

other HUBZone small business concerns. This final rule amends FAR clause 52.219-3, Notice of Total HUBZone Set-Aside, and FAR clause 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns, to include an Alternate I, to be used to waive the 50 percent requirement only after determining that at least two HUBZone small business concerns cannot meet the requirement. However, the HUBZone small business prime contractor must still meet the performance of work requirements set forth in 13 CFR 125.6(c).

**Item III—Preventing Abuse of Interagency Contracts (FAR Case 2008-032) (Interim)**

This interim rule implements section 865 of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009. FAR subpart 17.5 now addresses all interagency acquisitions, not just those made under the Economy Act authority. A new subsection 17.502-1 is added to require that all interagency acquisitions include a determination of best procurement approach. For an assisted acquisition between the servicing agency and the requesting agency, this subsection now requires a written agreement that establishes the general terms and conditions governing the relationship between the parties. Subsection 17.502-2 contains business-case analysis requirements when an agency wishes to establish a contract that would be used by other agencies. There is a statutory exception included in subpart 17.5 for orders of \$500,000 or less issued against Federal Supply Schedules.

**Item IV—Small Disadvantaged Business Program Self-Certification of Subcontractors (FAR Case 2009-019) (Interim)**

This interim rule amends the FAR by allowing small disadvantaged businesses (SDBs) to self-represent their SDB status to prime contractors in good faith when seeking Federal subcontracting opportunities. This change implements revisions made by the Small Business Administration (SBA) to its SDB regulations. This case only addresses the subcontracting status portion of the SBA final rule for Small Disadvantaged Business certification. The Small Disadvantaged Business certification for prime contracts will be addressed in a future rule. This change removes a cost of compliance burden on SDB subcontractors seeking SBA certification.

**Item V—Uniform Suspension and Debarment Requirement (FAR Case 2009-036) (Interim)**

This interim rule amends the FAR at parts 9 and 52 to implement section 815 of the National Defense Authorization Act for Fiscal Year 2010, Public Law 111-84. The law requires that suspension and debarment requirements flow down to all subcontracts except contracts for the acquisition of commercially available off-the-shelf items, and in the case of contracts for the acquisition of commercial items, first-tier subcontracts only.

This requirement will protect the Government against contracting with entities at any tier who are suspended, debarred or proposed for debarment. This rule does not have a significant impact on the Government, contractors or any automated systems.

**Item VI—Limitations on Pass-Through Charges (FAR Case 2008-031)**

This final rule adopts the interim rule published in the **Federal Register** at 74 FR 52853, October 14, 2009, as a final rule with minor changes.

The interim rule amended the FAR to implement section 866 of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009 (Pub. L. 110-417) and section 852 of the John Warner NDAA for Fiscal Year 2007 (Pub. L. 109-364). This legislation required the Councils to amend the FAR to minimize excessive pass-through charges by contractors from subcontractors, or from tiers of subcontractors, that add no or negligible value, and to ensure that neither a contractor nor a subcontractor receives indirect costs or profit/fee (*i.e.*, pass-through charges) on work performed by a lower-tier subcontractor to which the higher-tier contractor or subcontractor adds no, or negligible, value.

To enable agencies to ensure that pass-through charges are not excessive, the interim rule included a solicitation provision and a contract clause requiring offerors and contractors to identify the percentage of work that will be subcontracted, and when subcontract costs will exceed 70 percent of the total cost of work to be performed, to provide information on indirect costs and profit/fee and value added with regard to the subcontract work.

**Item VII—Technical Amendments**

Editorial changes are made at FAR 3.104-1, 5.601, 7.105, and 10.002.

Dated: November 24, 2010.

**Millisa Gary,**

*Acting Director, Acquisition Policy Division.*

Dated: November 23, 2010.

**Shay D. Assad,**

*Director, Defense Procurement and Acquisition Policy.*

Dated: November 24, 2010.

**Joseph A. Neurauter,**

*Deputy Associate Administrator and Senior Procurement Executive, Office of Acquisition Policy, U.S. General Services Administration.*

Dated: November 23, 2010.

**William P. McNally,**

*Assistant Administrator for Procurement, National Aeronautics and Space Administration.*

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 1, 2, 22, and 52**

[FAC 2005-47; FAR Case 2010-006; Item I; Docket 2010-0106, Sequence 1]

RIN 9000-AL76

**Federal Acquisition Regulation; Notification of Employee Rights Under the National Labor Relations Act**

**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) are issuing an interim rule to amend the Federal Acquisition Regulation (FAR) to implement Executive Order 13496, Notification of Employee Rights Under Federal Labor Laws, as implemented by the Department of Labor (DoL). This Executive Order requires contractors to display a notice to employees of their rights under Federal labor laws, and the DoL has determined that the notice shall include employee rights under the National Labor Relations Act.

**DATES:** *Effective Date:* December 13, 2010.

*Comment Date:* Interested parties should submit written comments to the Regulatory Secretariat on or before February 11, 2011 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005–47, FAR Case 2010–006, by any of the following methods:

- *Regulations.gov*: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2010–006” under the heading “Enter Keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “FAR Case 2010–006.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2010–006” on your attached document.

- *Mail*: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE., Washington, DC 20417. *Instructions*: Please submit comments only and cite FAC 2005–47, FAR Case 2010–006, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Clare McFadden, Procurement Analyst, at (202) 501–0044. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–47, FAR Case 2010–006.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

Executive Order 13496, Notification of Employee Rights Under Federal Labor Laws, dated January 30, 2009 (published in the **Federal Register** at 74 FR 6107 on February 4, 2009), which revokes Executive Order 13201 of February 17, 2001, requires contractors and subcontractors to post a notice that informs employees of their rights under Federal labor laws. DoL has determined that the notice shall include employee rights under the National Labor Relations Act (“Act”), 29 U.S.C. 151 *et seq.* This Act encourages collective bargaining, and protects the exercise by employees of their freedom to associate, to self organize and to designate representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment. The DoL rule provides sanctions for noncompliance, but full compliance with the Executive Order and any related rules, regulations and orders of the Secretary of Labor is expected of all contractors. The DoL issued a final rule implementing Executive Order 13496 at 29 CFR part 471, published in the

**Federal Register** at 75 FR 28368 on May 20, 2010, with an effective date of June 21, 2010.

This FAR interim rule implements the requirements of the DoL final rule by creating a new FAR subpart 22.16 and clause 52.222–40, Notification of Employee Rights Under the National Labor Relations Act. Additionally, this rule revises FAR clauses at 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, and FAR 52.244–6, Subcontracts for Commercial Items, to include the requirements of the new FAR clause 52.222–40.

This rule amending the FAR is the formal notice to contracting officers to insert FAR clause 52.222–40 in all solicitations and contracts including acquisitions for commercial items and commercially available off-the-shelf (COTS), except acquisitions (*see* FAR 22.1605)—

(1) Under the simplified acquisition threshold;

(2) For work performed exclusively outside the United States; or

(3) Covered in their entirety by an exemption granted by the Secretary of Labor.

This is a significant regulatory action and, therefore, was 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 Councils do not expect this interim 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, *et seq.*, because it implements the requirements of DoL’s final rule, published in the **Federal Register** on May 20, 2010, with an effective date of June 21, 2010, that implemented Executive Order 13496 at 29 CFR part 471. The DoL final rule, implementing the requirements of Executive Order 13496, requires contractors to post notices and to insert a clause in subcontracts requiring subcontractors to post the notice and similarly insert a clause in their subcontracts. The notice advises contractor and subcontractor employees of their rights under the National Labor Relations Act. The rule provides sanctions for noncompliance, but full compliance with the Executive Order and any related rules, regulations and orders of the Secretary of Labor is expected of all contractors. Further, this rule is only implementing the DoL rule which prescribes the content of the

notices to be posted. The Department of Labor has certified that its rule will not have a significant economic impact on a substantial number of small entities. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

The Councils will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005–47, FAR Case 2010–006) in all correspondence.

**C. Paperwork Reduction Act**

This interim rule does not impose any information collection requirements apart from those already imposed by the DoL rule (75 FR 28368, May 20, 2010, effective date June 21, 2010). DoL has addressed the Paperwork Reduction Act (44 U.S.C. chapter 35) in the preamble to the final rule. DoL identified the burdens associated with the filing and processing of complaints by complainants and contractors in the notice of final rulemaking and obtained Office of Management and Budget clearance for such burdens. DoL also noted that the public disclosure of information originally supplied by the Federal Government to a recipient for the purpose of disclosure to the public is not considered a collection of information under the Act. The Councils believe that the package submitted by DoL meets the requirement imposed by the Paperwork Reduction Act and sufficiently covers this interim rule so that no further action is necessary.

**D. Determination To Issue an Interim Rule**

A determination has been made under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to implement Executive Order 13496 and the DoL rule at 29 CFR part 471, effective June 21, 2010. If this rule is not issued as an interim rule, contractors will not have the contractual requirement to display the notice to employees of their rights under Federal labor laws, as is required by DoL regulations on or after June 21,

2010. In addition, the regulated community was provided ample opportunity to comment on DoL's promulgation of that regulation, which prescribes the content of the employee notice, requirements for its posting, and enforcement procedures, and DoL received and considered numerous such comments in drafting the final rule. However, pursuant to 41 U.S.C. 418b and FAR 1.501-3, 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 1, 2, 22, and 52

Government procurement.

Dated: November 24, 2010.

Millisa Gary,

Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 2, 22, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 2, 22, and 52 continues 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 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

##### 1.106 [Amended]

■ 2. Amend section 1.106, in the table following the introductory text, by adding in numerical sequence, FAR segment "22.16" and its corresponding OMB Control Number "1215-0209", and FAR segment "52.222-40" and its corresponding OMB Control Number "1215-0209".

#### PART 2—DEFINITIONS OF WORDS AND TERMS

■ 3. Amend section 2.101 in paragraph (b)(2), in the definition "United States" by redesignating paragraphs (5) through (8) as paragraphs (6) through (9), respectively, and adding a new paragraph (5) to read as follows:

##### 2.101 Definitions.

\* \* \* \* \*

*United States* \* \* \*

(5) For use in subpart 22.16, *see* the definition at 22.1601.

\* \* \* \* \*

#### PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 4. Add subpart 22.16 to read as follows:

#### Subpart 22.16—Notification of Employee Rights Under the National Labor Relations Act

Sec.

22.1600 Scope of subpart.

22.1601 Definitions.

22.1602 Policy.

22.1603 Exceptions.

22.1604 Compliance evaluation and complaint investigations and sanctions for violations.

22.1605 Contract clause.

#### Subpart 22.16—Notification of Employee Rights Under the National Labor Relations Act

##### 22.1600 Scope of subpart.

This subpart prescribes policies and procedures to implement Executive Order 13496, dated January 30, 2009 (74 FR 6107, February 4, 2009).

##### 22.1601 Definitions.

As used in this subpart—  
*Secretary* means the Secretary of Labor, U.S. Department of Labor.

*United States* means the 50 States, the District of Columbia, Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island.

##### 22.1602 Policy.

(a) Executive Order 13496 requires contractors to post a notice informing employees of their rights under Federal labor laws.

(b) The Secretary has determined that the notice must contain employee rights under the National Labor Relations Act (Act), 29 U.S.C. 151 *et seq.* The Act encourages collective bargaining, and protects the exercise by employees of their freedom to associate, to self-organize, and to designate representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

##### 22.1603 Exceptions.

(a) The requirements of this subpart do not apply to—

(1) Contracts under the simplified acquisition threshold;

(2) Subcontracts of \$10,000 or less; and

(3) Contracts or subcontracts for work performed exclusively outside the United States.

(b) *Exemptions granted by the Secretary.* (1) If the Secretary finds that the requirements of the Executive Order impair the ability of the Government to procure goods and services on an economical and efficient basis or if special circumstances require an exemption in order to serve the national interest, the Secretary may exempt a contracting department or agency, or

groups of departments or agencies, from the requirements of any or all of the provisions of this Executive Order with respect to a particular contract or subcontract, or any class of contracts or subcontracts, including the requirement to include the clause at 52.222-40, or parts of that clause, in contracts.

(2) Requests for exemptions may be submitted in accordance with Department of Labor regulations at 29 CFR 471.3.

##### 22.1604 Compliance evaluation and complaint investigations and sanctions for violations.

(a) The Secretary may conduct compliance evaluations or investigate complaints of any contractor or subcontractor to determine if any of the requirements of the clause at 52.222-40 have been violated.

(b) Contracting departments and agencies shall cooperate with the Secretary and provide such information and assistance as the Secretary may require in the performance of the Secretary's functions.

(c) If the Secretary determines that there has been a violation, the Secretary may take such actions as set forth in 29 CFR 471.14.

(d) The Secretary may not terminate or suspend a contract or suspend or debar a contractor if the agency head has provided written objections, which must include a statement of reasons for the objection and a finding that the contractor's performance is essential to the agency's mission, and continues to object to the imposition of such sanctions and penalties. Procedures for enforcement by the Secretary are set out in 29 CFR 471.10 through 29 CFR 471.16.

##### 22.1605 Contract clause.

(a) Insert the clause at 52.222-40, Notification of Employee Rights under the National Labor Relations Act, in all solicitations and contracts, including acquisitions for commercial items and commercially available off-the-shelf items, except acquisitions—

(1) *Under the simplified acquisition threshold.* For indefinite-quantity contracts, include the clause only if the value of orders in any calendar year of the contract is expected to exceed the simplified acquisition threshold;

(2) For work performed exclusively outside the United States; or

(3) Covered (in their entirety) by an exemption granted by the Secretary.

(b) A contracting agency may modify the clause at 52.222-40, if necessary, to reflect an exemption granted by the Secretary (*see* 22.1603(b)).

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

- 5. Amend section 52.212–5 by—
- a. Revising the date of the clause;
- b. Redesignating paragraphs (b)(27) through (b)(44) as paragraphs (b)(28) through (b)(45), respectively; and adding a new paragraph (b)(27);
- c. Adding paragraph (e)(1)(vii); and
- d. In Alternate II by—
- (1) Revising the date of Alternate II;
- (2) Redesignating paragraphs (e)(1)(ii)(G) through (M) as paragraphs (e)(1)(ii)(H) through (N), respectively; and adding a new paragraph (e)(1)(ii)(G).

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 (DEC 2010)**

\* \* \* \* \*

(b) \* \* \*

(27) 52.222–40, Notification of Employee Rights Under the National Labor Relations Act (DEC 2010) (E.O. 13496).

\* \* \* \* \*

(e)(1) \* \* \*

(vii) 52.222–40, Notification of Employee Rights Under the National Labor Relations Act (DEC 2010) (E.O. 13496). Flow down required in accordance with paragraph (f) of FAR clause 52.222–40.

\* \* \* \* \*

*Alternate II (DEC 2010).*

\* \* \* \* \*

(e)(1) \* \* \*

(ii) \* \* \*

(G) 52.222–40, Notification of Employee Rights Under the National Labor Relations Act (DEC 2010) (E.O. 13496). Flow down required in accordance with paragraph (f) of FAR clause 52.222–40.

\* \* \* \* \*

- 6. Amend section 52.213–4 by revising the date of the clause; and removing from paragraph (a)(2)(vii) “(Oct 2010)” and adding “(DEC 2010)” in its place.

The revision reads as follows:

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

\* \* \* \* \*

**Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (DEC 2010)**

\* \* \* \* \*

- 7. Add section 52.222–40 to read as follows:

**52.222–40 Notification of Employee Rights Under the National Labor Relations Act.**

As prescribed in 22.1605, insert the following clause:

**Notification of Employee Rights Under the National Labor Relations Act (DEC 2010)**

(a) During the term of this contract, the Contractor shall post an employee notice, of such size and in such form, and containing such content as prescribed by the Secretary of Labor, in conspicuous places in and about its plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically, in the languages employees speak, in accordance with 29 CFR 471.2(d) and (f).

(1) Physical posting of the employee notice shall be in conspicuous places in and about the Contractor’s plants and offices so that the notice is prominent and readily seen by employees who are covered by the National Labor Relations Act and engage in activities related to the performance of the contract.

(2) If the Contractor customarily posts notices to employees electronically, then the Contractor shall also post the required notice electronically by displaying prominently, on any Web site that is maintained by the Contractor and is customarily used for notices to employees about terms and conditions of employment, a link to the Department of Labor’s Web site that contains the full text of the poster. The link to the Department’s Web site, as referenced in (b)(3) of this section, must read, “Important Notice about Employee Rights to Organize and Bargain Collectively with Their Employers.”

(b) This required employee notice, printed by the Department of Labor, may be—

(1) Obtained from the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5609, Washington, DC 20210, (202) 693–0123, or from any field office of the Office of Labor-Management Standards or Office of Federal Contract Compliance Programs;

(2) Provided by the Federal contracting agency if requested;

(3) Downloaded from the Office of Labor-Management Standards Web site at <http://www.dol.gov/olms/regs/compliance/EO13496.htm>; or

(4) Reproduced and used as exact duplicate copies of the Department of Labor’s official poster.

(c) The required text of the employee notice referred to in this clause is located at Appendix A, Subpart A, 29 CFR Part 471.

(d) The Contractor shall comply with all provisions of the employee notice and related rules, regulations, and orders of the Secretary of Labor.

(e) In the event that the Contractor does not comply with the requirements set forth in paragraphs (a) through (d) of this clause, this contract may be terminated or suspended in whole or in part, and the Contractor may be

suspended or debarred in accordance with 29 CFR 471.14 and subpart 9.4. Such other sanctions or remedies may be imposed as are provided by 29 CFR part 471, which implements Executive Order 13496 or as otherwise provided by law.

(f) *Subcontracts.* (1) The Contractor shall include the substance of this clause, including this paragraph (f), in every subcontract that exceeds \$10,000 and will be performed wholly or partially in the United States, unless exempted by the rules, regulations, or orders of the Secretary of Labor issued pursuant to section 3 of Executive Order 13496 of January 30, 2009, so that such provisions will be binding upon each subcontractor.

(2) The Contractor shall not procure supplies or services in a way designed to avoid the applicability of Executive Order 13496 or this clause.

(3) The Contractor shall take such action with respect to any such subcontract as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for noncompliance.

(4) However, if the Contractor becomes involved in litigation with a subcontractor, or is threatened with such involvement, as a result of such direction, the Contractor may request the United States, through the Secretary of Labor, to enter into such litigation to protect the interests of the United States.

(End of clause)

- 8. Amend section 52.244–6 by revising the date of the clause and adding paragraph (c)(1)(vii) to read as follows:

**52.244–6 Subcontracts for Commercial Items.**

\* \* \* \* \*

**Subcontracts for Commercial Items (DEC 2010)**

\* \* \* \* \*

(c)(1) \* \* \*

(vii) 52.222–40, Notification of Employee Rights Under the National Labor Relations Act (DEC 2010) (E.O. 13496), if flow down is required in accordance with paragraph (f) of FAR clause 52.222–40.

\* \* \* \* \*

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