



DEPARTMENT OF DEFENSE

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 4, 19, and 52**

**[FAR Case 2020-016; Docket No. FAR-2020-0016; Sequence No.**

**1]**

**RIN 9000-A018**

**Federal Acquisition Regulation: Rerepresentation of Size and Socioeconomic Status**

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

**ACTION:** Proposed rule.

**SUMMARY:** DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement regulatory changes made by the Small Business Administration to order-level size and socioeconomic status rerepresentation requirements.

**DATES:** Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]** to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments in response to FAR Case 2020-016 to the Federal eRulemaking portal at <https://www.regulations.gov> by searching for "FAR Case

2020-016". Select the link "Comment Now" that corresponds with "FAR Case 2020-016". Follow the instructions provided at the "Comment Now" screen. Please include your name, company name (if any), and "FAR Case 2020-016" on your attached document. If your comment cannot be submitted using <https://www.regulations.gov>, call or email the points of contact in the FOR FURTHER INFORMATION CONTACT section of this document for alternate instructions.

*Instructions:* Please submit comments only and cite "FAR Case 2020-016" in all correspondence related to this case. Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal and/or business confidential information provided. Public comments may be submitted as an individual, as an organization, or anonymously (see frequently asked questions at <https://www.regulations.gov/faq>). To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Dana Bowman, Procurement Analyst, at 202-803-3188 or by email at [dana.bowman@gsa.gov](mailto:dana.bowman@gsa.gov). For information pertaining to status, publication schedules, or alternate instructions for submitting comments if <https://www.regulations.gov> cannot be used, contact the

Regulatory Secretariat Division at 202-501-4755 or  
GSARegSec@gsa.gov. Please cite FAR Case 2020-016.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD, GSA, and NASA are proposing to amend the FAR to implement regulatory changes made by the Small Business Administration (SBA) in its final rule published on October 16, 2020, at 85 FR 66146 to require small business concerns to rerepresent their size and/or socioeconomic status for orders placed under multiple-award contracts under certain circumstances. Federal Supply Schedules (FSS) are exempt from this mandatory requirement; however, the contracting officer continues to have the discretion to require a rerepresentation for an order. SBA amended its regulations to ensure that small businesses qualify for the applicable size and/or socioeconomic status associated with orders placed under multiple-award contracts where size and/or socioeconomic status were not relevant to the award of the underlying multiple-award contract. Specifically, SBA amended its regulations to require small business concerns identified at FAR 19.000(a)(3) to rerepresent their size and/or socioeconomic status for orders set aside exclusively for small businesses that are issued under an unrestricted multiple-award contract, except for those with reserves. In addition, small business concerns must rerepresent their socioeconomic status for orders issued

under a small business set-aside multiple-award contract or the set-aside part of a multiple-award contract where the orders are further set aside for a particular socioeconomic category which differs from the underlying multiple-award contract or the set-aside part of the multiple-award contract.

## **II. Discussion and Analysis**

This rule proposes to modify FAR 19.301-2, Rerepresentation by a contractor that represented itself as a small business concern, and FAR clause 52.219-28, Postaward Small Business Program Rerepresentation, to implement regulatory changes made in SBA's final rule issued on October 16, 2020, at 85 FR 66146 as follows:

- Amend FAR 19.301-2(b) to require a contractor that represented its status as any of the small business concerns at FAR 19.000(a)(3) before contract award, and whose socioeconomic status is not certified by the SBA, to rerepresent its size and socioeconomic status in accordance with the clause at 52.219-28, Postaward Small Business Program Rerepresentation.

- Amend FAR 19.301-2(b) to add a new paragraph (2)(i) to require a contractor that represented itself as any of the small business concerns at FAR 19.000(a)(3) at the multiple-award contract level to rerepresent its size and socioeconomic status upon submitting an offer for orders set aside exclusively for small business concerns that are

issued under an unrestricted multiple-award contract,  
except for orders issued under an unrestricted multiple-  
award contract with reserves;

- Amend FAR 19.301-2(b) to add a new paragraph (2) (ii)  
to require a contractor that represented itself as any of  
the small business concerns at FAR 19.000(a) (3) at the  
multiple-award contract level to rerepresent its size and  
socioeconomic status upon submitting an offer for orders  
issued under a set-aside multiple-award contract that are  
further set aside for a specific socioeconomic category  
that differs from the underlying multiple-award contract  
(i.e., orders set aside for HUBZone small business concerns  
under a small business set-aside multiple-award contract);

- Amend FAR 19.301-2(b) to add a new paragraph  
(2) (iii) to require a contractor that represented itself as  
any of the small business concerns at FAR 19.000(a) (3) at  
the multiple-award contract level to rerepresent its size  
and socioeconomic status upon submitting an offer for  
orders issued under the set-aside part of a multiple-award  
contract that are further set-aside for a specific  
socioeconomic category that differs from the underlying  
set-aside part of the multiple-award contract (i.e., orders  
set aside for women-owned small business concerns under the  
small business set-aside part of a multiple-award  
contract);

- As a result of adding the new paragraph (b) (2), the existing FAR 19.301-2(b) (2) is renumbered as 19.301-2(b) (3); and

- Amend FAR clause 52.219-28, Post-Award Small Business Program Rerepresentation, to change the clause title from "Post-Award" to "Postaward" and to notify offerors of the rerepresentation requirements at FAR 19.301-2(b) (2). "Post-Award" is also changed to "Postaward" at FAR 4.604, 19.202-5(c), 19.301-2(b), 19.302(j), and 19.309(c).

Orders issued under FSS are exempt from the requirement to rerepresent size and/or socioeconomic status. However, a contracting officer has the discretion to request rerepresentation of size and/or socioeconomic status for a specific order.

**III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Products, (Including Commercially Available Off-the-shelf (COTS) Items) and for Commercial Services**

This proposed rule amends the clauses at FAR 52.219-28, Postaward Small Business Program Rerepresentation, and 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Products and Commercial Services. However, this proposed rule does not change the application to contracts at or below the SAT, or for commercial products and commercial services,

including COTS items. The clauses continue to apply to acquisitions at or below the SAT and to acquisitions for commercial products and commercial services, including COTS items.

#### **IV. Expected Impact of the Rule**

As a result of this proposed rule a contractor that represented its status before contract award, and whose socioeconomic status is not certified by SBA, will be required to rerepresent their size and/or socioeconomic status for orders placed under multiple-award contracts, under certain circumstances, where rerepresentation was not previously required. The proposed changes ensure that the award of small business set-aside orders under certain multiple-award contracts are made to small businesses that qualify for the size and/or socioeconomic status associated with the orders. Therefore, the expected impact of this rule is that entities that no longer qualify under the applicable North American Industry Classification System (NAICS) code will not be awarded orders under the multiple-award contracts subject to this rule when those orders are set aside.

Also, contracting officers will be required to verify the size and/or socioeconomic status of a small business concern prior to issuing an order under the multiple-award contracts subject to this rule.

Orders placed under the FSS program are exempt from the mandatory rerepresentation requirement; however, contracting officers continue to have the discretion to require a rerepresentation for an order.

This proposed rule is also expected to prevent agencies from receiving credit towards their small business goals for awards made to firms that no longer qualify as small under the applicable NAICS code.

Existing e-business systems are also expected to be impacted by this proposed rule as the Federal Procurement Data System (FPDS) currently does not capture size and socioeconomic status at the order level; therefore, contracting officers will not be able to indicate the size or socioeconomic status of a small business concern at the order level. This may result in inaccurate data and data reporting.

#### **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.

## **VI. Regulatory Flexibility Act**

DoD, GSA, and NASA do not expect this proposed 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. 601-612, because contractors are currently required by regulation to update their size and socioeconomic status representation at least annually; within 30 days after a novation or merger; for long-term contracts, within 60 to 120 days prior to the end of the fifth year of the contract and within 60 to 120 days prior to the date specified in the contract for the exercise of any option thereafter, and when a contracting officer requires rerepresentation for an order. This proposed rule adds a requirement for small business concerns to rerepresent their size and socioeconomic representations for orders issued under a multiple-award contract under certain circumstances. However, an Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to update the requirement for rerepresentation of size and socioeconomic status for set-aside orders issued under multiple-award contracts. These changes are required to implement the regulatory changes made by the Small Business Administration (SBA) in its final rule published October 16, 2020, at 85 FR 66146. Specifically, this proposed rule requires a small business concern that represented its status before contract award, and whose socioeconomic status is not certified by the SBA, to

rerepresent its size and/or socioeconomic status for all set-aside orders under an unrestricted multiple-award contract where the orders are set aside for a particular socioeconomic category, unless the contract authorized reserves. Additionally, small business concerns must rerepresent their socioeconomic status for orders issued under a set-aside multiple-award contract where the orders are further set aside exclusively for a particular socioeconomic category which differs from the underlying multiple-award contract or the set-aside part of the multiple-award contract (e.g., the multiple-award contract is a small business set-aside award and competition is restricted to certified HUBZone small businesses). This proposed rule also requires a small business concern to rerepresent its socioeconomic status for all set-aside orders where the required socioeconomic status for the order differs from that of the underlying set-aside part of the multiple-award contract. The updated requirements are made to clarify SBA's regulatory provisions and ensure that small businesses qualify under the NAICS code for orders issued under multiple-award contracts.

The objective of this proposed rule is to implement regulatory changes made in SBA's final rule at 85 FR 66146 published on October 16, 2020, to update the requirements for size and socioeconomic status rerepresentation for set-aside orders issued under multiple-award contracts where the socioeconomic status of the order differs from the underlying multiple-award contract or set-aside part of the multiple-award contract, except for multiple-award contracts with reserves and Federal Supply Schedule (FSS) contracts. These changes will ensure that orders set-aside for small businesses are awarded to concerns that qualify for the size and/or socioeconomic status of the NAICS code associated with the order. Promulgation of the FAR is authorized by 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113. The legal basis for this rule is SBA's regulations at 13 CFR Part 121.404(a)(1) as amended by SBA's final rule.

This rule will impact approximately 4,395 small entities per year. Currently, contractors are required to rerepresent their size and socioeconomic status for orders under multiple-award contracts if the contracting officer explicitly requires rerepresentation for that order or as required by FAR clause 52.219-28, Postaward Small Business Program Rerepresentation.

According to FPDS, in the last three fiscal years (FYs), agencies set aside orders for small entities under unrestricted multiple-award contracts as follows: 6,509 in FY 2019; 7,392 in FY 2020; and 7,251 in FY 2021; for an average of 7,051 per fiscal year. According to FPDS, in the last three fiscal years, agencies further set aside orders for small entities under set-aside multiple-award contracts as follows: 8,403 in FY 2019; 9,470 in FY 2020; and 10,034 in FY 2021; for an average of 9,302 per fiscal year. According to FPDS, in the last three fiscal years, agencies further set aside orders for a socioeconomic category under the set-aside portion of a multiple-award contract, where the socioeconomic category differs from the underlying multiple-award contract, as follows: 43 in FY 2019; 41 in FY 2020; and 37 in FY 2021; for an average of 40 per fiscal year. This provides an average

5,464 total set-aside orders for small entities per fiscal year.

This proposed rule will impose new reporting, recordkeeping, or other compliance requirements for all small entities. In accordance with FAR 4.1201(b)(1), small entities are required to update their size and socioeconomic status representations in the System for Award Management as necessary, but at least annually, to ensure they are kept current, accurate, and complete. Small entities are also required to rerepresent their size and socioeconomic status in accordance with FAR clause 52.219-28, Postaward Small Business Program Rerepresentation. Currently, in accordance with FAR 19.301-1(e), the size and/or socioeconomic status representation of small entities flows from the multiple-award contract to orders placed under it. This proposed rule will make it mandatory for small entities to rerepresent their size and/or socioeconomic status at the order level under certain circumstances (e.g., when submitting an offer for a set-aside order under an unrestricted multiple-award contract). Therefore, this rule will apply to all small entities seeking award of an order under the types of multiple-award contracts addressed by this rule.

The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the proposed rule.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2020-016), in correspondence.

## **VII. Paperwork Reduction Act**

The Paperwork Reduction Act (44 U.S.C 3501-3521) applies because the proposed rule contains information collection requirements. This rule affects the information collection requirements in the provisions at 52.219-28 currently approved under OMB Control Number 9000-0163 in accordance with the Paperwork Reduction Act. Accordingly, the Regulatory Secretariat Division has submitted a request for approval of a revised information collection requirement concerning 9000-0163, Rerepresentation of Size and Socioeconomic Status to the Office of Management and Budget.

A. Public reporting burden for this collection of information is estimated to average 0.5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden is estimated as follows:

Respondents: 4,395

Responses per respondent: 3

Total annual responses: 13,185

Preparation hours per response: 0.5

Total response burden hours: 6,592.50

B. Request for Comments Regarding Paperwork Burden.  
Submit comments, including suggestions for reducing this burden, not later than **[INSERT DATE 60 DAYS AFTER**

**PUBLICATION IN THE *FEDERAL REGISTER***] through

<https://www.regulations.gov> and follow the instructions on the site. All items submitted must cite OMB Control No. 9000-0163, Small Business Size Rerepresentation. Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202-501-4755 or [GSARegSec@gsa.gov](mailto:GSARegSec@gsa.gov).

Public comments are particularly invited on:

- Whether the proposed collection of information is necessary for the proper performance of the functions of Federal Government acquisitions, including whether the information will have practical utility;
- The accuracy of the estimate of the burden of the proposed information collection;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the information collection on respondents, including the use of

automated collection techniques or other forms of  
information technology.

Requesters may obtain a copy of the supporting statement  
from the GSA Regulatory Secretariat Division by calling  
202-501-4755 or emailing *GSAREgSec@gsa.gov*. Please cite OMB  
Control No. 9000-0163, Small Business Size  
Rerepresentation, in all correspondence.

**List of Subjects in 48 CFR Parts 4, 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 propose amending 48 CFR parts 4, 19, and 52 as set forth below:

1. The authority citation for 48 CFR parts 4, 19, and 52 continues to read as follows:

**AUTHORITY:** 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

#### **PART 4—ADMINISTRATIVE AND INFORMATION MATTERS**

##### **4.604 [Amended]**

2. Amend section 4.604 in paragraph (b)(4) by removing "Post-Award" and adding "Postaward" in its place.

#### **PART 19—SMALL BUSINESS PROGRAMS**

##### **19.202-5 [Amended]**

3. Amend section 19.202-5 in paragraph (c) introductory text by removing "Post Award" and adding "Postaward" in its place.

4. Amend section 19.301-2 in paragraph (b) by—

- a. Revising paragraph (b) introductory text;
- b. Removing from paragraphs (b)(1)(i) and (ii) "Post-Award" and adding "Postaward" in its place;
- c. Removing from paragraph (b)(1)(iii)(B) "thereafter; or" and adding "thereafter." in its place; and
- d. Redesignating paragraph (b)(2) as paragraph (b)(3) and adding a new paragraph (b)(2).

The revision and addition read as follows:

**19.301-2 Rerepresentation by a contractor that represented itself as a small business concern.**

\* \* \* \* \*

(b) A contractor that represented its status as any of the small business concerns identified in 19.000(a)(3) before contract award, and whose socioeconomic status is not certified by the SBA, is required to rerepresent its size and socioeconomic status in accordance with the clause at 52.219-28, Postaward Small Business Program Rerepresentation-

\* \* \* \* \*

(2) For the NAICS code assigned to an order (except for an order issued under a Federal Supply Schedule contract)-

(i) Set aside exclusively for a small business concern identified at 19.000(a)(3) that is issued under an unrestricted multiple-award contract, unless the order is issued under an unrestricted multiple-award contract with reserves;

(ii) Issued under a set-aside multiple-award contract that is further set aside for a specific socioeconomic category that differs from the underlying multiple-award contract (e.g., an order set aside for a HUBZone small business concern under a small business set-aside multiple-award contract); or

(iii) Issued under the set aside part of a multiple-award contract that is further set-aside for a specific socioeconomic category that differs from the underlying set-aside part of the multiple-award contract (e.g., an order set aside for a women-owned small business concern under the small business set-aside part of the multiple-award contract).

\* \* \* \* \*

**19.302 [Amended]**

5. Amend section 19.302 in paragraph (j) by removing "Post-Award" and adding "Postaward" in its place.

**19.309 [Amended]**

6. Amend section 19.309 in paragraph (c)(1) by removing "Post-Award" and adding "Postaward" in its place.

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

7. Amend section 52.212-5 by revising the date of the clause and removing from paragraph (b)(23)(i) "Post Award" and "(MAR 2023)" and adding "Postaward" and "(DATE)" in its place.

The revision reads as follows:

**52.212-5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services.**

\* \* \* \* \*

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES (DATE)

\* \* \* \* \*

8. Amend section 52.219-28 by—

- a. Revising the section heading;
- b. Revising the clause heading and date of the clause;
- c. Revising paragraph (c); and
- d. Removing from paragraph (f) "paragraph (b) and (c)" and adding "paragraphs (b) and (c)" in its place.

The revisions read as follows:

**52.219-28 Postaward Small Business Program**

**Rerepresentation.**

\* \* \* \* \*

POSTAWARD SMALL BUSINESS PROGRAM REREPRESENTATION (DATE)

\* \* \* \* \*

(c) If the Contractor represented its status as any of the small business concerns identified in 19.000(a)(3) prior to award of this contract and its socioeconomic status is not certified by the SBA, the Contractor shall rerepresent its size and socioeconomic status according to paragraph (f) of this clause or, if applicable, paragraph (h) of this clause, for an order (except that paragraphs (a)(1) through (3) of this section do not apply to an order issued under a Federal Supply Schedule contract at subpart 8.4)–

(1) Set aside exclusively for a small business concern identified at 19.000(a)(3) that is issued under an

unrestricted multiple-award contract (unless the order is issued under an unrestricted multiple-award contract with reserves);

(2) Issued under a set-aside multiple-award contract that is further set aside for a specific socioeconomic category that differs from the underlying multiple-award contract (e.g., an order set aside for a HUBZone small business concern under a small business set-aside multiple-award contract);

(3) Issued under the set-aside part of a multiple-award contract that is further set aside for a specific socioeconomic category that differs from the underlying set-aside part of the multiple-award contract (e.g., an order set aside for a HUBZone small business concern under a multiple-award contract that is partially set-aside for small businesses); and

(4) When the Contracting Officer explicitly requires it for an order issued under a multiple-award contract, including for an order issued under a Federal Supply Schedule contract (see 8.405-5(b) and 19.301-2(b)(2)).

\* \* \* \* \*