



DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 19 and 52

[FAR Case 2021-020; Docket No. FAR-2021-0020; Sequence No. 1]

RIN 9000-AO36

Federal Acquisition Regulation: Limitations on Subcontracting Revisions

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 update and clarify requirements associated with the limitations on subcontracting and the nonmanufacturer rule.

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 DATE OF PUBLICATION IN THE FEDERAL REGISTER]** to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2021-020 to the Federal eRulemaking portal at <https://www.regulations.gov> by searching for "FAR Case 2021-020". Select the link "Comment

Now" that corresponds with "FAR Case 2021-020". Follow the instructions provided on the "Comment Now" screen. Please include your name, company name (if any), and "FAR Case 2021-020" 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 2021-020" 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: Ms. Carrie Moore, Procurement Analyst, at 571-300-5917 or by email at carrie.moore@gsa.gov, for clarification of content. 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 2021-020.

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 rules published on May 31, 2016, at 81 FR 34243; on November 29, 2019, at 84 FR 65647; and on October 16, 2020, at 85 FR 66146.

SBA's final rule published on May 31, 2016, which implements section 1651 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) as codified at 15 U.S.C. 657s, standardized the limitations on subcontracting and nonmanufacturer rule across the small business socioeconomic programs, and modified its regulations to specify that a similarly situated entity subcontractor must perform the work with its own employees. SBA's final rule was implemented via the final rule for FAR case 2016-011 published on August 11, 2021, at 86 FR 44233. However, the FAR final rule did not modify FAR 19.8, Contracting with the Small Business Administration (The 8(a) Program), to align it with the changes made to the socioeconomic programs at FAR subparts 19.13, 19.14, and 19.15.

In addition, this proposed rule implements regulatory changes made by SBA in its final rules published on November 29, 2019, and on October 16, 2020, to clarify requirements on the application of the limitations on subcontracting, provide exclusions of certain costs from the limitations on subcontracting calculation for services, and remove specific rules related to kit assemblers from the nonmanufacturer rule.

The explanation for these changes is in the preamble of SBA's final rules.

II. Discussion and Analysis

The proposed changes to the FAR and the rationale are summarized as follows:

- Modify FAR 19.505(b)(1) introductory text to implement SBA's regulations at 13 CFR 125.6(b) to make clear that only one of the limitations of subcontracting apply to a contract;

- Modify FAR 19.505(b)(1)(i) and paragraph (e)(1) of FAR clause 52.219-14 to implement SBA's regulations at 13 CFR 125.6(a)(1) to permit the exclusion of other direct costs that are not the principal purpose of the contract, and are not performed by small businesses, from the limitations on subcontracting requirements for a service contract, and to exclude work performed outside the United States on a contract approved or financed under the Foreign Assistance Act of 1961 (Pub. L. 87-195, 22 U.S.C. 2151 et seq.), and work required to be performed by a foreign contractor, from the limitations on subcontracting requirements for service contracts;

- Modify FAR 19.505(b)(1)(iii) and (iv) and paragraphs (e)(3) and (e)(4) of FAR clause 52.219-14 to implement SBA's regulations at 13 CFR 125.6(b) to clarify that the limitation on subcontracting applies to contracts for general construction or for construction by special trade contractors when the contract also includes supplies and/or services;

- Modify FAR 19.505(b) (1) (i) through (iv) and paragraphs (e) (1) through (4) of FAR clause 52.219-14, Limitations on Subcontracting, to clarify that any work that a similarly situated entity further subcontracts out will count towards the prime contract's limitation on subcontracting;

- Modify FAR 19.505(c) to remove paragraph (c) (2), renumber the remaining paragraphs, and remove the text and references to the unique standard for kit assemblers when applying the nonmanufacturer rule to implement SBA's regulations at 13 CFR 121.406(c) and 13 CFR 121.406(e). Upon removal of the standard for kit assemblers, agencies should apply the policy now at FAR 19.505(c) (4) to multiple item acquisitions;

- Remove and reserve FAR 19.809-2, Limitations on subcontracting and nonmanufacturer rule, to implement SBA's regulations at 13 CFR 124.510 to eliminate the unique requirements of the limitations on subcontracting and nonmanufacturer rule for 8(a) contractors; and

- Modify paragraph (c) (1) (i), remove paragraph (c) (2), and renumber the paragraphs of FAR clause 52.219-33, Nonmanufacturer Rule, to implement SBA's regulations at 13 CFR 121.406(c) and 13 CFR 121.406(e)) to remove text and references to the unique standard for kit assemblers when applying the nonmanufacturer rule.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT), for Commercial Products (Including

**Commercially Available Off-the-Shelf (COTS) Items), or for
Commercial Services**

This rule amends the clauses at FAR 52.212-5, 52.219-14, and 52.219-33. The clauses continue to apply to acquisitions at or below the SAT and to acquisitions for commercial products, including COTS items, and commercial services, as they did prior to this rule.

IV. Expected Impact of the Rule

This proposed rule simplifies and clarifies the limitations on subcontracting requirements and the nonmanufacturer rule; therefore, this rule is expected to make it easier for offerors, contractors, and contracting officers to implement the regulations. This proposed rule is expected to benefit small businesses and the Government by allowing concerns to exclude certain costs from the calculation of the limitations on subcontracting and excluding certain costs for the calculation of the limitations on subcontracting, which may increase small business participation and ensure that the benefits of set-aside contracts flow to the intended beneficiaries.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 (as amended by E.O. 14094) and 13563 direct agencies to assess the 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 this rule merely standardizes, clarifies, and simplifies the requirements for compliance with the limitations on subcontracting and the nonmanufacturer rule. 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 implement regulatory changes made by the Small Business Administration (SBA) in its final rule published on May 31, 2016, at 81 FR 34243, to implement section 1651 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) which amended 15 U.S.C. 657s to standardize the limitations on subcontracting and nonmanufacturer rule across the small business programs. This proposed rule also implements SBA's final rules published on November 29, 2019, at 84 FR 65647, and on October 16, 2020, at 85 FR 66146. This rule proposes to standardize the limitations on subcontracting and nonmanufacturer rule among the small business programs and update and clarify requirements associated with the limitations on subcontracting and nonmanufacturer rule.

The objective of this rule is to implement SBA's regulatory changes that provide exclusions of certain costs from the limitations on subcontracting calculation for services, and remove specific rules related to kit assemblers from the nonmanufacturer rule. The proposed rule clarifies that a similarly situated entity, first-tier subcontractor must perform the work with its own employees or the work will be counted towards the prime contractor's limitation on subcontracting; permits the exclusion of other direct costs that are not the principal purpose of the acquisition and not performed by small businesses from the limitations on subcontracting calculation; for service contracts, excludes from the limitations on subcontracting calculation work performed

outside the United States on contracts or orders approved or financed under the Foreign Assistance Act of 1961 (Pub. L. 87-195, 22 U.S.C. 2151 et seq.) and work required to be performed by a foreign contractor; removes specific nonmanufacturer regulations applicable to kit assemblers; clarifies which limitation on subcontracting applies for contracts for general construction and construction by special trade contractors when the contract includes construction and supplies and/or services; and removes the separate limitations on subcontracting regulations for 8(a) contractors. The legal basis for this rule is as stated in the preceding paragraph. 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.

This proposed rule will impact small businesses that enter into contracts with the Government that are set-aside for any of the small business concerns identified at FAR 19.000(a)(3). This proposed rule may have a positive economic impact on small businesses because it will make the application of the limitations on subcontracting and nonmanufacturer rule consistent across all of the small business socioeconomic programs, will exclude certain costs from the limitations on subcontracting calculation, and will simplify the nonmanufacturer rule. The ability to exclude certain costs from the limitations on subcontracting calculation will make it possible for small businesses to compete for higher dollar value service contracts.

According to the System for Award Management (SAM), there are 355,208 active registrants that are considered small for at least one North American Industry Classification System code. Small business entities seeking to be prime contractors for Government contracts are required to register in SAM; however, those seeking to be subcontractors are not required to register in SAM. Therefore, the number of small business entities impacted by this rule may be greater than the number of entities registered in SAM.

The proposed rule does not impose any new reporting, recordkeeping, or other compliance requirements for small entities.

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 proposed 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 2021-020) in correspondence.

VII. 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. 3501-3521).

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 propose 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 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

PART 19—SMALL BUSINESS PROGRAMS

2. Amend section 19.505 by—
- a. Revising paragraph (b) (1);
 - b. Revising the introductory text of paragraph (c);
 - c. Removing from paragraph (c) (1) (i) “paragraph (c) (3)” and adding “paragraph (c) (2)” in its place;
 - d. Removing paragraph (c) (2);
 - e. Redesignating paragraphs (c) (3) through (c) (5) as paragraphs (c) (2) through (c) (4); and
 - f. Removing from paragraphs (c) (3) (i) (A) and (B) “or (c) (2) (ii)”.

The revisions read as follows:

19.505 Limitations on subcontracting and nonmanufacturer rule.

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(b) (1) *Limitations on subcontracting.* A small business concern subject to the limitations on subcontracting is required to comply with one of 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 does not perform with its own employees or further subcontracts will count towards the concern's 50 percent subcontract amount that cannot be exceeded. Other direct costs may be excluded from the 50 percent limitation when they are not the principal purpose of the contract or order, and small business concerns do not provide the service (e.g., airline travel, work performed by a transportation or disposal entity under a contract assigned the environmental remediation NAICS code 562910, cloud computing services, or mass media purchases). Work performed outside the United States on a contract or order approved or financed under the Foreign Assistance Act of 1961 (Pub. L. 87-195, 22 U.S.C. 2151 et seq.) and work required to be performed by a foreign contractor are excluded from the 50 percent limitation. 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 does not perform with its own employees or 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 does not perform with its own employees or further subcontracts will count towards the concern's 85 percent subcontract amount that cannot be exceeded. When a contract includes general construction and supplies and/or services, the 85 percent limitation shall apply only to the general-construction portion of the contract.

(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 does not perform with its own employees or further subcontracts will count towards the concern's 75 percent subcontract amount that cannot be exceeded. When a contract includes construction by

special trade contractors and supplies and/or services, the 75 percent limitation shall apply only to the construction-by-special-trade-contractors portion of the contract.

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(c) *Nonmanufacturer rule.* The nonmanufacturer rule applies to nonmanufacturers in accordance with paragraph (c) (1) of this section.

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19.809-2 Removed and Reserved.

3. Amend section 19.809-2 by removing and reserving it.
4. Amend section 19.811-3 by—
 - a. Revising paragraph (e); and
 - b. Adding paragraph (f).

The revision and addition reads as follows:

19.811-3 Contract clauses.

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

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

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Amend section 52.212-5 by—
 - a. Revising the date of the clause; and
 - b. Revising the date of paragraphs (b) (23) and (30).

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

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

* * * * *

(b) * * *

___(23) 52.219-14, Limitations on Subcontracting (**DATE**) (15 U.S.C. 657s).

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___(30) 52.219-33, Nonmanufacturer Rule (**DATE**) (15 U.S.C. 657s).

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6. Amend section 52.219-14 by—

- a. Revising the date of the clause; and
- b. Revising the paragraphs (e) (1) through (4).

The revisions read as follows:

52.219-14 Limitations on Subcontracting.

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LIMITATIONS ON SUBCONTRACTING (**DATE**)

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(e) * * *

(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 does not perform with its own employees or further subcontracts will count towards the prime contractor's 50 percent subcontract amount that cannot be exceeded. Other direct costs may be excluded from the 50 percent limitation when they are not the principal purpose of the contract or order, and small business concerns do not provide the service (e.g., airline travel, work performed by a transportation or disposal entity under a contract assigned the environmental remediation NAICS code 562910, cloud computing services, or mass media purchases). Work performed outside the United States on a contract or order approved or financed under the Foreign Assistance Act of 1961 (Pub. L. 87-195, 22 U.S.C. 2151 et seq.) and work required to be performed by a foreign contractor are excluded from the 50 percent limitation. 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 does not perform with its own employees or 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 does not perform with its own employees or further subcontracts will count towards the prime contractor's 85 percent subcontract amount that cannot be exceeded. When a contract includes general construction and supplies and/or services, the 85 percent limitation shall apply only to the general-construction portion of the contract; 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 does not perform with its own employees or further subcontracts will count towards the prime contractor's 75 percent subcontract amount that cannot be exceeded. When a contract includes construction by special trade contractors and supplies and/or services, the 75 percent limitation shall apply only to the construction-by-special-trade-contractors portion of the contract.

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7. Amend section 52.219-33 by-

a. Revising the date of clause; and

b. Revising paragraph (c).

The revisions read as follows:

52.219-33 Nonmanufacturer Rule.

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NONMANUFACTURER RULE (**DATE**)

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(c) *Requirements.* The Contractor shall—

(1) Provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas;

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

(3) 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.

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