

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 2, 19, 33, and 52**

[FAC 2005–47; FAR Case 2006–005; Item II; Docket 2009–0014, Sequence 2]

RIN 9000–AL18

**Federal Acquisition Regulation;
HUBZone Program Revisions**

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) are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement revisions to the Small Business Administration's HUBZone Program. This case requires that, for award of a HUBZone contract, a HUBZone small business concern must be a HUBZone small business concern both at the time of its initial offer and at the time of contract award. In addition, for general construction or construction by special trade contractors, a HUBZone small business concern must spend at least 50 percent of the cost of contract performance incurred for personnel on its own employees or subcontract employees of other HUBZone small business concerns. The 50 percent requirement may be waived in some circumstances.

DATES: *Effective Date:* January 12, 2011.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Karlos Morgan, Procurement Analyst, at (202) 501–2364. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAR Case 2006–005.

SUPPLEMENTARY INFORMATION:**A. Background**

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 74 FR 16823 on April 13, 2009. This FAR final rule implements the Small Business Administration (SBA) final rule published in the **Federal Register** at 69 FR 29411 on May 24, 2004, and an interim rule amending its HUBZone regulations at 13 CFR part 126 to implement the Small Business

Reauthorization Act of 2000, the Consolidated Appropriations Act, 2005, and other various policy changes published in the **Federal Register** at 70 FR 51243 on August 30, 2005. The public comment period for the FAR proposed rule closed June 12, 2009. Seven respondents submitted comments on the proposed rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided below.

1. *Comment:* Confirmation of subcontractors' representation. The respondent expressed concern that the addition of paragraph (d)(2) to FAR 52.219–8, Utilization of Small Business Concerns, requiring prime contractors to confirm that a subcontractor's representation as a HUBZone concern has been certified by the SBA, would add time and expense to the solicitation and award of subcontracts, particularly when Web sites are down for maintenance or experiencing technical issues and prime contractors must rely on a written response from the SBA to a letter or e-mail. The respondent is concerned that this requirement imposes an additional burden on prime contractors that will result in no direct improvement in the existing process.

Response: The revision to FAR 52.219–8(d)(2) makes it clear that the contractor is required to verify the "qualified" HUBZone small business status of its subcontractor, using any of the suggested sources in the regulation.

Section 3(p)(5)(D) of the Small Business Act requires SBA to establish a "List of Qualified HUBZone Small Business Concerns" which is available "to any Federal agency or other entity." This final rule includes the SBA Internet site at http://dsbs.sba.gov/dsbs/search/dsp_searchhubzone.cfm available to the public where the list of qualified HUBZone small businesses may be accessed. The list can also be obtained by accessing <http://www.sba.gov/hubzone>. HUBZone qualified subcontractors are required to be certified by SBA pursuant to the Small Business Act and SBA's regulations and this clause ensure that HUBZone subcontracts are awarded to, and goaling credit received for, eligible concerns.

2. *Comment:* Applicability of additional paragraph. Three respondents expressed concern with the addition of paragraph (d)(3) in FAR clause 52.219–8, Utilization of Small Business Concerns. According to the respondents, the proposed requirement is not limited in scope. It would apparently apply to all subcontract competitions, even competitions in which a small business did not

compete. One of the respondents believes that there will be a significant impact to the procurement process should this proposed rule be adopted as published, and the respondent also believes that protests are not allowed at the subcontract level. The proposed requirement for advance notice will delay subcontract awards, impact program schedules, require significantly more effort, increase the number of disputes, and increase administrative costs. One of the respondents requested an exception for those contractors that have successfully undergone an approved Contractor Purchasing System Review in accordance with FAR subpart 44.3 and maintain an approved system. A respondent requested a waiver of the clause if the contractor has undergone a successful Contractor Purchasing System Review.

Response: The final rule amends the FAR to conform to existing SBA regulations (13 CFR 125.3(c)(1)(v) for subcontracts above \$100,000, and 13 CFR 125.3(c)(1)(vi) which addresses best practices for under \$100,000). The SBA regulations prescribe written notification which must include the name and location of the apparent successful offeror and its small business program status. The intent of the notification requirement is to allow the unsuccessful small business subcontractor to protest the size status of the successful subcontractor to the contracting officer or SBA (see FAR 19.703). The SBA regulation was not adequately addressed in the proposed rule and the coverage has been narrowed and moved to FAR 52.219–9, Small Business Subcontracting Plan. The requirement for notification applies only to prime contractors with contracts requiring subcontracting plans. The notification applies to those subcontracts over the simplified acquisition threshold in which a small business concern received a preference. The Councils do not agree with waiver of the clause if the contractor has undergone a successful Contractor Purchasing System Review.

3. *Comment:* Commercial items. Two respondents urge the FAR Council not to apply the proposed FAR 52.219–8(d) successful subcontractor notification to prime contractors that are suppliers of commercial items. One respondent stated that the FAR does not define "subcontractor" in the context of commercial item acquisition and believes that the clause requires the prime contractor to reveal competitive information about its subcontractor. The respondents state that it is impractical to segregate the purchases of materials and other supplies and services for

products sold under Government contracts from those sold under other commercial contracts. In addition, the proposed rule is not required by statute and SBA is not obligated or permitted to impose this requirement on commercial item acquisitions.

Response: The respondents misinterpreted the commercial item statute. The SBA regulation upon which this is based, 13 CFR 125.3(c)(1)(v), is not required by statute and cannot be waived under FAR subpart 12.5 procedures. However, the SBA regulation was not adequately addressed in the proposed rule, and the coverage has been narrowed and moved to FAR 52.219–9(e)(6). The requirement for notification applies only to prime contractors with contracts requiring subcontracting plans. The notification applies to those subcontracts over the simplified acquisition threshold in which a small business concern received a preference. In addition, “subcontract” is defined in FAR 2.101, and the Councils determined that there was no need to create a special definition for this case. Further, the notification releases only the name of the apparent successful small business subcontractor, its location, and its small business status so that others may protest its size; this does not reveal competitive information about the subcontractor.

4. *Comment:* Task orders. The respondent requested that the regulations address the use of HUBZones in task-order contracts. The respondent is concerned with the accountability of firms and the oversight afforded them by the contracting officer.

Response: If the contracting officer is notified of possible contractor violations of Federal law involving fraud, waste, or abuse, or a violation of the False Claims Act, the contracting officer must either coordinate the matter with the agency Office of the Inspector General, or take action in accordance with agency procedures and in accordance with FAR part 3, Improper Business Practices and Personal Conflicts of Interest.

Additionally, the FAR requires the contracting officer to monitor the contractor’s performance throughout the life of the contract. Where the contractor is found to be in noncompliance with the terms and conditions of the contract, such as compliance with the Limitations on Subcontracting clause (FAR 52.219–14), the contracting officer is required to take appropriate action in accordance with FAR part 42.

5. *Comment:* Geographical restriction. The respondent requested that the rule contain a geographic restriction for HUBZone performance and address

contract administration and other enforcement issues.

Response: The comment is outside the scope of this FAR case.

6. *Comment:* Use of terminology. The respondent noted that FAR 19.1303(a) should be changed to reflect deletion of the word “qualified” in the title of this section.

Response: The final rule deletes the word “qualified.”

7. *Comment:* Sole source authority. The respondent suggested replacing the language at FAR 19.1306, HUBZone sole source awards, to be consistent with the proposed Service-Disabled Veteran-Owned Small Business rule addressing sole source award authority (74 FR 23373, May 19, 2009).

Response: FAR Case 2008–023, Clarification of Criteria for Sole Source Awards to Service Disabled Veteran Owned Small Business Concerns, was published as a final rule in the **Federal Register** at 75 FR 38687 on July 2, 2010. The changes in that rule have been reflected in this case.

8. *Comment:* Clause numbering. The respondent stated that the proposed rule, at FAR 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, appears to have inadvertently used the wrong subparagraph numbers for the clauses listed in paragraph (b) of the clause.

Response: The paragraph numbering has been revised in the final rule to reflect the current FAR baseline.

9. *Comment:* Program parity. The respondent stated that the proposed rule should address “parity” among all of SBA’s programs, *i.e.*, HUBZone, 8(a), and Service-Disabled Veteran-Owned Small Business.

Response: This comment is outside the scope of this FAR case.

10. *Comment:* Price preference. The respondent stated that the newly designated FAR 19.1309(b) is inconsistent with the statute creating the HUBZone program and therefore the second sentence should be deleted. The HUBZone Act requires that a HUBZone price preference be applied in the evaluation process for all full and open competitions.

Response: The sentence was deleted. The HUBZone Price Evaluation Preference applies to those contracting actions that are awarded through full and open competition to HUBZone Small Business Concerns. FAR 19.1307(a)(1) has also been deleted.

11. *Comment:* HUBZone certification by contracting officer. The respondent has requested deletion of the second sentence of FAR 52.219–3(f) and 52.219–4(g) from the final rule, which

mandates that a HUBZone offeror provide the contracting officer a copy of its HUBZone eligibility if material changes occur before contract award that could affect its eligibility. The respondent states that the contracting officer is not the authority allowed to take action on such facts; only the SBA has the authority to certify or de-certify a HUBZone small business. In addition, the HUBZone small business may be able to resolve any issue which would prevent the SBA from taking action to de-certify the firm.

Response: The contracting officer does not have the authority to certify or de-certify a HUBZone program participant. If the contracting officer receives a notice of a material change from a HUBZone small business concern, then he/she should file a HUBZone status protest before awarding a HUBZone contract to that concern.

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 Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, applies to this final rule. The Councils prepared a Final Regulatory Flexibility Analysis (FRFA), and it is summarized as follows:

The FAR rule requires a HUBZone small business concern to be eligible for the HUBZone Program both at the time of its initial offer and at the time of contract award. This requirement will eliminate some small businesses that are not eligible in both instances. In addition, it is estimated that approximately 220 counties will be added as HUBZones as a result of base closures. The requirements for percentage of work that must be performed by the HUBZone contractor’s own employees or a HUBZone subcontractor has been increased for the “performance of work” requirements for general and specialty construction. The rule impacts some small business concerns by revising the FAR to state that except for construction or service contracts, when the total value of the contract exceeds \$25,000, a HUBZone small business concern nonmanufacturer must agree to furnish in performing the contract only end items manufactured or produced by HUBZone small business manufacturer concerns.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat will be submitting a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

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. chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 2, 19, 33, and 52

Government procurement.

Dated: November 24, 2010.

Millisa Gary,

Acting Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 19, 33, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 19, 33, 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 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) in the definitions by—

■ a. Revising the definition of “HUBZone”;

■ b. Adding in alphabetical order the definition of “HUBZone contract”; and

■ c. Removing from the definition of “HUBZone small business concern” the word “Administration” and adding “Administration (13 CFR 126.103)”.

The revised and added text reads as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

HUBZone means a historically underutilized business zone that is an area located within one or more qualified census tracts, qualified nonmetropolitan counties, lands within the external boundaries of an Indian reservation, qualified base closure areas, or redesignated areas, as defined in 13 CFR 126.103.

HUBZone contract means a contract awarded to a “HUBZone small business” concern through any of the following procurement methods:

(1) A sole source award to a HUBZone small business concern.

(2) Set-aside awards based on competition restricted to HUBZone small business concerns.

(3) Awards to HUBZone small business concerns through full and open competition after a price evaluation preference in favor of HUBZone small business concerns.

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

■ 3. Amend section 19.000 by revising paragraph (a)(6) to read as follows:

19.000 Scope of part.

(a) * * *

(6) The “8(a)” business development program (hereafter referred to as 8(a) program), under which agencies contract with the SBA for goods or services to be furnished under a subcontract by a small disadvantaged business concern;

* * * * *

■ 4. Amend section 19.101 in the definition “Affiliates”, in paragraph (7) by—

■ a. Redesignating paragraphs (7)(ii) through (7)(v) as paragraphs (7)(iii) through (7)(vi);

■ b. Adding a new paragraph (7)(ii); and

■ c. Revising the first sentence of newly redesignated paragraph (7)(iii).

The added and revised text reads as follows:

19.101 Explanation of terms.

* * * * *

Affiliates * * *

(7) * * *

(ii) *HUBZone joint venture.* A HUBZone joint venture of two or more HUBZone small business concerns may submit an offer for a HUBZone contract as long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract, provided one of the following conditions apply:

(A) The aggregate total of the joint venture is small under the size standard corresponding to the NAICS code assigned to the contract.

(B) The aggregate total of the joint venture is not small under the size standard corresponding to the NAICS code assigned to the contract and either—

(1) For a revenue-based size standard, the estimated contract value exceeds half the size standard corresponding to the NAICS code assigned to the contract; or

(2) For an employee-based size standard, the estimated contract value exceeds \$10 million.

(iii) *Joint venture.* Concerns submitting offers on a particular acquisition as joint ventures are considered as affiliated and controlling or having the power to control each other with regard to performance of the contract. * * *

* * * * *

■ 5. Amend section 19.102 by adding paragraph (f)(8) to read as follows:

19.102 Size standards.

* * * * *

(f) * * *

(8) For non-manufacturer rules pertaining to HUBZone contracts, *see* 19.1303(e).

* * * * *

■ 6. Amend section 19.306 by—

■ a. Redesignating paragraphs (a) through (k) as paragraphs (b) through (l);

■ b. Adding new paragraph (a);

■ c. Revising the newly redesignated paragraph (b);

■ d. Removing from end of newly redesignated paragraph (d) “(AA/HUB)” and adding “(Director/HUB)” in its place;

■ e. Revising the newly redesignated paragraphs (e) and (f);

■ f. Redesignating newly redesignated paragraphs (g) through (l) as (h) through (m);

■ g. Adding a new paragraph (g);

■ h. Removing from the second sentence of the newly redesignated paragraph (i) “8(a) Business Development (ADA/GC&8(a)BD).” and adding “Administrator for Government Contracting and 8(a) Business Development(AA/GC&BD).” in its place;

■ i. Removing from the newly redesignated paragraph (j) “ADA/GC&8(a)BD” and adding “AA/GC&BD” in its place (twice).

■ j. Removing from the newly redesignated paragraph (k) “AA/HUB” and adding “Director/HUB” in its place;

■ k. Removing from the newly redesignated paragraph (l) “AA/HUB’s” and adding “Director/HUB’s” in its place; and

■ l. Removing from the first sentence of the newly redesignated paragraph (m) “ADA/GC&8(a)BD” and adding “AA/GC&BD” in its place and removing from the last sentence “ADA/GC&8(a)BD’s” and adding “AA/GC&BD’s” in its place.

The added and revised text reads as follows:

19.306 Protesting a firm’s status as a HUBZone small business concern.

(a) *Definition.* As used in this section—

Interested party has the meaning given in 13 CFR 126.103.

(b) *HUBZone Small Business Status.*

(1) For sole source acquisitions, the SBA or the contracting officer may protest the apparently successful offeror’s HUBZone small business concern status.

(2) For all other acquisitions, an offeror that is an interested party, the contracting officer, or the SBA may protest the apparently successful offeror’s qualified HUBZone small business concern status.

* * * * *

(e)(1) The protest of an offeror that is an interested party must be submitted by—

- (i) For sealed bids:
 - (A) The close of business on the fifth business day after bid opening; or
 - (B) The close of business on the fifth business day from the date of identification of the apparent successful offeror, if the price evaluation preference was not applied at the time of bid opening.

(ii) For negotiated acquisitions, the close of business on the fifth business day after notification by the contracting officer of the apparently successful offeror.

(2) Any protest submitted after these time limits is untimely, unless it is submitted by the SBA or the contracting officer. Any protest received prior to bid opening or notification of intended award, whichever applies, is premature and shall be returned to the protester.

(f) Except for premature protests, the contracting officer shall forward all protests received, notwithstanding whether the contracting officer believes that the protest is not sufficiently specific, timely, or submitted by an interested party. The contracting officer shall also forward a referral letter with the information required by 13 CFR 126.801(e).

(g)(1) Protests may be submitted in person or by facsimile, express delivery service, or U.S. mail (postmarked within the applicable time period) to the Director/HUB, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, Fax (202) 205-7167.

(2) The Director/HUB will notify the protester and the contracting officer that the protest was received and indicate whether the protest will be processed or dismissed for lack of timeliness or specificity. A protest will be dismissed if SBA determines the protester is not an interested party.

* * * * *

■ 7. Amend section 19.703 by revising paragraphs (d)(1)(i) and (ii) to read as follows:

19.703 Eligibility requirements for participating in the program.

* * * * *

(d)(1) * * *

(i) HUBZone small business database search application Web page at http://dsbs.sba.gov/dsbs/dsp_searchhubzone.cfm or <http://www.sba.gov/hubzone>.

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

* * * * *

19.800 [Amended]

■ 8. Amend section 19.800 in paragraph (e) by removing the last sentence.

19.803 [Amended]

■ 9. Amend section 19.803 in paragraph (c) by removing from the end of the last sentence “(but see 19.800(e))”.

19.804–3 [Amended]

■ 10. Amend section 19.804–3 in paragraph (a) by removing from the last sentence “(AA)/8(a)/BD”.

19.805–1 [Amended]

■ 11. Amend section 19.805–1 in paragraph (d) by removing “(AA/8(a)BD)” and adding “(AA/BD)” in its place; and removing “AA/8(a)BD” and adding “AA/BD” in its place each time it appears (two times).

■ 12. Amend section 19.1301 by revising paragraph (a) to read as follows:

19.1301 General.

(a) The Historically Underutilized Business Zone (HUBZone) Act of 1997 (15 U.S.C. 631 note) created the HUBZone Program.

* * * * *

■ 13. Amend section 19.1303 by—

- a. Revising the section heading;
- b. Removing from paragraph (a) “qualified”;
- c. Revising paragraphs (b), (c), and (d); and
- d. Adding paragraph (e).

The revised and added text reads as follows:

19.1303 Status as a HUBZone small business concern.

* * * * *

(b) If the SBA determines that a concern is a HUBZone small business concern, it will issue a certification to that effect and will add the concern to the List of Qualified HUBZone Small Business Concerns at http://dsbs.sba.gov/dsbs/search/dsp_searchhubzone.cfm. Only firms on the list are HUBZone small business concerns, eligible for HUBZone preferences. HUBZone preferences apply without regard to the place of performance. Information on HUBZone small business concerns can also be obtained at <http://www.sba.gov/hubzone> or by writing to the Director for the HUBZone Program (Director/HUB) at U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416 or at hubzone@sba.gov.

(c) A joint venture may be considered a HUBZone small business concern if it meets the criteria in the explanation of affiliates (see 19.101).

(d) To be eligible for a HUBZone contract under this section, a HUBZone

small business concern must be a HUBZone small business concern both at the time of its initial offer and at the time of contract award.

(e) A HUBZone small business concern may submit an offer for supplies as a nonmanufacturer if it meets the requirements of the nonmanufacturer rule set forth at 13 CFR 121.406(b)(1) and if the small business manufacturer providing the end item is also a HUBZone small business concern.

(1) There are no waivers to the nonmanufacturer rule for HUBZone contracts.

(2) For HUBZone contracts at or below \$25,000 in total value, a HUBZone small business concern may supply the end item of any manufacturer, including a large business, so long as the product acquired is manufactured or produced in the United States.

■ 14. Amend section 19.1305 by—

- a. Removing from paragraph (a) “A participating agency contracting” and adding “The contracting” in its place;
- b. Removing from paragraph (c) “A participating agency” and adding “A contracting officer” in its place; and
- c. Revising paragraph (e) to read as follows:

19.1305 HUBZone set-aside procedures.

* * * * *

(e) The procedures at 19.202–1 and, except for acquisitions not exceeding the simplified acquisition threshold, at 19.402 apply to this section.

(1) When the SBA intends to appeal a contracting officer’s decision to reject a recommendation of the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) to set aside an acquisition for competition restricted to HUBZone small business concerns, the SBA procurement center representative shall notify the contracting officer, in writing, of its intent within 5 business days of receiving the contracting officer’s notice of rejection.

(2) Upon receipt of notice of SBA’s intent to appeal, the contracting officer shall suspend action on the acquisition unless the head of the contracting activity makes a written determination that urgent and compelling circumstances, which significantly affect the interests of the Government, exist.

(3) Within 15 business days of SBA’s notification to the contracting officer, SBA must file its formal appeal with the head of the agency, or the appeal will be deemed withdrawn. The head of the agency shall reply to SBA within 15

business days of receiving the appeal. The decision of the head of the agency shall be final.

■ 15. Amend section 19.1306 by revising paragraph (a) introductory text and paragraph (a)(2)(ii) to read as follows:

19.1306 HUBZone sole source awards.

(a) A contracting officer may award contracts to HUBZone small business concerns on a sole source basis (see 19.501(c) and 6.302–5(b)(5)) before considering small business set-asides (see subpart 19.5), provided none of the exclusions at 19.1304 apply; and—

* * * * *

(2) * * *

(ii) \$4 million for a requirement within all other NAICS codes;

* * * * *

■ 16. Amend section 19.1307 by removing paragraph (a)(1); redesignating paragraphs (a)(2) and (a)(3) as paragraphs (a)(1) and (a)(2), respectively; amending newly redesignated paragraph (a)(1) by adding “or” to the end of the paragraph; and adding paragraph (e) to read as follows:

19.1307 Price evaluation preference for HUBZone small business concerns.

* * * * *

(e) When the two highest rated offerors are a HUBZone small business concern and a large business, and the evaluated offer of the HUBZone small business concern is equal to the evaluated offer of the large business after considering the price evaluation preference, the contracting officer shall award the contract to the HUBZone small business concern.

19.1308 [Redesignated as 19.1309]

■ 17a. Redesignate section 19.1308 as section 19.1309

■ 17b. Add new section 19.1308 to read as follows:

19.1308 Performance of work requirements (limitations on subcontracting) for general construction or construction by special trade contractors.

(a) Before issuing a solicitation for general construction or construction by special trade contractors, the contracting officer shall determine if at least two HUBZone small business concerns can spend at least 50 percent of the cost of contract performance to be incurred for personnel on their own employees or subcontract employees of other HUBZone small business concerns.

(b) The clause at 52.219–3, Notice of Total HUBZone Set-Aside or Sole Source Award, or 52.219–4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns,

shall be used, as applicable, with its Alternate I to waive the 50 percent requirement (see 19.1309) if at least two HUBZone small business concerns cannot meet the conditions of paragraph (a); but, the HUBZone prime contractor can still meet the following—

(1) For general construction, at least 15 percent of the cost of the contract performance to be incurred for personnel using the concern’s employees; or

(2) For construction by special trade contractors, at least 25 percent of the cost of contract performance to be incurred for personnel using the concern’s employees.

(c) See 13 CFR 125.6 for definitions of terms used in paragraph (a) of this section.

■ 17c. Revise newly redesignated section 19.1309 to read as follows:

19.1309 Contract clauses.

(a) The contracting officer shall insert the clause 52.219–3, Notice of Total HUBZone Set-Aside or Sole Source Award, in solicitations and contracts for acquisitions that are set aside for, or awarded on a sole source basis to, HUBZone small business concerns under 19.1305 or 19.1306.

(1) The contracting officer shall use the clause with its Alternate I to waive the 50 percent requirement if the conditions at 19.1308(b) apply.

(2) If a waiver is granted, the HUBZone small business prime contractor must still meet the performance of work requirements set forth in 13 CFR 125.6(c).

(b) The contracting officer shall insert the clause at FAR 52.219–4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns, in solicitations and contracts for acquisitions conducted using full and open competition.

(1) The contracting officer shall use the clause with its Alternate I to waive the 50 percent requirement if the conditions at 19.1308(b) apply.

(2) If a waiver is granted, the HUBZone small business prime contractor must still meet the performance of work requirements set forth in 13 CFR 125.6(c).

PART 33—PROTESTS, DISPUTES, AND APPEALS

■ 18. Amend section 33.102 in paragraph (a) by revising the second sentence to read as follows:

33.102 General.

(a) * * * (See 19.302 for protests of small business status, 19.305 for protests of disadvantaged business

status, 19.306 for protests of HUBZone small business status, and 19.307 for protests of service-disabled veteran-owned small business status.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 19. Amend section 52.212–3 by revising the date of the provision and paragraphs (c)(10)(i) and (ii) to read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (JAN 2011)

* * * * *

(c) * * *

(10) * * *

(i) It is, is not a HUBZone small business concern listed, on the date of this representation, on the List of Qualified HUBZone Small Business Concerns maintained by the Small Business Administration, and no material changes in ownership and control, principal office, or HUBZone employee percentage have occurred since it was certified in accordance with 13 CFR Part 126; and

(ii) It is, is not a HUBZone joint venture that complies with the requirements of 13 CFR Part 126, and the representation in paragraph (c)(10)(i) of this provision is accurate for each HUBZone small business concern participating in the HUBZone joint venture. [The offeror shall enter the names of each of the HUBZone small business concerns participating in the HUBZone joint venture: _____.] Each HUBZone small business concern participating in the HUBZone joint venture shall submit a separate signed copy of the HUBZone representation.

* * * * *

■ 20. Amend section 52.212–5 by—

■ a. Revising the date of the clause and paragraph (b)(7);

■ b. Removing from paragraph (b)(8) “(July 2005)” and adding “(JAN 2011)” in its place;

■ c. Removing from paragraph (b)(12) “(May 2004)” and adding “(JAN 2011)” in its place; and

■ d. Removing from paragraph (b)(13)(i) “(Oct 2010)” and adding “(JAN 2011)” in its place.

The revised 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 (JAN 2011)

* * * * *

(b) * * *
 (7) 52.219–3, Notice of Total HUBZone Set-Aside or Sole-Source Award (JAN 2011) (15 U.S.C. 657a).

* * * * *

■ 21. Amend section 52.213–4 by revising the date of the clause and paragraph (a)(2)(vii) to read as follows:

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

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (JAN 2011)

(a) * * *
 (2) * * *
 (vii) 52.244–6, Subcontracts for Commercial Items (JAN 2011).

* * * * *

■ 22. Amend section 52.219–1 by revising the date of the provision and paragraphs (b)(6)(i) and (ii) to read as follows:

52.219–1 Small Business Program Representations.

* * * * *

Small Business Program Representations (JAN 2011)

* * * * *

(b) * * *
 (6) * * *
 (i) It is, is not a HUBZone small business concern listed, on the date of this representation, on the List of Qualified HUBZone Small Business Concerns maintained by the Small Business Administration, and no material changes in ownership and control, principal office, or HUBZone employee percentage have occurred since it was certified in accordance with 13 CFR Part 126; and
 (ii) It is, is not a HUBZone joint venture that complies with the requirements of 13 CFR Part 126, and the representation in paragraph (b)(6)(i) of this provision is accurate for each HUBZone small business concern participating in the HUBZone joint venture. [*The offeror shall enter the names of each of the HUBZone small business concerns participating in the HUBZone joint venture: _____.*] Each HUBZone small business concern participating in the HUBZone joint venture shall submit a separate signed copy of the HUBZone representation.

* * * * *

■ 23. Amend section 52.219–3 by—
 ■ a. Revising the section heading, the introductory text, the date of the clause, and paragraph (a);
 ■ b. Removing from paragraph (b)(1) “concerns shall” and adding “concerns will” in its place;
 ■ c. Revising paragraphs (c)(3), (c)(4), (d), and (e); and
 ■ d. Adding paragraph (f) and Alternate I.

The revised and added text reads as follows:

52.219–3 Notice of Total HUBZone Set-Aside or Sole Source Award.

As prescribed in 19.1309(a), insert the following clause:

Notice of Total Hubzone Set-Aside or Sole Source Award (JAN 2011)

(a) *Definitions.* See 13 CFR 125.6(e) for definitions of terms used in paragraph (c).

* * * * *

(c) * * *
 (3) *General construction.* (i) At least 15 percent of the cost of contract performance to be incurred for personnel will be spent on the HUBZone prime contractor’s employees;

(ii) At least 50 percent of the cost of the contract performance to be incurred for personnel will be spent on the HUBZone prime contractor’s employees or on a combination of the HUBZone prime contractor’s employees and employees of HUBZone small business concern subcontractors; and

(iii) No more than 50 percent of the cost of contract performance to be incurred for personnel will be subcontracted to concerns that are not HUBZone small business concerns; or

(4) *Construction by special trade contractors.* (i) At least 25 percent of the cost of contract performance to be incurred for personnel will be spent on the HUBZone prime contractor’s employees;

(ii) At least 50 percent of the cost of the contract performance to be incurred for personnel will be spent on the HUBZone prime contractor’s employees or on a combination of the HUBZone prime contractor’s employees and employees of HUBZone small business concern subcontractors;

(iii) No more than 50 percent of the cost of contract performance to be incurred for personnel will be subcontracted to concerns that are not HUBZone small business concerns.

(d) A HUBZone joint venture agrees that, in the performance of the contract, the applicable percentage specified in paragraph (c) of this clause will be performed by the aggregate of the HUBZone small business participants.

(e)(1) When the total value of the contract exceeds \$25,000, a HUBZone small business concern nonmanufacturer agrees to furnish in performing this contract only end items manufactured or produced by HUBZone small business concern manufacturers.

(2) When the total value of the contract is equal to or less than \$25,000, a HUBZone small business concern nonmanufacturer may provide end items manufactured by other than a HUBZone small business concern manufacturer provided the end items are produced or manufactured in the United States.

(3) Paragraphs (e)(1) and (e)(2) of this section do not apply in connection with construction or service contracts.

(f) *Notice.* The HUBZone small business offeror acknowledges that a prospective HUBZone awardee must be a HUBZone small

business concern at the time of award of this contract. The HUBZone offeror shall provide the Contracting Officer a copy of the notice required by 13 CFR 126.501 if material changes occur before contract award that could affect its HUBZone eligibility. If the apparently successful HUBZone offeror is not a HUBZone small business concern at the time of award of this contract, the Contracting Officer will proceed to award to the next otherwise successful HUBZone small business concern or other offeror.

(End of clause)

Alternate I (JAN 2011). As prescribed in 19.1309(a)(1), substitute the following paragraphs (c)(3) and (c)(4) for paragraphs (c)(3) and (c)(4) of the basic clause:

(c)(3) General construction, at least 15 percent of the cost of the contract performance to be incurred for personnel will be spent on the concern’s employees; or

(c)(4) Construction by special trade contractors, at least 25 percent of the cost of the contract performance to be incurred for personnel will be spent on the concern’s employees.

■ 24. Amend section 52.219–4 by—
 ■ a. Revising the introductory paragraph, the date of the clause, and paragraph (a);
 ■ b. Adding paragraph (b)(4);
 ■ c. Removing from the second sentence of paragraph (c) introductory text “paragraph (d)” and adding “paragraphs (d) and (e)” in its place;
 ■ d. Revising paragraphs (d)(3), (d)(4), (e), and (f); and
 ■ e. Adding paragraph (g) and Alternate I.

The revised and added text reads as follows:

52.219–4 Notice of Price Evaluation Preference for HUBZone Small Business Concerns.

As prescribed in 19.1309(b), insert the following clause:

Notice of Price Evaluation preference for HUBZone Small Business Concerns (JAN 2011)

(a) *Definitions.* See 13 CFR 125.6(e) for definitions of terms used in paragraph (d).

(b) * * *

(4) When the two highest rated offerors are a HUBZone small business concern and a large business, and the evaluated offer of the HUBZone small business concern is equal to the evaluated offer of the large business after considering the price evaluation preference, award will be made to the HUBZone small business concern.

* * * * *

(d) * * *

(3) *General construction.* (i) At least 15 percent of the cost of contract performance to be incurred for personnel will be spent on the prime contractor’s employees;

(ii) At least 50 percent of the cost of the contract performance to be incurred for

personnel will be spent on the prime contractor's employees or on a combination of the prime contractor's employees and employees of HUBZone small business concern subcontractors;

(iii) No more than 50 percent of the cost of contract performance to be incurred for personnel will be subcontracted to concerns that are not HUBZone small business concerns; or

(4) *Construction by special trade contractors.* (i) At least 25 percent of the cost of contract performance to be incurred for personnel will be spent on the prime contractor's employees;

(ii) At least 50 percent of the cost of the contract performance to be incurred for personnel will be spent on the prime contractor's employees or on a combination of the prime contractor's employees and employees of HUBZone small business concern subcontractors;

(iii) No more than 50 percent of the cost of contract performance to be incurred for personnel will be subcontracted to concerns that are not HUBZone small business concerns.

(e) A HUBZone joint venture agrees that the aggregate of the HUBZone small business concerns to the joint venture, not each concern separately, will perform the applicable percentage of work requirements.

(f)(1) When the total value of the contract exceeds \$25,000, a HUBZone small business concern nonmanufacturer agrees to furnish in performing this contract only end items manufactured or produced by HUBZone small business concern manufacturers.

(2) When the total value of the contract is equal to or less than \$25,000, a HUBZone small business concern nonmanufacturer may provide end items manufactured by other than a HUBZone small business concern manufacturer provided the end items are produced or manufactured in the United States.

(3) Paragraphs (f)(1) and (f)(2) of this section do not apply in connection with construction or service contracts.

(g) *Notice.* The HUBZone small business offeror acknowledges that a prospective HUBZone awardee must be a HUBZone small business concern at the time of award of this contract. The HUBZone offeror shall provide the Contracting Officer a copy of the notice required by 13 CFR 126.501 if material changes occur before contract award that could affect its HUBZone eligibility. If the apparently successful HUBZone offeror is not a HUBZone small business concern at the time of award of this contract, the Contracting Officer will proceed to award to the next otherwise successful HUBZone small business concern or other offeror.

(End of clause)

Alternate I (JAN 2011). As prescribed in 19.1309(b)(1), substitute the following paragraphs (d)(3) and (d)(4) for paragraphs (d)(3) and (d)(4) of the basic clause:

(3) General construction, at least 15 percent of the cost of the contract performance to be incurred for personnel will be spent on the concern's employees; or

(4) Construction by special trade contractors, at least 25 percent of the cost of the contract performance to be incurred for personnel will be spent on the concern's employees.

■ 25. Amend section 52.219–8 by revising the date of the clause; and paragraph (d) to read as follows:

52.219–8 Utilization of small business concerns.

* * * * *

Utilization of Small Business Concerns (JAN 2011)

* * * * *

(d)(1) Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as a small business concern, a veteran-owned small business concern, a service-disabled veteran-owned small business concern, a small disadvantaged business concern, or a women-owned small business concern.

(2) 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 small business database search application Web page at http://dsbs.sba.gov/dsbs/search/dsp_searchhubzone.cfm; or <http://www.sba.gov/hubzone>;

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

(iii) The SBA HUBZone Help Desk at hubzone@sba.gov.

■ 26. Amend section 52.219–9 by revising the date of the clause and adding paragraph (e)(6) to read as follows:

52.219–9 Small business subcontracting plan.

* * * * *

Small Business Subcontracting Plan (JAN 2011)

* * * * *

(e) * * *

(6) For all competitive subcontracts over the simplified acquisition threshold in which a small business concern received a small business preference, upon determination of the successful subcontract offeror, the Contractor must inform each unsuccessful small business subcontract offeror in writing of the name and location of the apparent successful offeror prior to award of the contract.

* * * * *

[FR Doc. 2010–30560 Filed 12–10–10; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 8, 9, 17, 18, 35, and 41

[FAC 2005–47; FAR Case 2008–032; Item III; Docket 2010–0107, Sequence 1]

RIN 9000–AL69

Federal Acquisition Regulation; Preventing Abuse of Interagency Contracts

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 amending the Federal Acquisition Regulation (FAR) to implement provisions regarding, the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009 requirements for preventing abuse of interagency contracts.

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 2008–032, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2008–032” under the heading “Enter Keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “FAR Case 2008–032.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2008–032” 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 2008–032, in all correspondence related to this case. All comments received will