paragraph (d).

We do not estimate a cost for the items we identified as “administrative” in Table 2 because they would contain the addition of the regulatory text in the HSAR. This includes adding part, subpart, and section titles to the HSAR. This would cover part 3049, subpart 3049.90 (with sections 3049.9001 and 3049.9002), part 3052, and 3052.212–70 of the HSAR (see Table 2).

Subpart 3049.90 of the HSAR would contain the contract termination policy and notification of termination requirements for the Coast Guard.

Section 3049.9001 would implement the requirements of the NDAA. Paragraph (a) would implement the current statutory language in 14 U.S.C. 1155(a)(1), which provides the contract termination policy for Coast Guard contracts, including contracts for commercial items, with a total value of more than \$1 million. Additionally, subpart 49.1 (49.101) of the FAR currently provides the authority for Federal agencies and more specifically contracting officers to terminate contracts “. . . for the convenience of the Government, or for default . . .”. Because the proposed rule would add the statutory language, which

supplements the existing regulatory requirement for contract termination of subpart 49.1 of the FAR, we do not estimate a cost for this proposed change.

Paragraph (b) of section 3049.9001 would contain the notification requirement for the Commandant of the Coast Guard to notify the contractor before terminating a contract, including contracts for commercial items, with a total value of more than \$1 million, and for the contractor to maintain all work product related to the contract until the earlier of—

(1) Not less than 1 year after the date of notification; or

(2) The date the Commandant notifies the vendor that maintenance of such work product is no longer required.

Title 14 U.S.C. 1155(a)(1), currently provides the statutory authority for the Commandant of the Coast Guard to notify the contractor before terminating a procurement or acquisition contract with a total value of more than \$1 million. It also states the contractor must maintain all work product related to the contract as we previously mentioned. Subpart 49.1, specifically section 49.102 of the FAR currently contains the regulatory requirement that Federal contracting officers notify the contractor before terminating a contract for convenience or default. Title 14 U.S.C. 1155 does not specify the method of notification; however, the FAR states it must be by written notice or it “may be expedited by means of electronic communication capable of providing confirmation of receipt by the contractor”. It has been the past (and current) practice of the Coast Guard to notify contractors of contract termination by electronic means and for the contractor to reply by electronic means; therefore, this is not a new requirement and it would not impose any new costs on the contractor and the Coast Guard for this method of notification. Because the proposed rule would add the statutory language for the notification of contract termination, which section 49.102 of the FAR allows by electronic means, we do not estimate a cost for this proposed change (the statutory language for this provision also exists in 14 U.S.C. 1155).

We also do not estimate a cost for the requirement of the contractor to maintain all work product related to the contract because 14 U.S.C. 1155(b) statutorily requires the contractor to perform this function for the timeframe specified in the statute. Furthermore, subpart 4.7 [specifically sections 4.703(a) through (d)] of the FAR requires a contractor to retain records for the time specified in these regulations (readers should refer to subpart 4.7 of

the FAR for contractor records retention).

Additionally, this is not a new Information Collection Request (ICR) nor would it amend an existing ICR under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501).<sup>9</sup> The proposed rule would add the statutory language, codified in 14 U.S.C. 1155, to this subpart and paragraph of the HSAR and would ensure the contractor maintains the work product for the timeframes specified in the statute. Lastly, because the Coast Guard terminated an average of about 2 contracts a year over the past 11 years, this number does not exceed the threshold of 10 or more persons for a collection of information as defined in Title 5 part 1320 of the CFR.<sup>10</sup>

Paragraph (c) of 3049.9001 would contain the definition of the term “work product” and would be titled “Work Product Defined.” We classify this as an administrative provision without a regulatory requirement. We do not estimate a cost for this provision because this proposed rule would add this definition to the HSAR, which is codified in the statute in 14 U.S.C. 1155.

Paragraph (d) of 3049.9001 would add the penalty a contractor would incur if it fails to maintain the work product defined in paragraph (c) of this section. The Coast Guard does not believe it is likely it will levy this penalty in the future because for the contracts that it has terminated, the Coast Guard has generally been able to access the maintained work product when necessary. Because this regulatory language is codified in the statute in 14 U.S.C. 1155, we do not estimate a cost for this proposed change to the HSAR.

Paragraph (e) of 3049.9001 would contain the requirement for the contractor to insert the substance of the clause into contracts and subcontracts, including contracts and for commercial items with a total value of more than \$1 million. Subpart 49.5 (“Contract Termination Clauses”) of the FAR requires contracting officers to insert the substance of the clause into solicitations and contracts as specified in the statute. As a result, we classify this regulatory language and addition to the HSAR as an administrative item; therefore, we do not estimate a cost for this proposed change.

<sup>9</sup> Readers should reference the PRA for further information at: <https://www.govinfo.gov/content/pkg/PLAW-104publ13/html/PLAW-104publ13.htm>.

<sup>10</sup> Readers should reference the CFR for a full definition of the term “collection of information” and for further information on controlling paperwork burdens on the public at: <https://www.govinfo.gov/content/pkg/CFR-2010-title5-vol3/xml/CFR-2010-title5-vol3-part1320.xml>.

business is one that meets SBA’s size standards based upon the North American Industry Classification System (NAICS). Readers can reference SBA’s table of size standards and the NAICS codes at: <https://www.sba.gov/document/support-table-size-standards>. For more information on NAICS codes, readers should reference the U.S. Census Bureau’s website at: <https://www.census.gov/naics/>. Small businesses may also obtain Federal contracts through GSA’s “One Acquisition Solution for Integrated Services” (OASIS) Small Business (OASIS SB) contracts, see: <https://www.gsa.gov/buying-selling/products-services/professional-services/buy-services/oasis-and-oasis-small-business>.

The proposed rule would add section 3049.9002, “Contract Clause (USCG)”, to subpart 3049.90 of the HSAR. It states Coast Guard contracting officers shall insert the clause at 3052.249–90, “Contract Termination (USCG)”, in all solicitations and contracts, including contracts for commercial items, with a total value of more than \$1 million. Similar to the proposed paragraph (e) of subpart 3049.9001, the contracting officer of the Coast Guard is required in subpart 49.5 of the FAR to insert this language into all solicitations and contracts.<sup>11</sup> As a result, we classify this regulatory language and addition to the HSAR as an administrative item; therefore, we do not estimate a cost for this proposed change.

Lastly, the proposed rule would add section 3052.249–90, “Contract Termination (USCG)”, to the HSAR. We classify this proposed change as an administrative item, which would add the regulatory language with the same requirements that would be contained in section 3049.9001, paragraphs (a) through (e) of HSAR. As a result, we do not estimate a cost for this proposed change.

#### *Benefit Analysis of the Proposed Rule*

The primary benefit of this proposed rule is to provide contractors and subcontractors, a consistent regulatory environment between the U.S.C., the FAR, and the HSAR, in the event the Federal Government terminates a contract, including contracts for commercial items, with a total value of more than \$1 million. The regulatory consistency also includes the notification of termination to a contractor by the Commandant of the Coast Guard. The HSAR would contain the requirement of the U.S.C. for the contractor to maintain the work product specified and the penalty to be levied against a contractor for not maintaining the work product as defined in the statute.

#### *Alternatives of the Proposed Rule*

DHS considered two alternatives to this proposed rule. Neither alternative would align the HSAR with the statutory requirements of 14 U.S.C. 1155, nor would they provide the

<sup>11</sup> The proposed rule includes all Coast Guard contracts. The Coast Guard, however, issues primarily fixed-price contracts or firm fixed-price contracts. The FAR defines fixed-price contracts as types of contracts that “. . . provide for a firm price or, in appropriate cases, an adjustable price . . . the contracting officer shall use firm fixed-price or fixed price with economic price adjustment contracts when acquiring commercial items, except as provided in 12.207(b)”. Readers should refer to the FAR for information about other types of contracts.

consistent regulatory environment of the chosen alternative.

1. *No Action Alternative.* We rejected this alternative because the HSAR would not align with the relevant statute, which contain the statutory requirements for contract termination and notification for the Coast Guard, specifically, the National Defense Authorization Act (NDAA) for Fiscal Year 2019 (Pub. L. 115–232), 14 U.S.C. 1155, and subpart 49.5 of the FAR.<sup>12</sup> The statutory requirements are applicable to contracts, including contracts for commercial items, with a total value of more than \$1 million. The HSAR would also not contain the requirement for the contractor to maintain the work product as defined in the U.S.C. Lastly, the HSAR would not contain the penalty specified in the U.S.C. levied against a contractor for not maintaining the work product.

2. *Issue a policy letter referencing the FAR and the U.S.C. for contract termination policy and notification for the Coast Guard.* We rejected this alternative because the a policy letter would not revise the HSAR and thus it would not contain the requirements found in 14 U.S.C. 1155. A policy letter would merely provide guidance for contractors regarding the Coast Guard’s contract termination policy, including the penalty clause, and notification procedures for requirements that currently exist in the relevant statutes and regulations. There would be no costs associated with this alternative.

#### **V. Regulatory Flexibility Act**

Under the Regulatory Flexibility Act, 5 U.S.C. 601 612, we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

This proposed rule would not impose any new requirements or costs on small entities. This proposed rule would insert the Coast Guard’s termination policy and the notification of termination procedures for contracts, including contracts for commercial items, with a total value of more than \$1 million, into DHS’ HSAR. The requirements for contract termination and notification are currently in subpart 49.5 of the FAR and 14 U.S.C. 1155.

<sup>12</sup> For further information, readers should reference the NDAA for fiscal year 2019 at: <https://www.congress.gov/115/bills/hr5515/BILLS-115hr5515enr.pdf>.

The Coast Guard collected data on contracts it terminated over the past 11 years, including contracts for commercial items, with a total value of more than \$1 million. Over this period of time, the Coast Guard terminated 8 contracts (or less than 1 a year on average) awarded to small businesses that met this total dollar value. Although these 8 companies registered as a “small business” with the SBA in order to obtain a contract with the Federal Government as a small business, we researched these companies to determine the type of small entity that they are in order to correctly classify them in this Regulatory Flexibility Act (RFA) analysis. This is necessary because a “small business” is one type of small entity as stated previously in this section.

We obtained the NAICS codes from the FPDS–NG for all 8 companies. We found company-specific information on 6 of the 8 companies by using the publicly-available online database of businesses in the United States, ReferenceUSA.gov (we did not find revenue or employee information for 2 companies, and assumed they were small).<sup>13</sup> Nevertheless, based on each company’s NAICS code, and using SBA’s table of size standards for each NAICS code, we found all of the 8 companies, who had contracts with a total value of more than \$1 million that were terminated by the Coast Guard, to be small businesses, and not governmental jurisdictions or not-for-profit organizations that are independently owned and operated and are not dominant in their fields.

As noted above, that the Coast Guard terminated an average of less than 1 contract a year (over the past 11 years) that was associated with a small entity and that the proposed rule would not impose any new requirements or costs on small entities. Therefore, DHS certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment to the docket at the address listed in the **ADDRESSES** section of this preamble. In your comment, explain why you think it qualifies and how and to what degree this proposed rule would economically affect it.

<sup>13</sup> Readers can access the database at: <https://www.referenceusagov.com/Home/Home>.

## VI. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) requires agencies to consider the impact of paperwork and other information collection burdens imposed on the public. According to the 1995 amendments to the Paperwork Reduction Act, an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. As defined in 5 CFR 1320.3(c), “collection of information” comprises reporting, recordkeeping, monitoring, posting, labeling, and other similar actions.

DHS has determined that there would be no new requirement for information collection associated with this proposed rule. This proposed rule would not change the burden in the collections currently approved by OMB under OMB Control Numbers, 1600–0002, “Various Contract Related Forms that will be Included in the Homeland Security Acquisition Regulation”, 1600–0003, “Post-Contract Award Information”, and 1600–0005, “Solicitation of Proposal Information for Award of Public Contracts”. There are no Coast Guard Information Collection Requests (ICRs) associated with non-Federal contracts.

### List of Subjects in 48 CFR Parts 3049 and 3052

Government procurement.

#### Paul Courtney,

Chief Procurement Officer, Department of Homeland Security.

Therefore, DHS proposes to amend 48 CFR parts 3049 and 3052 as follows:

### PART 3049—TERMINATION OF CONTRACTS

■ 1. The authority citation for part 3049 is revised to read as follows:

Authority: 14 U.S.C. 1155.

■ 2. Add subpart 3049.90 to read as follows:

#### Subpart 3049.90 Contract Termination (USCG)

3049.9001 Policy (USCG).  
3049.9002 Contract clause (USCG).

#### 3049.9001 Policy (USCG).

(a) This section implements 14 U.S.C. 1155 and provides the policy for the USCG to use for contract terminations. This contract termination policy applies to USCG contract terminations, including contracts for commercial items, with a total value of more than \$1,000,000.

(b) *Notification.* Before terminating a contract with a total value of more than \$1,000,000, the Commandant of the Coast Guard shall notify the contractor and the contractor shall be required to maintain all work product related to the contract until the earlier of—

(1) not less than 1 year after the date of the notification; or  
(2) the date the Commandant notifies the vendor that maintenance of such work product is no longer required.

(c) *Work Product Defined.* The term “work product”—

(1) means tangible and intangible items and information produced or possessed as a result of a contract referred to in subsection (b); and  
(2) includes—  
(i) any completed end items;  
(ii) any uncompleted end items; and  
(iii) any property in the Contractor’s possession in which the United States Government has an interest.

(d) *Penalty.* A Contractor that fails to maintain work product as required under subsection (b) is liable to the United States for a civil penalty of not more than \$25,000 for each day on which such work product is unavailable.

(e) The Contractor shall insert the substance of this clause in contracts and subcontracts, including contracts and for commercial items, with a total value of more than \$1,000,000.

#### 3049.9002 Contract clause (USCG).

USCG contracting officers shall insert the clause at 3052.249–90, Contract Termination (USCG), in all solicitations and contracts, including contracts for commercial items, with a total value of more than \$1,000,000.

### PART 3052—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. The authority citation for part 3052 is revised to read as follows:

Authority: 5 U.S.C. 301–302, 14 U.S.C. 1155, 41 U.S.C. 1303, 41 U.S.C. 1707, 41 U.S.C. 1702, and 48 CFR subpart 1.3.

■ 4. Add § 3052.249–90 to read as follows:

#### § 3052.249–90 Contract Termination (USCG).

As prescribed in the USCG guidance at (HSAR) 48 CFR 3049.9002, insert the following clause:

#### Contract Termination (USCG) (Month 2022)

(a) This contract is subject to Section 3523 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232), 14 U.S.C. 1155, pertaining to contract terminations for the United States Coast Guard (USCG).

(b) *Notification.* As required by 14 U.S.C. 1155(b), before terminating a contract with a total value of more than \$1,000,000, the Commandant of the Coast Guard shall notify the contractor and the contractor shall be required to maintain all work product related to the contract until the earlier of—

(1) not less than 1 year after the date of the notification; or  
(2) the date the Commandant notifies the vendor that maintenance of such work product is no longer required.

(c) *Work Product Defined.* In this clause the term “work product”—

(1) means tangible and intangible items and information produced or possessed as a result of a contract referred to in subsection (b); and  
(2) includes—  
(i) any completed end items;  
(ii) any uncompleted end items; and  
(iii) any property in the Contractor’s possession in which the United States Government has an interest.

(d) *Penalty.* A Contractor that fails to maintain work product as required under subsection (b) is liable to the United States for a civil penalty of not more than \$25,000 for each day on which such work product is unavailable.

(e) The Contractor shall insert the substance of this clause in contracts and subcontracts, including contracts for commercial items, with a total value of more than \$1,000,000.

(End of clause)

#### § 3052.212–70 Contract Terms and Conditions Applicable to DHS Acquisition of Commercial Items. [Amended]

■ 5. In § 3052.212–70, add the text “\_HSAR 3052.249–90 Contract Termination (USCG)” at the end of the section, after the text “\_3052.247–72 F.o.B. Destination Only.” and before the text “(End of clause)”.

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