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LEGAL STATUS

# Federal Acquisition Regulation: Construction Contract Administration

A Rule by the [Defense Department](#), the [General Services Administration](#), and the [National Aeronautics and Space Administration](#) on 09/23/2022

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Effective October 28, 2022.

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FAC 2022-08

FAR Case 2018-020

Item II

Docket No. FAR-2018-0020, Sequence No. 1

**RIN:**9000-AN78 (<https://www.federalregister.gov/regulations/9000-AN78/federal-acquisition-regulation-far-far-case-2018-020-construction-contract-administration>)**Document Number:**

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**ENHANCED CONTENT****Docket Number:**FAR-2018-0020 (<https://www.regulations.gov/docket/FAR-2018-0020>)**Docket Name:**

Federal Acquisition Regulation: Construction Contract Administration (FAR Case 2018-020)

**Docket RIN**9000-AN78 (<https://www.federalregister.gov/regulations/9000-AN78/federal-acquisition-regulation-far-far-case-2018-020-construction-contract-administration>)**Supporting/Related Materials:**Federal Acquisition Regulation: Construction Contract... (<https://www.regulations.gov/document?D=FAR-2018-0020-0008>)Federal Acquisition Regulations: Construction Contract... (<https://www.regulations.gov/document?D=FAR-2018-0020-0001>)

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**ENHANCED CONTENT**

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**PUBLISHED DOCUMENT****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 John S. McCain National Defense Authorization Act for Fiscal Year 2019, to require agencies to provide a notice along with the solicitation to prospective bidders and offerors regarding

definitization of requests for equitable adjustment related to change orders under construction contracts.

## DATES:

Effective October 28, 2022.

## FOR FURTHER INFORMATION CONTACT:

Ms. Dana Bowman, Procurement Analyst, at 202-803-3188, or by email at [dana.bowman@gsa.gov](mailto:dana.bowman@gsa.gov) (<mailto:dana.bowman@gsa.gov>), for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755 or [GSARegSec@gsa.gov](mailto:GSARegSec@gsa.gov) (<mailto:GSARegSec@gsa.gov>). Please cite FAC 2022-08, FAR Case 2018-020.

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## SUPPLEMENTARY INFORMATION:

### I. Background

DoD, GSA, and NASA published a proposed rule at 85 FR 18181 (/citation/85-FR-18181) on April 1, 2020, to implement section 855 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232), codified at 15 U.S.C. 644(w) (<https://www.govinfo.gov/link/uscode/15/644>) in the Small Business Act.

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 that includes 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. Definitization of requests for equitable adjustment occurs after the contracting officer receives, reviews, and conducts an analysis and audit of the information contained in a change order proposal, and results in an executed contractual action. The notice must also 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.

FAR 36.211 requires agencies to furnish data for the three fiscal years preceding the issuance of the solicitation notice.

Six respondents submitted public comments in response to the proposed 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 received, and any changes made to the rule as a result of the public comments are provided as follows:

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

The following significant changes from the proposed rule are made in the final rule:

##### (1) REMOVAL OF PROVISION 52.236-XX; REPLACED BY SOLICITATION NOTICE

The final rule FAR text removes the proposed solicitation provision 52.236-XX, Notice Regarding Administration of Change Orders for Construction. The provision is replaced with an instruction to the contracting officer at FAR subpart 5.2, Synopses of Proposed Contract Actions. Specifically, 5.205(h), Special

situations, requires contracting officers to transmit a notice in the solicitation notice on the Governmentwide point of entry (GPE) to meet the requirements of section 855 (15 U.S. C. 644(w) (<https://www.govinfo.gov/link/uscode/15/644>)).

The final rule FAR text removes the proposed text at FAR subpart 36.5, Contract Clauses, and replaces it with text at subpart 36.2, Special Aspects of Contracting for Construction. Specifically, paragraph (b) is added to FAR section 36.211 to coincide with FAR 5.205(h) and to provide specifics on the information required in the solicitation notice. This change will allow agencies more flexibility to share their specific guidance or to provide explanatory commentary. The text from the removed provision, 52.236-XX, is converted into the text for the solicitation notice.

## **(2) REMOVAL OF “PUBLICLY ACCESSIBLE WEBSITE” AND “WEBSITE TO BE DETERMINED”; REPLACED WITH “AGENCY SPECIFIC, PUBLICLY ACCESSIBLE WEBSITE” AND “FOLLOW AGENCY PROCEDURES”**

FAR 36.211(b) requires contracting officers to provide a description of applicable policies or procedures in the notice or through “an address of an agency-specific, publicly accessible website” containing this information rather than through a provision to be filled in or a “publicly accessible website.” The agency's past performance data will be included in the table format provided at FAR 36.211(b) or on an agency-specific, publicly accessible website in lieu of a “website to be determined” as stated in the proposed rule.

This change will allow agencies more flexibility in how to share their specific guidance, and to provide explanatory commentary when appropriate.

## **(3) CLARIFICATIONS**

The final rule makes revisions at FAR part 43, Contract Modifications. Specifically, FAR 43.204(b)(3)(ii), regarding recording and maintaining data for definitizing equitable adjustments, is moved to paragraph (b) (1)(ii) to clarify that the requirement applies to all change orders. This paragraph replaces in two places the phrase “shall use [website to be determined]” with a reference to agency procedures to allow more flexibility in recording and maintaining the required data.

## **(4) MEASUREMENT OF THE DEFINITIZATION OF EQUITABLE ADJUSTMENTS**

The final rule revises FAR 43.204(b)(1)(ii), previously FAR 43.204(b)(3)(ii) in the proposed rule, to identify the measurement of the definitization of equitable adjustments by including the following sentence: “The definitization of an equitable adjustment begins upon receipt of an adequate change order definitization proposal by the contracting officer and ends upon the contracting officer's execution of a contractual action to definitize the change order.”

## **B. Analysis of Public Comments**

### **1. APPLICABILITY/AUTHORITY FOR APPROPRIATIONS**

*Comment:* One respondent stated that NDAA appropriations are not applicable to non-DoD agencies. The respondent stated that the law should be incorporated into the Defense Federal Acquisition Regulation Supplement (DFARS) instead of the FAR.

*Response:* Congress often uses the annual NDAA as a vehicle for making Governmentwide acquisition law changes. In this instance, Congress amended section 15 of the Small Business Act (15 U.S.C. 644 (<https://www.govinfo.gov/link/uscode/15/644>)) in section 855 of the John S. McCain NDAA for FY 2019 (Pub. L. 115-232 (<https://www.govinfo.gov/link/plaw/115/public/232>)). The new requirements are codified

at 15 U.S.C. 644(w) (<https://www.govinfo.gov/link/uscode/15/644>). Since section 15 of the Small Business Act (15 U.S.C. 644 (<https://www.govinfo.gov/link/uscode/15/644>)) has Governmentwide applicability, it is appropriate for the requirements to be implemented in the FAR. No changes were made to the final rule as a result of this comment.

## 2. PAST PERFORMANCE DATA

*Comment:* One respondent stated that the rule should allow agencies an opportunity to explain factors contributing to the time required to resolve equitable adjustments as the reasons are often beyond the Government's control. The respondent stated that historical data without context is irrelevant to predicting future time frames and otherwise makes the data meaningless.

Another respondent noted that construction contracts are usually administered by individual construction contract administration offices near the project site. The respondent stated that collecting agency-wide past performance data is not indicative of future time frames and cannot be correlated to accurately anticipate future conduct of an administering office. The respondent stated that the rule should be amended to allow agencies an opportunity to account for a contract change's specific facts and circumstances; otherwise, the data is meaningless.

A third respondent stated that allowing an “explanatory commentary” section in either the solicitation or a public website for agencies to explain the metric or means used to compile or report the types of equitable adjustments included or excluded from the metrics would be helpful.

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*Response:* While primary data without context has value, the Councils acknowledge context could enhance the value of historical data in some situations and that agencies should have the opportunity to provide additional relevant information. The FAR text is revised to remove the proposed provision 52.236-XX, Notice Regarding Administration of Change Orders for Construction, and replace it with a requirement for contracting officers to transmit a notice on the GPE in the solicitation notice as required by FAR part 5 to meet the requirements of section 855 (15 U.S.C. 644(w) (<https://www.govinfo.gov/link/uscode/15/644>)). Additional text is added at FAR 5.205(h) to include the requirement for a solicitation notice on the GPE. Also, FAR 36.524 is replaced by FAR 36.211 to coincide with FAR 5.205(h) and to provide specifics on the information required in the solicitation notice (previously in the removed provision).

As previously included in paragraph (b) of the removed provision, contracting officers will include in the notice a description of the agency's applicable policies and procedures or the address of an agency-specific, publicly accessible website containing the information that applies to definitization of equitable adjustments for change orders under construction contracts. Additionally, the final rule revises “publicly accessible website” from paragraph (b) of the now removed provision to “an agency-specific, publicly accessible website” at 36.211(b)(1) and (2) to allow more flexibility for agencies to share their specific guidance or to provide explanatory commentary.

Also, the proposed rule text at FAR 43.204(b)(3)(ii) regarding recording and maintaining data for definitizing requests for equitable adjustment is moved to FAR 43.204(b)(1)(ii) to clarify that the requirement applies to all change orders. This paragraph replaces in two places “[website to be determined]” with a reference to “agency procedures” to allow more flexibility in recording and maintaining the required data.

## 3. DEFINITIZING EQUITABLE ADJUSTMENTS

### A. EQUITABLE ADJUSTMENTS IN GENERAL VERSUS UNPRICED CHANGE ORDERS

*Comment:* One respondent stated that it was unclear if the intent was to disclose all equitable adjustments in general or only those for unpriced change orders. The respondent stated that the rule should be limited to disclosing past performance data accounting for the time associated with definitization of equitable adjustments for unpriced change orders and not the time associated with the resolution of equitable adjustments in general. The respondent indicated section 855 discusses the definitization process but is not applicable to undefinitized equitable adjustments and stated that the FAR rule should be revised to clearly and precisely reflect the definitization process.

*Response:* This final rule implements section 855 of the John S. McCain NDAA for FY 2019, which requires notification to prospective bidders and offerors regarding administration of change orders for construction and does not exclude any type of change order. For clarification purposes, the final rule moves the proposed text at 43.204(b)(3)(ii) to 43.204(b)(1)(ii) to clarify that applicability is to all change orders.

## **B. INCORPORATE BROADER DEFINITION FOR CLARIFICATION**

*Comment:* One respondent stated that agencies have different standards for definitizing equitable adjustments and the FAR does not adequately define “equitable adjustment;” therefore, any resultant data reporting from Federal agencies will differ. The respondent stated that the rule should require agencies to incorporate the “broadest possible definition” in reporting the time to definitize an equitable adjustment. A second respondent stated that broadening the definition of a request for equitable adjustment to include contract modifications that result from either unilateral or bilateral changes would be helpful.

*Response:* FAR 43.204 and agency supplements provide the standard for definitizing equitable adjustments, while this rule adds the requirement for providing a notice to prospective bidders or offerors regarding definitization of change orders for construction. Also, the notice requirements at FAR 36.211(b)(1) (previously at FAR 36.524 and the removed provision) allows the agency issuing the solicitation to share the policies and procedures that apply to definitization of equitable adjustments for change orders under construction contracts. With this information all offerors will have the same understanding of each solicitation. A broader definition is not necessary considering the guidance that is already available in the FAR, agency supplements, and agency policies and procedures.

For clarification purposes, the final rule includes at FAR 43.204(b)(1)(ii) (previously at FAR 43.204(b)(3)(ii)) the parameter, per section 855 of the John S. McCain NDAA for FY 2019, that the measurement of definitizing equitable adjustments begins upon receipt of an adequate change order definitization proposal by the contracting officer and ends upon the contracting officer's execution of a contractual action to definitize the change order.

## **C. MEASUREMENT OF CHANGE ORDER PROCESS**

*Comment:* One respondent stated that measurement of the change order process should start when the contractor provides the contracting officer with an estimate of cost or provides schedule impacting decisions and the cost or changes are validated by the contracting officer as being within the scope of the contract.

*Response:* This FAR rule implements section 855 of the John S. McCain NDAA for FY 2019, which requires that measurement of the change order process begin upon receipt of a request for an equitable adjustment. For clarification purposes, the final rule identifies at FAR 43.204(b)(1)(ii) (previously at FAR 43.204(b)(3)(ii)) the measurement of the definitization of requests for equitable adjustment by including the following

sentence, “The definitization of an equitable adjustment begins upon receipt of an adequate change order definitization proposal by the contracting officer and ends upon the contracting officer’s execution of a contractual action to definitize the change order.”

#### **4. COST/ADMINISTRATIVE BURDEN**

##### **A. COLLECTION PROCESS WITHOUT CORRESPONDING BENEFITS**

*Comment:* One respondent stated that the transparency required by the FAR rule places undue costs and administrative burdens on agencies without corresponding benefits. The respondent also stated that by requiring disclosure of historical past performance data, the FAR rule will serve as a deterrent to some small business offerors and may cause small business offerors to inflate construction prices to mitigate possible lengthy equitable adjustment timeframes.

*Response:* The FAR rule is not intended to place undue costs and administrative burden on agencies or to deter small business contractors. In contrast, the rule provides small business contractors with useful information that will allow them to make informed decisions and to properly plan and prepare proposals, thus providing agencies with corresponding benefits. Also, the disclosure of an agency’s historical past performance data on the timeliness of definitization of equitable adjustments will provide potential small business offerors with data that can be used in deciding whether to submit a proposal and the knowledge to plan financially for possible incurred costs if delays are experienced in the definitization of equitable adjustments. As with the initial contract, contracting officers are required to negotiate equitable adjustments resulting from change orders to ensure the Government receives fair and reasonable pricing. Therefore, the final rule is unchanged as a result of this comment.

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##### **B. CENTRALIZED TRACKING WEBSITE**

*Comment:* One respondent stated that agencies are unlikely to have a centralized tool to track the required past performance data. The respondent stated that the rule should not be finalized until adequate funding is identified and a tracking tool can be designed, constructed, implemented, operated, and maintained.

*Response:* The Government does not intend to develop a centralized tool to track the past performance data required under this rule. Instead, the final rule, at FAR 43.204(b)(1)(ii) (previously at FAR 43.204 (b)(3)(ii)), replaces “[website to be determined]” with “follow agency procedures” to clarify the recording and maintenance of data; and revises the next to last sentence of FAR 43.204(b)(1)(ii) to state, “The contracting officer shall ensure the data is recorded promptly in accordance with agency procedures.” Additionally, the data (previously required by the removed provision) to be disclosed to offerors is required in the table provided at FAR 36.211(b)(2).

#### **5. SUPPORT FOR THE RULE**

*Comment:* Two respondents expressed support for the rule.

*Response:* The Councils acknowledge the respondents’ support for the rule.

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

This rule implements 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 related to, and agency past performance in, complying with FAR

requirements related to the timely definitization of requests for equitable adjustment resulting from change orders under construction contracts.

This rule does not create new solicitation provisions or contract clauses or impact any existing provisions or clauses.

#### **A. Applicability to Contracts at or Below the Simplified Acquisition Threshold**

41 U.S.C. 1905 (<https://www.govinfo.gov/link/uscode/41/1905>) governs the applicability of laws to acquisitions at or below the SAT. Section 1905 generally limits the applicability of new laws when agencies are making acquisitions at or below the SAT, but provides that such acquisitions will not be exempt from a provision of law under certain circumstances, including when the Federal Acquisition Regulatory Council (FAR Council) makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts and subcontracts in amounts not greater than the SAT from the provision of law. The FAR Council has made a determination to apply 41 U.S.C 1905 (<https://www.govinfo.gov/link/uscode/41/1905>) to acquisitions at or below the SAT.

#### **B. Applicability to Contracts for the Acquisition of Commercial Products, Including Commercially Available Off-The-Shelf (COTS) Items, or for Commercial Services**

41 U.S.C. 1906 (<https://www.govinfo.gov/link/uscode/41/1906>) governs the applicability of laws to contracts for the acquisition of commercial products or services and is intended to limit the applicability of laws to those contracts. Section 1906 provides that if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial product or commercial service contracts and subcontracts, the provision of law will apply to those contracts and subcontracts.

41 U.S.C. 1907 (<https://www.govinfo.gov/link/uscode/41/1907>) states that acquisitions of COTS items will be exempt from certain provisions of law unless the Administrator for Federal Procurement Policy makes a written determination and finds that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items.

The FAR Council did not make a determination to apply 41 U.S.C. 1906 (<https://www.govinfo.gov/link/uscode/41/1906>) to acquisitions for commercial products or commercial services. The Administrator for Federal Procurement Policy did not make a determination to apply 41 U.S.C. 1907 (<https://www.govinfo.gov/link/uscode/41/1907>) to acquisitions of COTS items.

### **IV. Expected Impact of the Rule**

This rule requires agencies to provide a notice that includes information about the agency's policies or practices in complying with FAR requirements related to the timely definitization of equitable adjustments under construction contracts, along with solicitations for construction contracts anticipated to be awarded to small businesses. 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 they were to experience delays in the timely definitization of equitable adjustments. Additionally, contracting offices and contract administration offices are required to



collect data on the time required to definitize change orders for construction contracts. There will be no cost impact to the public other than a de minimis cost to read the notice. The notice is for informational purposes and does not require any action on the part of the public.

## V. 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 (/executive-order/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.

## VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808 (<https://www.govinfo.gov/link/uscode/5/801>)) before an interim or final rule takes effect, DoD, GSA, and NASA will send the rule and the "Submission of Federal Rules Under the Congressional Review Act" form to ☐ each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804 (<https://www.govinfo.gov/link/uscode/5/804>).

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## VII. 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. 601-612 (<https://www.govinfo.gov/link/uscode/5/601>). The FRFA is summarized as follows:

This rule is necessary to implement section 855 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232 (<https://www.govinfo.gov/link/plaw/115/public/232>), codified at 15 U.S.C. 644(w) (<https://www.govinfo.gov/link/uscode/15/644>)). 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 in complying with FAR requirements related to the timely definitization of requests for equitable adjustment on construction contracts. The notice must also include 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. FAR 36.211 requires agencies to furnish data for the three fiscal years preceding the issuance of the solicitation notice.

The objective of this 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.

There were no significant issues raised by the public comments in response to the initial regulatory flexibility analysis.

DoD, GSA, and NASA do not expect this change to have a significant economic impact on a substantial number of small entities because this rule is aimed primarily at Federal agencies, requiring them to provide a notice of their past performance on definitizing equitable adjustments for change orders under 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 they were to experience delays in the timely definitization of equitable adjustments.

An analysis of the Federal Procurement Data System reveals that an average of 2,280 unique entities per year were awarded construction contracts during FY 2017, FY 2018, and FY 2019. Of those, 1,797 were small entities. The number of construction contracts awarded in FY 2017, FY 2018, and FY 2019 averaged 4,349 per year, of which 3,323 were awarded to small entities. Additionally, during these same years, an average of 3,659 construction-related task orders were awarded each year to approximately 1,054 unique entities; 2,991 of those task orders were awarded to 838 small entities. On average, over FY 2017, FY 2018, and FY 2019, 6,422 modifications were issued each year to approximately 1,542 entities for change orders or definitization of change orders under construction contracts. Of those, approximately 3,702 modifications were issued to 1,125 small entities.

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

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

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

## **VIII. 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. 3501-3521 (<https://www.govinfo.gov/link/uscode/44/3501>)).

**List of Subjects in 48 CFR Parts 5 (<https://www.ecfr.gov/current/title-48/part-5>), 12 (<https://www.ecfr.gov/current/title-48/part-12>), 19 (<https://www.ecfr.gov/current/title-48/part-19>), 36 (<https://www.ecfr.gov/current/title-48/part-36>), and 43 (<https://www.ecfr.gov/current/title-48/part-43>)**

- Government procurement

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 5 (<https://www.ecfr.gov/current/title-48/part-5>), 12 (<https://www.ecfr.gov/current/title-48/part-12>), 19 (<https://www.ecfr.gov/current/title-48/part-19>), 36 (<https://www.ecfr.gov/current/title-48/part-36>), and 43 (<https://www.ecfr.gov/current/title-48/part-43>) as set forth below:

1. The authority citation for 48 CFR parts 5 (<https://www.ecfr.gov/current/title-48/part-5>), 12 (<https://www.ecfr.gov/current/title-48/part-12>), 19 (<https://www.ecfr.gov/current/title-48/part-19>), 36 (<https://www.ecfr.gov/current/title-48/part-36>), and 43 (<https://www.ecfr.gov/current/title-48/part-43>) continues to read as follows:

**Authority:** 40 U.S.C. 121(c) (<https://www.govinfo.gov/link/uscode/40/121>); 10 U.S.C. chapter 137; and 51 U.S.C. 20113 (<https://www.govinfo.gov/link/uscode/51/20113>).

PART 5—PUBLICIZING CONTRACT ACTIONS

2. Amend section 5.205 by adding paragraph (h) to read as follows:

5.205Special situations.

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(h) *Notice regarding timely definitization of equitable adjustments for change orders under construction contracts.* When the contracting officer anticipates award of a contract to a small business pursuant to a solicitation for construction, the contracting officer must transmit in the solicitation notice on the GPE information regarding definitization of equitable adjustments for change orders under construction contracts (see 36.211).

PART 12—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

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

12.503Applicability of certain laws to Executive agency contracts for the acquisition of commercial products and commercial services.

(a) \* \* \*

(10) 15 U.S.C. 644(w) (<https://www.govinfo.gov/link/uscode/15/644>), Solicitation Notice Regarding Administration of Change Orders for Construction (see 36.211).

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PART 19—SMALL BUSINESS PROGRAMS

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

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

See 36.211 for the requirement to provide a notice to offerors regarding definitization of equitable adjustments for change orders under construction contracts.

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

5. Revise section 36.211 to read as follows:

**36.211 Distribution of advance notices and solicitations.**

(a) Advance notices and solicitations should be distributed to reach as many prospective offerors as practicable. Contracting officers may send notices and solicitations to organizations that maintain, without charge to the public, display rooms for the benefit of prospective offerors, subcontractors, and material suppliers. If requested by such organizations, this may be done for all or a stated class of construction projects on an annual or semiannual basis. Contracting officers may determine the geographical extent of distribution of advance notices and solicitations on a case-by-case basis.

(b) As required by 15 U.S.C. 644(w) (<https://www.govinfo.gov/link/uscode/15/644>), the contracting officer shall transmit to the Governmentwide point of entry (GPE) a notice (see 5.205(h), in solicitation notices posted at the GPE for construction contracts anticipated to be awarded to a small business pursuant to part 19. The notice shall include certain information regarding the agency's □ definitization of equitable adjustments for change orders under construction contracts. This information includes:

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(1) A description of agency policies or procedures, in addition to that outlined in FAR 43.204, that apply to definitization of equitable adjustments for change orders under construction contracts. This description may be provided in a notice by including an address of an agency-specific, publicly accessible website containing this information. If no agency-specific additional policies and procedures exist, the notice shall include a statement to that effect.

(2) Data on the agency's past performance, for the prior 3 fiscal years, regarding the time required to definitize equitable adjustments for change orders under construction contracts (see 43.204). If fewer than 3 fiscal years of data are available, agencies shall provide data for the number of fiscal years that are available. Data shall be provided in the solicitation notice as shown in the following table, or provide the address of an agency-specific, publicly accessible website containing this information. An adequate change order definitization proposal shall contain sufficient information to enable the contracting officer to conduct meaningful analyses and audits of the information contained in the proposal.

Table 1 to Paragraph (b)(2)

Time to definitize after receipt of an adequate change order definitization proposal under construction contracts	Number of change order proposals definitized under construction contracts
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 equitable adjustments received during contract performance	

**6.** 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.

## **PART 43—CONTRACT MODIFICATIONS**

**7.** Amend section 43.204 by redesignating paragraph (b)(1) as paragraph (b)(1)(i) and adding paragraph (b)(1)(ii) to read as follows:

**43.204 Administration.**

(b) \* \* \*

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

(ii) Agencies shall, in accordance with agency procedures, record and maintain data regarding the time required to definitize equitable adjustments associated with change orders for construction. The definitization of an equitable adjustment begins upon receipt of an adequate change order definitization proposal by the contracting officer, and ends upon the contracting officer's execution of a contractual action to definitize the change order. The contracting officer shall ensure the data is recorded promptly in accordance with agency procedures. See 36.211(b).

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