

available to the program or component for which the ICT supply or service is being procured.

(2) *Fundamental alteration.* When an agency determines that acquisition of ICT that conforms with all applicable ICT accessibility standards would result in a fundamental alteration in the nature of the ICT, such acquisition is required to conform only to the extent that conformance will not result in a fundamental alteration in the nature of the ICT.

(3) *Nonavailability of conforming commercial items.* Where there are no commercial items that fully conform to the ICT accessibility standards, the agency shall procure the supplies or service available in the commercial marketplace that best meets the ICT accessibility standards consistent with the agency's needs.

(b) *Alternative means of access.* An agency shall provide individuals with disabilities access to and use of information and data by an alternative means to meet the identified needs when an exemption in paragraphs (a)(1), (2), or (3) of this section applies.

(c) *Documentation.* When an exemption applies, the contracting officer shall obtain, as part of the requirements documentation, a written determination from the requiring activity explaining the basis for the exemption in paragraphs (a)(1), (2) or (3) of this section. This documentation shall be maintained in the contract file.

(1) *Undue burden.* A determination of undue burden shall address why and to what extent compliance with applicable ICT accessibility standards constitutes an undue burden.

(2) *Fundamental alteration.* A determination of fundamental alteration shall address the extent to which compliance with the applicable ICT accessibility standards would result in a fundamental alteration in the nature of the ICT.

(3) *Nonavailability of conforming commercial items.* A determination of commercial items nonavailability shall include—

(i) A description of the market research performed;

(ii) A listing of the requirements that cannot be met; and

(iii) The rationale for determining that the ICT to be procured best meets the ICT accessibility standards in 36 CFR 1194.1, consistent with the agency's needs.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 19 and 52

[FAC 2021-07; FAR Case 2016-011; Item II; Docket No. 2016-0011; Sequence No. 1]

RIN 9000-AN35

Federal Acquisition Regulation: Revision of Limitations on Subcontracting

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement revised and standardized limitations on subcontracting, including the nonmanufacturer rule, that apply to small business concerns.

DATES: Effective September 10, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Mahruha Uddowla, Procurement Analyst, at 703-605-2868 or by email at mahruha.uddowla@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 2021-07, FAR Case 2016-011.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule at 83 FR 62540 on December 4, 2018, to implement regulatory changes made by the Small Business Administration (SBA) in its final rule published in the **Federal Register** at 81 FR 34243 on May 31, 2016, which became effective on June 30, 2016. SBA's final rule implements the statutory requirements of section 1651 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (15 U.S.C. 657s). Section 1651 revised and standardized the limitations on subcontracting, including the nonmanufacturer rule, that apply to small business concerns under FAR part 19. Twenty-nine respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils)

reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes

This final rule makes the following significant changes from the proposed rule:

- *The definition of “similarly situated entity”.* The definition of “similarly situated entity” is revised at FAR 19.001 and in FAR clause 52.219-14, Limitations on Subcontracting. It now provides an example of entities having the same small business program status and to specify that the entity must be small under the size standard associated with the North American Industry Classification System (NAICS) code the prime contractor assigned to the subcontract.

- *Applicable dollar threshold.* The final rule reflects the clarification that the nonmanufacturer rule and the limitations on subcontracting apply to set-asides and sole source awards made pursuant to subparts 19.8, 19.13, 19.14, and 19.15, as well as awards using the HUBZone price evaluation preference pursuant to subpart 19.13, regardless of dollar value.

- *HUBZone price evaluation preference.*

- Paragraph (e)(2) is added to FAR 19.507, Solicitation provisions and contract clauses, to clarify that, in solicitations and contracts using the HUBZone price evaluation preference, the contracting officer shall insert the clause at FAR 52.219-14, Limitations on Subcontracting. Paragraph (h)(1)(ii)(B) is added to specify that the contracting officer shall insert the clause at FAR 52.219-33, Nonmanufacturer Rule, in solicitations and contracts when the HUBZone price evaluation preference is used. For the FAR clauses at 52.219-14 and 52.219-33, the prescription also states that the contracting officer shall not insert the clause in the resultant contract if the prospective contractor waived the use of the price evaluation preference or is an other than small business.

- The clause at FAR 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns, is revised to remove the proposed rule definition of “similarly situated entity”, and to delete (instead of revising) the new redundant paragraphs (d) and (e), which pertained to the limitation on subcontracting.

- *Limitations on Subcontracting.* FAR clause 52.219-14, Limitations on Subcontracting, is revised to clarify that

this clause applies to contracts using the HUBZone price evaluation preference to award to a HUBZone small business concern unless the concern waived the evaluation preference. Additionally, to provide clarification on calculating the 50 percent limitation for contracts that include both services and supplies (*i.e.*, “mixed contracts”), paragraph (e)(1) of the clause at FAR 52.219–14 is revised to specify that when a contract is assigned a NAICS code for services, the 50 percent limitation shall only apply to the services portion of the contract. Paragraph (e)(2) is revised to specify that when a contract is assigned a NAICS code for supplies, the 50 percent limitation shall only apply to the supply portion of the contract.

- **Nonmanufacturer Rule.** FAR clause 52.219–33, Nonmanufacturer Rule, is revised to clarify the clause applies to contracts using the HUBZone price evaluation preference to award to a HUBZone small business concern unless the concern waived the evaluation preference. Paragraph (c)(2) is revised to remove text concerning an item for a kit that is not produced by small business concerns in the United States or its outlying areas.

- **Revisions to include recent FAR changes.** Prior to publication of this final rule, FAR part 19 and its associated provisions and clauses were substantially revised as a result of FAC 2020–05 (published February 27, 2020, and effective March 30, 2020). As a result, some revisions in the proposed rule are no longer included in this final rule, because the revisions have already been made to the FAR in FAC 2020–05. Other revisions appear in a different location due to the changed landscape of FAR part 19. The final rule also contains revisions that were not in the proposed rule due to changes made in FAC 2020–05. For example, prior to March 30, 2020, the FAR did not include coverage of the limitations on subcontracting and nonmanufacturer rule in subparts 19.8, 19.13, 19.14, and 19.15; FAC 2020–05 added coverage tailored for each of those subparts. Due to the standardization of the limitations on subcontracting and nonmanufacturer rule, this final rule removes the coverage from those subparts and consolidates the coverage in subpart 19.5. In addition, as of March 30, 2020, FAR part 19 includes coverage for orders issued directly to one small business under a reserve. This final rule provides guidance on the applicability of the limitations on subcontracting and nonmanufacturer rule for this new topic.

B. Analysis of Public Comments

1. Support for the Rule

Comment: Several respondents expressed support for the rule.

Response: The Councils acknowledge the expressions of support.

2. Faster Implementation

Comment: Several respondents expressed disappointment at the time it took to publish the proposed rule. More specifically, two respondents noted that it had taken over 2 years to publish the proposed rule. One respondent requested immediate implementation of the rule by means of a class deviation for the civilian agencies or an “interim final rule,” noting that it is burdensome for small businesses if one agency has a class deviation in place while others do not. Another respondent also requested issuance of an “interim final rule” and recommended that the FAR Council coordinate with SBA on SBA’s pending rulemaking and issue its own final rule that matches SBA’s final rule.

Response: The Councils acknowledge the length of time between the opening of FAR case 2016–011 and publication of the proposed rule. More time was required to publish the proposed rule due to changes in the rulemaking process that occurred in 2017 to more fully consider the regulatory or deregulatory impact of the rulemaking. The Councils have taken steps to try to shorten the time required to implement SBA’s rules in the FAR. Beginning in 2019, the Councils started working on proposed FAR rules after SBA publishes a proposed rule, instead of waiting for a final rule from SBA. This approach should allow more timely publication of FAR rules implementing SBA rules.

3. Simplified Acquisition Threshold vs. Dollar Value

Comment: Several respondents recommended changing all references to “\$150,000” to “the simplified acquisition threshold (SAT).” Furthermore, two respondents highlighted the fact that SBA updated its regulation at 13 CFR 121.406(d) to reference the term “the simplified acquisition threshold” and that the FAR at 48 CFR 2.101 contains the definition of the SAT.

Response: This final rule has been revised to include recent amendments to the FAR, including the removal of many of the references to the dollar value “\$150,000” (reference FAC 2020–05).

4. Other Pending FAR Rules

Comment: Two respondents pointed out that the proposed text for FAR

52.219–4(e) does not account for the joint venture options afforded to HUBZone small business concerns under SBA’s regulations and requires further revisions to bring the clause into alignment with SBA’s limitations on subcontracting rules for HUBZone joint ventures. Specifically, the respondents are concerned the SBA’s requirement that a HUBZone joint venture partner perform 40 percent of the joint venture’s work, is not being addressed.

Response: A separate FAR case, 2017–019, Policy on Joint Ventures, will address the respondents’ concern. The final rule will address the policy that a HUBZone joint venture partner must perform 40 percent of the joint venture’s work.

5. HUBZone Price Evaluation Preference

Comment: One respondent stated that the clause at FAR 52.219–4 places HUBZone distributors at a significant disadvantage by effectively preventing them from taking advantage of the HUBZone price evaluation preference, because it is not possible for a HUBZone nonmanufacturer to obtain a waiver of the nonmanufacturer rule from SBA for a full-and-open contract. The respondent also stated that the HUBZone nonmanufacturer should be permitted to supply a product of any business when utilizing the HUBZone price evaluation preference. The respondent further stated that if the clause at FAR 52.219–4 continues to require full compliance with the nonmanufacturer rule for HUBZone distributors, then the waiver rules must be modified to permit SBA to issue a waiver of the nonmanufacturer rule, upon request of a HUBZone firm, for a full and open contract when the price evaluation preference is utilized. The respondent further stated that if HUBZone distributors are not permitted to supply products of any size business, the clause at FAR 52.219–4 should be modified to permit HUBZone distributors to provide products of any type of small business rather than the current requirement to supply products made by other HUBZone small businesses.

Response: This final rule is implementing SBA’s final rule published in the **Federal Register** at 81 FR 34243 on May 31, 2016, and the changes requested by the respondent would not be consistent with that SBA rule. An award made using the HUBZone price evaluation preference is considered a HUBZone contract (see 13 CFR 126.600(c) and FAR 2.101). SBA’s regulations regarding the limitations on subcontracting and the nonmanufacturer rule apply to

HUBZone contracts (see 13 CFR 125.6). The Councils have updated the final rule at FAR 19.507(e) and (h) to clarify that solicitations and contracts using the HUBZone price evaluation preference to award to a HUBZone small business concern must include the FAR clauses at 52.219–14, Limitations on Subcontracting, and 52.219–33, Nonmanufacturer Rule. The Councils have also updated the paragraphs entitled “Applicability” in these clauses to clarify their applicability to contracts awarded to a HUBZone small business concern using the HUBZone price evaluation preference and that the limitations on subcontracting and nonmanufacturer rule do not apply if the price evaluation preference is waived by the offeror.

6a. Similarly Situated Entities—Definition

Comment: One respondent requested clarification on which subcontractors count as similarly situated entities. The respondent specifically requested additional examples regarding “standard small business set-asides.”

Response: SBA’s regulation at 13 CFR 125.1 states that “for small business set-aside, partial set-aside, or reserve” a similarly situated entity is “a subcontractor that is a small business concern.” Therefore, the definition of “similarly situated entity” in this final FAR rule has been revised to clarify that, for a small business set-aside, a similarly situated entity is a small business, without regard to socioeconomic status.

6b. Similarly Situated Entities—Loophole for 8(a) Participants

Comment: One respondent stated the proposed rule circumvents FAR 19.808–1(e) by allowing a new ANC or Indian Tribe to win a sole-source follow-on contract and then to subcontract it to the incumbent without competing it, which would increase costs to the Government. The respondent requested language be added to FAR 52.219–14(e)(1) through (4) to prohibit treatment of such a subcontractor as a similarly situated entity.

Response: The FAR does not direct subcontracting decisions of prime contractors. Additionally, SBA’s regulation does not provide that a prime contractor must compete a subcontract before it can award a subcontract, whether or not the award is to a similarly situated entity. This final rule will not be revised to incorporate the requested language as the rule is consistent with SBA’s regulations.

6c. Treatment of Similarly Situated Entity Subcontractors

Comment: One respondent acknowledged the proposed rule properly provides that first-tier subcontracts awarded to a “similarly situated entity” are excluded from the calculation of the 50 percent subcontract amount that cannot be exceeded. However, the respondent points out, the clauses then provide that all work further subcontracted by such similarly situated entity does count toward the 50 percent subcontract amount that cannot be exceeded. The respondent believes this formulation creates an inconsistency among small business programs and an administrative burden for prime contractors and urges that this further limitation be deleted.

Response: SBA’s regulation at 13 CFR 125.6(c) limits similarly situated entities to the first-tier subcontractors. Therefore, this final rule also contains this limitation. Determining compliance with the limitations on subcontracting by including in the calculation subcontracts beyond the prime contractor and first-tier subcontractor creates the possibility that the first-tier subcontractor may subcontract 100% of the work it received from the prime to an entity that is not similarly situated. This would create a loophole for entities that are not small business concerns and would not have qualified to receive the prime contract, to benefit as subcontractors from Government contracts that are set aside for performance by small business concerns. To address these concerns, SBA’s regulations apply the limitations on subcontracting collectively to the prime and any similarly situated first-tier subcontractor. Any work performed by a similarly situated first-tier subcontractor will count toward compliance with the applicable limitation on subcontracting. For purposes of determining whether the prime and its subcontractor complied with the applicable limitation on subcontracting, work that is not performed by the employees of the prime contractor or employees of first-tier similarly situated subcontractors will count as subcontracts performed by non-similarly situated entities. Using similarly situated subcontractors gives the prime contractor greater flexibility but does require monitoring and oversight by the prime contractor to ensure the benefits flow to the intended recipients. The final rule has been revised at FAR 52.219–14 to provide additional clarity on this issue.

6d. Similarly Situated Entities—Interpretation of the Rule

Comment: One respondent requested clarification of its understanding of the proposed rule regarding the prime contractor not completing 50 percent of the work because it subcontracted to a similarly situated entity.

Response: A prime contractor may subcontract more than 50 percent of the work to a similarly situated entity and still comply with the limitations on subcontracting. SBA’s regulation at 13 CFR 125.6(c) provides three examples to illustrate when the prime contractor meets, or fails to meet, the limitations on subcontracting. One example describes an award for supplies to a service-disabled veteran-owned small business (SDVOSB) that subcontracts to a similarly situated entity for 51 percent of the work, which does not violate the limitations on subcontracting. However, any work that the similarly situated entity further subcontracts will be counted toward the 50 percent subcontract limit.

7a. Application of the Limitations on Subcontracting and Nonmanufacturer Rule at or Below the SAT

Comment: Two respondents submitted substantially similar comments suggesting that set-asides below the SAT in all small business and small business socioeconomic categories should be exempt from any limitations on subcontracting, including the nonmanufacturer rule. Another respondent stated the original intent of the nonmanufacturer rule was to promote U.S. innovation in manufacturing and technology by allowing small U.S. manufacturers to compete with large business for Federal Government contracts. This respondent also stated the recent SBA change to raise the value of application of the nonmanufacturer rule to the SAT contradicts this intent and threatens the U.S. Defense Industrial Base.

Response: This rule implements SBA’s policy on the limitations on subcontracting and the nonmanufacturer rule. The rule reflects distinct statutory authorities for setting aside small business procurements and small business socioeconomic category procurements below and above the threshold at 15 U.S.C. 644(j).

For small business socioeconomic category procurements (*i.e.*, a set-aside or sole source contract for 8(a) participants, women-owned small businesses, HUBZone small businesses, or SDVOSBs), the limitations on subcontracting, and the nonmanufacturer rule, apply to

procurements regardless of contract value. The Small Business Act at 15 U.S.C. 657s established the applicability of the limitations on subcontracting and the nonmanufacturer rule for contracts awarded to “covered” small business (or socioeconomic category) concerns “under section 637(a), 637(m), 644(a), 657a, or 657f” of Title 15. Contracts with “covered” concerns under 15 U.S.C. 637(a), 637(m), 657a, and 657f include set-aside or sole source contracts, and any evaluation-preference contracts, regardless of dollar value, for specific small business socioeconomic categories, *i.e.*, small disadvantaged businesses participating in the section 8(a) business development program, women-owned small businesses, HUBZone small businesses, and SDVOSBs.

Set-aside contracts with small business concerns below the threshold (*i.e.*, the simplified acquisition threshold) at 15 U.S.C. 644(j) are not designated as “covered” in section 657s (see SBA’s implementing regulations 13 CFR 125.6(a)). For this reason, contracts resulting from small business set-asides below this threshold would be exempt from the limitations on subcontracting and the nonmanufacturer rule.

7b. Application of the Limitations on Subcontracting and Nonmanufacturer Rule to Commercial Items

Comment: Two respondents commented that the limitations on subcontracting, including those related to the nonmanufacturer rule, should not apply to acquisitions for commercial items and commercially available off-the-shelf (COTS) items because the complex and confusing limits conflict with the straightforward nature of commercial and COTS acquisitions.

Response: The Councils do not concur with this comment. Section 1651 of the NDAA for FY 2013 is silent on its applicability to commercial and COTS items. The corresponding final rule implemented by the SBA in its regulation did not exempt acquisitions of commercial or COTS items from the limitations on subcontracting. Further, the revisions to the limitations on subcontracting reflected in this final FAR rule actually facilitate access to the Federal marketplace for small businesses, simplify the process of tracking costs spent by prime contractors on subcontractors, and make the application of limitations on subcontracting consistent across the small business programs. Exclusion of acquisitions for commercial and COTS items will limit the full realization of these improvements for small businesses and hinder their

participation in Federal procurements as both prime contractors and subcontractors.

8. Limitations on Subcontracting Too Restrictive

Comment: One respondent suggests the proposed rule restricts opportunities for small businesses and discourages subcontracting arrangements. The same respondent recommends eliminating all limitations between prime contractors and subcontractors, regardless of business size.

Response: The rule does not restrict small business subcontracting opportunities nor does it discourage subcontracting arrangements. Rather, the proposed rule provides small businesses with greater flexibility in how they choose to comply with the limitations on subcontracting. Moreover, the new rules make it easier for small business prime contractors to do business with Federal agencies by giving them more choices that are less burdensome and less costly for pursuing and winning larger contracts than before. The rule implements an SBA final rule intended to ensure that the benefits of set-aside contracts flow to the intended beneficiaries. The recommended elimination of all limitations on subcontracting is counter to that intent and is beyond the scope of this rule.

9. Mixed Contracts

Comment: One respondent noted that 13 CFR 125.6(b) discusses the limitations on subcontracting with respect to mixed contracts (*i.e.*, contracts for both supplies and services). The proposed revision to the clause at FAR 52.219–14 failed to address mixed contracts. The respondent proposed bringing the FAR into alignment with SBA’s regulation by adding another subparagraph to address mixed contracts.

Response: According to SBA’s final rule published in the **Federal Register** at 81 FR 34243, on May 31, 2016, SBA’s regulation at 13 CFR 125.6(b) states that, “where a contract combines services and supplies, the contracting officer shall select the appropriate NAICS code” that best describes the principal purpose of the product or service being acquired. The contracting officer’s selection of the applicable NAICS code determines which limitation on subcontracting applies. Thus, for a prime contract that includes both services and supplies, the NAICS code assigned by the contracting officer determines the relevant amount for purposes of calculating compliance with the limitation on subcontracting; *e.g.*,

when a NAICS code for services is assigned, the limitation on subcontracting for services applies to the services portion of the contract. Likewise, for subcontracts, the prime contractor will assign the NAICS. To provide clarification on calculating the 50 percent limitation for contracts that include both services and supplies (*i.e.*, “mixed contracts”), this final rule revises the clause at 52.219–14, Limitations on Subcontracting, to specify that when a contract is assigned a NAICS code for services, the 50 percent limitation applies only to the services portion of the contract, and that when a contract is assigned a NAICS code for supplies, the 50 percent limitation applies only to the supply portion of the contract.

10. Revisions to the Clause on the Nonmanufacturer Rule

Comment: One respondent indicated that the proposed solicitation provision does not state that the nonmanufacturer rule requirements can be waived by SBA, either on an individual or class basis; and furthermore, the provision does not state that nonmanufacturers need to have no more than 500 employees. The respondent further stated that the SBA has proposed to eliminate its rule about “kit assemblers,” and suggested that the Council similarly remove all rules about “kit assemblers.”

Response: The Councils reviewed the area of the rule identified by the respondent and found that the SBA waiver information for the nonmanufacturer rule is not appropriate for inclusion in the contract clause at 52.219–33, Nonmanufacturer Rule. FAR 19.507(h)(2) instructs contracting officers not to use 52.219–33 when SBA has waived the nonmanufacturer rule. Individual and class waivers of the nonmanufacturer rule are addressed in the final rule at FAR 19.505(c).

The size standard for nonmanufacturers is located in the solicitation provisions that contain the requirement for offerors to represent size status (*e.g.*, 52.219–1, Small Business Program Representations). There is no need to include it in the clause at 52.219–33, which does not address representation of size status.

The Councils found that removing the text on kit assemblers from the FAR is premature in this final rule, and must be addressed in a separate case. Therefore, the suggested revisions have not been included in the final rule.

11. Orders Under Multiple Award Contracts

Comment: One respondent stated that clarification should be provided for orders set aside for small business under multiple-award contracts regarding whether, for the purpose of applying the limitations on subcontracting and the nonmanufacturer rule, the value is determined at the contract level or at the order level. The respondent further expressed a preference for having the value determined at the individual order level, so that the nonmanufacturer rule would only apply to orders above the simplified acquisition threshold.

Response: The prescriptions for the clauses at FAR 52.219–14, Limitations on Subcontracting, and 52.219–33, Nonmanufacturer Rule, specify use of the clauses when “any portion of the requirement is set aside for small business and is expected to exceed the simplified acquisition threshold”. The prescriptions also specify use of the clauses in multiple-award contracts when orders may be set aside for small business because the clauses apply to orders that are set aside for small business under multiple-award contracts. The applicability of the limitations on subcontracting and the nonmanufacturer rule is determined partly by whether the contract or the order is being set aside for small business. If an order is set aside for small business, the clause applies to the order if it exceeds the simplified acquisition threshold (see 52.219–14(c)(4) and 52.219–33(b)(2)(iii)). Alternatively, if a multiple-award contract is set aside for small business, the clause applies to the contract if it exceeds the simplified acquisition threshold.

12a. Additional SBA Rule—Hazardous Waste Industry

Comment: Six respondents stated the hazardous waste industry should be excluded from the limitations on subcontracting as disposal facilities and transportation costs are prohibitively expensive for small businesses to own and operate. Therefore, small businesses subcontract out these services, which would cause them to exceed the limitations on subcontracting.

Two respondents stated environmental remediation requires the purchase of significant materials, which is similar to construction. The respondents requested these materials be excluded from the limitations on subcontracting.

Response: These changes are included in SBA’s final rule at 13 CFR 125.6(a), published in the **Federal Register** on

November 29, 2019 (84 FR 65647). SBA’s rule updates the limitations on subcontracting. A new FAR case would have to be opened to implement the additional changes, which require public comment under 41 U.S.C. 1707 prior to implementation in the FAR. Therefore, the suggested changes are not incorporated in this final rule.

12b. Additional SBA Rule—Independent Contractors

Comment: Two respondents suggested additional language be added to the proposed rule to define an independent contractor. One respondent requested that the term “independent contractor” be removed from the rule. One respondent recommended that independent contractors should not be subject to FAR 44.201–1, Consent requirements.

Response: SBA made clarifications regarding independent contractors in its final rule, published in the **Federal Register** on November 29, 2019 (84 FR 65647), which updates the limitations on subcontracting. Those changes are beyond the scope of this FAR case. A new FAR case would have to be opened to implement additional changes in the FAR, including publication for notice and comment if necessary. The suggested changes are not consistent with the SBA’s regulations which are being implemented in this final FAR rule, and therefore will not be included in this final FAR rule.

12c. Additional SBA Rule—Exclusion of Materials and Other Direct Costs From the Limitation on Subcontracting for Services

Comment: Four respondents stated the cost of materials and other direct costs for services should be excluded from the limitations on subcontracting, which would treat these contracts the same as supply contracts.

Response: This rule implements SBA’s final rule published in the **Federal Register** at 81 FR 34243 on May 31, 2016, which does not provide an exclusion for the cost of materials or other direct costs. These changes are in SBA’s final rule, published in the **Federal Register** on November 29, 2019 (84 FR 65647), which updates the limitations on subcontracting. A new FAR case would have to be opened to implement the additional changes.

12d. Additional SBA Rule—Inconsistencies Between FAR and SBA

Comment: Two respondents stated that because of SBA’s proposed rule published December 4, 2018, 83 FR 62516, the FAR will be inconsistent with SBA’s regulations once again,

which will create new confusion. They requested the FAR Council issue an interim final rule.

Response: SBA’s final rule published November 29, 2019, 84 FR 6564, made updates to the limitations on subcontracting. A new FAR case would have to be opened to implement the SBA’s November 29, 2019 changes. The FAR Council may issue an interim rule without first publishing a proposed rule only when urgent and compelling circumstances exist, which justify changing the FAR prior to seeking public comment.

13. Information Technology Value Added Resellers

Comment: One respondent requested a clarification of whether the nonmanufacturer rule applies to Information Technology Value Added Resellers (ITVAR), NAICS code 541519.

Response: An ITVAR provides a total solution to information technology acquisitions by providing multi-vendor hardware and software along with significant value added services. SBA’s regulation at footnote 18 within 13 CFR 121.201 states that the nonmanufacturer rule applies to an ITVAR procurement unless SBA has issued a class or contract-specific waiver of the nonmanufacturer rule.

14. Out of Scope

Comment: One respondent stated DoD Class Deviation 2019–O0003, Limitations on Subcontracting for Small Business, contains a requirement stating, if the contract falls below the SAT, it is not a complete waiver of the nonmanufacturer rule because the small business must still provide the end item of any domestic firm. The respondent noted this same requirement is not present in the current SBA regulations, nor in the current proposed rule change and encourages the Councils to proceed with issuing a final rule that does not include this restriction. A second respondent recommended that clear definitions of subcontract and subcontractor should be provided to regulate the use of independent contractors (consultants) and ancillary services, as well as to formulate policies and mechanisms with respect to consent to subcontract, flow down of contract provisions, and other FAR requirements. A third respondent asked if the proposed regulation would take precedence over a specified agency’s clause.

Response: These comments are beyond the scope of this rule. SBA’s waiver of the nonmanufacturer rule (13 CFR 121.406(b)(7)) has no effect on requirements external to the Small

Business Act which involve domestic sources of supply, such as the Buy American Act or the Trade Agreements Act. Class deviations issued by individual agencies do not impact the text of this rule. In many instances the definition of subcontractor used in the FAR varies depending on which statutes or FAR regulations apply. It is not possible to use the same definition across all the parts of the FAR. Agency regulations and guidance must be consistent with the FAR unless an authorized deviation (see FAR 1.404) is in place.

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

The Federal Acquisition Regulatory (FAR) Council has made the following determinations with respect to the rule's application of section 1651 of the NDAA for FY 2013 to contracts at or below the simplified acquisition threshold (SAT) and for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items. Discussion of these determinations is set forth below.

A. Applicability to Contracts at or Below the SAT

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

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

limitations on subcontracting in section 1651.

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

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

Application of the law to acquisitions at or below the SAT will maximize the positive impact set-aside and sole-source contracts provide for small businesses in the socioeconomic programs (e.g., HUBZone, 8(a), service-disabled veteran-owned, and women-owned small business programs) by ensuring these benefits extend to the many contracts valued below the SAT. According to the Federal Procurement Data System, an average of 283,374 contracts per year resulted from FAR part 19 set-asides and sole-source awards at or below the simplified acquisition threshold during fiscal years 2016–2018. Failure to apply section 1651 below the SAT would exclude a significant number of acquisitions, contrary to the goal of promoting opportunities for small businesses in the Federal marketplace to the maximum extent possible. Further, the FAR clauses imposing limitations on subcontracting and the nonmanufacturer rule are currently prescribed for use in solicitations and contracts at or below the SAT that are set aside for, or awarded on a sole-source basis to, 8(a) program participants, HUBZone, service-disabled veteran-owned, women-owned, or economically disadvantaged women-owned small business concerns; or that use the HUBZone price evaluation preference to award to a HUBZone small business concern. Making section 1651 applicable to acquisitions at or below the SAT would allow the amended

versions of those clauses, reflecting the requirements of section 1651, to be incorporated into such solicitations and contracts. Exclusion of the amended clauses from those documents would create confusion among contractors and the Federal contracting workforce. Finally, under the FAR clauses currently incorporated into those documents, contractors are already required to comply with the limitations on subcontracting and the nonmanufacturer rule. The new requirements will result in substantial savings for contractors.

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

B. Applicability to Contracts for the Acquisition of Commercial Items

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

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

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

The law is silent on the applicability of these requirements to acquisitions of commercial items and does not independently provide for criminal or

civil penalties; nor does it include terms making express reference to 41 U.S.C. 1906 and its application to acquisitions of commercial items. Therefore, it does not apply to acquisitions of commercial items unless the FAR Council makes a written determination as provided at 41 U.S.C. 1906.

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

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

C. Applicability to Contracts for the Acquisition of COTS Items

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

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

The purpose of this rule is to implement section 1651 of the NDAA for FY 2013 (codified at 15 U.S.C. 657s). Section 1651 provides revised limitations on subcontracting that apply across all small business programs. It also requires that the limitations on subcontracting be determined based on the percentage of the overall award amount that a prime contractor spends on its subcontractors. In addition, section 1651 provides that the percentage of the award amount that the prime contractor spends on subcontractors who are similarly situated entities is not considered subcontracted for purposes of the limitations in section 1651.

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

The law is silent on the applicability of these requirements to acquisitions of COTS items and does not independently provide for criminal or civil penalties; nor does it concern bid protest procedures developed under the authority of the relevant statutes. Therefore, it does not apply to acquisitions of COTS items unless the Administrator for Federal Procurement Policy makes a written determination as provided at 41 U.S.C. 1907.

The law furthers the Administration's goal of simplifying the acquisition process and facilitating easier access to the Federal marketplace, in this case for small business contractors who make up an important component of the Government's industrial base. It advances the interests of small business prime contractors by making it easier to comply with the limitations on subcontracting, potentially allowing those contractors to compete for larger contracts than they could in the past.

The law also advances the interests of small business subcontractors by encouraging small business prime contractors to award more subcontracts to similarly situated small businesses. Exclusion of a large segment of Federal contracting, such as acquisitions for COTS items, would limit the full implementation of these objectives. Further, FAR clauses imposing limitations on subcontracting and the nonmanufacturer rule are currently prescribed for use in solicitations and contracts for COTS items. Making section 1651 applicable to acquisitions of COTS items would allow the amended versions of those clauses, reflecting the requirements of section 1651, to be incorporated into such solicitations and contracts. Exclusion of the amended clauses from those documents would create confusion among contractors and the Federal contracting workforce. Finally, the burden on contractors would not increase significantly if the requirements of section 1651 were applied to acquisitions for COTS items. Under the FAR clauses currently incorporated into contracts for those items, contractors are already required to comply with the limitations on subcontracting and the nonmanufacturer rule. The new requirements will result in substantial savings for contractors.

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

IV. Expected Cost Savings

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

ensure that the benefits of contracts and orders awarded to small businesses flow to the intended beneficiaries.

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

In addition, the basis of the limitations on subcontracting has

changed. Prior to section 1651, the limitations on subcontracting were calculated as a percentage of work to be performed by a prime contractor; the calculation was based on the contractor's costs to perform the contract (e.g., salaries and other allowable costs under FAR part 31). As a result of section 1651, the limitations on subcontracting will be calculated as a percentage of the overall contract or order amount (i.e., the contract price, including costs and profit or fee) to be spent by the prime contractor on subcontractors. As a result, for the purpose of compliance with the limitations on subcontracting the prime contractor no longer has to track the percentage of costs incurred that it spends performing work itself. It only has to track the percentage of the overall award amount (i.e., contract price) that it spends on subcontractors. For small businesses, this change will reduce the burden associated with tracking and documenting compliance with the limitations on subcontracting.

Section 1651 also applied the concept of "similarly situated entities" to all small business programs. A similarly

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

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

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

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

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

limitations on subcontracting as long as the amount spent on non-similarly situated entities does not exceed \$500. For example, the small business can subcontract \$500 to any business and spend \$300 on its own employees, or subcontract \$500 to any business, \$100 to a similarly situated entity, and spend only \$200 on its own employees.

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

- The nonmanufacturer rule does not apply to small business set-asides at or below the simplified acquisition threshold. Note that currently, the FAR applies the nonmanufacturer rule to small business set-asides above \$25,000.
- Waivers of the nonmanufacturer rule will now be allowed for procurements under the HUBZone Program. Such waivers allow a

HUBZone small business to provide the product of any size business.

- In the event SBA grants a nonmanufacturer rule waiver after the issuance of a solicitation, but before award, contracting officers are required to amend that solicitation to notify potential offerors of the waiver and to give them more time to submit proposals.

The above changes drive both costs and savings; however, the rule is expected to result in net savings to small entities, as well as to the Government. Since the rule will only revise regulations under the various small business programs, there will be no costs or savings to large businesses. The expected net savings of the rule, calculated at present value using a 7-percent discount rate over ten years, is estimated to be \$189,298,957.

To access the full regulatory cost analysis for this rule, go to the Federal eRulemaking Portal at <http://www.regulations.gov>, search for "FAR

Case 2016–011,” click “Open Docket,” and view “Supporting Documents.”

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. The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD, GSA and NASA will submit for an interim or final rule a report to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs 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, *et seq.* The FRFA is summarized as follows:

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

The objectives of this rule are to apply the limitations on subcontracting consistently to the small business concerns identified in FAR 19.000(a)(3) and to change the method of calculation to the percentage of the award amount to be spent on subcontractors.

There were no significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis.

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

According to the System for Award Management (SAM), there are 315,655 active registrants that are considered small for at least one North American Industry Classification System code. Firms looking to be prime contractors for Government contracts are required to register in SAM. However, firms do not need to register in SAM to participate in subcontracting. Thus, the number of small business firms impacted by this rule may be greater than the number of firms registered in SAM.

This rule does not include any new reporting or recordkeeping requirements for small entities. This rule does not include any new compliance requirements. The FAR already required compliance with the limitations on subcontracting and the nonmanufacturer rule for small business prime contractors receiving awards pursuant to part 19. This rule simply revises the limitations on subcontracting and the nonmanufacturer rule to match that required by section 1651 of the NDAA for FY 2013. According to the Federal Procurement Data System, there were approximately 70,992 contracts per year in fiscal years 2016–2018 under all the small business programs to which the limitations on subcontracting or the nonmanufacturer rule would apply.

This rule is not expected to have a negative impact on the majority of small entities.

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 SBA.

VIII. Paperwork Reduction Act

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

List of Subjects in 48 CFR Parts 19 and 52

Government procurement.

William F. Clark,

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

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

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

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

PART 19—SMALL BUSINESS PROGRAMS

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

19.001 Definitions.

* * * * *

Similarly situated entity means a first-tier subcontractor, including an independent contractor, that—

(1) Has the same small business program status as that which qualified the prime contractor for the award (*e.g.*, for a small business set-aside contract, any small business concern, without regard to socioeconomic status); and (2) Is considered small for the size standard under the NAICS code the prime contractor assigned to the subcontract.

■ 3. Revise section 19.505 to read as follows:

19.505 Limitations on subcontracting and nonmanufacturer rule.

(a) *Applicability.* (1) This section applies to small business set-asides above the simplified acquisition threshold and orders issued directly to a small business in accordance with 19.504(c)(1)(ii) above the simplified acquisition threshold.

(2) This section applies, regardless of dollar value, to the following awards under subparts 19.8, 19.13, 19.14, and 19.15:

- (i) Contracts that are set aside.
- (ii) Contracts that are awarded on a sole-source basis.
- (iii) Orders that are set-aside as described in 8.405–5 and 16.505(b)(2)(i)(F).
- (iv) Orders that are issued directly in accordance with 19.504(c)(1)(ii).
- (v) Contracts that use the HUBZone price evaluation preference to award to a HUBZone small business concern unless the concern waived the evaluation preference.

(b)(1) *Limitations on subcontracting.* A small business concern subject to the limitations on subcontracting is required to comply with the following:

(i) For a contract or order assigned a North American Industry Classification System (NAICS) code for services (except construction), the concern will not pay more than 50 percent of the amount paid by the Government for contract performance to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the concern's 50 percent subcontract amount that cannot be exceeded. When a contract includes both services and supplies, the 50 percent limitation shall apply only to the service portion of the contract.

(ii) For a contract or order assigned a NAICS code for supplies or products (other than a procurement from a nonmanufacturer of such supplies or products), the concern will not pay more than 50 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the concern's 50 percent subcontract amount that cannot be exceeded. When a contract includes both supplies and services, the 50 percent limitation shall apply only to the supply portion of the contract.

(iii) For a contract or order assigned a NAICS code for general construction, the concern will not pay more than 85 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the concern's 85 percent subcontract amount that cannot be exceeded.

(iv) For a contract or order assigned a NAICS code for construction by special trade contractors, the concern will not pay more than 75 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the concern's 75 percent subcontract amount that cannot be exceeded.

(2) *Compliance period.* A small business contractor subject to the limitations on subcontracting is required to comply with the limitations on subcontracting—

(i) For a contract that has been set aside, either by the end of the base term

and then by the end of each subsequent option period, or by the end of the performance period for each order issued under the contract, at the contracting officer's discretion; and

(ii) For an order set aside under a contract as described in 19.504(a), (b), or (c)(1)(i) or an order issued in accordance with 19.504(c)(1)(ii), by the end of the performance period for the order.

(c) *Nonmanufacturer rule.* The nonmanufacturer rule applies to nonmanufacturers in accordance with paragraph (c)(1) of this section and to kit assemblers who are nonmanufacturers in accordance with paragraph (c)(2) of this section.

(1) *Nonmanufacturers.* Any concern, including a supplier, that is awarded a contract or order subject to the nonmanufacturer rule, other than a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce (*i.e.*, a “nonmanufacturer”), is required to—

(i) Provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas (see paragraph (c)(3) of this section for determining the manufacturer of an end item);

(ii) Not exceed 500 employees;

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

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

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

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

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

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

(4) *Waiver of nonmanufacturer rule.*

(i) The SBA may grant an individual or a class waiver to the nonmanufacturer rule to allow a nonmanufacturer to provide an end item of an other than small business without regard to the

place of manufacture, processing, or production.

(A) *Class waiver.* An agency may request that SBA waive the requirement at paragraph (c)(1)(i) or (c)(2)(ii) of this section for a specific product or class of products. See 13 CFR 121.1202 for an explanation of when SBA will issue a class waiver.

(B) *Individual waiver.* The contracting officer may also request a waiver of the requirements at paragraph (c)(1)(i) or (c)(2)(ii) of this section for an individual acquisition once the contracting officer determines through market research that no known small business manufacturers, processors, or producers in the United States or its outlying areas can reasonably be expected to offer an end item meeting the requirements of the solicitation. This type of waiver is known as an individual waiver and would apply only to a specific acquisition.

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

(iii) *List of class waivers.* For the most current listing of class waivers, contact the SBA Office of Government Contracting or go to <https://www.sba.gov/document/support-non-manufacturer-rule-class-waiver-list>.

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

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

(ii) If more than 50 percent of the estimated acquisition cost is composed of items manufactured, processed, or produced by other than small business concerns, then a waiver is required. SBA may grant an individual waiver for one or more items in an acquisition in order to ensure that at least 50 percent

of the cost of the items to be supplied by the nonmanufacturer comes from small business manufacturers, processors, and producers in the United States or its outlying areas or are subject to a waiver.

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

■ 4. Amend section 19.507 by revising paragraphs (e) and (h) to read as follows:

19.507 Solicitation provisions and contract clauses.

* * * * *

(e) The contracting officer shall insert the clause at 52.219–14, Limitations on Subcontracting, in solicitations and contracts—

(1) For supplies, services, and construction, if any portion of the requirement is to be set aside for small business and the contract amount is expected to exceed the simplified acquisition threshold, and in any solicitations and contracts that are set aside or awarded on a sole-source basis in accordance with subparts 19.8, 19.13, 19.14, or 19.15, regardless of dollar value. This includes multiple-award contracts when orders may be set aside for small business concerns, as described in 8.405–5 and 16.505(b)(2)(i)(F), and when orders may be issued directly to a small business concern as described in 19.504(c)(1)(ii). For contracts that are set aside, the contracting officer shall indicate in paragraph (f) of the clause whether compliance with the limitations on subcontracting is required at the contract or order level;

(2) *Using the HUBZone price evaluation preference.* However, if the prospective contractor waived the use of the price evaluation preference, or is an other than small business, do not insert the clause in the resultant contract.

* * * * *

(h)(1) The contracting officer shall insert the clause at 52.219–33, Nonmanufacturer Rule, in solicitations and contracts (including multiple-award contracts when orders may be set aside for small business concerns as described in 8.405–5 and 16.505(b)(2)(i)(F), and when orders may be issued directly to a small business concern as described in 19.504(c)(1)(ii)), when—

(i) the item being acquired has been assigned a manufacturing or supply NAICS code, and—

(ii)(A) Any portion of the requirement is to be—

(1) Set aside for small business and is expected to exceed the simplified acquisition threshold; or

(2) Set aside or awarded on a sole-source basis in accordance with subparts 19.8, 19.13, 19.14, or 19.15, regardless of dollar value; or

(B) *Using the HUBZone price evaluation preference.* However, if the prospective contractor waived the use of the price evaluation preference, or is an other than small business, do not insert the clause in the resultant contract.

(2) The contracting officer shall not insert the clause at 52.219–33 when the Small Business Administration has waived the nonmanufacturer rule (see 19.505(c)(4)).

19.811–3 [Amended]

■ 5. Amend section 19.811–3 by removing from paragraph (d) “The clause at 52.219–18 with its Alternate I shall be used when” and adding “Use the clause at 52.219–18 with its Alternate I when” in its place.

19.1308 [Removed and Reserved]

■ 6. Remove and reserve section 19.1308.

■ 7. Revise section 19.1309 to read as follows:

19.1309 Contract clauses.

(a) The contracting officer shall insert the clause at 52.219–3, Notice of HUBZone Set-Aside or Sole-Source Award, in solicitations and contracts for acquisitions that are set aside or awarded on a sole-source basis to, HUBZone small business concerns under 19.1305 or 19.1306. This includes multiple-award contracts when orders may be set aside for HUBZone small business concerns as described in 8.405–5 and 16.505(b)(2)(i)(F) or when orders may be issued directly to one HUBZone small business concern in accordance with 19.504(c)(1)(ii).

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

(c) For use of clause 52.219–14, Limitations on Subcontracting, see the prescription at 19.507(e).

(d) For use of clause 52.219–33, Nonmanufacturer Rule, see the prescription at 19.507(h).

19.1403 [Amended]

■ 8. Amend section 19.1403 by removing from paragraph (d) “19.1407(c)” and adding “19.505” in its place.

19.1407 [Removed and Reserved]

■ 9. Remove and reserve section 19.1407.

■ 10. Revise section 19.1408 to read as follows:

19.1408 Contract clauses.

(a) The contracting officer shall insert the clause at 52.219–27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside, in solicitations and contracts for acquisitions that are set aside or awarded on a sole-source basis to, service-disabled veteran-owned small business concerns under 19.1405 and 19.1406. This includes multiple-award contracts when orders may be set aside for service-disabled veteran-owned small business concerns as described in 8.405–5 and 16.505(b)(2)(i)(F) or when orders may be issued directly to one service-disabled veteran-owned small business contractor in accordance with 19.504(c)(1)(ii).

(b) For use of clause 52.219–14, Limitations on Subcontracting, see the prescription at 19.507(e).

(c) For use of clause 52.219–33, Nonmanufacturer Rule, see the prescription at 19.507(h).

19.1507 [Removed and Reserved]

■ 11. Remove and reserve section 19.1507.

■ 12. Revise section 19.1508 to read as follows:

19.1508 Contract clauses.

(a) The contracting officer shall insert the clause at 52.219–29, Notice of Set-Aside for, or Sole-Source Award to, Economically Disadvantaged Women-owned Small Business Concerns, in solicitations and contracts for acquisitions that are set aside or awarded on a sole-source basis to, EDWOSB concerns under 19.1505(b) or 19.1506(a). This includes multiple-award contracts when orders may be set aside for EDWOSB concerns as described in 8.405–5 and 16.505(b)(2)(i)(F) or when orders may be issued directly to one EDWOSB contractor in accordance with 19.504(c)(1)(ii).

(b) The contracting officer shall insert the clause at 52.219–30, Notice of Set-Aside for, or Sole-Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program, in solicitations and contracts for acquisitions that are set aside or awarded on a sole-source basis to WOSB concerns under 19.1505(c) or 19.1506(b). This includes multiple-award contracts when orders may be set aside for WOSB concerns eligible under the WOSB Program as described in 8.405–5 and 16.505(b)(2)(i)(F) or when orders may be issued directly to one

WOSB contractor in accordance with 19.504(c)(1)(ii).

(c) For use of clause 52.219–14, Limitations on Subcontracting, see the prescription at 19.507(e).

(d) For use of clause 52.219–33, Nonmanufacturer Rule, see the prescription at 19.507(h).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 13. Amend section 52.204–8 by—
- a. Revising the date of the provision;
- b. Revising paragraph (a)(3);
- c. Revising the date of Alternate I; and
- d. Revising paragraph (a)(2) of Alternate I.

The revisions read as follows:

52.204–8 Annual Representations and Certifications.

* * * * *

Annual Representations and Certifications (SEP 2021)

(a) * * *

(3) The small business size standard for a concern that submits an offer, other than on a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce is 500 employees if the acquisition—

(i) Is set aside for small business and has a value above the simplified acquisition threshold;

(ii) Uses the HUBZone price evaluation preference regardless of dollar value, unless the offeror waives the price evaluation preference; or

(iii) Is an 8(a), HUBZone, service-disabled veteran-owned, economically disadvantaged women-owned, or women-owned small business set-aside or sole-source award regardless of dollar value.

* * * * *

Alternate I (SEP 2021).

* * *

(a) * * *

(2) The small business size standard for a concern that submits an offer, other than on a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce, (*i.e.*, nonmanufacturer), is 500 employees if the acquisition—

(i) Is set aside for small business and has a value above the simplified acquisition threshold;

(ii) Uses the HUBZone price evaluation preference regardless of dollar value, unless the offeror waives the price evaluation preference; or

(iii) Is an 8(a), HUBZone, service-disabled veteran-owned, economically disadvantaged women-owned, or women-owned small business set-aside or sole-source award regardless of dollar value.

* * * * *

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

52.212–1 Instructions to Offerors—Commercial Items.

* * * * *

Instructions to Offerors—Commercial Items (SEP 2021)

(a) *North American Industry Classification System (NAICS) code and small business size standard.* The NAICS code(s) and small business size standard(s) for this acquisition appear elsewhere in the solicitation. However, the small business size standard for a concern that submits an offer, other than on a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce is 500 employees if the acquisition—

(1) Is set aside for small business and has a value above the simplified acquisition threshold;

(2) Uses the HUBZone price evaluation preference regardless of dollar value, unless the offeror waives the price evaluation preference; or

(3) Is an 8(a), HUBZone, service-disabled veteran-owned, economically disadvantaged women-owned, or women-owned small business set-aside or sole-source award regardless of dollar value.

* * * * *

- 15. Amend section 52.212–5 by revising the date of the clause and paragraphs (b)(11), (b)(12), (b)(19), (b)(21), (b)(22), (b)(23), (b)(24), and (b)(26) to read as follows:

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

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (SEP 2021)

* * * * *

(b) * * *

(11) 52.219–3, Notice of HUBZone Set-Aside or Sole-Source Award (SEP 2021) (15 U.S.C. 657a).

(12) 52.219–4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns (SEP 2021) (if the offeror elects to waive the preference, it shall so indicate in its offer) (15 U.S.C. 657a).

* * * * *

(19) 52.219–14, Limitations on Subcontracting (SEP 2021) (15 U.S.C. 657s).

* * * * *

(21) 52.219–27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside (SEP 2021) (15 U.S.C. 657f).

(22)(i) 52.219–28, Post-Award Small Business Program Rerepresentation (SEP 2021) (15 U.S.C. 632(a)(2)).

(ii) Alternate I (MAR 2020) of 52.219–28.

(23) 52.219–29, Notice of Set-Aside for, or Sole-Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns (SEP 2021) (15 U.S.C. 637(m)).

(24) 52.219–30, Notice of Set-Aside for, or Sole-Source Award to, Women-Owned

Small Business Concerns Eligible Under the Women-Owned Small Business Program (SEP 2021) (15 U.S.C. 637(m)).

* * * * *

(26) 52.219–33, Nonmanufacturer Rule (SEP 2021) (15 U.S.C. 657s).

* * * * *

- 16. Amend section 52.219–1 by—
- a. Revising the date of the provision;
- b. Removing from paragraph (b)(1) “—” and adding a space in its place;
- c. Revising paragraph (b)(3);
- d. Revising the date of Alternate II; and
- e. Revising paragraph (b)(2) of Alternate II.

The revisions read as follows:

52.219–1 Small Business Program Representations.

* * * * *

Small Business Program Representations (SEP 2021)

* * * * *

(b) * * *

(3) The small business size standard for a concern that submits an offer, other than on a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce (*i.e.*, nonmanufacturer), is 500 employees if the acquisition—

(i) Is set aside for small business and has a value above the simplified acquisition threshold;

(ii) Uses the HUBZone price evaluation preference regardless of dollar value, unless the offeror waives the price evaluation preference; or

(iii) Is an 8(a), HUBZone, service-disabled veteran-owned, economically disadvantaged women-owned, or women-owned small business set-aside or sole-source award regardless of dollar value.

* * * * *

Alternate II (SEP 2021).

* * * * *

(b) * * *

(2) The small business size standard for a concern that submits an offer, other than on a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce (*i.e.*, nonmanufacturer), is 500 employees if the acquisition—

(i) Is set aside for small business and has a value above the simplified acquisition threshold;

(ii) Uses the HUBZone price evaluation preference regardless of dollar value, unless the offeror waives the price evaluation preference; or

(iii) Is an 8(a), HUBZone, service-disabled veteran-owned, economically disadvantaged women-owned, or women-owned small business set-aside or sole-source award regardless of dollar value.

* * * * *

- 17. Amend section 52.219–3 by—
- a. Revising the introductory text;
- b. Revising the title and date of the clause;

- c. Revising paragraph (a);
 - d. In paragraph (b)(1) removing “sole source” and adding “sole-source” in its place;
 - e. In paragraph (b)(3) removing “set-aside” and adding “set aside” in its place;
 - f. Removing paragraphs (d), (e), and (f);
 - g. Redesignating paragraph (g) as paragraph (d); and
 - h. Removing Alternate I.
- The revisions read as follows:

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

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

Notice of HUBZone Set-Aside or Sole-Source Award (SEP 2021)

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

* * * * *

- 18. Amend section 52.219–4 by—
- a. In the introductory text removing “19.1309(b)(1)” and adding “19.1309(b)” in its place;
- b. Revising the date of the clause;
- c. Removing paragraphs (a), (d), and (e);
- d. Redesignating paragraphs (b), (c) and (f) as paragraphs (a), (b) and (c), respectively;
- e. Revising newly redesignated paragraph (b); and
- f. Removing Alternate I.

The revision reads as follows:

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

* * * * *

Notice of Price Evaluation Preference for HUBZone Small Business Concerns (SEP 2021)

* * * * *

(b) *Waiver of evaluation preference*. A HUBZone small business concern may elect to waive the evaluation preference, in which case the factor will be added to its offer for evaluation purposes.

☐ Offeror elects to waive the evaluation preference.

* * * * *

- 19. Revise section 52.219–14 to read as follows:

52.219–14 Limitations on Subcontracting.

As prescribed in 19.507(e), insert the following clause:

Limitations on Subcontracting (SEP 2021)

(a) This clause does not apply to the unrestricted portion of a partial set-aside.

(b) *Definition*. *Similarly situated entity*, as used in this clause, means a first-tier subcontractor, including an independent contractor, that—

- (1) Has the same small business program status as that which qualified the prime contractor for the award (e.g., for a small business set-aside contract, any small business concern, without regard to its socioeconomic status); and
- (2) Is considered small for the size standard under the North American Industry Classification System (NAICS) code the prime contractor assigned to the subcontract.

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

- (1) Contracts that have been set aside for any of the small business concerns identified in 19.000(a)(3);
- (2) Part or parts of a multiple-award contract that have been set aside for any of the small business concerns identified in 19.000(a)(3);
- (3) Contracts that have been awarded on a sole-source basis in accordance with subparts 19.8, 19.13, 19.14, and 19.15;
- (4) Orders expected to exceed the simplified acquisition threshold and that are—

(i) Set aside for small business concerns under multiple-award contracts, as described in 8.405–5 and 16.505(b)(2)(i)(F); or

(ii) Issued directly to small business concerns under multiple-award contracts as described in 19.504(c)(1)(ii);

(5) Orders, regardless of dollar value, that are—

(i) Set aside in accordance with subparts 19.8, 19.13, 19.14, or 19.15 under multiple-award contracts, as described in 8.405–5 and 16.505(b)(2)(i)(F); or

(ii) Issued directly to concerns that qualify for the programs described in subparts 19.8, 19.13, 19.14, or 19.15 under multiple-award contracts, as described in 19.504(c)(1)(ii); and

(6) Contracts using the HUBZone price evaluation preference to award to a HUBZone small business concern unless the concern waived the evaluation preference.

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

(e) *Limitations on subcontracting*. By submission of an offer and execution of a contract, the Contractor agrees that in performance of a contract assigned a North American Industry Classification System (NAICS) code for—

(1) Services (except construction), it will not pay more than 50 percent of the amount paid by the Government for contract performance to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the prime contractor's 50 percent subcontract amount that cannot be exceeded. When a contract includes both services and supplies, the 50 percent limitation shall apply only to the service portion of the contract;

(2) Supplies (other than procurement from a nonmanufacturer of such supplies), it will not pay more than 50 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly

situated entities. Any work that a similarly situated entity further subcontracts will count towards the prime contractor's 50 percent subcontract amount that cannot be exceeded. When a contract includes both supplies and services, the 50 percent limitation shall apply only to the supply portion of the contract;

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

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

(f) The Contractor shall comply with the limitations on subcontracting as follows:

(1) For contracts, in accordance with paragraphs (c)(1), (2), (3) and (6) of this clause—

[Contracting Officer check as appropriate.]

By the end of the base term of the contract and then by the end of each subsequent option period; or

By the end of the performance period for each order issued under the contract.

(2) For orders, in accordance with paragraphs (c)(4) and (5) of this clause, by the end of the performance period for the order.

(g) A joint venture agrees that, in the performance of the contract, the applicable percentage specified in paragraph (e) of this clause will be performed by the aggregate of the joint venture participants.

(End of clause)

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

The revisions read as follows:

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

* * * * *

Notice of Service-Disabled Veteran-Owned Small Business Set-Aside (SEP 2021)

* * * * *

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

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

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

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

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

(3) The joint venture meets the requirements of 13 CFR 121.103(h); and

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

■ 21. Amend section 52.219–28 by revising the date of the clause and paragraph (e) to read as follows:

52.219–28 Post-Award Small Business Program Rerepresentation.

* * * * *

Post-Award Small Business Program Rerepresentation (SEP 2021)

* * * * *

(e) The small business size standard for a Contractor providing an end item that it does not manufacture, process, or produce itself, for a contract other than a construction or service contract, is 500 employees if the acquisition—

(1) Was set aside for small business and has a value above the simplified acquisition threshold;

(2) Used the HUBZone price evaluation preference regardless of dollar value, unless the Contractor waived the price evaluation preference; or

(3) Was an 8(a), HUBZone, service-disabled veteran-owned, economically disadvantaged women-owned, or women-owned small business set-aside or sole-source award regardless of dollar value.

* * * * *

■ 22. Amend section 52.219–29 by—

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

■ b. In paragraph (a) removing from the definition “Economically disadvantaged women-owned small business (EDWOSB) concern” “means- A small” and adding “means a small” in its place;

■ c. In paragraph (b)(1) removing “sole source” and adding “sole-source” in its place;

■ d. Removing paragraphs (d) and (e);

■ e. Redesignating paragraph (f) as paragraph (d);

■ f. In newly redesignated paragraph (d)—

■ i. In paragraph (1) removing “NAICS” and adding “North American Industry Classification System” in its place;

■ ii. In paragraph (3)(v) removing “venture.” and adding “venture; and” in its place;

■ iii. Removing paragraph (4);

■ iv. Redesignating paragraph (5) as (4); and

■ v. In newly redesignated paragraph (4) removing “procuring activity” and adding “Contracting Officer” in its place.

The revision reads as follows:

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

* * * * *

Notice of Set-Aside for, or Sole-Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns (SEP 2021)

* * * * *

■ 23. Amend section 52.219–30 by—

■ a. Revising the section heading, clause heading, date of the clause, and the introductory text of paragraph (a);

■ b. In paragraph (b)(1) removing “sole source” and adding “sole-source” in its place;

■ c. In the second sentence of paragraph (c)(1) removing “WOSB program” and adding “WOSB Program” in its place;

■ d. Removing paragraphs (d) and (e);

■ e. Redesignating paragraph (f) as paragraph (d);

■ f. In newly redesignated paragraph (d):

■ i. In paragraph (1) removing “NAICS” and adding “North American Industry Classification System” in its place;

■ ii. In paragraph (d)(3)(v) removing “venture.” and adding “venture; and” in its place;

■ iii. Removing paragraph (4);

■ iv. Redesignating paragraph (5) as (4); and

■ v. In newly redesignated paragraph (4) removing “procuring activity” and adding “Contracting Officer” in its place.

The revisions read as follows:

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

* * * * *

Notice of Set-Aside for, or Sole-Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program (SEP 2021)

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

* * * * *

■ 24. Revise section 52.219–33 to read as follows:

52.219–33 Nonmanufacturer Rule.

As prescribed in 19.507(h), insert the following clause:

Nonmanufacturer Rule (SEP 2021)

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

Manufacturer means the concern that transforms raw materials, miscellaneous parts, or components into the end item. Concerns that only minimally alter the item being procured do not qualify as manufacturers of the end item. Concerns that add substances, parts, or components to an existing end item to modify its performance

will not be considered the end item manufacturer, where those identical modifications can be performed by and are available from the manufacturer of the existing end item.

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

(b) *Applicability.*

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

(2) This clause applies to—

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

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

(iii) Orders expected to exceed the simplified acquisition threshold and that are—

(A) Set aside for small business under multiple-award contracts, as described in 8.405–5 and 16.505(b)(2)(i)(F); or

(B) Issued directly to a small business concern under multiple-award contracts as described in 19.504(c)(1)(ii);

(iv) Orders, regardless of dollar value, that are—

(A) Set aside in accordance with subparts 19.8, 19.13, 19.14, and 19.15 under multiple-award contracts as described in 8.405–5 and 16.505(b)(2)(i)(F); or

(B) Issued directly to concerns that qualify for the programs described in subparts 19.8, 19.13, 19.14, and 19.15 under multiple-award contracts as described in 19.504(c)(1)(ii); and

(v) Contracts using the HUBZone price evaluation preference to award to a HUBZone concern unless the Contractor waived the evaluation preference.

(c) *Requirements.*

(1) The Contractor shall—

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

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

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

(2) When the end item being acquired is a kit of supplies, at least 50 percent of the total cost of the components of the kit shall be manufactured, processed, or produced in the United States or its outlying areas by small business concerns.

(End of clause)

* * * * *

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