



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 201, 209, 211, and 252

[Docket DARS-2018-0059]

RIN 0750-AJ85

Defense Federal Acquisition Regulation Supplement:

**Applicability of Inflation Adjustment of Acquisition Related
Thresholds (DFARS Case 2018-D023)**

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2018 to require that inflation adjustments of statutory acquisition-related thresholds apply to existing contracts and subcontracts in effect on the date of the adjustment that contain the adjusted clauses.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2018-D023,

using any of the following methods:

- o *Federal eRulemaking Portal:* <http://www.regulations.gov>.

Search for "DFARS Case 2018-D023." Select "Comment Now" and follow the instructions provided to submit a comment. Please include "DFARS Case 2018-D023" on any attached documents.

- o *Email:* osd.dfars@mail.mil. Include DFARS Case 2018-D023 in the subject line of the message.

- o *Fax:* 571-372-6094.

- o *Mail:* Defense Acquisition Regulations System, Attn: Ms. Heather Kitchens, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal 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. Heather Kitchens, telephone 571-372-6104.

SUPPLEMENTARY INFORMATION:

I. Background

This rule proposes to revise the DFARS to implement section 821 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91). Section 821 amends 41 U.S.C.

1908(d) to require that the inflation adjustments of statutory acquisition-related thresholds under 41 U.S.C. 1908 apply to existing contracts and subcontracts in effect on the date of the adjustment.

41 U.S.C. 1908, Inflation adjustment of acquisition-related dollar thresholds, requires an adjustment every five years of statutory acquisition-related thresholds for inflation using the Consumer Price Index for All Urban Consumers (CPI-U), except for the Construction Wage Rate Requirements statute (formerly known as the Davis-Bacon Act), Service Contract Labor Standards statute (formerly known as the Service Contract Act), and trade agreements thresholds. See Federal Acquisition Regulation (FAR) 1.109. The last DFARS case that raised the thresholds for inflation was 2014-D025, a final rule published in the *Federal Register* (80 FR 36903) on June 26, 2015, effective October 1, 2015. The next final rule to be published raising thresholds for inflation under 41 U.S.C. 1908 will be effective October 1, 2020.

Section 821 adds the words "and shall apply, in the case of the procurement of property or services by contract, to a contract, and any subcontract at any tier under the contract, in effect on that date without regard to the date of award of the contract or subcontract" at the end of 41 U.S.C. 1908(d). Therefore, if acquisition-related thresholds are adjusted under

41 U.S.C. 1908 during the life of a contract, then that contract and all of the subcontracts under that contract will now be subject to the adjusted thresholds.

II. Discussion and Analysis

Currently, the DFARS clauses that contain thresholds subject to inflation adjustment provide the specific dollar amount of the threshold. To implement the new requirements under 41 U.S.C. 1908(d), DoD is proposing to replace the dollar amounts of the thresholds in each clause with a reference to the FAR or DFARS section that provides the overarching policy and the acquisition-related threshold. If the DFARS policy section does not currently include the acquisition-related threshold, this rule proposes amendments to those sections to add the thresholds. In addition, within the affected DFARS clauses, additional text is added to clarify that the threshold with which a contractor or subcontractor must comply is the threshold in effect at the time of contract or subcontract award or issuance of the notice, as appropriate.

These changes not only reduce the number of places to update the thresholds for future inflation changes, but also ensures that future contracts containing these clauses always include a reference to the current threshold. The following is a summary of the DFARS clauses affected by this rule and the associated FAR or DFARS policy sections that include or will include the

acquisition-related threshold as a result of this rule or the related FAR rule:

DFARS Clause	FAR/DFARS Policy Section	Threshold
252.203-7004, Display of Hotline Posters	DFARS 203.1004(b)(2)(ii)	Currently includes threshold
252.209-7004, Subcontracting with Firms That Are Owned or Controlled by the Government of a Country that is a State Sponsor of Terrorism	FAR 9.405-2(b)	Currently includes threshold
252.209-7009, Organizational Conflict of Interest-Major Defense Acquisition Program.	DFARS 209.571-1	Threshold to be added under this rule
252.219-7003, Small Business Subcontracting Plan (DoD Contracts)	FAR 19.702(a)	Currently includes threshold
252.219-7004, Small	FAR 19.702(a)	Currently

Business Subcontracting Plan (Test Program)		includes threshold
252.225-7004, Report of Intended Performance Outside the United States and Canada- Submission after Award	DFARS 225.870-4 (c) (2) (i) (A) (1)	Currently includes threshold
252.249-7002, Notification of Anticipated Contract Termination or Reduction	DFARS 225.870-4 (c) (2) (i) (A) (1) and 225.870-4 (c) (2) (i) (C)	Currently includes threshold

In order to incorporate the acquisition-related threshold in the DFARS policy section associated with DFARS clause 252.209-7009 and to be consistent with current drafting conventions, the definitions in DFARS 209.571-1 are proposed to be provided in full text, in lieu of referring to the definitions in clauses. The statutory acquisition-related threshold in DFARS clause 252.211-7000 is proposed to be incorporated in a new DFARS policy section 211.7000.

Finally, this rule proposes to add a new paragraph at 201.109(a) to advise contracting officers of the new requirements of 41 U.S.C. 1908(d) with regard to the effective date of statutory acquisition-related thresholds that are subject to adjustment based on inflation.

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

This rule does not propose to create any new provisions or clauses or impact any existing provisions or clauses, except for moving dollar values of thresholds in the stated clauses and adding references in these clauses to the location of the threshold in the associated DFARS policy section. Therefore, there is no change to the applicability of any of the clauses to contracts at or below the simplified acquisition threshold, or to the acquisition of commercial items, including commercially available off-the-shelf items.

IV. Executive Orders 12866 and 13563

Executive Order (E.O.s) 12866, Regulatory Planning and Review; and E.O. 13563, Improving Regulation and Regulatory Review, 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 is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not an E.O. 13771 regulatory action, because this rule is not significant under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule 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. The scope of the rule relates to amending the Defense Federal Acquisition Regulation Supplement (DFARS) to require that inflation adjustments of statutory acquisition-related thresholds under 41 U.S.C. 1908 apply to existing contracts and subcontracts in effect on the date of the adjustment. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to make inflation adjustments of statutory acquisition-related thresholds under 41 U.S.C. 1908(d) applicable to existing contracts and subcontracts in effect on the date of the adjustment that contain the revised clauses.

The objective is to implement section 821 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018.

Section 821 amends 41 U.S.C. 1908(d) to require inflation adjustments of statutory acquisition-related thresholds under 41 U.S.C. 1908 apply to existing contracts and subcontracts in effect on the date of the adjustment. Section 821 adds the words "and shall apply, in the case of the procurement of property or services by contract, to a contract, and any subcontract at any tier under the contract, in effect on that date without regard to the date of award of the contract or subcontract" at the end of 41 U.S.C. 1908(d).

This proposed rule will likely affect to some extent all small business concerns that submit offers or are awarded contracts by the Federal Government.

However, this rule is not expected to have any significant economic impact on small business concerns because this rule is only establishing the framework to apply the inflation adjustments of statutory acquisition-related thresholds under 41 U.S.C. 1908 to existing contracts and subcontracts in effect on the date of the adjustment. Any impact on small business concerns will be beneficial by preventing burdensome requirements from applying to the smaller dollar value acquisitions, which are the acquisitions in which small business concerns are most likely to participate.

For FY 2017, there were 106,438 unique vendors in the Federal Procurement Data System (FPDS) identified as small business concerns.

As of September 30, 2017, there were 637,791 active entity registrations in SAM.gov. Of those active entity registrations, 452,310 (71%) completed all four modules of the registration, in accordance with Federal Acquisition Regulation 52.204-7(a)(2), including Assertions (where they enter their size metrics and select their North American Industry Classification System (NAICS) Codes) and Representations and Certifications (where they certify to the information they provided and the size indicator by NAICS).

Of the possible 452,310 active SAM.gov entity registrations, 338,207 (75%) certified to meeting the size standard of small for their primary NAICS Code. Therefore, this rule may be beneficial to 338,207 small business entities that submit proposals that may now fall under the micro-purchase threshold and the simplified acquisition threshold, which provide for the use of streamlined procedures.

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

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

There are no known significant alternative approaches to the proposed rule that would meet the requirements of the applicable statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD 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 such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2018-D023), 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 201, 209, 211, and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 201, 209, 211, and 252 are proposed to be amended as follows:

1. The authority citation for parts 201, 209, 211, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 201—FEDERAL ACQUISITION REGULATIONS SYSTEM

2. Amend section 201.109 by—

- a. Designating the paragraph (a) text as paragraph (a)(ii); and
- b. Adding paragraph (a)(i).

The addition reads as follows:

201.109 Statutory acquisition-related dollar thresholds—adjustment for inflation.

(a)(i) 41 U.S.C. 1908(d) requires the adjustment for inflation of all statutory acquisition-related dollar thresholds in the DFARS be applied to contracts and subcontracts without regard to the date of award of the contract or subcontract, except thresholds based on the Wage Rate Requirements statute, the Service Contract Labor Standards statute, or established by the United States Trade Representative pursuant to the Trade Agreement Act, which are not escalated by the statute.

* * * * *

PART 209—CONTRACTOR QUALIFICATION

3. Amend section 209.571-1 by revising the definitions of "Lead system integrator" and "Major subcontractor" to read as follows:

209.571-1 Definitions.

* * * * *

"Lead system integrator" includes *lead system integrator with system responsibility* and *lead system integrator without system responsibility*.

(1) *Lead system integrator with system responsibility* means a prime contractor for the development or production of a major system, if the prime contractor is not expected at the time of award to perform a substantial portion of the work on the system and the major subsystems.

(2) *Lead system integrator without system responsibility* means a prime contractor under a contract for the procurement of services, the primary purpose of which is to perform acquisition functions closely associated with inherently governmental functions (see section 7.503(d) of the Federal Acquisition Regulation) with respect to the development or production of a major system.

"Major subcontractor" means a subcontractor that is awarded a subcontract that equals or exceeds—

(1) Both the certified cost or pricing data threshold and 10 percent of the value of the contract under which the subcontract is awarded; or

(2) \$55 million.

* * * * *

PART 211—DESCRIBING AGENCY NEEDS

4. Add section 211.7000 to read as follows:

211.7000 Acquisition streamlining.

Acquisition streamlining is required for all systems acquisition program contracts and for all subcontracts over \$1.5 million awarded in the performance of contracts for systems acquisition programs.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Amend section 252.203-7004 by—

- a. Removing the clause date of "(OCT 2016)" and adding "(DATE)" in its place;
- b. Revising paragraph (d).

The revision reads as follows:

252.203-7004 Display of Hotline Posters.

* * * * *

(d) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (d), in all subcontracts that exceed the threshold specified in Defense Federal Acquisition Regulation Supplement 203.1004(b)(2)(ii) on the date of subcontract award except when the subcontract is for the acquisition of a commercial item.

* * * * *

252.209-7004 [Amended]

6. Amend section 252.209-7004 by—

- a. Removing the clause date of "(OCT 2015)" and adding "(DATE)" in its place;

b. In paragraph (a), removing "\$35,000" and adding "the threshold specified in Federal Acquisition Regulation 9.405-2(b) on the date of subcontract award" in its place.

7. Amend section 252.209-7009 by-

a. Removing the clause date of "(OCT 2015)" and adding "(DATE)" in its place; and

b. Revising paragraph (a).

The revision reads as follows:

252.209-7009 Organizational Conflict of Interest-Major Defense Acquisition Program.

* * * * *

(a) *Definition.* As used in this clause-

Major subcontractor means a subcontractor that is awarded a subcontract that equals or exceeds-

(1) Both the certified cost or pricing data threshold and 10 percent of the value of the contract under which the subcontract is awarded; or

(2) The threshold specified in the definition of "major subcontractor" at Defense Federal Acquisition Regulation Supplement 209.571-1 on the date of subcontract award.

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8. Amend section 252.219-7003 by-

a. Removing the clause date of "(APR 2018)" and adding "(DATE)" in its place;

- b. Revising paragraph (g);
- c. In Alternate I-
 - i. Removing the clause date of "(APR 2018)" and adding "(DATE)" in its place; and
- b. Revising paragraph (g).

The revision reads as follows:

252.219-7003 Small Business Subcontracting Plan (DoD Contracts)

* * * * *

(g) Include the clause at Defense Federal Acquisition Regulation Supplement (DFARS) 252.219-7004, Small Business Subcontracting Plan (Test Program), in subcontracts with subcontractors that participate in the Test Program described in DFARS 219.702-70, if the subcontract is expected to exceed the applicable threshold specified in Federal Acquisition Regulation 19.702(a), and to have further subcontracting opportunities.

* * * * *

Alternate I. * * *

(g) Include the clause at Defense Federal Acquisition Regulation Supplement (DFARS) 252.219-7004, Small Business Subcontracting Plan (Test Program), in subcontracts with subcontractors that participate in the Test Program described in DFARS 219.702-70, if the subcontract is expected to exceed the applicable threshold specified in Federal Acquisition Regulation 19.702(a), and to have further subcontracting opportunities.

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9. Amend section 252.219-7004 by-

- a. Revising the section heading;
- b. Removing the clause date of "(APR 2018)" and adding "(DATE)" in its place;
- c. Revising paragraph (g) introductory text.
- d. In paragraph (g) (1), removing "252.219-7003" and adding "Defense Federal Acquisition Regulation Supplement (DFARS) 252.219-7003" in its place;
- e. In paragraph (g) (2), removing "252.219-7003" and adding "DFARS 252.219-7003" in its place; and
- f. In paragraph (g) (3), removing "252.219-7004" and adding "DFARS 252.219-7004" in its place.

The revisions read as follows:

252.219-7004 Small Business Subcontracting Plan (Test Program).

* * * * *

(g) *Subcontracts*. The Contractor shall include in subcontracts that offer subcontracting opportunities, are expected to exceed the applicable threshold specified in FAR 19.702(a) on the date of subcontract award, and are required to include the clause at FAR 52.219-8, Utilization of Small Business Concerns, the clauses at-

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10. Amend section 252.225-7004 by-

- a. Removing the clause date of "(OCT 2015)" and adding "(DATE)" in its place; and
- b. Revising paragraphs (a) and (b) (1).

The revisions read as follows:

252.225-7004 Report of Intended Performance Outside the United States and Canada—Submission after Award.

* * * * *

(a) *Definition.* As used in this clause—
United States means the 50 States, the District of Columbia, and outlying areas.

(b) * * *

(1) Exceeds the threshold specified in Defense Federal Acquisition Regulation Supplement 225.870-4(c) (2) (i) (A) (1) on the date of award of this contract; and

* * * * *

11. Amend section 252.249-7002 by—

- a. Revising the section heading;
- b. Removing the clause date of "(OCT 2015)" and adding "(DATE)" in its place;
- c. Adding paragraph (a) introductory text; and
- d. Revising paragraphs (d) (1) and (2).

The addition and revisions read as follows:

252.249-7002 Notification of Anticipated Contract Termination or Reduction.

* * * * *

(a) * * * As used in this clause-

* * * * *

(d) * * *

(1) Provide notice of the anticipated termination or reduction to each first-tier subcontractor with a subcontract that equals or exceeds the threshold specified in Defense Federal Acquisition Regulation Supplement (DFARS) 225.870-4(c)(2)(i)(A)(1) at the time of the notice; and

(2) Require that each such subcontractor-

(i) Provide notice to each of its subcontractors with a subcontract that equals or exceeds the threshold specified in DFARS 225.870-4(c)(2)(i)(C) at the time of the notice; and

(ii) Impose a similar notice and flowdown requirement to subcontractors with subcontracts that equal or exceed the threshold specified in DFARS 225.870-4(c)(2)(i)(C) at the time of the notice.

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