

materials or labor-hour contracts with small business represent only approximately 2 percent of all contracts. In addition, the rule eases the impact of the current FAR by permitting the contracting officer to use judgment in deciding whether to withhold payments, thus the number of contracts affected is a subset of the 2 percent figure. This change is expected to have a small but beneficial impact on small businesses.

### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

#### List of Subjects in 48 CFR Parts 14, 32, and 52

Government procurement.

Dated: July 20, 2005.

Julia B. Wise,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 14, 32, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 14, 32, and 52 is revised to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

#### PART 14—SEALED BIDDING

##### 14.408-3 [Amended]

■ 2. Amend section 14.408-3 in paragraph (b) by removing “See 32.111(c)(1),” and adding “See 32.111(b)(1),” in its place.

#### PART 32—CONTRACT FINANCING

■ 3. Amend section 32.111 by—

■ a. Removing from the end of paragraph (a)(5) the word “and”;

■ b. Removing the period from the end of paragraph (a)(6) and adding “; and” in its place;

■ c. Adding paragraph (a)(7);

■ d. Removing paragraph (b); and

■ e. Redesignating paragraphs (c) and (d) as (b) and (c), respectively.

The added text reads as follows:

##### 32.111 Contract clauses for non-commercial purchases.

(a) \* \* \*

(7) The clause at 52.232-7, Payments under Time-and-Materials and Labor-Hour Contracts, in solicitations and contracts when a time-and-materials or labor-hour contract is contemplated.

(i) If the nature of the work to be performed requires the contractor to

furnish material that is regularly sold to the general public in the normal course of business by the contractor and the price is under the limitations prescribed in 16.601(b)(3), the contracting officer shall use the clause with its Alternate I.

(ii) If a labor-hour contract is contemplated, and if no specific reimbursement for materials furnished is intended, the contracting officer may use the clause with its Alternate II.

(iii) If the contracting officer determines that it is necessary to withhold payment to protect the Government's interests, paragraph (a)(2) of the clause permits the contracting officer to unilaterally issue a modification requiring the contractor to withhold 5 percent of amounts due, up to a maximum of \$50,000 under the contract. The contracting officer shall ensure that the modification specifies the percentage and total amount of the withhold payment. Normally, there should be no need to withhold payment for a contractor with a record of timely submittal of the release discharging the Government from all liabilities, obligations, and claims, as required by paragraph (f) of the clause.

\* \* \* \* \*

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

■ 4. Amend section 52.232-7 by—

■ a. Removing from the introductory text “32.111(b)” and adding “32.111(a)(7)” in its place;

■ b. Revising the date of the clause; and

■ c. Revising paragraph (a)(2).

The revised text reads as follows:

##### 52.232-7 Payments under Time-and-Materials and Labor-Hour Contracts.

\* \* \* \* \*

##### PAYMENTS UNDER TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS (AUG 2005)

\* \* \* \* \*

(a) \* \* \*

(2) Unless otherwise prescribed in the Schedule, the Contracting Officer may unilaterally issue a contract modification requiring the Contractor to withhold amounts from its billings until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interests. The Contracting Officer may require a withhold of 5 percent of the amounts due under paragraph (a), but the total amount withheld for the contract shall not exceed \$50,000. The amounts withheld shall be retained until the Contractor executes and delivers the release required by paragraph (f) of this clause.

\* \* \* \* \*

##### 52.232-8 [Amended]

■ 5. In the introductory text of section 52.232-8, remove “32.111(c)(1)” and add “32.111(b)(1)” in its place.

##### 52.232-9 [Amended]

■ 6. In the introductory text of section 52.232-9, remove “32.111(c)(2)” and add “32.111(b)(2)” in its place.

##### 52.232-10 [Amended]

■ 7. In the introductory text of section 52.232-10, remove “32.111(d)(1)” and add “32.111(c)(1)” in its place.

##### 52.232-11 [Amended]

■ 8. In the introductory text of section 52.232-11, remove “32.111(d)(2)” and add “32.111(c)(2)” in its place.

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 19 and 52

[FAC 2005-05; FAR Case 2005-009; Item IV]

RIN 9000-AK22

#### Federal Acquisition Regulation; Confirmation of HUBZone Certification

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

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed to an interim rule amending the Federal Acquisition Regulation (FAR) to clarify that prime contractors must confirm that a subcontractor representing itself as a Historically Underutilized Business Zone (HUBZone) small business concern is certified, consistent with the requirements of 15 U.S.C. 632 *et seq.*, as amended.

**DATES:** *Effective Date:* July 27, 2005.

*Comment Date:* Interested parties should submit comments to the FAR Secretariat at the address shown below on or before September 26, 2005 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005-05, FAR case

2005-009, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Agency Web Site: <http://www.acqnet.gov/far/ProposedRules/proposed.htm>. Click on the FAR case number to submit comments.

- E-mail: [farcase.2005-009@gsa.gov](mailto:farcase.2005-009@gsa.gov). Include FAC 2005-05, FAR case 2005-009 in the subject line of the message.

- Fax: 202-501-4067.

- Mail: General Services

Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

**Instructions:** Please submit comments only and cite FAC 2005-05, FAR case 2005-009, in all correspondence related to this case. All comments received will be posted without change to <http://www.acqnet.gov/far/ProposedRules/proposed.htm>, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Rhonda Cundiff, Procurement Analyst, at (202) 501-0044. Please cite FAC 2005-05, FAR case 2005-009.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

Title 15 of the United States Code, section 632 requires that a qualified Historically Underutilized Business Zone (HUBZone) small business concern be certified by the Small Business Administration (SBA). A Department of Defense Inspector General report D-2003-019 "DoD Contractor Subcontracting With Historically Underutilized Business Zones (HUBZones) Small Businesses" found that prime contractors were overstating their HUBZone accomplishments because subcontractor's representations were not being verified. The FAR is being revised to clarify that prime contractors must confirm a subcontractor representing itself as a HUBZone small business concern is certified, consistent with the requirements of 15 U.S.C. 632 *et seq.*, as amended.

The specific changes revise FAR 19.703 and the clause at 52.219-9 to clarify that contractors shall confirm that a subcontractor representing itself as a HUBZone small business concern is certified by SBA as a HUBZone small business concern by accessing the Central Contractor Registration or by contacting the SBA.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

##### B. Regulatory Flexibility Act

The changes may 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 this rule change will have a positive effect on small businesses who are certified HUBZone small business concerns and are losing subcontracting opportunities taken by another company falsely claiming to be a certified HUBZone small business concern. The FAR Secretariat has submitted a copy of the Initial Regulatory Flexibility Analysis to the Chief Counsel for Advocacy of the Small Business Administration. The analysis is summarized as follows:

Title 15 of the United States Code, section 632 requires that a qualified Historically Underutilized Business Zone (HUBZone) small business concern be on the list of qualified HUBZone small business concerns maintained by the Small Business Administration. A Department of Defense Inspector General report D-2003-019 "DoD Contractor Subcontracting With Historically Underutilized Business Zones (HUBZones) Small Businesses" found that prime contractors were overstating their HUBZone accomplishments because subcontractor's representations were not being verified. This interim rule revises the Federal Acquisition Regulation to require prime contractors to verify that its HUBZone small business concerns are qualified as required by 15 U.S.C. 632 *et seq.*, as amended.

The changes may 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 certified HUBZone small business concerns will have additional subcontracting opportunities previously taken by other companies falsely claiming to be certified HUBZone small business concerns.

Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Parts 19 and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2005-05, FAR case 2005-009), in correspondence.

##### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management

and Budget under 44 U.S.C. 3501, *et seq.*

##### D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because some subcontractors incorrectly claim to be certified HUBZone small business concerns. Since prime contractors are not currently required to verify their subcontractors' HUBZone certifications through the SBA prior to reporting their subcontracting awards to DoD, many real HUBZone small business concerns are losing opportunities that they should have. This also results in the reporting of inaccurate data on the HUBZone program to Congress and SBA. Awards to improperly certified subcontractors can be stopped immediately, if prime contractors make a simple check on the CCR database or contact SBA. Pursuant to Public Law 98-577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

##### List of Subjects in 48 CFR Parts 19 and 52

Government procurement.

Dated: July 20, 2005.

**Julia B. Wise,**

*Director, Contract Policy Division.*

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

■ 1. The authority citation for 48 CFR parts 19 and 52 is revised to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

##### PART 19—SMALL BUSINESS PROGRAMS

- 2. Amend section 19.703 by—
- a. Removing "HUBZone small business," from the first sentence of paragraph (b);
  - b. Removing the last sentence of paragraph (b); and
  - c. Adding paragraph (c) to read as follows:

##### 19.703 Eligibility requirements for participating in the program.

\* \* \* \* \*

(c)(1) The contractor shall confirm that a subcontractor representing itself

as a HUBZone small business concern is certified by SBA as a HUBZone small business concern by accessing the Central Contractor Registration (CCR) database or by contacting the SBA. Options for contacting the SBA include—

(i) HUBZone web page at [http://dsbs.sba.gov/dsbs/dsp\\_searchhubzone.cfm](http://dsbs.sba.gov/dsbs/dsp_searchhubzone.cfm);

(ii) In writing to the AA/HUB at U.S. Small Business Administration, 409 3rd Street, S.W., Washington DC 20416; or

(iii) E-mail at [hubzone@sba.gov](mailto:hubzone@sba.gov).

(2) Protests challenging HUBZone small business concern size status must be filed in accordance with 13 CFR 121.411.

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 3. Amend section 52.212–5 by—
- a. Revising the date of the clause; and
- b. Removing from paragraph (b)(8)(i) “(JAN 2002”) and adding “(JUL 2005”).

The revised and added text reads 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 (JUL 2005)

\* \* \* \* \*

- 4. Amend section 52.219–9 by—
- a. Revising the date of the clause;
- b. Redesignating paragraph (e)(4) as paragraph (e)(5); and
- c. Adding a new paragraph (e)(4).

The revised and added text reads as follows:

### 52.219–9 Small Business Subcontracting Plan.

\* \* \* \* \*

SMALL BUSINESS SUBCONTRACTING PLAN (JUL 2005)

\* \* \* \* \*

(e) \* \* \*

(4) Confirm that a subcontractor representing itself as a HUBZone small business concern is identified as a certified HUBZone small business concern by accessing the Central Contractor Registration (CCR) database or by contacting SBA.

\* \* \* \* \*

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 45 and 52

[FAC 2005–05; FAR Case 2002–015; Item V]

RIN 9000–AJ99

### Federal Acquisition Regulation; Government Property Rental and Special Tooling

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to incorporate a class deviation regarding use and charges, which has been applicable to the Department of Defense since 1998. This deviation is appropriate for application across the Federal Government. The change clarifies the basis for determining the rental charges for the use of Government property and is intended to promote the dual use of such property. The final rule specifically impacts contracting officers, property administrators, and contractors responsible for the management of Government property.

**DATES:** *Effective Date:* August 26, 2005.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Jeritta Parnell, Procurement Analyst, at (202) 501–4082. Please cite FAC 2005–05, FAR case 2002–015.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

DoD, GSA, and NASA published a proposed rule in the *Federal Register* at 69 FR 42544, July 15, 2004, to incorporate two Department of Defense class deviations, 98–O0010, Use and Charges, and 98–O0011, Special Tooling, into FAR Part 45 and make appropriate revisions to FAR 52.245–9, Use and Charges, and FAR 52.245–17, Special Tooling. The final rule establishes, as the basis for rental charges, the time property is actually used for commercial purposes, rather

than the time available for use; permits contractors to obtain property appraisals from independent appraisers; permits appraisal-based rentals for all property; and allows contracting officers to consider alternate bases for determining rentals. The final rule does not change the requirements for special tooling as originally proposed by the Councils because the Councils are now considering deleting the clause in its entirety rather than revising it based on comments received on the proposed rule. The Councils plan to solicit comments on the proposed deletion of the FAR clause at 52.245–17, Special Tooling, under another proposed rule.

Four respondents provided public comments. Consideration of these comments resulted in only minor administrative changes to the proposed rule. The resolution of the comments follows:

#### Summary of Comments Received/Disposition

1. *Proposed Rule (PR): 52.245–9.* Deviation to the clause at 52.245–9 sets a fair and equitable method for applying a rent usage when Government property is used for commercial purposes or existing Government property is used for future contracts and equitable adjustment is needed to eliminate unfair competitive advantage.

Concur.

2. *PR: 52.245–17.* All respondents proposed the elimination of the special tooling clause. The Councils plan to solicit comments on the proposed deletion of the FAR clause at 52.245–17, Special Tooling, under another proposed rule.

3. *PR: 52.245–9(h).* Amend paragraph (h) to strike “person” and replace it with “contractor.” Rationale is that a company would control their personnel through their administrative procedures when wrong is discovered and the Government may control the contractor in a like manner.

Nonconcur. The legal basis for this citation, 18 U.S.C. 641, applies to an individual, as well as a corporate entity.

4. *PR: 52.245–9.* It may make sense to provide a time frame where an immediate need for usage of property from another contract becomes imminent and use of the property would not interfere with the owning contract, and the ACO is not available for authorization, a period of 48 hours, documented by the losing contract, would be allowed for transfer of tooling and use of such tooling be paid for at a higher rate than the proposed schedule. Tooling would be returned immediately if authorization were not received.