



5001-06-P

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 244**

**[Docket DARS-2019-0006]**

**RIN 0750-AK24**

**Defense Federal Acquisition Regulation Supplement: Consent to Subcontract (DFARS Case 2018-D065)**

**AGENCY:** Defense Acquisition Regulation System, Department of Defense (DoD)

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2019 to require, for DoD contracts with contractors that have approved purchasing systems, that a contracting officer have written approval from the program manager prior to withholding a consent to subcontract.

**DATES:** Effective **[Insert date of publication in the FEDERAL REGISTER]**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Kimberly Bass, telephone 571-372-6174.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD is issuing a final rule to amend the DFARS to implement section 824 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019, which amends section 893 of the NDAA for FY 2011 (Pub. L. 111-383) regarding consent to subcontract requirements. Specifically, section 893 requires contracting officers to have written approval from the program manager prior to withholding consent to subcontract for DoD contracts with contractors that have approved purchasing systems, as defined in Federal Acquisition Regulation (FAR) 44.101.

## **II. Discussion and Analysis**

This rule proposes to add a new paragraph (a) at DFARS 244.201-1 to include the new requirement for contracting officers to obtain written approval from the program manager prior to withholding a consent to subcontract for DoD contracts with contractors that have an approved purchasing system. Conforming changes are made to the existing text at 244.201-1, by renumbering the existing text as paragraph (S-70).

## **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 create any new provisions or clauses or impact any existing provisions or clauses. The rule only impacts the internal operating procedures of the agency. As such, the rule does not impose any new requirements on contracts

at or below the simplified acquisition threshold or for commercial items, including commercially available off-the-shelf items.

#### **IV. Publication of This Final Rule for Public Comment Is Not Required by Statute**

The statute that applies to the publication of the FAR is 41 U.S.C. 1707 entitled "Publication of Proposed Regulations." Paragraph (a)(1) of the statute requires that a procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because this rule merely establishes internal Government procedures for contracting officers to obtain written approval from the program manager prior to withholding a consent to subcontract on a contract with a contractor with an approved purchasing system.

#### **V. Executive Order 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, or reducing costs, or 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.

#### **VI. Executive Order 13771**

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

#### **VII. Regulatory Flexibility Act**

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section IV. of this preamble), the analytical requirement of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

#### **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. chapter 35).

**List of Subjects in 48 CFR Part 244**

Government procurement.

**Jennifer Lee Hawes,**

*Regulatory Control Officer, Defense Acquisition Regulations System.*

Therefore, 48 CFR part 244 is amended as follows:

**PART 244—SUBCONTRACTING POLICIES AND PROCEDURES**

1. The authority citation for part 244 continues to read as follows:

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

2. Amend section 244.201-1 by—

a. Designating the existing text as paragraph (S-70); and

b. Adding a paragraph (a) to start the section.

The addition reads as follows:

**244.201-1 Consent requirements.**

(a) In accordance with section 824 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232), notwithstanding the requirements in FAR 44.201-1(a), the contracting officer shall not withhold consent to subcontract

without the written approval of the program manager, or comparable requiring activity official exercising program management responsibilities, if the contractor has an approved purchasing system, as defined in FAR 44.101.

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