



**Billing Code 6820-EP**

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 12, 19, 36, 43, and 52**

**[FAR Case 2018-020; Docket No. FAR-2018-0020, Sequence No.**

**1]**

**RIN 9000-AN78**

**Federal Acquisition Regulation: Construction Contract  
Administration**

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

**ACTION:** Proposed rule.

**SUMMARY:** DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which requires agencies to provide a notice along with the solicitation to prospective bidders and offerors regarding definitization of requests for an equitable adjustment related to change orders under construction contracts.

**DATES:** Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before **[insert date 60 days after date of publication in the FEDERAL REGISTER]** to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments in response to FAR Case 2018-020 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. comments via the Federal eRulemaking portal by searching for "FAR Case 2018-020". Select the link "Comment Now" that corresponds with FAR Case 2018-020. Follow the instructions provided at the "Comment Now" screen. Please include your name, company name (if any), and "FAR Case 2018-020" on your attached document.
- Mail: General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW., 2<sup>nd</sup> Floor, ATTN: Lois Mandell, Washington, DC 20405.

*Instructions:* Please submit comments only and cite FAR Case 2018-020, in all correspondence related to this case. Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal

and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov*, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** Ms. Camara Francis, Procurement Analyst, at 202-550-0935, or by email at *camara.francis@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 FAR Case 2018-020.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD, GSA, and NASA are proposing to amend the FAR to implement section 855 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232, 15 U.S.C. 644(w)). Section 855 requires Federal agencies to provide a notice, along with solicitations for construction contracts anticipated to be awarded to small businesses, to prospective offerors including information about the agency's policies or practices in complying with FAR requirements related to the timely definitization of requests for equitable adjustment

on construction contracts. The notice must include data regarding the time it took the agency to definitize requests for equitable adjustment on construction contracts for the three-year period preceding the issuance of the notice.

## **II. Discussion and Analysis**

The proposed changes to the FAR are summarized in the following paragraphs.

A. Solicitation notice regarding administration of change orders for construction. New text is proposed in FAR part 36, Construction and Architect-Engineer Contracts, subpart 36.5, Contract Clauses, to add coverage of the requirement for a new solicitation notice to be included in solicitations for construction. Specifically, new section 36.524, Notice to offerors regarding administration of change orders for construction, contains the prescription for the use of new solicitation provision 52.236-XX, Notice Regarding Administration of Change Orders for Construction. New section 36.524 also includes guidance for contracting officers regarding the information to be inserted in the provision. This new solicitation provision, which is proposed to be added in FAR part 52, Solicitation Provisions and Contract Clauses, will provide a

standardized way for contracting officers to provide the notice required by section 855 of the NDAA for FY 2019.

Additional coverage related to the requirement for the new solicitation notice is proposed in FAR part 43, Contract Modifications, subpart 43.2, Change Orders. A new paragraph is proposed for section 43.204, Administration, to instruct contracting offices and contract administration offices to use a specific Federal system to collect data on the time required to definitize unpriced change orders for construction contracts. The data will be used in new solicitation provision 52.236-XX.

In FAR part 12, Acquisition of Commercial Items, subpart 12.5, Applicability of Certain Laws to the Acquisition of Commercial Items and Commercially Available Off-The-Shelf Items, a new paragraph is added to note that 15 U.S.C. 644(w), Solicitation Notice Regarding Administration of Change Orders for Construction, is not applicable to Executive agency contracts for the acquisition of commercial items.

B. Cross reference to coverage of new solicitation notice.

Section 19.502, Setting aside acquisitions, is amended to add a cross reference to the new section 36.524.

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

This rule proposes to implement a statutory requirement for Federal agencies to provide a notice, along with solicitations for construction contracts anticipated to be awarded to small businesses, to prospective offerors regarding agency policies or practices, and agency past performance, in complying with FAR requirements related to the timely definitization of requests for equitable adjustments resulting from change orders under construction contracts. The Federal Acquisition Regulatory Council (FAR Council) intends to apply the new provision 52.236-XX, Notice Regarding Administration of Change Orders for Construction, to contracts at or below the simplified acquisition threshold (SAT), but does not intend to apply the new provision to contracts for the acquisition of commercial items including COTS items.

A. Applicability to Contracts at or below the SAT.

Pursuant to 41 U.S.C. 1905, a provision of law is not applicable to acquisitions at or below the SAT unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1905 and states that the

law applies to acquisitions at or below the SAT; or (iii) the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to acquisitions at or below the SAT.

The purpose of this rule is to implement section 855 of the NDAA for FY 2019. Section 855 requires Federal agencies to provide a notice, along with solicitations for construction contracts anticipated to be awarded to small businesses, to prospective offerors regarding agency policies or practices, and agency past performance, in complying with FAR requirements related to the timely definitization of requests for equitable adjustments resulting from change orders under construction contracts. Section 855 is silent on the applicability of these requirements for acquisitions at or below the SAT and does not independently provide for criminal or civil penalties; nor does it include terms making express reference to 41 U.S.C. 1905 and its application to acquisitions at or below the SAT. Therefore, it does not apply to acquisitions at

or below the SAT unless the FAR Council makes a written determination as provided at 41 U.S.C. 1905.

Application of section 855 to acquisitions at or below the SAT will maximize the number of small entities who would benefit from the information to be provided regarding definitization of requests for equitable adjustment resulting from change orders under construction contracts. Approximately one third of construction contracts awarded in FY 2016 through FY 2018 were valued at or below the SAT. Not applying this rule to acquisitions at or below the SAT would exclude acquisitions intended to be covered by section 855.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of the rule to acquisitions at or below the SAT.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items.

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial items, and is intended to limit the applicability of laws to contracts for the acquisition of commercial items. 41 U.S.C. 1906 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written

determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Likewise, 41 U.S.C. governs the applicability of laws to COTS items, with the Administrator for Federal Procurement Policy the decision authority to determine that it is in the best interest of the Government to apply a provision of law to acquisitions of COTS items in the FAR. The FAR Council and the Administrator for Federal Procurement Policy have not made such determination, therefore this rule does not apply to commercial items.

#### **IV. 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 not a significant regulatory action and, therefore, was not

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.

**V. Executive Order 13771**

This proposed rule is not subject to E.O. 13771, Reducing Regulation and controlling Regulatory Costs, because this rule is not expected to be a significant regulatory action under E.O. 12866.

**VI. Regulatory Flexibility Act**

DoD, GSA, and NASA do not expect this change to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. However, an Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement section 855 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019, which requires Federal agencies to provide a notice, along with solicitations for construction contracts anticipated to be awarded to small businesses, to prospective offerors regarding agency policies or practices in complying with FAR requirements related to the timely definitization of requests for equitable adjustment on construction contracts. The notice must include information on the agency's policies or practices on definitizing equitable adjustments on construction contracts and data on the amount of time it took the agency to definitize requests for equitable adjustment on construction contracts during the three-year period preceding the issuance of the notice.

The objective of this proposed rule is to provide contractors with information about an agency's past

performance in definitizing equitable adjustments under construction contract change orders as required by section 855 of the NDAA for FY 2019.

This rule is primarily aimed at Federal agencies, requiring them to provide a notice of their past performance on definitizing equitable adjustments for construction contracts. The notice will provide potential small business offerors with information that may be useful to them as they prepare, or decide whether to prepare and submit, a proposal in response to an agency's solicitation for construction. For example, if an agency has a poor history of definitizing equitable adjustments, potential small business offerors may reconsider whether to submit a proposal in response to that agency's solicitation. Alternately, when preparing their proposals, small business offerors may consider the additional costs that could be incurred if it is likely they will experience delays in the definitization of equitable adjustments.

An analysis of the Federal Procurement Data System (FPDS) reveals that an average of 2,340 unique entities per year were awarded construction contracts during FY 2016, 2017, and 2018. Of those, 1,872 were small entities. The number of construction contracts awarded in FY 2016, 2017, and 2018 averaged 4,488 per year, of which 3,355 were awarded to small entities. Additionally, during these same years, an average of 3,939 construction-related task orders were awarded each year to approximately 1,069 unique entities; 3,254 of those task orders were awarded to 851 small entities. On average, over FY 2016, 2017, and 2018, 6,503 modifications were issued each year to approximately 1,582 entities for change orders or definitization of change orders under construction contracts. Of those, approximately 3,803 modifications were issued to 1,147 small entities.

This proposed rule does not include any new reporting, recordkeeping or other compliance requirements for small entities.

The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches that would accomplish the stated objectives of the applicable statute.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the SBA. A copy of the IRFA may be obtained from the

Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit comments separately and should cite 5 U.S.C. 610 (FAR case 2018-020) in correspondence.

#### **VII. 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 12, 19, 36, 43, and 52**

Government procurement.

William F. Clark,  
Director,  
Office of Governmentwide  
Acquisition Policy,  
Office of Acquisition Policy,  
Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR part(s) 12, 19, 36, 43, and 52 as set forth below:

1. The authority citation for 48 CFR part(s) 12, 19, 36, 43, 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 12—ACQUISITION OF COMMERCIAL ITEMS**

2. Amend section 12.503 by adding paragraph (a)(10) to read as follows:

**12.503 Applicability of certain laws to Executive agency contracts for the acquisition of commercial items.**

(a) \* \* \*

(10) 15 U.S.C. 644(w), Solicitation Notice Regarding Administration of Change Orders for Construction (see 36.524).

\* \* \* \* \*

**PART 19—SMALL BUSINESS PROGRAMS**

3. Add section 19.502-11 to read as follows:

**19.502-11 Solicitation notice regarding administration of change orders for construction.**

See 36.524 for the requirement to provide a notice to offerors regarding definitization of requests for equitable adjustment for change orders under construction contracts.

**PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS**

4. Revise subpart 36.5 heading to read as follows:

**Subpart 36.5—Solicitation Provisions and Contract Clauses**

\* \* \* \* \*

5. Revise section 36.500 to read as follows:

**36.500 Scope of subpart.**

(a) This subpart prescribes provisions and clauses for insertion in solicitations and contracts for—

(1) Construction; and

(2) Dismantling, demolition, or removal of improvements contracts.

(b) Provisions and clauses prescribed elsewhere in the Federal Acquisition Regulation (FAR) shall also be used in such solicitations and contracts when the conditions specified in the prescriptions for the provisions and clauses are applicable.

6. Add section 36.524 to read as follows:

**36.524 Notice to offerors regarding administration of change orders for construction.**

(a) The contracting officer shall insert the provision at 52.236-XX, Notice Regarding Administration of Change Orders for Construction, in solicitations for construction that are set aside, or will be awarded on a sole-source basis, pursuant

to part 19. This provision does not apply to the acquisition of commercial items using part 12 procedures.

(b) The contracting officer shall complete the fill-ins to provide—

(1) Information to offerors about the agency's policies or procedures in complying with requirements relating to timely definitization of requests for equitable adjustment for change orders for construction; and

(2) Data for the prior 3 fiscal years, available at [*website to be determined*], regarding the time required to definitize requests for equitable adjustment for change orders for construction (see 43.204). Prior to August 13, 2021, if fewer than 3 fiscal years of data are available, provide data for the number of fiscal years that are available.

**PART 43—CONTRACT MODIFICATIONS**

7. Amend section 43.204 by redesignating paragraph (b) (3) as paragraph (b) (3) (i), and adding paragraph (b) (3) (ii) to read as follows:

\* \* \* \* \*

**43.204 Administration**

\* \* \* \* \*

(b) \* \* \*

(3) \* \* \*

(ii) Contracting offices and contract administration offices, as appropriate, shall use [website to be determined] to record and maintain data regarding the time required to definitize requests for equitable adjustment associated with unpriced change orders for construction. The contracting officer shall ensure the data is entered into [website to be determined] promptly.

\* \* \* \* \*

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

8. Add section 52.236-XX to read as follows:

**52.236-XX Notice Regarding Administration of Change Orders for Construction.**

As prescribed in 36.524, insert the following provision:

**NOTICE REGARDING ADMINISTRATION OF CHANGE ORDERS FOR CONSTRUCTION (DATE)**

(a) As required by 15 U.S.C. 644(w), this provision provides information relating to the definitization of requests for equitable adjustment for change orders under construction contracts.

(b) Federal Acquisition Regulation (FAR) 43.204 provides policy and guidance relating to definitization of requests for equitable adjustment resulting from change orders for contracts, including those for construction. In addition to FAR 43.204, the agency issuing this solicitation has

established the following policies or procedures that apply to definitization of requests for equitable adjustment for change orders under construction contracts: \_\_\_\_\_.

*[Contracting officer insert description of applicable policies or procedures, or address of a publicly accessible website containing this information. If no applicable policies or procedures exist, insert "None."]*

(c) Information on the agency's past performance in definitizing requests for equitable adjustment associated with change orders for construction for fiscal year(s) \_\_\_\_\_

*[Contracting Officer insert the prior fiscal years, up to 3, for which information is available]* is available at \_\_\_\_\_

*[Contracting Officer insert address of publicly accessible website containing this information]* or in the following table:

| Time to Definitize after Receipt of Request for Equitable Adjustment for Construction | Number of Requests for Equitable Adjustment Definitized for Construction |
|---|--|
| 30 days or less   |  |
| 31 to 60 days   |  |
| 61 to 90 days   |  |
| 91 to 180 days  |  |

|  |  |
|--|--|
| 181 to 365 days  |  |
| 366 or more days   |  |
| After completion of contract performance via a contract modification addressing all undefinitized requests for equitable adjustment received during contract performance |  |

*[Contracting Officer insert number of requests for equitable adjustment definitized in each category.]*

(End of provision)

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