



BILLING CODE: 6820-EP

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 22 and 52

[FAC 2021-02; FAR Case 2019-002; Item VII; Docket No. FAR 2019-0004, Sequence No. 1]

RIN 9000-AN85

Federal Acquisition Regulation: Recreational Services on Federal Lands

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 implement a Department of Labor (DOL) rule, which exempts certain contracts for seasonal recreational services or seasonal recreational equipment rental for the general public on Federal lands from an Executive order on minimum wage. This rule does not change the extent to which contractors can be used to assist Federal agencies with providing services on Federal lands. This rule only changes the

extent to which minimum wages are required for applicable Federal contracts.

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

FOR FURTHER INFORMATION CONTACT: Mr. Kevin Funk, Procurement Analyst, at 202-357-5805 or *kevin.funk@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 2019-002.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule on October 21, 2019, at 84 FR 56157, to amend the FAR to implement a DOL final rule, Minimum Wage for Contractors; Updating Regulations To Reflect Executive Order 13838, published in the *Federal Register* at 83 FR 48537 on September 26, 2018.

The DOL rule implemented Executive Order (E.O.) 13838, Exemption From Executive Order 13658 for Recreational Services on Federal Lands (May 25, 2018, published June 1, 2018, 83 FR 25341), which exempted certain contracts and contract-like instruments from the requirements of E.O. 13658, Establishing a Minimum Wage for Contractors. E.O.

13658 raised the hourly minimum wage paid to workers performing on or in connection with covered Federal contracts to: (i) \$10.10 per hour, beginning January 1, 2015; and (ii) beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary of Labor in accordance with the E.O. As of January 1, 2020, E.O. 13658 raised minimum wage to \$10.80 per hour (84 FR 49345).

E.O. 13838 and DOL's implementing regulation exempt contracts or contract-like instruments entered into with the Federal Government in connection with seasonal recreational services or seasonal recreational equipment rental for the general public on Federal lands from the requirements of E.O. 13658; lodging and food services are not exempted.

The purpose of this rule is to make a conforming change in the FAR. This rule implements E.O. 13838 by amending FAR 22.1903(b)(2) and FAR clause 52.222-55(c)(2) to conform to the DOL rule by adding seasonal recreational services or seasonal recreational equipment rental for the general public on Federal lands to the list of exemptions.

Eighteen respondents provided comments in response to the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Changes To Rule

A new definition for "seasonal recreational equipment rental" was added to provide additional clarity within the rule. An additional conforming editorial change was also made within the FAR clause at 52.222-55.

B. Analysis of public comments

1. Support for the rule.

Comment: One respondent expressed support for the rule.

Response: Noted.

2. Legal Sufficiency of Rule.

Comment: Two respondents stated the rule was illegal or would violate E.O. 13658.

Response: This rule exempts certain contracts and contract-like instruments from the requirements of E.O. 13658 as directed by E.O. 13838. An Executive order may revise, narrow, or augment a policy established under a prior Executive order as long as the new Executive order

does not conflict with the U.S. Constitution or current statutory law. This regulation is legally sufficient.

3. Opposition to the rule.

Comment: Several respondents expressed general opposition to the rule.

Response: The purpose of this rule is to make a conforming change in the FAR. This rule implements E.O. 13838 by amending FAR 22.1903(b) (2) and FAR clause 52.222-55(c) (2) to conform to the DOL rule by adding seasonal recreational services or seasonal recreational equipment rental for the general public on Federal lands to the list of exemptions.

4. Scope of Rule

Comment: Several respondents stated the rule would privatize the National Parks.

Response: This rule does not change the extent to which contractors can be used to assist Federal agencies with providing services on Federal lands. Nor does it alter any inherently governmental responsibility vested in the Federal Government. Contractors have been used by Federal agencies for many years to assist with providing superior and efficient services on Federal lands. This rule only changes the extent to which minimum wages are required for Federal contracts under E.O. 13658.

III. 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 does not add any new provisions or clauses. The rule does not change the applicability of existing provisions or clauses to contracts at or below the SAT and contracts for the acquisition of commercial items, including COTS items. The FAR clause at 52.222-55, Minimum Wages Under Executive Order 13658, is prescribed for use in contracts valued at or below the SAT and for the acquisition of commercial items. Under this rule, acquisitions below the SAT or for commercial items involving seasonal recreational services or seasonal recreational equipment rental for the general public on Federal lands would be exempt from FAR clause 52.222-55. Lodging and food services are not exempted.

IV. Executive Orders 12866 and 13563

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 rule 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.

V. Executive Order 13371

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

VI. 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:

This rule is required to implement a DOL rule dated September 26, 2018, which implemented E.O. 13838, Exemption from Executive Order 13658 for Recreational Services on Federal Lands (May 25, 2018, published June 1, 2018, 83 FR 25341). E.O. 13838 made contracts or contract-like instruments entered into with the Federal Government in connection with seasonal recreational services or seasonal recreational equipment rental for the general public on Federal lands exempt from the minimum wage requirements under E.O. 13658, dated February 12, 2014; lodging and food services are not exempted.

The objective of this rule is to make a conforming change in the FAR to conform to the DOL rule to implement E.O. 13838. This rule provides a conforming amendment to FAR 22.1903(b)(2)(iii) and FAR clause 52.222-55(c)(2)(ii) to conform to the DOL rule by adding seasonal recreational services or seasonal recreational equipment rental for the

general public on Federal lands to the list of exemptions. Lodging and food services are not exempted. The legal basis for these changes is E.O. 13838.

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

This rule is not expected 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 the rule only applies to contracts for seasonal recreational services or seasonal recreational equipment rental.

Lodging and food services are not exempted. On average for fiscal years 2016-2018, there were 229 awards reported on an annual basis in the Federal Procurement Data System (FPDS) for seasonal recreational services and seasonal recreational equipment rental, of which 153 were awarded to small business entities. The FPDS data could not isolate which of the awards were for services or rentals on Federal lands, so the average number of awards for seasonal recreational services or seasonal recreational equipment rental to the general public on Federal lands could be even lower. Furthermore, this rule is expected to have a beneficial impact on small businesses as it relaxes the burden on small businesses.

There are no reporting, recordkeeping, or other compliance requirements on any small entities in this rule. The rule does not duplicate, overlap or conflict with any other Federal rules.

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

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

VII. 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 22 and 52

Government procurement.

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 22 and 52 as set forth below:

1. The authority citation for 48 CFR parts 22 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 22—APPLICATION OF LABOR LAWS TO GOVERNMENT

ACQUISITIONS

2. Amend section 22.1901 by—

a. Revising the section heading;

b. Adding introductory text and, in alphabetical order, the definitions “Seasonal recreational equipment rental” and “Seasonal recreational services”; and

c. In the definition “Worker,” removing from the introductory text “, as used in this subpart,”.

The revision and additions read as follows:

22.1901 Definitions.

As used in this subpart—

Seasonal recreational equipment rental means any equipment rental in connection with seasonal recreational services.

Seasonal recreational services means services that include river running, hunting, fishing, horseback riding,

camping, mountaineering activities, recreational ski services, and youth camps.

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3. Amend section 22.1903 by—

- a. Removing the period at the end of paragraph (b) (2) (ii) (C) and adding “; or” in its place; and
- b. Adding paragraph (b) (2) (iii).

The addition reads as follows:

22.1903 Applicability.

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(b) * * *

(2) * * *

(iii) Seasonal recreational services or seasonal recreational equipment rental for the general public on Federal lands, except for lodging and food services associated with seasonal recreational services, in accordance with Executive Order 13838, Exemption from Executive Order 13658 for Recreational Services on Federal Lands (3 CFR, 2018 Comp., p. 831), as implemented by the U.S. Department of Labor regulations at 29 CFR 10.4(g).

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PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Amend section 52.212-5 by—

- a. Revising the date of the clause;

b. Removing from paragraph (c) (7) "(DEC 2015)" and adding "([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*])" in its place;

c. Removing from paragraph (e) (1) (xvii) "(DEC 2015)" and adding "([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*])" in its place; and

d. In Alternate II:

i. Revising the date of the alternate; and

ii. Removing from paragraph (e) (1) (ii) (P) "(DEC 2015)" and adding "([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*])" in its place.

The revisions read 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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Alternate II ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]). * * *

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5. Amend section 52.213-4 by—

a. Revising the date of the clause;

b. Removing from paragraph (a) (2) (viii) "(AUG 2020)" and adding "([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*])." in its place; and

c. Removing from paragraph (b) (1) (ix) "(DEC 2015)" 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:

**52.213-4 Terms and Conditions—Simplified Acquisitions
(Other Than Commercial Items).**

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TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL
ITEMS) ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF
PUBLICATION IN THE *FEDERAL REGISTER*])

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6. Amend section 52.222-55 by—

a. Revising the date of the clause;

b. Adding to paragraph (a), in alphabetical order, the definitions "Seasonal recreational equipment rental" and "Seasonal recreational services";

c. In paragraph (c) (2) (ii) (A), removing the period at the end of the sentence and adding a semicolon in its place;

d. In paragraph (c) (2) (ii) (B), removing the period at the end of the sentence and adding "; and" in its place;

e. In paragraph (c) (2) (ii) (C), removing the period at the end of the sentence and adding “; or” in its place; and

f. Adding paragraph (c) (2) (iii).

The revision and additions read as follows:

52.222-55 Minimum Wages Under Executive Order 13658.

* * * * *

MINIMUM WAGES UNDER EXECUTIVE ORDER 13658 ([**INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER***])

(a) * * *

“Seasonal recreational equipment rental” means any equipment rental in connection with seasonal recreational services.

“Seasonal recreational services” means services that include: river running, hunting, fishing, horseback riding, camping, mountaineering activities, recreational ski services, and youth camps.

* * * * *

(c) * * *

(2) * * *

(iii) Seasonal recreational services or seasonal recreational equipment rental for the general public on Federal lands, except for lodging and food services associated with seasonal recreational services, in

accordance with Executive Order 13838, Exemption from Executive Order 13658 for Recreational Services on Federal Lands (3 CFR, 2018 Comp., p. 831), as implemented by the U.S. Department of Labor regulations at 29 CFR 10.4(g).

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7. Amend section 52.244-6 by-

a. Revising the date of the clause; and

b. Removing from paragraph (c)(1)(xv) "(DEC 2015)"

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:

52.244-6 Subcontracts for Commercial Items.

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SUBCONTRACTS FOR COMMERCIAL ITEMS ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*])

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[FR Doc. 2020-21701 Filed: 10/22/2020 8:45 am; Publication Date: 10/23/2020]