



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 244

[Docket DARS-2019-0024]

RIN 0750-AJ48

Defense Federal Acquisition Regulation Supplement: Contractor Purchasing System Review Threshold (DFARS Case 2017-D038)

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to establish a DoD contractor purchasing system review dollar threshold that provides a regulatory basis for allowing DoD personnel to support other essential priorities and missions of greater contractual risk, while reducing regulatory impact on contractors.

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

FOR FURTHER INFORMATION CONTACT: Kimberly Ziegler, telephone 571-372-6095.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the *Federal Register* at 84 FR 25228 on May 31, 2019, proposing to amend the DFARS to implement a recommendation from the Defense Contract Management Agency (DCMA) to raise the contractor purchasing system review (CPSR) threshold at Federal Acquisition Regulation (FAR) 44.302(a) from \$25 million to \$50 million. Currently, FAR 44.302(a) requires the administrative contracting officer (ACO) to determine whether a contractor's sales to the Government are expected to exceed \$25 million during the next 12 months and, if so, perform a review to determine if a CPSR is needed. The ACO uses this dollar threshold in conjunction with the surveillance criteria cited at FAR 44.302(a), i.e., contractor past performance, and the volume, complexity, and dollar value of subcontracts, to make this determination. DCMA performs the preponderance of DoD CPSRs. Competitively awarded firm-fixed-price and competitively awarded fixed-price with economic price adjustment contracts and sales of commercial items pursuant to part 12 of the FAR are excluded from this requirement.

FAR 44.302(a) specifically authorizes the head of the agency responsible for contract administration to raise or lower the \$25 million CPSR threshold if it is considered to be in the Government's best interest. The dollar threshold of \$25 million cited at FAR 44.302(a) has been unchanged since 1996. In 2016, the DCMA CPSR Group conducted an analysis to determine if

raising the CPSR threshold would be beneficial. Based on the Group's findings, it was determined that adjusting the threshold upward to \$50 million would appropriately account for inflation, reduce burden on small contractors, and allow a more efficient and effective use of CPSR resources to review larger contractors where more taxpayer dollars are at risk. Three respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule.

A. Summary of Significant Changes from the Proposed Rule

There are no changes made to the final rule as a result of the public comments.

B. Analysis of Public Comments

1. Support for the Rule

Comment: Two respondents conveyed overall support for the rule, but one respondent stated the support for the rule was contingent on DoD ensuring procurements valued at \$50 million or below will not require the contractor to have or maintain an approved purchasing system per the clause at DFARS 252.242-7005, Contractor Business Systems.

Response: FAR clause 52.244-2, Subcontracts, allows the contracting officer to assess whether a system review is needed (e.g., when meeting the \$50 million threshold is anticipated).

DFARS 252.244-7001, Contractor Purchasing System Administration, establishes the review criteria. Contractors whose sales have not reached the \$50 million threshold may opt to allow their approval to expire rather than incur the costs to maintain a system that meets the criteria for an approved system. If an approved purchasing system is necessary to support a particular program, the contractor can work with the contracting officer to obtain a purchasing system review based on risk or pressing need. Otherwise, the contractor can request consent to subcontract in accordance with FAR 52.244-2.

2. Assessment of Risk

Comment: One respondent conveyed concerns that smaller contractors with fewer and lower dollar value contracts can create greater risks than contractors with larger dollar value contracts due to the availability of financial resources.

Response: There is no evidence that contractors with lower sales are inherently more risky than those with higher sales. The \$25 million threshold established by FAR 44.302(a) has not changed since 1996. Analysis shows that the threshold could be raised to \$50 million with consideration given to inflation and acceptable risk. Consistent with Better Buying Power (BBP) 3.0, raising the CPSR threshold is intended reduce the administrative burden on smaller contractors. Smaller contractors are often exempt from many of the CPSR review elements as a result of the

recent increase to the threshold for obtaining certified cost or pricing data.

Comment: One respondent recommended reevaluating the risk-based assessment approach that DCMA employs to assess which contractors to review in a given year because contractors currently exceeding the threshold should not have latent undiscovered weaknesses in their purchasing systems. Based upon this assumption, the increased threshold would have no significant impact upon those purchasing systems.

Response: Risk assessments on approved systems are used by DCMA to prioritize one approved system over another and are used to schedule reviews. New entries (initial reviews) are worked into the existing schedule.

3. FAR 52.244-2, Subcontracts, and DFARS 252.244-7001, Contractor Purchasing System Administration

Comment: One respondent recommended revising the requirement for inclusion of the clause at FAR 52.244-2, Subcontracts, and the clause at DFARS 252.244-7001, Contractor Purchasing System Administration, and permit contracting officers to omit both clauses from applicable contracts if a CPSR will not be performed.

Response: The contracting officer inserts the FAR clause 52.244-2, Subcontracts, when flexibly priced contracts are anticipated, thus setting the stage for a contractor to submit

requests for consent to subcontract. If a contractor's sales to the Government (excluding competitively awarded firm-fixed-price and competitively awarded fixed-price with economic price adjustment contracts and sales of commercial items pursuant to part 12) are expected to exceed \$50 million during the next 12 months, the contracting officer will perform a review to determine if a CPSR is needed. In evaluating the acceptability of the contractor's purchasing system, the contracting officer, in consultation with the purchasing system analyst or auditor, determines whether the contractor's purchasing system complies with the system criteria for an acceptable purchasing system as prescribed in the clause at 252.244-7001, Contractor Purchasing System Administration. CPSR approval can be viewed to lighten the consent to subcontract burden on both the contractor and contracting officer. If the contracting officer determines that an approved system is not in the best interests of the Government, then they can choose not to initiate a review and continue with consent packages and annual contracting officer surveillance. The criteria found at DFARS 252.244-7001 can be used by contracting officers, in addition to those found in FAR 52.244-2, when conducting annual surveillance of a contractor without an approved system when the clause is present in prime contracts.

4. Initial Regulatory Flexibility Analysis (IRFA)

Comment: One respondent inquired if the data in the IRFA for DCMA CPSRs included all of the military departments and defense agencies.

Response: See section VI of this preamble.

5. Small Business Impacts

Comment: One respondent conveyed concerns that many solicitations require as a responsive element of bidding that the contractor demonstrate that it has a current approved purchasing system. The respondent further stated that contractors meeting the threshold for CPSRs will meet that test, however, those that are no longer required to maintain and receive CPSRs will not. As a result, the respondent recommends that DoD consider the potential implications for small businesses and on competition for cost-reimbursement or certain indefinite delivery indefinite quantity contracts from the CPSR threshold change when developing contract requirements in the future.

Response: If an approved purchasing system is necessary to support a particular program, the contractor can work with the contracting officer to obtain a purchasing system review based on risk or pressing need. Otherwise, the contractor can request consent to subcontract in accordance with the clause at FAR 52.244-2.

6. Out of Scope

Comment: One respondent questioned the mechanism to be used to provide oversight of cybersecurity compliance if an entity no longer meets the threshold for a CPSR.

Response: This comment is out of scope of this rule.

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 add any new provisions or clauses or impact any existing provisions or clauses. The rule merely increases the DoD dollar threshold for conducting CPSRs from \$25 million to \$50 million.

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 final rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 604, et seq. The FRFA is summarized as follows:

DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to establish a DoD contractor purchasing system review (CPSR) dollar threshold. This rule creates a new DFARS section at 244.302 to establish a CPSR dollar threshold of \$50 million. The threshold will be used in conjunction with other surveillance criteria cited at Federal Acquisition Regulation (FAR) 44.302(a), to include contractor past performance and the volume, complexity, and dollar value of subcontracts. The rule establishes a DoD dollar threshold of \$50 million for a formal CPSR; in effect, raising the current surveillance threshold of \$25 million cited at FAR 44.302(a) for DoD contractors.

One respondent submitted a public comment in response to the initial regulatory flexibility analysis (IRFA) which is summarized as follows:

Comment: The respondent inquired if the data in the IRFA for DCMA CPSRs included all of the military departments and defense agencies.

Reponse: The data included all CPSRs across all of the Department of Defense. The Government sales include all Government contracts/subcontracts (to include military departments and defense agencies) minus those competitively awarded firm-fixed-price, competitively awarded fixed-price with economic price adjustment contracts, or sales of commercial items pursuant to FAR part 12.

In 2014, there were 667 unique entities for which administrative contracting officers (ACO) had recorded approved CPSR decisions in the Contract Business Analysis Repository. A 20% reduction in the number of CPSRs is expected to result from increasing the CPSR threshold from \$25 million to \$50 million for a total reduction of approximately 133 firms no longer meeting the criteria for a CPSR review. Contractor purchasing systems are eligible for a comprehensive follow-on review every three years. Based on this three-year review cycle, approximately 45 fewer contractors would be reviewed each year ($133 \text{ firms} / 3\text{-year cycle} = 44.3$, rounded to 45 fewer reviews conducted each year). Of the 45 entities, it is estimated that 35 of these contractors are large businesses and 10 are small entities.

The \$50 million dollar threshold should reduce the compliance burden for approximately 133 contractors, and permit a more prudent and efficient use of resources, prioritizing surveillance to the larger firms.

For the approximately 133 contractors affected by this rule, there could be additional requirements for those firms to request consent to contract from the ACO, pursuant to the clause at FAR 52.244-2, Subcontracts. It is estimated that the annual number of consent to contract requests are approximately 12 per contractor.

There are no known significant alternative approaches to the rule that would accomplish the stated objectives.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies. The rule contains information collection requirements. The Office of Management and Budget (OMB) has previously cleared the information collection requirements affected by this rule under OMB Control Number 9000-0132, Contractors' Purchasing System Review, and 9000-0149, Subcontract Consent. These two clearances have been consolidated; the updated clearance reflecting the new DoD CPSR threshold has been cleared by OMB under 9000-0149, entitled "Subcontract Consent and Contractor's Purchasing System Review" through February 28, 2022.

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 48 CFR part 244 continues to read as follows:

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

2. Section 244.302 is added to read as follows:

244.302 Requirements.

(a) In lieu of the threshold at FAR 44.302(a), the ACO shall determine the need for a CPSR if a contractor's sales to the Government are expected to exceed \$50 million during the next 12 months.

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