

2010)” in its place; revising the date of Alternate II; and removing from Alternate II, paragraph (e)(1)(ii)(C) “(MAY 2004)” and adding “(DEC 2010)” 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 (DEC 2010)**

\* \* \* \* \*

*Alternate II (DEC 2010).* \* \* \*

\* \* \* \* \*

■ 6. 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) (DEC 2010)**

(a) \* \* \*

(2) \* \* \*

(vii) 52.244–6, Subcontracts for Commercial Items (DEC 2010).

\* \* \* \* \*

■ 7. Amend section 52.219–8 by—

■ a. Revising the date of the clause; and  
 ■ b. In paragraph (c), in the definition “Small disadvantaged business concern”, by redesignating paragraphs (1) through (4) as paragraphs (1)(i) through (iv), respectively, and revising the newly redesignated paragraph (1)(iv); and adding paragraph (2).

The revised and added text reads as follows:

**52.219–8 Utilization of Small Business Concerns.**

\* \* \* \* \*

**Utilization of Small Business Concerns (DEC 2010)**

\* \* \* \* \*

(c) \* \* \*

\* \* \* \* \*

*Small disadvantaged business concern*

\* \* \*

(1)(i) \* \* \*

(iv) It is identified, on the date of its representation, as a certified small disadvantaged business in the CCR Dynamic Small Business Search database maintained by the Small Business Administration, or

(2) It represents in writing that it qualifies as a small disadvantaged business (SDB) for any Federal subcontracting program, and believes in good faith that it is owned and controlled by one or more socially and economically disadvantaged individuals and

meets the SDB eligibility criteria of 13 CFR 124.1002.

\* \* \* \* \*

■ 8. Amend section 52.219–25 by revising the date of the clause; revising the second sentence of paragraph (a); redesignating paragraph (b) as paragraph (c); and adding a new paragraph (b) to read as follows:

**52.219–25 Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting.**

\* \* \* \* \*

**Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting (DEC 2010)**

(a) \* \* \* The Contractor shall obtain representations of small disadvantaged status from joint venture partners, teaming arrangement members, and subcontractors (see exception in paragraph (b) of this section) through use of a provision substantially the same as paragraph (b)(1)(i) of the provision at FAR 52.219–22, Small Disadvantaged Business Status. \* \* \*

(b) For subcontractors that are not certified as a small disadvantaged business by the Small Business Administration, the Contractor shall accept the subcontractor’s written self-representation as a small disadvantaged business, unless the Contractor has reason to question the self-representation.

\* \* \* \* \*

■ 9. Amend section 52.244–6 by revising the date of the clause; and removing from paragraph (c)(1)(iii) “(MAY 2004)” and adding “(DEC 2010)” in its place.

The revised text reads as follows:

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

\* \* \* \* \*

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

\* \* \* \* \*

[FR Doc. 2010–30563 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 9 and 52**

[FAC 2005–47; FAR Case 2009–036; Item V; Docket 2010–0109, Sequence 1]

RIN 9000–AL75

**Federal Acquisition Regulation; Uniform Suspension and Debarment Requirement**

**AGENCY:** 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 (the Councils) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 815 of the National Defense Authorization Act for Fiscal Year 2010. Section 815 extends the flowdown of the restriction on subcontracting to lower tier subcontractors that have been suspended or debarred, with some exceptions for contracts for the acquisition of commercial items and commercially available off-the-shelf items.

**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 2009–036, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2009–036” under the heading “Enter Keyword or ID” and selecting “Search”. Select the link “Submit a Comment” that corresponds with “FAR Case 2009–036”. Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2009–036” 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 2009–036, 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. Millisa Gary, Procurement Analyst, at (202) 501–0699. Please cite FAC 2005–47, FAR Case 2009–036. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This interim rule revises the FAR to implement section 815 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84). Section 815 amends section 2455(c)(1) of the Federal Acquisition Streamlining Act of 1994 (31 U.S.C. 6101 note) by amending the definition of “procurement activities” to include subcontracts at any tier, except—

- It does not include subcontracts for commercially available off-the-shelf (COTS) items; and
- In the case of commercial items, such term includes only the first-tier subcontracts.

This has the effect, except for COTS items, of expanding the requirement of 2455(a), which states that “No agency shall allow a party to participate in any procurement \* \* \* activity if any agency has debarred, suspended, or otherwise excluded \* \* \* that party from participation in a procurement \* \* \* activity.”

Prime contractors will not be restricted from subcontracts with suspended or debarred entities for COTS items; subcontractors for COTS items will not be required to disclose to the prime contractor whether the subcontractor, or any of its principals, is debarred, suspended, or proposed for debarment at the time of subcontract award.

This interim rule amends—

(1) FAR 9.405–2 to exclude COTS items from the restrictions on subcontracting with contractors that have been debarred, suspended, or proposed for debarment;

(2) The clause at FAR 52.209–6, Protecting the Government’s Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment, by flowing down the requirements to check whether a subcontractor is suspended or debarred beyond the first-tier, with the stated exceptions for COTS items; and

(3) The clause at FAR 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, because the requirement that commercial contracts must flow the requirement down to the first-tier is now statutory.

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 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. The rule removes the current requirements relating to subcontracts for COTS items, and in the case of commercial items, the requirement extends only to the first-tier subcontracts. This rule will impact small entities that are awarded a lower-tier subcontract for a non-COTS item that exceeds \$30,000, in that these entities must now disclose to the higher-tier subcontractor whether they are suspended, debarred, or proposed for suspension. Although a substantial number of small entities may be impacted by this rule, the impact is not significant. It will likely only take one minute to include the required information with an offer. For the other impact of the rule, which will require the higher-tier subcontractor to provide an explanation if desiring to subcontract with an entity that has been debarred, suspended, or proposed for debarment, the Councils do not expect this requirement to impact a substantial number of small entities, because it would only be in rare circumstances that a subcontractor would potentially jeopardize performance or integrity by knowingly contracting with an entity that is debarred, suspended or proposed for debarment. 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 parts 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 2008–036) in correspondence.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does apply; however, these changes to the FAR only impose minimal additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0094. Because the change in burden hours is so slight, no new approval by OMB is required.

**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 the changes resulting from the enactment of Section 815 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84), effective October 28, 2009. However, pursuant to 41 U.S.C. 418b and FAR 1.501–3(b), 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 9 and 52**

Government procurement.

Dated: November 24, 2010.

**Millisa Gary,**

*Acting Director, Acquisition Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 9 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 9 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 9—CONTRACTOR QUALIFICATIONS**

■ 2. Amend section 9.405–2 by revising paragraph (b) introductory text to read as follows:

**9.405–2 Restrictions on subcontracting.**

\* \* \* \* \*

(b) The Government suspends or debars contractors to protect the Government’s interests. By operation of the clause at 52.209–6, Protecting the Government’s Interests When Subcontracting with Contractors Debarred, Suspended or Proposed for Debarment, contractors shall not enter into any subcontract in excess of \$30,000, other than a subcontract for a commercially available off-the-shelf

item, with a contractor that has been debarred, suspended, or proposed for debarment unless there is a compelling reason to do so. If a contractor intends to subcontract, other than a subcontract for a commercially available off-the-shelf item, with a party that is debarred, suspended, or proposed for debarment as evidenced by the parties' inclusion in the EPLS (*see* 9.404), a corporate officer or designee of the contractor is required by operation of the clause at 52.209-6, Protecting the Government's Interests when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment, to notify the contracting officer, in writing, before entering into such subcontract. For contracts for the acquisition of commercial items, the notification requirement applies only for first-tier subcontracts. For all other contracts, the notification requirement applies to subcontracts at any tier. The notice must provide the following:

\* \* \* \* \*

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

- 3. Amend section 52.209-6 by—
- a. Revising the date of the clause;
- b. Redesignating paragraphs (a) through (c) as paragraphs (b) through (d), respectively; and adding a new paragraph (a);
- c. Revising the newly designated paragraphs (b), (c), and (d) introductory text; and
- d. Adding paragraph (e).

The revised and added text reads as follows:

**52.209-6 Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, or Proposed for Debarment.**

\* \* \* \* \*

**Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, or Proposed for Debarment (DEC 2010)**

(a) *Definition. Commercially available off-the-shelf (COTS) item*, as used in this clause—

- (1) Means any item of supply (including construction material) that is—
  - (i) A commercial item (as defined in paragraph (1) of the definition in FAR 2.101);
  - (ii) Sold in substantial quantities in the commercial marketplace; and
  - (iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and
- (2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

(b) The Government suspends or debars Contractors to protect the Government's

interests. Other than a subcontract for a commercially available off-the-shelf item, the Contractor shall not enter into any subcontract, in excess of \$30,000 with a Contractor that is debarred, suspended, or proposed for debarment by any executive agency unless there is a compelling reason to do so.

(c) The Contractor shall require each proposed subcontractor whose subcontract will exceed \$30,000, other than a subcontractor providing a commercially available off-the-shelf item, to disclose to the Contractor, in writing, whether as of the time of award of the subcontract, the subcontractor, or its principals, is or is not debarred, suspended, or proposed for debarment by the Federal Government.

(d) A corporate officer or a designee of the Contractor shall notify the Contracting Officer, in writing, before entering into a subcontract with a party (other than a subcontractor providing a commercially available off-the-shelf item) that is debarred, suspended, or proposed for debarment (*see* FAR 9.404 for information on the Excluded Parties List System). The notice must include the following:

\* \* \* \* \*

(e) *Subcontracts.* Unless this is a contract for the acquisition of commercial items, the Contractor shall include the requirements of this clause, including this paragraph (e) (appropriately modified for the identification of the parties), in each subcontract that—

- (1) Exceeds \$30,000 in value; and
- (2) Is not a subcontract for commercially available off-the-shelf items.

(End of clause)

- 4. Amend section 52.212-5 by—
- a. Revising the date of the clause; and
- b. Redesignating paragraphs (b)(6) through (b)(44) as paragraphs (b)(7) through (b)(45), respectively; and adding a new paragraph (b)(6).

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) \* \* \*

(6) 52.209-6, Protecting the Government's Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment (DEC 2010) (31 U.S.C. 6101 note). (Applies to contracts over \$30,000). (Not applicable to subcontracts for the acquisition of commercially available off-the-shelf items).

\* \* \* \* \*

- 5. Amend section 52.213-4 by revising the date of the clause and paragraph (b)(2)(i) 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) (DEC 2010)**

(b) \* \* \*

(2) \* \* \*

(i) 52.209-6, Protecting the Government's Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment (DEC 2010) (Applies to contracts over \$30,000). (Not applicable to subcontracts for the acquisition of commercially available off-the-shelf items).

\* \* \* \* \*

[FR Doc. 2010-30565 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 15, 31, and 52**

[FAC 2005-47; FAR Case 2008-031; Item VI; Docket 2009-0034, Sequence 2]

RIN 9000-AL27

**Federal Acquisition Regulation; Limitation on Pass-Through Charges**

**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 adopted as final, with changes, the interim rule amending the Federal Acquisition Regulation (FAR) to implement section 866 of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2009, which applies to executive agencies other than DoD. DoD is subject to section 852 of the John Warner NDAA for FY 2007, which is also implemented in this final rule. Section 866 requires the Councils to amend the FAR, and section 852 requires the Secretary of Defense to prescribe regulations 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