

intended to limit the applicability of laws to contracts for the acquisition of commercial items. Section 1906 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items.

Finally, 41 U.S.C. 1907 states that acquisitions of COTS items will be exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1907 and states that the law applies to acquisitions of COTS items; (iii) concerns authorities or responsibilities under the Small Business Act (15 U.S.C. 644) or bid protest procedures developed under the authority of 31 U.S.C. 3551 *et seq.*, 10 U.S.C. 2305(e) and (f), or 41 U.S.C. 3706 and 3707; or (iv) the Administrator for Federal Procurement Policy makes a written determination and finding that would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items from the provision of law.

#### C. Determinations

With the publication of the interim rule the FAR Council has determined it was in the best interest of the Government to apply the rule to contracts at or below the SAT and for the acquisition of commercial items. Likewise, the Administrator for Federal Procurement Policy determined it was in the best interest of the Government to apply this rule to contracts for the acquisition of COTS items.

While the law does not specifically address acquisitions of commercial items, including COTS items, there is an unacceptable level of risk for the Government in buying hardware, software, or services developed or provided in whole or in part by Kaspersky Lab. This level of risk is not alleviated by the fact that the item being acquired has been sold or offered for sale to the general public, either in the same form or a modified form as sold to the Government (*i.e.*, that it is a commercial item or COTS item), nor by the small size of the purchase (*i.e.*, at or below the SAT). As a result, agencies may face increased exposure for violating the law and unknowingly acquiring a covered article absent coverage of these types of acquisitions by this rule.

#### IV. 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.

#### V. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

#### VI. Regulatory Flexibility Act

A final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* was prepared. The FRFA is summarized below.

This final rule implements section 1634 of Division A of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115–91). The objective of the rule is to prescribe appropriate policies and procedures to enable agencies to determine that they are not purchasing articles that section 1634 prohibits for use by the Government on or after October 1, 2018.

There were no significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis provided in the interim rule.

The rule applies to all contractors and subcontractors, regardless of size. Data from the Federal Procurement Data System (FPDS) indicates that the Government awarded contracts to an average of 93,792 unique entities in FY 2017 and FY 2018, of which an average of 68,778 (73 percent) were small entities. It is estimated that reports will be submitted by 5 percent of contractors, or 3,439 small entities.

The rule requires contractors and subcontractors that are subject to the clause to report to the contracting officer, or for DoD, to the website listed in the clause, any discovery of a covered article during the course of contract performance.

Because of the nature of the prohibition enacted by section 1634, it is not possible to establish different compliance or reporting requirements or timetables that take into account the resources available to small entities or to exempt small entities from coverage of the rule, or any part thereof. DoD, GSA, and NASA were unable to identify any alternatives that would reduce the burden on small entities and still meet the objectives of section 1634.

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

This rule contains information collection requirements that have been approved by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). This information collection requirement has been assigned OMB Control Number 9000–0197, entitled “Use of Products and Services of Kaspersky Lab”.

#### List of Subjects in 48 CFR Parts 1, 4, 13, 39, and 52

Government procurement.

William F. Clark,

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

#### Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR parts 1, 4, 13, 39, and 52 which was published in the **Federal Register** at 83 FR 28141 on June 15, 2018, is adopted as a final rule without change.

[FR Doc. 2019–19360 Filed 9–9–19; 8:45 am]

BILLING CODE 6820–EP–P

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 2, 19, and 52

[FAC 2019–06; FAR Case 2019–006; Item II; Docket No. FAR–2019–0006, Sequence No. 1]

RIN 9000–AN89

#### Federal Acquisition Regulation: Update of “Affiliates” and Section 8(a) Clauses

**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 update the definition of “affiliates” in the FAR, including references to that definition, and to delete an obsolete requirement for contractors who are 8(a) Program participants.

**DATES:** *Effective* October 10, 2019.

**FOR FURTHER INFORMATION CONTACT:** Ms. Marilyn E. Chambers, Procurement Analyst, at 202–285–7380 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2019–06, FAR Case 2019–006.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD, GSA, and NASA are amending the FAR to revise the definition of “affiliates” at FAR 19.101, as well as references to this definition at FAR 2.101, 19.001, 19.1303, 19.1403, and in the clause at FAR 52.219–27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside. The clauses at FAR 52.219–12, Special 8(a) Subcontract Conditions, and 52.219–17, Section 8(a) Award, currently require contractors who are 8(a) Program participants to obtain written approval from the Small Business Administration (SBA) and the contracting officer before subcontracting the performance of any contract requirements. SBA has removed this requirement from their regulations on the 8(a) Program at 13 CFR part 124. Therefore, DoD, GSA, and NASA are removing this obsolete requirement from the FAR.

**II. Discussion and Analysis**

A. Definition of “affiliates” in parts 2 and 9.

Subpart 2.1, Definitions, is amended to revise the definition of “affiliates” to include references to the unique definitions of that term in 9.403 and 19.101.

B. Definition of “concern”. Section 19.001, Definitions, is amended to delete a reference to section 19.101 regarding affiliation and to replace it with a reference to SBA’s regulations at 13 CFR 121.105.

C. Definition of “affiliates” in part 19. Subpart 19.1, Size Standards, is amended to revise the definition of

“affiliates” by deleting existing language and replacing it with a reference to SBA’s regulations on determining affiliation at 13 CFR 121.103. Editorial changes are made in 19.1303(c), 19.1403(c)(3), and paragraph (e)(3) of the clause at 52.219–27 to remove references to the definition of “affiliates” in 19.101 and 52.219–27 and to replace them with references to the applicable SBA regulation.

D. Removal of obsolete requirement for 8(a) contractors. The clauses at FAR 52.219–12 and 52.219–17 are amended to delete from each clause the paragraph requiring 8(a) contractors to obtain approval from SBA and the contracting officer prior to subcontracting the performance of any contract requirements. These paragraphs are obsolete.

**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 makes minor revisions to the definition of “affiliates” that have no bearing on the meaning of the term and replaces FAR coverage that is redundant of SBA regulations with references to SBA’s

rules. Additionally, this rule eliminates a requirement that no longer exists in SBA’s regulations on the 8(a) Business Development Program at 13 CFR part 124.

**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 update the definition of “affiliates,” as well as a reference to this definition in the clause at 52.219–27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside. Additionally, this rule removes an obsolete requirement from the clauses at FAR 52.219–12, Special 8(a) Subcontract Conditions, and 52.219–17, Section 8(a) Award, for contractors who are 8(a) Program participants to obtain written approval from SBA and the contracting officer before subcontracting the performance of any contract requirements. This rule does not change the applicability of these clauses, which currently apply to solicitations and contracts below the SAT and to the acquisition of commercial items, including COTS items.

**V. Expected Cost Savings**

This rule impacts only 8(a) Program participants who do business with the Government. Currently, 8(a) Program participants who have Federal contracts must obtain written approval from SBA and the contracting officer before subcontracting the performance of any contract requirements in accordance with FAR clauses 52.219–12 and 52.219–17. Removal of the requirement to obtain this approval is expected to result in savings for contractors who are 8(a) Program participants. The following is a summary of the estimated public and Government cost savings calculated in perpetuity in 2016 dollars at a 7-percent discount rate:

Summary	Public	Government	Total
Present Value .....	–\$14,595,843	–\$7,297,914	–\$21,893,757
Annualized Costs .....	– 1,021,709	– 510,854	– 1,532,563
Annualized Value Costs (as of 2016 if Year 1 is 2020) .....	– 799,457	– 389,728	– 1,189,185

To access the full Regulatory Cost Analysis for this rule, go to the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov), search for “FAR Case 2019–006”, click “Open Docket,” and view “Supporting Documents”.

**VI. 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.

VII. Executive Order 13771

This final rule is considered to be an E.O. 13771 deregulatory action. The total annualized value of the cost savings is \$1,189,185. Details on the estimated cost savings can be found in section V. of this preamble.

VIII. 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.

IX. 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, 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 amend 48 CFR parts 2, 19, and 52 as set forth below:

- 1. The authority citation for 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 revising the definition of “Affiliates” to read as follows:

2.101 Definitions.

- (b) \* \* \*
- (2) \* \* \*

*Affiliates* means associated business concerns or individuals if, directly or indirectly either one controls or can control the other; or third party controls or can control both, except as follows:

- (1) For the use in subpart 9.4, see the definition at 9.403.

- (2) For the use in subpart 19.1, see the definition at 19.101.

\* \* \* \* \*

PART 19—SMALL BUSINESS PROGRAMS

19.001 [Amended]

- 3. Amend section 19.001, in the defined term “Concern” by removing the last sentence and adding “For more information, see 13 CFR 121.105.” in its place.

- 4. Amend section 19.101 by revising the section heading and the definition of “Affiliates” to read as follows:

19.101 Definitions.

\* \* \* \* \*

*Affiliates* 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.

\* \* \* \* \*

19.1303 [Amended]

- 5. Amend section 19.1303, in paragraph (c) by removing “the explanation of affiliates (see 19.101)” and adding “13 CFR 121.103(h)” in its place.

19.1403 [Amended]

- 6. Amend section 19.1403, in paragraph (c)(3), by removing “of paragraph 7 of the explanation of Affiliates in 19.101” and adding “in 13 CFR 121.103(h)” in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 7. Amend section 52.212–5 by revising the date of the clause and paragraph (b)(21) to read as follows:

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

\* \* \* \* \*

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items Oct 2019)

\* \* \* \* \*

- (b) \* \* \*
- (21) 52.219–27, Notice of Service-Disabled Veteran-Owned Small

Business Set-Aside (Oct 2019) (15 U.S.C. 657f).

\* \* \* \* \*

- 8. Amend section 52.219–12 by—
- a. Revising the date of the clause;
- b. Removing paragraph (b)(3);
- c. Redesignating paragraph (b)(4) as (b)(3); and
- d. Removing from newly redesignated paragraph (b)(3) “That is” and adding “That it” in its place.

The revision reads as follows:

52.219–12 Special 8(a) Subcontract Conditions.

\* \* \* \* \*

Special 8(a) Subcontract Conditions (Oct 2019)

\* \* \* \* \*

- 9. Amend section 52.219–17 by revising the date of the clause and paragraph (a)(2) and removing paragraph (c).

The revisions read as follows:

52.219–17 Section 8(a) Award.

\* \* \* \* \*

Section 8(a) Award (Oct 2019)

- (a) \* \* \*

(2) Except for novation agreements, delegates to the \_\_\_ [insert name of contracting activity] the responsibility for administering the contract with complete authority to take any action on behalf of the Government under the terms and conditions of the contract; provided, however that the contracting agency shall give advance notice to the SBA before it issues a final notice terminating the right of the subcontractor to proceed with further performance, either in whole or in part, under the contract.

\* \* \* \* \*

- 10. Amend section 52.219–27 by revising the date of the clause and removing from paragraph (e)(3) “paragraph 7 of the explanation of Affiliates in 19.101 of the Federal Acquisition Regulation” and adding “13 CFR 121.103(h)” in its place.

The revision reads as follows:

52.219–27 Notice of Service-Disabled Veteran-Owned Small Business Set-Aside.

\* \* \* \* \*

Notice of Service-Disabled Veteran-Owned Small Business Set-Aside (Oct 2019)

\* \* \* \* \*