



BILLING CODE: 6820-EP

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 9, 19, and 52

[FAC 2021-02; FAR Case 2020-002; Item II; Docket No. FAR-2020-0002; Sequence No. 1]

RIN 9000-A005

Federal Acquisition Regulation: Removal of Obsolete Definitions

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 to amend the Federal Acquisition Regulation (FAR) to remove the definitions of the terms "annual receipts" and "number of employees" in the regulations regarding small business programs and to move the definition of "affiliates," as used with regard to small business size determination, to appropriate locations in the FAR.

DATES: *Effective:* [Insert date 30 days after date of publication in the **FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Ms. Mahruba Uddowla, Procurement Analyst, at 703-605-2868 or by email at mahruba.uddowla@gsa.gov for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite FAC 2021-02, FAR Case 2020-002.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are amending the FAR to remove the definitions of "annual receipts" and "number of employees" at FAR 19.101. These definitions unnecessarily duplicate the Small Business Administration (SBA) regulation at 13 CFR part 121. In addition, these definitions in the FAR are outdated, following the publication of SBA's final rule at 84 FR 66561 on December 5, 2019.

SBA's final rule amended 13 CFR part 121 to implement Public Law 115-324 (the "Small Business Runway Extension Act of 2018"), which amended section 3(a)(2)(C)(ii)(II) of the Small Business Act (15 U.S.C. 632(a)(2)(C)(ii)(II)) to modify the requirements for proposed small business size standards. SBA's final rule modifies its method for calculating average annual receipts used to prescribe size standards for small businesses by changing the calculation of average annual receipts for all of SBA's receipts-based

size standards, and for other agencies' proposed receipts-based size standards, from a 3-year averaging period to a 5-year averaging period. SBA has independent statutory authority to issue size standards.

While the definitions of "annual receipts" and "number of employees" are listed in part 19 of the FAR, they are not necessary for contracting officers, as SBA has sole responsibility for prescribing how these terms are used to determine small business size. The contracting officer's responsibility is to select the applicable North American Industry Classification Standards (NAICS) code and size standard for a given acquisition and to verify that a business concern has represented its business size for the acquisition. Therefore, DoD, GSA, and NASA are removing these redundant, obsolete definitions from the FAR.

Currently, the term "affiliates" only appears in the definitions of "annual receipts" and "number of employees" in FAR 19.101; it is not used anywhere else in part 19. Upon the removal of those definitions from FAR 19.101, "affiliates" will no longer be used in FAR part 19. As such, the definition is no longer required in section 19.101. However, since the term is used in multiple other locations in the FAR, the definition for "affiliates," as

used with regard to small business size determination, will be moved to these locations.

II. Discussion and Analysis

Subpart 19.1, Size Standards, is amended to remove the definitions of "annual receipts" and "number of employees." As explained in section I of this preamble, these definitions are not necessary for contracting officers since SBA determines small business size standards, as well as whether a specific business is small under those standards. Subpart 19.1 is also amended to remove the definition of "affiliates" since the term will no longer be used in the subpart.

Instead, the definition of "affiliates" is being incorporated into the definitions of "small business concern" at FAR part 2, FAR provisions 52.212-3 and 52.219-1, and FAR clauses 52.219-6, 52.219-7, and 52.219-28, which is where the term "affiliates" is used with regard to small business size determination.

III. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the FAR is the Office of Federal Procurement Policy statute (codified at title 41 of the United States Code). Specifically, 41 U.S.C. 1707(a)(1) requires that a

procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. While this final rule relates to the expenditure of appropriated funds, it is not required to be published for public comment, because it does not have a significant effect or impose any requirements on contractors or offerors. The rule removes two definitions that unnecessarily duplicate SBA's regulation and moves another definition from one part of the FAR to other parts where the term being defined is actually used.

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

This rule amends the FAR to remove the definitions of "annual receipts" and "number of employees" at section 19.101, as well as moving the definition of "affiliates," as used with regard to small business size determination, from 19.101 to other locations in the FAR where the term is actually used. This rule does not change the applicability

or the text of any FAR solicitation provisions or contract clauses.

V. Executive Orders 12866 and 13563

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

VI. Executive Order 13771

This final rule is not subject to E.O. 13771, Reducing Regulation and Controlling Regulatory Costs, because this rule is not a significant regulatory action under E.O. 12866.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) does not apply to this rule, because a notice of proposed

rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C.

1707(a) (1) (see section III. of this preamble).

Accordingly, no regulatory flexibility analysis is required and none has been prepared.

VIII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 2, 9, 19, and 52

Government procurement.

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

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 9, 19, and 52 as set forth below:

1. The authority citation for 48 CFR parts 2, 9, 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 2—DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101 in paragraph (b) (2) by—

a. In the definition "Affiliates":

i. Removing from paragraph (1) "For the use in subpart 9.4" and adding "For use in subpart 9.4" in its place; and

ii. Revising paragraph (2); and

b. Revising the definition "Small business concern".

The revisions read as follows:

2.101 Definitions.

* * * * *

Affiliates * * *

(2) For use of affiliates in size determinations, see the definition of "small business concern" in this section.

* * * * *

Small business concern—

(1) Means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria and size standards in 13 CFR part 121 (see 19.102). Such a concern is "not dominant in its field of operation" when it does not exercise a controlling or major influence on a national basis in a kind of business activity in which a number of business concerns are primarily engaged. In determining whether dominance exists, consideration must be given to all appropriate factors, including volume of business, number of employees, financial resources, competitive status or position, ownership or control of materials, processes, patents, license agreements, facilities, sales territory, and nature of business activity. (See 15 U.S.C. 632.)

(2) *Affiliates*, as used in this definition, means business concerns, one of whom directly or indirectly controls or has the power to control the others, or a third party or parties control or have the power to control the others. In determining whether affiliation exists, consideration is given to all appropriate factors including common ownership, common management, and contractual

relationships. SBA determines affiliation based on the factors set forth at 13 CFR 121.103.

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PART 9—CONTRACTOR QUALIFICATIONS

9.104-3 [Amended]

3. Amend section 9.104-3 by removing from the first sentence of paragraph (c) "*Affiliates* in 19.101" and adding "*Small business concern* in 2.101" in its place.

PART 19—SMALL BUSINESS PROGRAMS

19.101 [Removed and Reserved]

4. Remove and reserve section 19.101.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Amend section 52.212-3 by—

a. Revising the date of the provision; and

b. In paragraph (a), revising the definition "*Small business concern*".

The revisions read as follows:

**52.212-3 Offeror Representations and Certifications—
Commercial Items.**

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS ([INSERT
ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE
FEDERAL REGISTER])

* * * * *

(a) * * *

Small business concern—

(1) Means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria in 13 CFR part 121 and size standards in this solicitation.

(2) *Affiliates*, as used in this definition, means business concerns, one of whom directly or indirectly controls or has the power to control the others, or a third party or parties control or have the power to control the others. In determining whether affiliation exists, consideration is given to all appropriate factors including common ownership, common management, and contractual relationships. SBA determines affiliation based on the factors set forth at 13 CFR 121.103.

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6. Amend section 52.212-5 by—

a. Revising the date of the clause;

b. Removing from paragraph (b)(14)(i) "(MAR 2020)"

and adding "([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*])" in its place;

c. Removing from paragraph (b) (15) (i) "(MAR 2020)" and adding "([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*])" in its place; and

d. Removing from paragraph (b) (22) (i) "(MAY 2020)" and adding "([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*])" in its place.

The revision reads as follows:

52.212-5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders-Commercial Items.

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CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS-COMMERCIAL ITEMS ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*])

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7. Amend section 52.219-1 by-

- a. Revising the date of the provision; and
- b. In paragraph (a), revising the definition

"Small business concern".

The revisions read as follows:

52.219-1 Small Business Program Representations.

* * * * *

SMALL BUSINESS PROGRAM REPRESENTATIONS ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*])

(a) * * *

Small business concern-

(1) Means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria in 13 CFR part 121 and the size standard in paragraph (b) of this provision.

(2) *Affiliates*, as used in this definition, means business concerns, one of whom directly or indirectly controls or has the power to control the others, or a third party or parties control or have the power to control the others. In determining whether affiliation exists, consideration is given to all appropriate factors including common ownership, common management, and contractual relationships. SBA determines affiliation based on the factors set forth at 13 CFR 121.103.

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8. Amend section 52.219-6 by revising the date of the clause and paragraph (a) to read as follows:

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

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NOTICE OF TOTAL SMALL BUSINESS SET-ASIDE ([**INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER***])

(a) *Definition. Small business concern*, as used in this clause—

(1) Means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the size standards in this solicitation.

(2) *Affiliates*, as used in paragraph (a)(1) of this clause, means business concerns, one of whom directly or indirectly controls or has the power to control the others, or a third party or parties control or have the power to control the others. In determining whether affiliation exists, consideration is given to all appropriate factors including common ownership, common management, and contractual relationships. SBA determines affiliation based on the factors set forth at 13 CFR 121.103.

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9. Amend section 52.219-7 by revising the date of the clause and paragraph (a) to read as follows:

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

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NOTICE OF PARTIAL SMALL BUSINESS SET-ASIDE ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*])

(a) *Definition. Small business concern*, as used in this clause—

(1) Means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the size standards in this solicitation.

(2) *Affiliates*, as used in paragraph (a)(1) of this clause, means business concerns, one of whom directly or indirectly controls or has the power to control the others, or a third party or parties control or have the power to control the others. In determining whether affiliation exists, consideration is given to all appropriate factors including common ownership, common management, and contractual relationships. SBA determines affiliation based on the factors set forth at 13 CFR 121.103.

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10. Amend section 52.219-28 by—

a. Revising the date of the clause; and

b. In paragraph (a), revising the definition “Small business concern”.

The revisions read as follow:

52.219-28 Post-Award Small Business Program

Rerepresentation.

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POST-AWARD SMALL BUSINESS PROGRAM REREPRESENTATION ([**INSERT ABBREVIATED**
MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL*
***REGISTER*]**)

(a) * * *

Small business concern-

(1) Means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria in 13 CFR part 121 and the size standard in paragraph (d) of this clause. Such a concern is "not dominant in its field of operation" when it does not exercise a controlling or major influence on a national basis in a kind of business activity in which a number of business concerns are primarily engaged. In determining whether dominance exists, consideration shall be given to all appropriate factors, including volume of business, number of employees, financial resources, competitive status or position, ownership or control of materials, processes, patents, license agreements, facilities, sales territory, and nature of business activity.

(2) *Affiliates*, as used in this definition, means business concerns, one of whom directly or indirectly

controls or has the power to control the others, or a third party or parties control or have the power to control the others. In determining whether affiliation exists, consideration is given to all appropriate factors including common ownership, common management, and contractual relationships. SBA determines affiliation based on the factors set forth at 13 CFR 121.103.

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[FR Doc. 2020-21696 Filed: 10/22/2020 8:45 am; Publication Date: 10/23/2020]