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DEPARTMENT OF DEFENSE

Defense Acquisition Regulation System

48 CFR Parts 205, 206, 215, 219, 226, 232, 235, 252, and

Appendix I to Chapter 2

RIN 0750-AH45

**Defense Acquisition Regulation Supplement: Deletion of Text
Implementing 10 U.S.C. 2323 (DFARS Case 2011-D038)**

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

ACTION: Interim rule.

SUMMARY: DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to remove language based on 10 U.S.C. 2323. This action is necessary because the statute has expired.

DATES: Effective [Insert date of publication in the FEDERAL REGISTER].

Comment Date: Comments on the interim rule should be submitted in writing to the address shown below on or before [Insert date 60 days after date of publication in the FEDERAL REGISTER], to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2011-D038, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit

comments via the Federal eRulemaking portal by entering "DFARS Case 2011-D038" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2011-D038." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2011-D038" on your attached document.

- o E-mail: osd.dfars@mail.mil. Include DFARS Case 2011-D038 in the subject line of the message.

- o Fax: 571-372-6094.

- o Mail: Defense Acquisition Regulations System, Attn: Lee Renna, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Lee Renna, telephone 571-372-6095.

SUPPLEMENTARY INFORMATION:

I. Background

This interim rule revises the DFARS to implement changes

resulting from the expiration of 10 U.S.C. 2323 on September 30, 2009. Section 2323 of Title 10 was the underlying statutory authority for DoD's Small Disadvantaged Business (SDB) program, including the establishment of a specific goal within the overall 5 percent SDB goal for the award of prime contracts and subcontracts to historically black colleges and universities (HBCUs) and minority institutions (MIs).

DoD's fundamental policy to provide the maximum practicable number of contracting opportunities for SDB concerns and, in defense-related research and development, the maximum number of opportunities for HBCUs and MIs, is unchanged by this rule, as demonstrated by the following:

-DoD's annual SDB goal is 5 percent of the total value of all prime contract and subcontract awards for each fiscal year, in keeping with 15(g) of the Small Business Act, Pub. L. 85-536, as amended, (15 U.S.C. 644(g)). DoD has met or exceeded this goal every fiscal year since 2001.

-DoD contracting officers may continue to use incentives to encourage prime contractors to increase subcontracting opportunities with all small business types, including SDBs.

-DoD contracting officers will continue to evaluate the extent of small business participation, including that of SDBs, in solicitations and contracts that require subcontracting plans, as well as the past performance of offerors' achievement of

their small business subcontracting goals.

-In addition, section 252 of the National Defense Authorization Act for Fiscal Year (FY) 2010 (codified at 10 U.S.C. 2362) authorized the Secretary of Defense to establish a program to provide assistance to HBCUs and MIs in defense-related research, development, testing, and evaluation activities. This statutory authority is used in support of DoD's annual HBCU/MI Broad Agency Announcement.

II. Discussion and analysis

The following is a summary of the revisions to the DFARS:

-Removal of DFARS 205.207(d) subparagraphs (i) and (ii), which provided guidance for synopsising HBCU and MI set-asides, and update the PGI reference in subparagraph (iii).

-Removal of DFARS 206.203, which provided guidance pertaining to HBCU and MI set-asides under the authority of 10 U.S.C. 2323;

-Revision of DFARS 215.304 to (1) remove the references to HBCUs and MIs and (2) add language to clarify the extent of small business participation in performance of the contract that shall be addressed during source selection for acquisitions requiring subcontracting plans.

-Removal of DFARS 219.000, which stated purpose was to implement 10 U.S.C. 2323.

-Removal of DFARS 219.001 because (1) this SDB definition was provided for the purpose of implementing 10 U.S.C. 2323,

specifically as it pertained to the eligibility for the special progress payment rate for SDB's, and reporting contract actions in Federal Procurement Data System.

-Removal of DFARS 219.201(f) and 219.202-5, as these data collection and reporting requirements stemmed from 10 U.S.C 2323. A conforming change was made to DFARS 219.202.

-Removal of DFARS 219.502-3, which provided guidance for applying the SDB price evaluation adjustment to partial small business set-asides.

-Removal of DFARS 219.703(a)(2)(A) and (B), since there are no longer DoD-unique eligibility requirements for SDBs, HBCUs, and/or MIs.

-Removal of DFARS 219.704(1) since DoD prime contractors can no longer consider subcontract awards to HBCUs and MIs as a component of their SDB goal.

-Revision of DFARS 219.705-4 to remove the requirement for DoD contracting officer to consider the extent to which a prime contractor will restrict competition to HBCUs and/or MIs in fulfillment of its subcontracting plan.

-Removal of DFARS subpart 219.11 since there is no longer a statutory authority for the SDB price evaluation adjustment.

-Removal of DFARS subpart 219.12, which addressed monetary incentives to prime contractors to increase subcontracting opportunities for SDBs pursuant to 10 U.S.C. 2323. However, DoD

continues to employ monetary incentives for prime contractors, pursuant to FAR 19.7, as a means of encouraging efforts of prime contractors to maximize subcontracting opportunities with all small business concerns, including SDBs.

- Removal of DFARS subpart 226.3, which implemented 10 U.S.C. 2323 for HBCU and MI set-asides.

- Revision of DFARS 232.501-1 to remove authorizing language for the 95 percent progress payment rate for SDBs. The customary progress payment rate for all small businesses, including SDBs, is 90 percent.

- Removal of DFARS 232.502-1, which permitted progress payments to SDBs if the contract involved \$65,000 or more.

- Revision of DFARS 232.502-470(b) to remove the reference to SDBs in keeping with the revision to the associated DFARS clause at 252.232-7004.

- Removal of DFARS 235.016, since its stated purpose was to implement section 1207 of Pub. L. 99-661, which was codified at 10 U.S.C. 2323. Broad agency announcements, however, may still be used to encourage HBCUs and MIs to submit proposals in specific areas of scientific interest to DoD.

- Revision of DFARS DFARS clause 252.219-7003, Small Business Subcontracting Plan (DoD Contracts), to remove the DoD-specific definitions for SDB, HBCU, and MI, and authorities stemming from 10 U.S.C. 2323. In addition, the requirement for the Year End

Supplementary Report for Small Disadvantaged Businesses and the Small Disadvantaged Business Participation report have been removed, since both requirements stemmed from 10 U.S.C. 2323.

-Revision of DFARS clause 252.219-7004, Small Business Subcontracting Plan (Test Program), to remove the reporting requirement stemming from 10 U.S.C. 2323 for (1) DoD prime contractors regarding HBCUs and MIs, and (2) the Year End Supplementary Report for Small Disadvantaged Businesses.

-Removal of DFARS clause 252.226-7000, Notice of Historically Black College or University and Minority Institution Set-Aside, since 10 U.S.C. 2323 was the authority for the HBCU and MI set-aside program.

-Revision of DFARS clause 252.232-7004, Small Business Subcontracting Plan (Test Program), to remove language pertaining to the 95 percent SDB progress payment rate. The customary progress payment rate/liquidation rate that is applicable to all small businesses, including SDBs, is 90 percent.

-Revision of DFARS Appendix I-101-5 to remove the DoD-unique definition for an SDB concern.

-Removal of DFARS Appendix I-112.1(c), which references FAR 52.219-26, Small Disadvantaged Business Program-Incentive Subcontracting. The clause and the subcontracting incentives connected with the clause no longer exist, since both were based on the authority of 10 U.S.C. 2323.

III. Executive Orders 12866 and 13563

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

IV. Regulatory Flexibility Act

DoD does not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it does not change the fundamental procurement policies that DoD has used to achieve strong small disadvantaged business (SDB) participation or to encourage the involvement of historically black colleges and universities (HBCUs) and minority institutions (MIs) in defense-related research, development, testing, and evaluation activities. However, an

initial regulatory flexibility analysis has been performed and is summarized as follows:

The purpose of this rule is to remove language based on 10 U.S.C. 2323. Section 2323 of Title 10 expired on September 30, 2009. This interim rule amends the DFARS to remove or revise clauses, provisions, and guidance conditioned solely on section 1207 of the National Defense Authorization Act of 1987, Public Law 99-661, as codified at 10 U.S.C. 2323.

Under the authority of 10 U.S.C. 2323, DoD established an SDB participation program. This statute served as the basis for certain solicitation techniques used by DoD to further its SDB participation rate, such as the price evaluation adjustment for SDB concerns and the set-aside program for HBCUs and MIs.

In FY 2008, the last complete fiscal year for which the DoD SDB program was in effect, DoD awarded approximately 29,292 contracts to small disadvantaged businesses, inclusive of approximately 329 DoD awards made to HBCUs and MIs. These figures represent the population of small entities that may be affected by the expiration of 10 U.S.C. 2323. Several factors, however, mitigate the impact of this change, such as the following:

-Section 15(g) of the Small Business Act (Pub. L. 85-536, as amended), (15 U.S.C. 644(g)), requires all Federal agencies to make every attempt to achieve the annual Governmentwide goal for

participation by SDBs. The statutory SDB goal is not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year. DoD has met or exceeded the 5 percent SDB goal since FY 2001.

-DoD contracting officers may continue to employ incentives in solicitations and contracts, when inclusion of such incentives is, in the judgment of the contracting officer, necessary to increase subcontracting opportunities for small businesses, service-disabled veteran-owned small businesses, HUBZone small businesses, women-owned small businesses, as well as small disadvantaged businesses. Additionally, in keeping with SBA's regulations at 13 CFR 125.3(g), the extent of participation of all small businesses, including small disadvantaged businesses, in performance of the contract shall be addressed as part of the source selection for negotiated DoD acquisitions that have subcontracting opportunities. The past performance of offerors in complying with subcontracting goals with all small businesses, including SDBs, shall also be evaluated in DoD acquisitions.

-The effect of the permanent elimination of the price evaluation adjustment for SDB concerns is negligible. The authority for this adjustment had not been used by DoD since 2001 because, under 10 U.S.C. 2323, DoD was prohibited from using the price evaluation adjustment if, during the previous

fiscal year, it had achieved a 5 percent or greater SDB achievement. DoD has achieved the 5 percent SDB goal had been met or exceeded each year.

-In FY 2009, Congress passed, and on September 30, 2009, the President signed into law, the National Defense Authorization Act for FY 2010 (Pub. L. 111-84). Section 252 of the law, codified at 10 U.S.C 2362, gave the Secretary of Defense, and the Secretary of each military department, the authority to carry out a program to enhance participation of HBCUs and MIs in defense research programs. DoD has annually issued broad agency announcements in support of this program since FY 2010.

This rule does not impose new reporting, recordkeeping or other compliance requirements. There are no rules that duplicate, overlap, or conflict with this rule.

The desired outcome to remove language in the DFARS that is based solely on 10 U.S.C. 2323 is best achieved by implementation of the interim rule as stated herein. There are no known alternatives since the DFARS language that implemented this law must be removed since the underlying statute, 10 U.S.C. 2323 has expired.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2011-D038), in correspondence.

V. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). The associated information collection requirements are covered by the FAR under OMB Control numbers 9000-0150, 9000-0006, and 9000-007, which are being addressed accordingly under FAR Case 2009-016.

VI. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the statutory authority provided under 10 U.S.C. 2323 has expired; necessitating the removal of the law's implementing regulations in the DFARS. So long as this implementing language remains in the DFARS, there is a high risk that a DoD contracting officer will inadvertently attempt to execute a contractual action based on an expired legal authority. So as to avoid this situation,

the DFARS changes described herein must be made as soon as possible. However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 205, 206, 215, 219, 226, 232, 235, 252, and Appendix I to Chapter 2

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 205, 206, 215, 219, 226, 232, 235, 252, and Appendix I to Chapter 2 are amended as follows:

1. The authority citation for 48 CFR parts 205, 206, 215, 219, 226, 232, 235, 252, and Appendix I to chapter 2 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 205-PUBLICIZING CONTRACT ACTIONS

2. Amend section 205.207 by revising paragraph (d) to read as follows:

205.207 Preparation and transmittal of synopses.

* * * * *

(d) For special notices for small business events, follow the procedures at PGI 205.207(d).

PART 206 - COMPETITION REQUIREMENTS

206.203 [Removed]

3. Remove section 206.203.

PART 215 - CONTRACTING BY NEGOTIATION

4. Amend section 215.304 by revising paragraph (c)(i) to read as follows:

215.304 Evaluation factors and significant subfactors.

(c)(i) In acquisitions that require use of the clause at FAR 52.219-9, Small Business Subcontracting Plan, other than those based on the lowest price technically acceptable source selection process (see FAR 15.101-2), the extent of participation of small businesses (to include service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns, and women-owned small business concerns) in performance of the contract shall be addressed in source selection. The contracting officer shall evaluate the extent to which offerors identify and commit to small business performance of the contract, whether as a joint venture, teaming arrangement, or subcontractor.

(A) See PGI 215.304(c)(i)(A) for examples of evaluation factors.

(B) Proposals addressing the extent of small business performance shall be separate from subcontracting plans submitted pursuant to the clause at FAR 52.219-9 and shall be structured to allow for consideration of offers from small businesses.

(C) When an evaluation assesses the extent that small businesses are specifically identified in proposals, the small businesses considered in the evaluation shall be listed in any subcontracting plan submitted pursuant to FAR 52.219-9 to facilitate compliance with 252.219-7003(e).

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PART 219-SMALL BUSINESS PROGRAMS

219.000 [Removed]

5. Remove section 219.000.

219.001 [Removed]

6. Remove section 219.001.

219.201 [Amended]

7. Amend section 219.201 by removing paragraph (f).

219.202-1 [Amended]

8. Amend section 219.202-1 by removing "PGI 205.207(d)(ii)" and adding "PGI 205.207(d)" in its place.

219.202-5 [Removed]

9. Remove section 219.202-5.

219.502-3 [Removed]

10. Remove section 219.502-3.

219.703 [Amended]

11. Amend section 219.703 by removing paragraphs (a)(2)(A) and (B).

219.704 [Amended]

12. Amend section 219.704 by—

- a. Removing paragraph (1); and
- b. Redesignating paragraph (2) as paragraph (1), and paragraph (3) as paragraph (2), respectively.

13. Revise section 219.705-4 to read as follows:

219.705-4 Reviewing the subcontracting plan.

(d) Challenge any subcontracting plan that does not contain positive goals. A small disadvantaged business goal of less than five percent must be approved one level above the contracting officer.

Subpart 219.11 [Removed]

14. Remove subpart 219.11, consisting of sections 219.1101 and 219.1102.

Subpart 219.12 [Removed]

15. Remove subpart 219.12, consisting of sections 219.1203 and 219.1204.

PART 226—OTHER SOCIOECONOMIC PROGRAMS

Subpart 226.3 [Removed]

16. Remove subpart 226.3, consisting of sections 226.370 and 226.370-1 through 226.370-9.

PART 232—CONTRACT FINANCING

17. Revise section 232.501-1 to read as follows:

232.501-1 Customary progress payment rates.

(a) The customary progress payment rates for DoD contracts, including contracts that contain foreign military sales (FMS) requirements, are 80 percent for large business concerns and 90 percent for small business concerns.

232.502-1 [Removed]

18. Remove section 232.502-1.

232.502-4-70(b) [Amended]

19. Amend section 232.502-4-70(b) to remove the phrase "or small disadvantaged business".

PART 235—RESEARCH AND DEVELOPMENT CONTRACTING

235.016 [Removed]

20. Remove section 235.016.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

21. Amend section 252.219-7003 by—

- a. Removing the clause date "(AUG 2012)" and adding "(OCT 2014)" in its place;
- b. Revising paragraph (a);
- c. Removing paragraphs (b) and (c);
- d. Redesignating paragraph (d) as paragraph (b);
- e. Redesignating paragraphs (e) through (h) as (c) through (f), respectively;
- f. In the newly redesignated paragraph (c) removing "subcontracts awarded" and adding "subcontracts awarded to" in its place;

- g. In the newly redesignated paragraph (f)–
- i. In paragraph (f) (2) (i), removing “(h) (1) (i)” and adding “(f) (1) (i)” in its place;
- ii. In paragraph (f) (2) (ii), removing “(h) (2) (iii)” and adding “(f) (2) (iii)” in its place; and
- iii. Removing paragraphs (f) (2) (iv) and (v).
- h. Revising the Alternate I clause.

The revisions read as follows:

252.219-7003 Small Business Subcontracting Plan (DoD Contracts).

* * * * *

(a) Definition. Summary Subcontract Report (SSR) Coordinator, as used in this clause, means the individual at the department or agency level who is registered in eSRS and is responsible for acknowledging receipt or rejecting SSRs in eSRS for the department or agency.

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Alternate I (OCT 2014)

As prescribed in 219.708(b) (1) (A) (2), substitute the following paragraph (f) (1) (i) for (f) (1) (i) in the basic clause:

(f) (1) (i) The Standard Form 294 Subcontracting Report for Individual Contracts shall be submitted in accordance with the instructions on that form; paragraph (f) (2) (i) is inapplicable.

22. Section 252.219-7004 is amended by–

- a. Removing the clause date "(JAN 2011)" and adding "(OCT 2014)" in its place;
- b. Revising paragraph (d) introductory text;
- c. Removing paragraph (e); and
- d. Redesignating paragraphs (f) and (g) as paragraphs (e) and (f), respectively.

The revision reads as follows:

252.219-7004 Small Business Subcontracting Plan (Test Program).

* * * * *

(d) The Contractor shall submit SSRs using eSRS at <http://www.esrs.gov>. The reports shall provide information on subcontract awards to small business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns, and women-owned small business concerns. Purchases from a corporation, company, or subdivision that is an affiliate of the prime Contractor or subcontractor are not included in these reports. Subcontract award data reported by prime contractors and subcontractors shall be limited to awards made to their immediate next-tier subcontractors. Credit cannot be taken for awards made to lower-tier subcontractors unless the Contractor or subcontractor has been designated to receive a small business or small disadvantaged business credit from a member firm of the Alaska Native - Corporations or an Indian tribe. Only subcontracts

involving performance in the U.S. or its outlying areas should be included in these reports.

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252.226-7000 [Removed]

23. Remove section 252.226-7000.

24. Revise section 252.232-7004 to read as follows:

252.232-7004 DoD Progress Payment Rates.

As prescribed in 232.502-4-70(b), use the following clause:

DOD PROGRESS PAYMENT RATES (OCT 2014)

If the Contractor is a small business concern, the Progress Payments clause of this contract is modified to change each mention of the progress payment rate and liquidations rate (excepting paragraph (k), Limitations on Undefined Contract Actions) to 90 percent.

(End of clause)

25. Amend Appendix I to Chapter 2 by:

a. Revising section I-101.5(a.)

b. Amending section I-112.1 by removing paragraph (c).

The revision reads as follows:

**Appendix I to Chapter 2 -- Policy and Procedures for the DoD
Pilot Mentor-Protege Program**

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I-101.5 * * *

(a) An SDB concern as defined in 13 CFR 124.1002;

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