

2015. Between \$1 million and the increase to \$1.5 million, 56 total awards were made of which 10 or 17 percent were to small businesses in FY 2014, and 29 total awards were made of which 9 or 31 percent were to small businesses in FY 2015.

The final rule imposes no reporting, recordkeeping, or other information collection requirements.

There are no known significant alternatives to the rule. The impact of this final rule on small business is not expected to be significant.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

## V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

### List of Subjects in 48 CFR Parts 2, 13, and 19

Government procurement.

Dated: December 21, 2016.

**William F. Clark,**

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

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 13, and 19 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 13, and 19 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

## PART 2—DEFINITIONS WORDS AND TERMS

### 2.101 [Amended]

■ 2. Amend section 2.101, in paragraph (b)(2), in the definition “Simplified acquisition threshold” by removing from paragraphs (1)(i) and (ii) “\$300,000” and “\$1 million” and adding “\$750,000” and “\$1.5 million” in their places, respectively.

## PART 13—SIMPLIFIED ACQUISITION PROCEDURES

### 13.003 [Amended]

■ 3. Amend section 13.003 by removing from paragraph (b)(1) “\$300,000” and adding “\$750,000” in its place.

## PART 19—SMALL BUSINESS PROGRAMS

### 19.203 [Amended]

■ 4. Amend section 19.203 by removing from paragraph (b) “\$300,000” and adding “\$750,000” in its place.

### 19.502–2 [Amended]

■ 5. Amend section 19.502–2 by removing from paragraph (a) “\$300,000” and adding “\$750,000” in its place.

[FR Doc. 2016–31496 Filed 1–12–17; 8:45 am]

**BILLING CODE 6820–EP–P**

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 3, 4, and 52

[FAC 2005–95; FAR Case 2015–012; Item II; Docket No. 2015–0012, Sequence No. 1]

RIN 9000–AN04

#### Federal Acquisition Regulation; Contractor Employee Internal Confidentiality Agreements or Statements

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

**ACTION:** Final rule.

**SUMMARY:** DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the Consolidated and Further Continuing Appropriations Act, 2015, that prohibits the use of funds, appropriated or otherwise made available, for a contract with an entity that requires employees or subcontractors to sign an internal confidentiality agreement that restricts such employees or subcontractors from lawfully reporting waste, fraud, or abuse to a designated Government representative authorized to receive such information.

**DATES:** *Effective:* January 19, 2017.

*Applicability:* This rule applies to all solicitations and contracts, using fiscal year 2015 or subsequent fiscal year funds that do not already contain a comparable provision/clause.

**FOR FURTHER INFORMATION CONTACT:** Ms. Cecelia L. Davis, Procurement Analyst, at 202–219–0202 for clarification of content. For information pertaining to status or publication schedules, contact

the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2005–95, FAR Case 2015–012.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 81 FR 3763 on January 22, 2016, to implement section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions) (*i.e.*, section 743 of Division E of Pub. L. 114–113). Section 743 prohibits the use of funds appropriated or otherwise made available by Division E or any other Act for a contract, grant, or cooperative agreement with an entity that requires employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

Four respondents submitted comments on the interim rule.

##### II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

##### A. Summary of Significant Changes From the Proposed Rule

The following significant changes are included in the final rule:

- Adds definitions of “internal confidentiality agreement or statement,” “subcontract,” and “subcontractor” (FAR 3.901, 52.203–18(a), and 52.203–19(a)).

- Clarifies that the representation applies to future internal confidentiality agreements or statements that restrict reporting of waste, fraud, or abuse related to the performance of a Government contract, and specifically cites the agency Office of the Inspector General as a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information (FAR 3.909–2, 52.203–18(d), 52.203–19(b), and 52.212–3(s)(3)).

- Clarifies that the contractor is required to give notice only to current employees and subcontractors that any prohibitions and restrictions of any preexisting confidentiality agreements or statements covered by the clause are no longer in effect, to the extent that such prohibitions and restrictions are in conflict with the prohibitions of the clause (FAR 52.203–19(c)).

#### B. Analysis of Public Comments

##### 1. General Support for the Rule

*Comment:* All respondents were in general support of the rule. For example, one respondent stated its support of the intent of section 743 and the proposed rule to provide appropriate protection for employees looking to report waste, fraud, or abuse.

*Response:* Noted.

##### 2. Internal Confidentiality Agreement or Statement

Several respondents raised questions about the meaning of “internal confidentiality agreements or statement” and their scope.

*Comment:* One respondent questioned use of the term “internal confidentiality agreement” to apply to an agreement with a subcontractor, because “internal” would imply an agreement with employees of the company.

The respondent questioned how the rule applies to subcontractors and subcontracts and suggested that the application to subcontractors is only through flowdown, rather than direct application to the prime contractor.

*Response:* Notwithstanding the word “internal,” which would normally apply to inside the company, the statute specifically addresses the situation in which the contractor requires employees or subcontractors to sign internal confidentiality agreements or statements.

The clause does flow down to subcontracts, but it also prohibits the prime contractor from requiring subcontractors to sign internal confidentiality agreements or statements.

*Comment:* One respondent asked whether the rule covers confidentiality agreements arising out of civil litigation. The respondent also questioned whether it applies to confidentiality agreements that employees sign at the behest of a Federal agency.

*Response:* A definition of “internal confidentiality agreement or statement” has been added to the final rule. This definition excludes confidentiality agreements arising out of civil litigation or confidentiality agreements that contractor employees or subcontractors sign at the behest of a Federal agency.

3. Definitions of “Entity,” “Employee,” and “Subcontractor”

##### a. “Entity”

*Comment:* One respondent noted that the proposed rule did not define “entity” and sometimes used the term “contractor” or “offeror” in a manner that appears to be intended to mean “entity.”

*Response:* The term “entity” is a well-known legal term, frequently used in the FAR with its standard dictionary meaning, and does not require further definition in the acquisition regulations. According to Black’s Law Dictionary, “entity” is a generic term inclusive of a person, partnership, organization, or business, which can be legally bound, and is uniquely identifiable from any other entity. All offerors and contractors are entities, but not all entities are offerors or contractors. The statute prohibits making funds available to entities that require employees or subcontractors to sign certain confidentiality agreements or statements due to this prohibition. Therefore, it is very possible that such entities will not submit offers or be awarded contracts. The terms “offeror” and “contractor” are used when the rule is specifically addressing an entity that has submitted an offer or bid or an entity that has been awarded a contract.

##### b. “Employee”

*Comment:* One respondent requested a definition of the term “employee.” The respondent suggested the term be defined to mean “any officer, partner, employee, or agent of a prime contractor,” consistent with the definition of “prime contractor employee” at FAR 3.502–1. The respondent noted that this definition would clarify that the term encompasses only current employees, reducing the burden of who would be covered for purposes of implementing the rule.

*Response:* The term “employee” is used throughout the FAR, generally without definition. The definition of “prime contractor employee” at FAR 3.502–1 was first included in the FAR in FAC 84–24 (February 6, 1987), to implement the Anti-Kickback Enforcement Act of 1986. According to the Senate Report 99–435, the statute added a definition of “prime contractor employee” to parallel the language of 41 U.S.C. 51, which prohibits payments to any prime contractor, or to any officer, partner, employee, or agent of a prime contractor. All of these separate terms were included in the expanded definition of “prime contractor employee” in order to cover all those persons that might be acting to benefit

or on behalf of the prime contractor when participating in a kick-back scheme. In general usage, an “officer” is an employee, but a “partner” is a co-owner, not an employee. An “agent” also is not necessarily an employee and instead is frequently a subcontractor. More importantly, the difference between an employee and an independent contractor is not an issue in this rule, because the rule equally covers both employees and subcontractors (including consultants).

However, the rule has been modified at FAR 52.203–19(c) to specify that the contractor is only required to notify current employees and subcontractors.

##### c. “Subcontractor”

*Comment:* Several respondents were concerned about limiting the meaning of the term subcontractor. One respondent stated that “subcontractor” should cover only current subcontractors that have fully executed subcontracts under which work is currently being performed. Both respondents commented that the subcontract should be directly in support of a Government contract. The respondents consider that it would be a substantial burden to cover subcontractors that they do business with commercially that do not operate under a Government contract (e.g., cafeteria and lawn services).

*Response:* Definitions of “subcontract” and “subcontractor” have been added to the final rule to specify that the term “subcontract” applies to contracts entered into by a prime contractor or by a subcontractor “to furnish supplies or services for performance of a prime contract or subcontract.” “Subcontractor” means any supplier, distributor, vendor, or firm (including a consultant) that furnishes supplies or services to or for a prime contractor or another subcontractor.

As stated in the responses in section II.B.2.b. of this preamble, the rule has been modified at FAR 52.203–19(c) to specify that the contractor is only required to notify current employees and subcontractors.

##### 4. Clarify Scope of Representation

*Comment:* One respondent was concerned that the rule as proposed could be construed in a manner broader than the stated policy for the proposed rule. The policy states that the proposed rule is intended to reduce waste, fraud, and abuse in all Federal acquisitions. The respondent recommended that the rule be clarified that it only addresses those agreements or statements involving the employees or contractors

directly performing work on a Federal contract.

*Response:* The definition of “subcontractor” limits the applicability of the rule to subcontracts under the Government contract. However, the statute focuses on reporting of waste, fraud, and abuse related to the performance of a Government contract. It is very possible that employees of the contractor not directly employed on the Government contract may have information to report relating to waste, fraud, or abuse on such contract. Therefore, the prohibition applies to all employees of the contractor, whether or not they are directly employed on the Government contract.

#### 5. Timeframe of Representation

One respondent recommended that the representation be revised to provide for prospective applicability.

Retrospective representation would require offerors to locate and review all of its employee and subcontract agreements, which could be a time-consuming and costly task. The respondent recommended that the rule be revised to require offerors to represent that “they have no such agreements in place with regard to current employees and current subcontracts used for performance of government contracts and it agrees that it will not enter into any new confidentiality agreements or statements that include prohibited limitations on reporting.”

*Response:* The rule does not require retrospective representation. It allows contractors to make a blanket notice of nonenforcement (FAR 52.203–19(b)). The respondent’s proposed wording requiring contractors to represent they have no such agreements in place with current employees or subcontractors appears more burdensome than the current rule. However, the representation has been modified to accept the latter part of the recommendation, changing it to read that the offeror “will not require its employees or subcontractors” to sign such internal confidentiality agreements or statements.

#### 6. Reporting

*Comment:* One respondent recommended that the FAR clause be modified so that the scope of the reporting is limited to waste, fraud, and abuse related to the execution of Government contracts.

*Response:* The final rule has been amended at FAR 3.909–2 to specify that the policy applies to the reporting of waste, fraud, or abuse related to the performance of a Government contract.

The same change is also incorporated in the associated provision and clause.

*Comment:* Another respondent recommended that the rule should more precisely identify the “designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.” The respondent recommended that clarification would avoid creating a situation such as where the report is inadvertently made to the wrong agency, or to entities that have no responsibility for the procurement.

*Response:* The purpose of the quoted phrase is to eliminate protection for disclosures to unauthorized people. The final rule has been amended to add “(e.g., agency Office of the Inspector General)” at the end of FAR 52.203–18(d) and 52.203–19(b).

*Comment:* One respondent was concerned that the proposed rule does not apply to disclosures made to Congress.

*Response:* Other statutes cover disclosures to Congress (see e.g., the whistleblower rights at FAR 3.907 and 3.908). This statute does not address disclosure to Congress.

#### 7. Notice Requirements

*Comment:* One respondent recommended that the preamble be amended to validate more flexible forms of notification, other than email, that could be selected by the contractor/offeror.

*Response:* The rule does not specify how the notification is to be made. The preamble to the proposed rule only used email as an example, stating that “This notice could be accomplished through normal business communication channels, such as email.”

#### 8. Protection of Controlled Unclassified Information

*Comment:* One respondent recommended that the rule should address the interplay with procedures for handling controlled unclassified information. An employee or subcontractor who wished to report fraud, waste, or abuse, should still be responsible for the proper protection and handling of controlled unclassified information. When an agency has a reason to limit the reporting of waste, fraud, or abuse to a limited chain of individuals, the rule should be revised to respect those limits.

Another respondent stated concern that the rule does not acknowledge that contractors have a legitimate interest in protecting their privileged and confidential information. The respondent recommended a change to

the clauses to acknowledge the ability of contractors to protect this information.

*Response:* Information that is reported to the agency Office of the Inspector General is protected from further disclosure outside of the Government, respecting all markings on any data or confidential information that is received.

#### 9. Safe Harbor

*Comment:* One respondent requested examples of or guidance about confidentiality agreements or statements that would help contractors comply. The respondent recommended that the rule should include definitive guidance as to language to be included in a confidentiality statement or agreement that would comply with the requirements of the statute. The respondent suggested the following:

“Neither the confidentiality provision contained in the \_\_\_\_\_ [insert title of agreement, statement, policy], nor confidentiality provisions contained in any existing employment or contract with \_\_\_\_\_ [insert name of contractor] shall be construed to prohibit or otherwise restrict you, as an employee or {sub}contractor of \_\_\_\_\_ [insert name of contractor] from lawfully reporting waste, fraud, or abuse to a designated investigative or law enforcement representative of a federal department or agency authorized to receive such information under the procurement.”

*Response:* Although the Councils do not consider it appropriate to prescribe specific language in the regulations, the language provided by the respondent is provided in full text in the preamble. The Councils concur that the sample contains appropriate language that could be included in an internal confidentiality agreement or statement, and could be tailored for use in the notice required by FAR 52.203–19(c).

#### 10. Applicability to Contracts Valued at or Below the Simplified Acquisition Threshold (SAT) and for the Acquisition of Commercial Items

*Comment:* One respondent was pleased that the rule also applies to contracts and subcontracts for acquisitions in amounts not greater than the simplified acquisition threshold, and to contracts and subcontracts for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items.

*Response:* Noted.

*Comment:* Another respondent recommended that the rule be revised to exclude contracts for commercial items, including COTS items, and purchases

below the simplified acquisition threshold.

- This rule would interfere with customary commercial practices and may deter certain valued commercial vendors from participating in Government procedures.
- Nothing in the statute indicates that commercial items or purchases below the simplified acquisition threshold are a significant source of this type of waste, fraud, or abuse.
- Government should determine whether commercial item suppliers routinely enter into such restrictive confidentiality agreements with their employees and subcontractors.
- The conclusion that the burdens imposed by this rule are minimal does not acknowledge the due diligence and effort necessary before a contractor can accurately represent compliance. According to the respondent, contractors will be required to review current internal confidentiality agreements, identify any conflicts with the regulatory requirement, and modify or enter into new confidentiality agreements to the extent necessary to ensure compliance.
- At a minimum, the clause should not require flowdown to commercial item subcontractors.

*Response:* This is an appropriations act restriction on use of funds, passed by Congress to protect the Government's interests in preventing waste, fraud, and abuse on Federal contracts. The FAR signatories and the Administrator for Federal Procurement Policy have determined that it would not be in the best interest of the Government to waive applicability of this statute to acquisitions valued at or below the SAT and contracts and subcontracts for the acquisition of commercial items (including COTS items). In response to the specific comments of the respondent, the Government has no insight into when a contractor requires internal confidentiality agreements or statements from its employees and subcontractors. The concern that this rule will interfere with common commercial practice implies that it is common commercial practice to require internal confidentiality agreements or statements. Nothing in the statute indicates that acquisitions below the SAT and for the acquisition of commercial items are not a significant source of waste, fraud, and abuse. (See also section IV of this preamble.) Furthermore, the rule imposes far less burden than envisioned by the respondent (see response to the comments in section II.B.11. of this preamble.)

Although the preamble for the proposed rule stated the clear intent to flow the clause down to subcontracts for the acquisition of commercial items, the rule did not actually implement this flowdown. The final rule implemented the flowdown requirement by adding the FAR clause 52.203–19 to the lists at 52.212–5(e) and 52.244–6.

#### 11. Implementation Burden

*Comment:* Several respondents commented that implementation of the proposed requirements would be immensely burdensome, without implementation of the recommended changes to limit scope and applicability. In particular, one respondent was especially concerned about the significant burden for contractors to track and trace all existing confidentiality agreements and statements, which may be freestanding or incorporated into other agreements. According to the respondent, an offeror would have to review each agreement and statement to determine whether it would be covered and compliant.

*Response:* There is no requirement to track and trace all existing internal confidentiality agreements and statements. That is the purpose of the notification at FAR 52.203–19(c), to override the prohibitions and restrictions of any preexisting internal confidentiality agreements or statements covered by the clause that are in conflict with the new requirement.

#### 12. Law Does Not Go Far Enough

*Comment:* One respondent was concerned that the law does not go far enough and should be expanded to—

- Eliminate “nondisclosure agreements” to hide any criminal activity, including but not limited to fraud, waste, and abuse;
- Be worldwide; and
- Not be limited to just businesses with Government contracts.

*Response:*

The final rule implements the requirements of the statute. The Councils note that—

- Certain crimes are covered by existing whistleblower statutes; see FAR 3.908–3 and 3.907;
- Agreements are covered worldwide, but only for agreements applying to disclosures made to U.S. Federal officials; and
- The FAR cannot cover businesses that do not have Government contracts.

#### C. Other Changes

The title of the FAR provision 52.203–18 and clause 52.203–19 were changed to include “or Statements” and the clause title was revised from

“Prohibition on Contracting with Entities that Require . . .” to “Prohibition on Requiring . . .” (since the contract has already been awarded).

### III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

### IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

Based on determinations by the FAR signatories (DoD, GSA, and NASA) and the Administrator for Federal Procurement Policy, in accordance with 41 U.S.C. 1905, 1906, and 1907, this rule applies to all solicitations and resultant contracts that are funded with fiscal year (FY) 2015 funds or subsequent FY funds that are subject to the same prohibition on confidentiality agreements, including contracts and subcontracts for acquisitions in amounts not greater than the SAT, and contracts and subcontracts for the acquisition of commercial items, (including COTS items). This is an appropriations act restriction that prohibits use of funds appropriated or otherwise made available by Division E of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 112–235), or any other act, for a contract with an entity that requires employees or subcontractors to sign certain internal confidentiality agreements or statements. It is not in the best interest of the Federal Government to waive the applicability of section 743 to contracts and subcontracts in amounts not greater than the SAT, or for the acquisition of commercial items (including COTS items). In FY 2015, about 90 percent of all awards were below the SAT, and commercial procedures were used in more than 50 percent of all awards, so that excluding these awards from

application of the law would seriously weaken the impact of the law.

Because the emphasis of section 743 is to prohibit restrictions on the ability of employees and subcontractors to report waste, fraud, or abuse to appropriate Government authorities, it is not in the best interest of the Federal Government to waive the applicability of section 743 to contracts and subcontracts in amounts not greater than the SAT. The suggested exception would exclude a significant number of acquisitions and thereby further limit the number of contractor/subcontractor employees protected by section 743. Furthermore, this rule imposes a minimal burden on offerors and contractors, requiring only that offerors represent by submission of the offer that they will not require certain internal confidentiality agreements. Contractors only need to notify employees that the prohibition and restrictions of any preexisting internal confidentiality agreements covered by the clause, are no longer in effect to the extent that the restrictions are inconsistent with the prohibitions of the clause.

Therefore, contractors are not required to conduct an exhaustive and burdensome search of all preexisting agreements to conform to the rule.

## V. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This rule implements section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235) and successor provisions in subsequent appropriations acts (and as extended in continuing resolutions). Section 743 prohibits the use of funds appropriated or otherwise made available by Division E or any other Act for a contract, grant, or cooperative agreement with an entity that requires employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

The objective of the rule is to remove restrictions on the ability of employees and subcontractors to report waste, fraud, or abuse to the appropriate Government authorities.

The legal basis for the rule is the above-cited statute.

There were no public comments in response to the initial regulatory flexibility analysis.

This rule will apply to all small entities that receive Government contracts awarded

using funds subject to the restriction of section 743, or successor provisions in subsequent appropriations acts with the same prohibition (and as extended in continuing resolutions). Based on FPDS data for FY 2014, this rule may affect up to 108,500 small entities per year (75,000 small entities receiving new awards, 33,500 modifications). However, it is doubtful that most small entities have any such prohibited internal confidentiality agreements with their employees and subcontractors.

There are no reporting or recordkeeping burdens associated with this rule and the other compliance requirements do not have significant impact, because the rule does not impose any significant burdens—it merely requires that contractors (1) not prohibit their employees and subcontractors from reporting fraud, waste, or abuse to appropriate Government authorities; and (2) notify employees previously subject to such agreements, that the prohibited sections of the agreements are no longer in effect (*e.g.*, an email to all affected employees).

The rule has no significant economic impact on small entities. DoD, GSA, and NASA did not identify any significant alternatives that would reduce the impact on small entities and still meet the objectives of the statute.

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

## VI. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

### List of Subjects in 48 CFR Parts 3, 4, and 52

Government procurement.

Dated: December 21, 2016.

**William F. Clark,**

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

Therefore, DoD, GSA, and NASA amend 48 CFR parts 3, 4, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 3, 4, and 52 continues to read as follows;

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

## PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTERESTS

■ 2. Amend section 3.900 by—  
 ■ a. Removing from the introductory text “three different” and adding “various” in its place;

■ b. Redesignating paragraph (c) as paragraph (d); and

■ c. Adding a new paragraph (c).

The addition reads as follows:

### 3.900 Scope of subpart.

\* \* \* \* \*

(c) Section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions), implemented in 3.909, applicable to all agencies.

\* \* \* \* \*

■ 3. Amend section 3.901 by adding, in alphabetical order, definitions for “Internal confidentiality agreement or statement”, “Subcontract”, and “Subcontractor” to read as follows:

### 3.901 Definitions.

\* \* \* \* \*

*Internal confidentiality agreement or statement* means a confidentiality agreement or any other written statement that the contractor requires any of its employees or subcontractors to sign regarding nondisclosure of contractor information, except that it does not include confidentiality agreements arising out of civil litigation or confidentiality agreements that contractor employees or subcontractors sign at the behest of a Federal agency.

*Subcontract* means any contract as defined in subpart 2.1 entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

*Subcontractor* means any supplier, distributor, vendor, or firm (including a consultant) that furnishes supplies or services to or for a prime contractor or another subcontractor.

■ 4. Add sections 3.909, 3.909–1, 3.909–2, and 3.909–3 to read as follows:

### 3.909 Prohibition on providing funds to an entity that requires certain internal confidentiality agreements or statements.

#### 3.909–1 Prohibition.

(a) The Government is prohibited from using fiscal year 2015 and subsequent fiscal year funds for a contract with an entity that requires employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law

enforcement representative of a Federal department or agency authorized to receive such information. See section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions.)

(b) The prohibition in paragraph (a) of this section does not contravene requirements applicable to Standard Form 312 (Classified Information Nondisclosure Agreement), Form 4414 (Sensitive Compartmented Information Nondisclosure Agreement), or any other form issued by a Federal department or agency governing the nondisclosure of classified information.

**3.909–2 Representation by the offeror.**

(a) In order to be eligible for contract award, an offeror must represent that it will not require its employees or subcontractors to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting waste, fraud, or abuse related to the performance of a Government contract to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information (e.g., agency Office of the Inspector General). Any offeror that does not so represent is ineligible for award of a contract.

(b) The contracting officer may rely on an offeror’s representation unless the contracting officer has reason to question the representation.

**3.909–3 Solicitation provision and contract clause.**

When using funding subject to the prohibitions in 3.909–1(a), the contracting officer shall—

(a)(1) Include the provision at 52.203–18, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements or Statements—Representation, in all solicitations, except as provided in paragraph (a)(2) of this section; and

(2) Do not insert the provision in solicitations for a personal services contract with an individual if the services are to be performed entirely by the individual, rather than by an employee of the contractor or a subcontractor.

(b)(1) Include the clause at 52.203–19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements, in all solicitations and resultant contracts, other than personal services contracts with individuals.

(2) Modify existing contracts, other than personal services contracts with individuals, to include the clause before obligating FY 2015 or subsequent FY funds that are subject to the same prohibition on internal confidentiality agreements or statements.

**PART 4—ADMINISTRATIVE MATTERS**

- 5. Amend section 4.1202 by—
- a. Redesignating paragraphs (a)(3) through (33) as paragraphs (a)(4) through (34), respectively;
- b. Revising the heading and first sentence of the Note in newly redesignated paragraph (a)(22); and
- c. Adding new paragraph (a)(3).

The addition and revision reads as follows:

**4.1202 Solicitation provision and contract clause.**

(a) \* \* \*

(3) 52.203–18, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements or Statements—Representation.

\* \* \* \* \*

(22) \* \* \*

**Note to paragraph (a)(22):** By a court order issued on October 24, 2016, this paragraph (a)(22) is enjoined indefinitely as of the date of the order.

\* \* \* \* \*

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

- 6. Add sections 52.203–18 and 52.203–19 to read as follows:

**52.203–18 Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements or Statements—Representation.**

As prescribed in 3.909–3(a), insert the following provision:

**Prohibition on Contracting With Entities That Require Certain Internal Confidentiality Agreements or Statements—Representation (JAN 2017)**

(a) *Definition.* As used in this provision— *Internal confidentiality agreement or statement, subcontract, and subcontractor,* are defined in the clause at 52.203–19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements.

(b) In accordance with section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113–235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions), Government agencies are not permitted to use funds appropriated (or otherwise made available) for contracts with an entity that requires employees or subcontractors of such entity seeking to report waste, fraud, or abuse

to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

(c) The prohibition in paragraph (b) of this provision does not contravene requirements applicable to Standard Form 312, (Classified Information Nondisclosure Agreement), Form 4414 (Sensitive Compartmented Information Nondisclosure Agreement), or any other form issued by a Federal department or agency governing the nondisclosure of classified information.

(d) *Representation.* By submission of its offer, the Offeror represents that it will not require its employees or subcontractors to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting waste, fraud, or abuse related to the performance of a Government contract to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information (e.g., agency Office of the Inspector General).

(End of provision)

**52.203–19 Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements.**

As prescribed in 3.909–3(b), insert the following clause:

**Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements (JAN 2017)**

(a) *Definitions.* As used in this clause— *Internal confidentiality agreement or statement* means a confidentiality agreement or any other written statement that the contractor requires any of its employees or subcontractors to sign regarding nondisclosure of contractor information, except that it does not include confidentiality agreements arising out of civil litigation or confidentiality agreements that contractor employees or subcontractors sign at the behest of a Federal agency.

*Subcontract* means any contract as defined in subpart 2.1 entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

*Subcontractor* means any supplier, distributor, vendor, or firm (including a consultant) that furnishes supplies or services to or for a prime contractor or another subcontractor.

(b) The Contractor shall not require its employees or subcontractors to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting waste, fraud, or abuse related to the performance of a Government contract to a designated investigative or law enforcement

representative of a Federal department or agency authorized to receive such information (e.g., agency Office of the Inspector General).

(c) The Contractor shall notify current employees and subcontractors that prohibitions and restrictions of any preexisting internal confidentiality agreements or statements covered by this clause, to the extent that such prohibitions and restrictions are inconsistent with the prohibitions of this clause, are no longer in effect.

(d) The prohibition in paragraph (b) of this clause does not contravene requirements applicable to Standard Form 312 (Classified Information Nondisclosure Agreement), Form 4414 (Sensitive Compartmented Information Nondisclosure Agreement), or any other form issued by a Federal department or agency governing the nondisclosure of classified information.

(e) In accordance with section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015, (Pub. L. 113-235), and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions) use of funds appropriated (or otherwise made available) is prohibited, if the Government determines that the Contractor is not in compliance with the provisions of this clause.

(f) The Contractor shall include the substance of this clause, including this paragraph (f), in subcontracts under such contracts.

(End of clause)

- 7. Amend section 52.204-8 by—
- a. Revising the date of the provision;
- b. Redesignating paragraphs (c)(1)(iii) through (xxiv) as paragraphs (c)(1)(iv) through (xxv), respectively;
- c. In the note to newly redesignated paragraph (c)(1)(xvi), remove “paragraph (c)(1)(xv)” and add “paragraph (c)(1)(xvi)” in its place; and
- d. Adding a new paragraph (c)(1)(iii).

The revision and addition reads as follows:

**52.204-8 Annual Representations and Certifications.**

\* \* \* \* \*

**Annual Representations and Certifications (JAN 2017)**

\* \* \* \* \*

(c)(1) \* \* \*  
(iii) 52.203-18, Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements or Statements—Representation. This provision applies to all solicitations.

\* \* \* \* \*

- 8. Amend section 52.212-3 by—
- a. Revising the date of provision;
- b. Removing from the introductory text of the provision “through (t)” and adding “through (u)” in its place;
- c. Removing from paragraph (b)(2), in the bracketed paragraph, “through (t)”

and adding “through (u)” in its place; and

- d. Adding paragraph (u).

The revision and addition reads as follows:

**52.212-3 Offeror Representations and Certifications—Commercial Items.**

\* \* \* \* \*

**Offeror Representations and Certifications—Commercial Items (JAN 2017)**

\* \* \* \* \*

(u)(1) In accordance with section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions), Government agencies are not permitted to use appropriated (or otherwise made available) funds for contracts with an entity that requires employees or subcontractors of such entity seeking to report waste, fraud, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

(2) The prohibition in paragraph (u)(1) of this provision does not contravene requirements applicable to Standard Form 312 (Classified Information Nondisclosure Agreement), Form 4414 (Sensitive Compartmented Information Nondisclosure Agreement), or any other form issued by a Federal department or agency governing the nondisclosure of classified information.

(3) *Representation.* By submission of its offer, the Offeror represents that it will not require its employees or subcontractors to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting waste, fraud, or abuse related to the performance of a Government contract to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information (e.g., agency Office of the Inspector General).

- 9. Amend section 52.212-5 by—
- a. Revising the date of clause;
- b. Redesignating paragraphs (a)(1) through (3) as paragraphs (a)(2) through (4), respectively;
- c. Adding a new paragraph (a)(1);
- d. Redesignating paragraphs (e)(1)(ii) through (xxii) as (e)(1)(iii) through (xxiii), respectively;
- e. In the note to newly redesignated paragraph (e)(1)(xvii), remove “paragraph (e)(1)(xvi)” and add “paragraph (e)(1)(xvii)” in its place; and
- f. Adding a new paragraph (e)(1)(ii).

The revision and additions read as follows:

**52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.**

\* \* \* \* \*

**Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (JAN 2017)**

\* \* \* \* \*

(a) \* \* \*  
(1) 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements (JAN 2017) (section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions)).

\* \* \* \* \*

(e) \* \* \*  
(1) \* \* \*  
(ii) 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements (JAN 2017) (section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions)).

\* \* \* \* \*

- 10. Amend section 52.213-4—
- a. Revising the date of the clause;
- b. Redesignating paragraphs (a)(1)(i) through (vi) as (a)(1)(ii) through (vii), respectively;
- c. Adding a new paragraph (a)(1)(i); and
- d. Revising paragraph (a)(2)(viii).

The revisions and addition reads as follows:

**52.213-4 Terms and Conditions-simplified Acquisitions (Other Than Commercial Items).**

\* \* \* \* \*

**Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (JAN 2017)**

(a) \* \* \*  
(1) \* \* \*  
(i) 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements (JAN 2017) (section 743 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions)).

\* \* \* \* \*

(2) \* \* \*



(viii) 52.244-6, Subcontracts for Commercial Items (JAN 2017).

\* \* \* \* \*

- 11. Amend section 52.244-6 by—
- a. Revising the date of the clause;
- b. Redesignating paragraphs (c)(1)(iii) through (xix) as paragraphs (c)(1)(iv) through (c)(1)(xx);
- c. In the note to newly redesignated paragraph (c)(1)(xiv), remove “paragraph (c)(1)(xiii)” and add “paragraph (c)(1)(xiv)” in its place; and
- d. Adding a new paragraph (c)(1)(iii).

The revision and addition reads as follows:

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

\* \* \* \* \*

**Subcontracts for Commercial Items (JAN 2017)**

\* \* \* \* \*

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

(iii) 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements (JAN 2017).

\* \* \* \* \*

[FR Doc. 2016-31497 Filed 1-12-17; 8:45 am]

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 5, 6, 18, 19 and 52**

[FAC 2005-95; FAR Case 2012-022; Item IV; Docket No. 2012-0022, Sequence No. 1]

RIN 9000-AM68

**Federal Acquisition Regulation; Contracts Under the Small Business Administration 8(a) Program**

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

**ACTION:** Final rule.

**SUMMARY:** DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement regulatory clarifications made by the Small Business Administration regarding the 8(a) program.

**DATES:** Effective: January 13, 2017.

**FOR FURTHER INFORMATION CONTACT:** Ms. Mahruba Uddowla, Procurement

Analyst, at 703-605-2868, or by email at [mahruba.uddowla@gsa.gov](mailto:mahruba.uddowla@gsa.gov), for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite FAC 2005-95, FAR Case 2012-022.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 79 FR 6135 on February 3, 2014, soliciting public comments regarding the implementation of regulatory clarifications made by the Small Business Administration (SBA) under section 8(a) of the Small Business Act (15 U.S.C. 637(a)). The proposed rule provided additional guidance for the evaluation, offering, and acceptance process; procedures for releasing a requirement for non-8(a) procurement; and information on the effect exiting the 8(a) program will have on its current contractual obligations and the firm’s ability to receive new 8(a) requirements. Six respondents submitted comments on the proposed rule.

**II. Discussion and Analysis**

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. A discussion of the comments is provided.

*A. Summary of Significant Changes*

The final rule contains revisions to the language at FAR 19.804-6(a) to clarify that offers and acceptances are required for individual orders under multiple-award contracts that were not set aside for competition among 8(a) contractors. The final rule also revises the language at FAR 19.814(a) to indicate that the SBA Inspector General can request a formal size determination. In addition, the final rule revises the language at FAR 19.815 regarding the release of requirements from the 8(a) program. Language has been added to clarify that any follow-on 8(a) requirement shall remain in the 8(a) program unless there is a mandatory source for the requirement pursuant to FAR 8.002 or 8.003 or SBA agrees to release the requirement for procurement outside the 8(a) program.

*B. Analysis of Public Comments*

**1. Support Proposed Changes**

*Comment:* One respondent stated support for the changes made in the proposed rule.

*Response:* The Councils acknowledge receipt of this comment.

**2. Potential Conflict With Other Statutorily Mandated Socioeconomic Programs**

*Comment:* Two respondents expressed concern that the proposed language at FAR 19.815 appeared to be in conflict with other socioeconomic programs, such as the Javits-Wagner-O’Day (JWOD) Act (now codified at 41 U.S.C. chapter 85). The proposed rule at FAR section 19.815, Release for non-8(a) procurement, implies that the SBA Associate Administrator for Business Development will only consider releasing requirements from the 8(a) program when there are assurances that the requirement will be procured under another small business program. However, the proposed rule does not mention that another reason a requirement must be released is when it can be procured under a statutory authority other than the Small Business Act. For example, if the requirement has been placed on the Procurement List by the Committee for Purchase from People Who are Blind or Severely Disabled (AbilityOne), it must, by law, be procured under JWOD, using the procedures at FAR subpart 8.7. These respondents asked for further clarification of this point in the FAR.

*Response:* The purpose of FAR 19.815 is to clarify that the contracting officer must submit a formal request to the SBA Associate Administrator for the release of a requirement that is currently accepted into the 8(a) program, if he or she intends to procure the item from a non-8(a) source. It further clarifies the factors SBA will take into consideration when determining whether to release the requirement from the 8(a) program.

This clarification does not conflict or eliminate an agency’s obligation to follow the procedures at FAR 8.002, Priorities for use of mandatory Government sources, and FAR 8.003, Use of other mandatory sources. As stated in these sections of the FAR, an agency may consider satisfying its requirement(s) through a commercial source, such as a small business, only after it has exhausted the possibility of fulfilling its requirement through one of the mandatory sources identified in FAR 8.002 or 8.003. However, new language has been added at FAR 19.815(a) and (b), to clarify that a requirement accepted into the 8(a) program shall remain in the 8(a) program unless the requirement can be satisfied through one of the mandatory sources listed at FAR 8.002 or 8.003 or the SBA Associate Administrator for Business Development agrees to release it.