



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204, 212, 215, 219, 226, and 252

[Docket DARS-2019-0009]

RIN 0750-AK19

Defense Federal Acquisition Regulation Supplement:

Demonstration Project for Contractors Employing Persons with Disabilities (DFARS Case 2018-D058)

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 implement a section of the National Defense Authorization Act for Fiscal Year 2019 that requires the DFARS to be updated to include an instruction on the Demonstration Project for Contractors.

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

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer D. Johnson, telephone 571-372-6100.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the *Federal Register* at 84 FR 12182 on April 1, 2019, to implement section 888 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232). Section 888 requires that the DFARS be updated to include an instruction on the demonstration project authorized by section 853 of the NDAA for FY 2004 (Pub. L. 108-136, 10 U.S.C. 2302 note), as amended by division H, section 110 of the Consolidated Appropriations Act, 2004 (Pub. L. 108-199, 10 U.S.C. 2302 note). Section 853 authorizes a demonstration project for contractors employing persons with disabilities in order to provide defense contracting opportunities for both nonprofit and for-profit entities employing individuals who have severe disabilities. Twenty 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 discussion of the comments, and of the changes made to the rule as a result of those comments, is provided as follows:

A. Summary of Significant Changes From the Proposed Rule

This final rule makes the following significant changes from the proposed rule:

- 1. Clarification of procedures for use of the Demonstration Project*

In DFARS subpart 226.72, Demonstration Project for Contractors Employing Persons with Disabilities, section 226.7200, Scope of subpart, is revised to clarify that subpart 226.72 does not supersede the requirements for contracting officers to use the mandatory sources in FAR part 8, Required Sources of Supplies and Services, or the small business programs in FAR part 19, Small Business Programs. This means that, depending on the specifics of a particular procurement, FAR part 8 or 19 may require a contracting officer to use a program other than the Demonstration Project for Contractors Employing Persons with Disabilities.

The text in DFARS 226.7202, Policy and procedures, is revised to clarify that, in order to limit competition to entities that meet the definition of "eligible contractor," a written justification and approval is required pursuant to FAR 6.302-5, Authorized or required by statute. This means that prior to issuing the solicitation, contracting officers must explain, in writing, their rationale for using the Demonstration Project, and must obtain approval at the appropriate level based on the dollar value of the procurement.

DFARS 226.7202 is also revised to require that, in order for DoD to continue to receive small disadvantaged business credit for a contract awarded under the Demonstration Project, the contractor must be an eligible contractor when options are

exercised. Contracting officers are required to verify whether the contractor is still an eligible contractor (e.g., by checking the representation in the System for Award Management (SAM)) prior to exercising an option on a contract awarded under the Demonstration Project. The contracting officer may exercise an option on a contract regardless of whether the contractor is still an eligible contractor, but DoD would only continue to receive small disadvantaged business credit for that contract if the contractor remains an eligible contractor under the Demonstration Project.

2. Clarification regarding subcontracts under the Demonstration Project

The final rule adds Alternate II for the clause at DFARS 252.219-7003, Small Business Subcontracting Plan (DoD Contracts), for use in solicitations and contracts issued under the Demonstration Project. Alternate II includes the definition of "eligible contractor" and allows the prime contractor to receive credit toward its small disadvantaged business subcontracting goal for subcontracts issued to eligible contractors. This final rule does not include, in the basic or Alternate I clause at DFARS 252.219-7003, the definition of "eligible contractor" and the statement regarding credit toward the small disadvantaged business subcontracting goal. The effect of this changes is that only eligible contractors that

have contracts awarded under the Demonstration Project will receive credit toward their small disadvantaged business subcontracting goal for subcontracts they award to other eligible contractors under Demonstration Project contracts. The prescription for use of Alternate II of DFARS 252.219-7003 is added at DFARS 219.708.

3. *Clarification of applicability to commercial items*

To clarify that contracting officers may use the Demonstration Project to purchase commercial items, including commercially available off-the-shelf (COTS) items, this final rule adds the following provision and clause to section 212.301, Solicitation provisions and contract clauses for the acquisition of commercial items:

- Alternate II of the clause at DFARS 252.219-7003, Small Business Subcontracting Plan (DoD Contracts).
- The provision at DFARS 252.226-7002, Representation for Demonstration Project for Contractors Employing Persons with Disabilities.

B. *Analysis of Public Comments*

1. *Support for the rule*

Comment: Most respondents expressed support for the rule and for the opportunities it may provide to entities employing individuals with disabilities.

Response: DoD acknowledges the respondents' support.

2. Scope of the Demonstration Project

a. Product Service Codes

Comment: A few respondents commented on the need for clarity about the types of procurements that would be eligible for the Demonstration Project, particularly with regard to the product service codes (PSCs) listed in the proposed rule. One respondent requested confirmation that the Demonstration Project would be used only for procurements under those PSCs.

Response: Section 853 does not impose limitations on the products or services that may be procured under the Demonstration Project. The PSCs listed in the Federal Register notice for the proposed rule were used merely to estimate the potential opportunities Congress identified in the Conference Report for the NDAA for FY 2004. The list of PSCs was not intended to limit the procurements that could be conducted under the Demonstration Project.

b. Applicability of the Demonstration Project at or below the simplified acquisition threshold and to commercial items

Comment: One respondent commented on the applicability of the Demonstration Project to acquisitions at or below the simplified acquisition threshold (SAT) and to acquisitions of commercial items. The respondent stated that the Demonstration Project should be limited to commercial items under the SAT, and that to

apply the Demonstration Project to all commercial item acquisitions would have a wider impact than Congress intended.

Response: Section 853 did not limit the procurements that could be conducted under the Demonstration Project with regard to dollar value or the commercial (or noncommercial) nature of the product or service to be procured. By applying section 853 to acquisitions at or below the SAT, DoD allows these low dollar value procurements to be conducted under the Demonstration Project. In other words, the Demonstration Project could be used to buy products or services valued at or below the SAT. Similarly, applying section 853 to acquisitions of commercial items, including COTS items, allows these items to be procured under the Demonstration Project. For the reasons stated in section IV of this preamble, DoD has determined that it is in the Government's best interest to allow acquisitions at or below the SAT and acquisitions of commercial items, including COTS items, to be conducted under the Demonstration Project.

c. Selecting procurements for the Demonstration Project

Comment: One respondent asked how DoD would "determine the suitability" of a procurement for the Demonstration Project. In particular, the respondent asked if DoD would "apply the Rule of Two like other Small Business programs."

Response: Contracting officers may elect to use the Demonstration Project for a particular procurement, but they are

not required to do so. FAR part 10 requires agencies to conduct market research, and contracting officers will use the results of market research to determine whether a particular procurement may be appropriate for the Demonstration Project. The Demonstration Project is not a small business program. Therefore, the rule of two in FAR part 19 does not apply. However, section 853 does not provide authority to award contracts on a sole-source basis (i.e., without competition), so there is an expectation that procurements under the Demonstration Project will be competed unless a sole-source award is justified and approved based on another authority.

3. Demonstration Project and the AbilityOne Program

a. Credit toward small disadvantaged business goal for AbilityOne contracts

Comment: Two respondents recommended allowing credit toward the small disadvantaged business goal for current and future contracts awarded to AbilityOne nonprofits that also qualify as eligible contractors under the Demonstration Project. Several respondents recommended continuing the small disadvantaged business credit for Demonstration Project contracts that are later added to the AbilityOne Procurement List.

Response: There is no statutory authority for DoD to implement the respondents' recommendations. Section 853 provides credit for DoD toward its small disadvantaged business

goal only for contracts awarded to eligible contractors under the Demonstration Project. This credit does not extend to contracts awarded outside the Demonstration Project. There is no statutory authority to provide small disadvantaged business credit for contracts for products or services on the Procurement List.

b. Impact of the Demonstration Project on the AbilityOne Procurement List

Comment: Several respondents expressed concern that allowing DoD to receive credit toward its small disadvantaged business goal for contracts awarded under the Demonstration Project would have an adverse impact on AbilityOne nonprofits' ability to add projects to the AbilityOne Procurement List.

Response: The authority to add products or services to the Procurement List resides with the U.S. AbilityOne Commission, which has its own process to make such additions. Addressing this process in the DFARS is outside the scope of this rule.

c. AbilityOne purchase exception process

Comment: Several respondents commented on the description of procurements made under the Demonstration Project in section III of the preamble of the proposed rule and recommended clarifying that a "valid purchase exception" must be granted by an appropriate authority in the AbilityOne Program. Some respondents stated that products and services on the Procurement

List should not be eligible for award under the Demonstration Project. One respondent recommended modifying DFARS 226.7202 to require contracting officers to ensure compliance with FAR 8.002 and subpart 8.7 prior to conducting market research and developing a solicitation under the Demonstration Project.

Response: The final rule includes a clarification at DFARS 226.7200 that nothing in DFARS subpart 226.72 supersedes the requirement to use the mandatory sources in FAR part 8, Required Sources of Supplies and Services, or the small business programs in FAR part 19, Small Business Programs.

d. Eligibility of AbilityOne nonprofits for the Demonstration Project

Comment: Two respondents commented that they believe it was the intent of Congress to allow AbilityOne nonprofits to be eligible to participate in the Demonstration Project. One respondent noted that there appear to be limits on the participation of AbilityOne nonprofits in procurements conducted under the Demonstration Project. Two respondents argued that there should be a presumption of eligibility for AbilityOne nonprofits to participate in procurements under the Demonstration Project.

Response: Any entity that meets the definition of "eligible contractor" may participate in a procurement conducted under the Demonstration Project. While AbilityOne nonprofit agencies are

likely to meet the Demonstration Project requirement that at least 33 percent of their workforce must be severely disabled individuals, the statutory definition of "eligible contractor" in section 853 goes beyond the percentage. The definition includes other requirements (e.g., health insurance, minimum wage) that a specific nonprofit agency may or may not meet. Therefore, the eligibility of any entity for the Demonstration Project cannot be presumed.

e. Oversight of the Demonstration Project

Comment: A few respondents suggested that the AbilityOne Commission should provide oversight for eligible contractors under the Demonstration Project, i.e., all eligible contractors "would fall under the umbrella of the AbilityOne program."

Response: The Demonstration Project includes both for-profit and nonprofit entities. The AbilityOne Commission oversees only nonprofit entities. Therefore, the respondents' suggestion is not included in the final rule.

4. Demonstration Project and small business

a. Relationship to small business programs

Comment: One respondent asked whether the Demonstration Project would "affect the mandatory small business reserve" at 15 U.S.C. 644(j).

Response: The Demonstration Project will not affect the mandatory small business set-asides required by 15 U.S.C.

644(j). Text has been added in the final rule to clarify that nothing in DFARS subpart 226.72 supersedes the requirement to use the small business programs in FAR part 19, Small Business Programs, or the mandatory sources in FAR part 8, Required Sources of Supplies and Services.

b. Credit toward the small disadvantaged business goal

Comment: Two respondents objected to allowing DoD to receive credit toward its small disadvantaged business goal for contracts awarded under the Demonstration Project, since such credit should only be allowed for awards to small businesses that qualify as disadvantaged under the Small Business Administration's rules. One respondent commented that it appears prime contractors who are not eligible contractors under the Demonstration Project could obtain credit toward their small disadvantaged business subcontracting goal for subcontracts awarded to eligible contractors. Another respondent recommended changing "may" to "shall" in paragraph (c) of the proposed text at DFARS 226.7202 to more closely align with section 853.

Response: Section 853 of the NDAA for FY 2004 was amended by division H, section 110 of the Consolidated Appropriations Act, 2004 (Pub. L. 108-199), which required that contracts awarded under the Demonstration Project to eligible contractors be counted toward DoD's small disadvantaged business goal, and that subcontracts awarded to eligible contractors under these

contracts be counted toward the prime contractor's small disadvantaged business goal. Therefore, this final rule requires these contracts and subcontracts to be counted toward the small disadvantaged business goal.

DoD contractors can only receive credit toward the small disadvantaged business goal for subcontracts to eligible contractors if the prime contract was awarded under the Demonstration Project. The final rule provides clarification by adding Alternate II for the clause at DFARS 252.219-7003, Small Business Subcontracting Plan (DoD Contracts), specifically for use in procurements conducted under the Demonstration Project. Alternate II will appear in contracts awarded under the Demonstration Project, not in any other contracts, so it should be clear that this credit is available only if the prime contract was awarded under the Demonstration Project.

DoD agrees that "may" should be changed to "shall" at DFARS 226.7202, paragraph (c), as well as in Alternate II of the clause at DFARS 252.219-7003, to be consistent with the statute. This change is included in the final rule.

c. Update of systems

Comment: One respondent stated that the Federal Procurement Data System (FPDS) and the Electronic Subcontracting Reporting System (eSRS) must be updated to ensure contract awards under

the Demonstration Project can be accurately reported and counted toward the small disadvantaged business goal.

Response: DoD agrees that FPDS will need to be updated to ensure accurate reporting and counting of awards to eligible contractors under the Demonstration Project. No change is needed to eSRS. Contractors with subcontracting plans will continue to report their achievements toward their subcontracting goals in eSRS.

d. Subcontracting plan requirement

Comment: One respondent commented that the subcontracting plan requirement may dissuade nontraditional companies from participating in the Demonstration Project. Another respondent requested clarification that small business subcontracting plans are not required from small businesses or AbilityOne nonprofit agencies.

Response: If a contract awarded under the Demonstration Project meets the requirements for a subcontracting plan at FAR 19.702, then a subcontracting plan is required. Section 853 does not provide relief from this requirement. FAR 19.702 states that subcontracting plans are not required from small businesses. It is not necessary to repeat this in the DFARS, since DoD contracting officers use the DFARS in conjunction with the FAR. Clarification regarding applicability of the

subcontracting plan requirement to AbilityOne nonprofit agencies is outside the scope of this DFARS rule.

e. Limitation on subcontracting

Comment: Two respondents requested that DoD limit outsourcing by an eligible contractor to 50 percent of the contract amount, similar to the limitation on subcontracting that applies to small business.

Response: The statutory authority for the Demonstration Project does not provide limits on subcontracting for eligible contractors. To the extent an eligible contractor decides to subcontract part of the work under a Demonstration Project contract, there is an incentive for them to subcontract to other eligible contractors because they receive credit toward their small disadvantaged business subcontracting goal for those subcontracts.

5. Eligibility criteria

a. Verification of compliance

Comment: Many respondents expressed concern regarding DoD's ability to verify compliance with the eligibility criteria for the Demonstration Project. Three respondents recommended independent verification of an entity's employment of severely disabled individuals. Other respondents commented that self-certification may lead to waste, fraud, and abuse, resulting in "crowding the intended beneficiaries out of employment

opportunities generated.” These respondents suggested that AbilityOne nonprofits “could be deemed to be compliant” under the Demonstration Project, but other entities should be required to demonstrate compliance with the definition of eligible contractor. Another respondent urged DoD to consider strengthening the self-certification process for eligible contractors.

Response: All offerors for procurements conducted under the Demonstration Project are required to represent whether they are or are not eligible contractors. This representation has value because there are criminal and civil penalties for misrepresentations associated with Government contracts (see 18 U.S.C. 287 and 31 U.S.C. 3729–3733).

DoD considered more extensive verification requirements for this final rule. However, such requirements would be burdensome for contractors and for the Government. At this time, DoD does not have sufficient data on the use of the Demonstration Project to determine whether this burden would be necessary. Therefore, DoD will rely on the representation requirement described above until enough data can be collected on the Demonstration Project to determine if more extensive requirements are needed.

b. Challenges to representations

Comment: One respondent recommended that DoD identify an appellate body to which awards under the Demonstration Project

could be appealed. Another respondent commented that there is no way to determine how DoD will evaluate offerors for compliance and enforcement and asked if offerors would submit a protest for evaluation of another offeror's representation. If so, the respondent asked how DoD would examine and enforce the protests.

Response: DoD contracting officers will rely on an offeror's representation under the provision at DFARS 252.226-7002.

Interested parties may file a protest under existing FAR part 33 procedures. Any challenge to an entity's representation will be addressed on a case-by-case basis.

c. Definition of eligible contractor

Comment: Several respondents commented that eligible contractors should be required to meet the requirement to employ severely disabled individuals at a rate of 33 percent of the contractor's workforce throughout the life of the contract. One respondent questioned whether the 33 percent requirement applied to the entity's total workforce or only to employees for a specific contract, as well as whether it applied to full-time and part-time employees. Another respondent supported applying the 33 percent requirement to the entity's total workforce. One respondent recommended requiring performance of the contract by disabled individuals. Another respondent recommended, to the extent feasible, clarifying how a contractor can ascertain in

good faith its compliance with the requirement to offer health insurance and retirement plan that are comparable to those offered by entities of similar size in its industrial sector or geographic region.

Response: The 33 percent requirement applies to the entity's total workforce. To qualify for a contract under the Demonstration Project, eligible contractors are required to employ severely disabled individuals at a rate of 33 percent of their total workforce over the 12-month period prior to issuance of the solicitation. The final rule has been revised to require contracting officers to verify whether the contractor is still an eligible contractor (e.g., by checking the representation in SAM) prior to exercising an option under a contract awarded under the Demonstration Project. The contracting officer may decide to exercise an option on the contract if the contractor has represented that it is not an eligible contractor, but DoD will not continue to receive small disadvantaged business credit for that contract.

Regarding health insurance and retirement plans, the final rule implements the definition of "eligible contractor" consistent with the authorizing statute, which allows for variability among industries and regions. Entities should be generally aware of benefits packages offered by competitors in their own industry and geographic region.

d. Flexible implementation of eligibility criteria

Comment: Two respondents requested greater clarity and additional guidance on possible teaming or subcontracting opportunities to meet the eligibility criteria. One of the two respondents noted that initial flexibility would be helpful regarding the requirement to employ severely disabled individuals at a rate of 33 percent of the entity's workforce, e.g., a transition phase of 2 or 3 years building up to 33 percent or allow a prime contractor and subcontractor working together to meet the requirement. The other respondent commented that more contractors may participate if there is flexibility in achieving eligibility criteria.

Response: The statutory authority for the Demonstration Project specifies that an eligible contractor must employ severely disabled individuals at a rate of 33 percent of the entity's total workforce. A prime contractor and subcontractor would not qualify as a single entity in order to meet the requirement. The use of joint ventures to meet the 33 percent requirement would be consistent with this final rule.

e. Definition related to disabilities

Comment: Several respondents stated that it was unclear whether "severe" in the definition of "severely disabled individual" is meant to create a subset of people with disabilities who can be counted by eligible contractors, or if

anyone with a disability can be counted, and recommended adopting the legal definition of blindness in 41 U.S.C. 8501(1). Another respondent commented that the definition of "severely disabled individual" does not clarify what would constitute a "serious limitation of one or more functional capacities" or a "severe physical or mental impairment." Another respondent recommended that DoD consider expanding the definition of "severely disabled individual" to include severely disabled veterans "to remove any uncertainty."

Response: The definition of "severely disabled individual" comes from section 853. Any employee who meets the definition of "severely disabled individual" in this rule, including veterans, can be counted toward the requirement to employ severely disabled individuals at a rate of 33 percent of the entity's total workforce.

6. Protected health information

Comment: One respondent recommended the creation of criteria for eligible contractors to obtain and maintain protected health information in their possession.

Response: The creation of such criteria is outside the scope of this DFARS rule.

7. Use of evaluation factor

Comment: One respondent stated that it is unclear how the evaluation factor for the percentage of the entity's workforce

that consists of severely disabled individuals will be applied if the contracting officer is also considering price and technical factors. The respondent recommended use of a "best-value scenario" and expressed support for the use of a rating method in which a higher percentage of the workforce results in a higher overall rating. Another respondent commented that the evaluation factor should not give an advantage to offerors who employ severely disabled individuals at a rate of more than 33 percent of their workforce.

Response: The contracting officer has the discretion to structure this evaluation factor in a way that best suits the specific procurement. The evaluation factor will be applied as described in the solicitation for the specific procurement.

8. Guidance and training for contracting officers

Comment: One respondent noted that there is no incentive for contracting officers to use the Demonstration Project, so it is important to educate them about the Demonstration Project and to encourage them to use it.

Response: DoD acknowledges the comment and notes that training is considered for DFARS rules as needed.

9. Vocational support services

Comment: One respondent recommended considering the establishment of a requirement for all eligible contractors to provide vocational support services for severely disabled

individuals to help them overcome challenges that impede their ability to obtain and retain employment, e.g., vocational rehabilitation, employment retention support.

Response: Establishment of such a requirement is outside the scope of this rule.

10. Preemployment training

Comment: One respondent recommended including, as part of the Demonstration Project, preemployment training for severely disabled individuals employed by eligible contractors.

Response: Inclusion of such training is outside the scope of this rule.

C. *Other changes*

The final rule includes minor editorial changes in paragraph (3) of the definition of "eligible contractor" at 226.7201.

III. Expected Impact of the Rule

The Demonstration Project allows DoD to provide additional contracting opportunities to entities that employ individuals who are severely disabled. Procurements under the Demonstration Project must be for products and services that are not on the AbilityOne Procurement List, or for which the designated central nonprofit agency has granted a purchase exception.

The Demonstration Project is modeled after the Small Business Administration's set-aside program, but uniquely includes an incentive for Federal contractors to hire people with

disabilities who currently receive Social Security benefits. Such a demonstration project provides opportunities for severely disabled individuals to become gainfully employed taxpayers. Employing people with disabilities can be a way to offset the effects of an aging and shrinking workforce. In addition, people with disabilities bring different perspectives on solving problems and adapting to different circumstances. The Demonstration Project provides another incentive for both for-profit and nonprofit entities to recruit, employ, and retain people with disabilities.

DoD estimates that there may be approximately 549 procurements conducted under the Demonstration Project per year, based on data obtained from the Federal Procurement Data System. Specifically, DoD examined the number of contracts awarded to nonprofits in product service codes (PSCs) that may be suitable for award under the Demonstration Project. The selection of PSCs was informed by the Conference Report for the NDAA for FY 2004, which authorized the Demonstration Project. The Conference Report indicated that Congress expected opportunities to exist for the Demonstration Project in aerospace end items and components, as well as information technology products and services. It is important to note that use of these PSCs to estimate the number of procurements that may be conducted under the Demonstration Project does not limit such procurements to

these PSCs. Opportunities may exist for the Demonstration Project in other PSCs.

DoD obtained data for contracts awarded in the following PSCs:

PSC	Description
1560	Airframe Structural Components
All PSCs in Group 16	Aerospace Craft Components and Accessories
All PSCs in Group 70	Information Technology Equipment (including firmware), Software, Supplies, and Support Equipment
All PSCs in Category D3	Information Technology and Telecommunications

In certain PSCs, there is some overlap with the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled. The areas of overlap generally included a few items within a specific PSC, not the entire PSC. Therefore, relevant PSCs were included regardless of possible overlap with the Procurement List.

DoD also used awards to nonprofits as an indicator of suitability for the Demonstration Project because of its similarities to the AbilityOne Program, in terms of employment of individuals with severe disabilities. From FY 2016 through 2018, an average of 0.16 percent of those contracts (approximately 90 each year) were awarded to nonprofits. Since the Demonstration Project applies to both for-profit and nonprofit entities, DoD conservatively estimated that up to 1 percent of contracts (approximately 549 each year) awarded in those PSCs may be suitable for the Demonstration Project.

This rule requires offerors for procurements conducted under the Demonstration Project to represent whether they are or are not eligible contractors as defined in the rule. Offerors will complete the representation in SAM. The cost associated with the representation is expected to be de minimis and is within the estimate of public burden for OMB Control Number 9000-0159, System for Award Management Registration.

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

This rule applies the requirements of section 853 of the NDAA for FY 2004 (Pub. L. 108-136), as amended by division H, section 110 of the Consolidated Appropriations Act, 2004 (Pub. L. 108-199) (10 U.S.C. 2302 note), to contracts at or below the SAT and to contracts for the acquisition of commercial items, including COTS items.

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

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 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 contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

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

10 U.S.C. 2375 governs the applicability of laws to DoD contracts and subcontracts for the acquisition of commercial items (including commercially available off-the-shelf items) and is intended to limit the applicability of laws to contracts for the acquisition of commercial items, including COTS items. 10 U.S.C. 2375 provides that if a provision of law contains criminal or civil penalties, or if the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) 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. Due to delegations of authority from USD(A&S), the Principal Director, DPC, is the appropriate authority to make this determination.

C. Determinations

The requirements of section 853 of the NDAA for FY 2004, as amended by division H, section 110 of the Consolidated Appropriations Act, 2004, were enacted to provide defense contracting opportunities for contractors employing persons with disabilities. The majority of contracts that could be awarded under the Demonstration Project are likely to be valued at or below the SAT. Similarly, the majority of the products and services offered by these contractors are commercial items, including COTS items. Therefore, DoD has determined that it is in the best interest of the Federal Government to apply the rule to contracts valued at or below the SAT and contracts for the acquisition of commercial items, including COTS items. It is expected that contracting officers would likely be unable to utilize the Demonstration Project established by Congress, if this rule is not applied to these categories of contracts.

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 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of

promoting flexibility. This is a significant regulatory action and, therefore, was 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 subject to the requirements of E.O. 13771, because this rule will result in no more than de minimis costs.

VII. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

DoD is amending the DFARS to include an instruction on the Demonstration Project for Contractors Employing Persons with Disabilities, as required by section 888 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232). The Demonstration Project allows DoD to provide defense contracting opportunities to entities that employ individuals who are severely disabled. Nothing in this final DFARS rule supersedes the requirement to use the mandatory sources in FAR part 8 or the small business programs in FAR part 19.

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

The rule will apply to entities, including small entities, that meet the definition of "eligible contractor" in the rule

and that are interested in competing for contracts under the Demonstration Project. Specifically, an eligible contractor is one that employs severely disabled individuals at a rate of no less than 33 percent of the contractor's workforce over a 12-month period prior to issuance of the solicitation; pays not less than the minimum wage to those individuals; and provides health insurance and a retirement plan comparable to those provided by similar entities. The entity may operate on a for-profit or nonprofit basis.

According to data in FPDS, DoD awarded contracts to approximately 4,065 small entities each year from FY 2016 to FY 2018 in product and service codes (PSCs) that may be suitable for award under the Demonstration Project, such as aerospace components and accessories and information technology equipment and services. DoD conservatively estimates that approximately 21 percent, or 870 small entities, may meet the definition of "eligible contractor" and be interested in competing for contracts under the Demonstration Project.

This rule requires offerors to represent whether they are or are not eligible contractors under the Demonstration Project. This representation will be available for completion in SAM and will be completed on an annual basis. This rule does not impose any additional recordkeeping or other compliance requirements for small entities.

DoD considered more extensive recordkeeping requirements related to the definition of "eligible contractor," particularly with regard to the percentage of the entity's workforce that consists of severely disabled individuals. Such recordkeeping requirements would be burdensome for small entities. At this time, DoD does not have sufficient data on the use of the Demonstration Project to determine whether this burden would be necessary. Therefore, DoD will rely on the representation requirement described above until sufficient data can be collected on the Demonstration Project to determine if more extensive requirements are needed.

VIII. Paperwork Reduction Act

This rule affects the information collection requirements in the provision at FAR 52.204-7, System for Award Management, and in the clause at FAR 52.204-13, System for Award Management Maintenance, currently approved under OMB Control Number 9000-0159, entitled System for Award Management Registration, in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35). The impact, however, is negligible, because the cost of providing the additional representation in SAM is de minimis and is within the estimate of public burden approved for OMB Control Number 9000-0159.

List of Subjects in 48 CFR Parts 204, 212, 215, 219, 226, and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 204, 212, 215, 219, 226, and 252 are amended as follows:

1. The authority citation for 48 CFR parts 204, 212, 215, 219, 226, and 252 continues to read as follows:

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

PART 204—ADMINISTRATIVE MATTERS

2. Amend section 204.1202 by-

- a. Redesignating paragraphs (2)(xii), (xiii), and (xiv) as paragraphs (2)(xiii), (xiv), and (xv), respectively; and
- b. Adding new paragraph (xii).

The addition reads as follows:

204.1202 Solicitation provision.

* * * * *

(2) * * *

(xi) 252.226-7002, Representation for Demonstration Project for Contractors Employing Persons with Disabilities.

* * * * *

PART 212—ACQUISITION OF COMMERCIAL ITEMS

3. Amend section 212.301(f) by-

- a. Adding paragraph (vii)(A)(3); and

b. In paragraph (x), designating the text as paragraph (A) and adding a new paragraph (B).

The additions read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(vii) * * *

(A) * * *

(3) Use the alternate II clause as prescribed in 219.708 (b) (1) (A) (3).

* * * * *

(x) * * *

(B) Use the provision at 252.226-7002, Representation for Demonstration Project for Contractors Employing Persons with Disabilities, as prescribed in 226.7203.

PART 215—CONTRACTING BY NEGOTIATION

4. Amend section 215.304 by adding paragraph (c) (vii) to read as follows:

215.304 Evaluation factors and significant subfactors.

(c) * * *

(vii) See 226.7202 for an additional evaluation factor required in solicitations when using the Demonstration Project for Contractors Employing Persons with Disabilities.

PART 219—SMALL BUSINESS PROGRAMS

5. Amend section 219.708 by-

- a. In paragraph (b) (1) (A) introductory text, removing "basic or alternate clause" and adding "basic, alternate I, or alternate II clause" in its place; and
- b. Adding paragraph (b) (1) (A) (3).

219.708 Contract clauses.

(b) * * *

(1) * * *

(A) * * *

(3) Use the alternate II clause at 252.219-7003 when using the Demonstration Project described at 226.72.

* * * * *

PART 226—OTHER SOCIOECONOMIC PROGRAMS

6. Add subpart 226.72, consisting of 226.7200 through 226.7203, to read as follows:

SUBPART 226.72—DEMONSTRATION PROJECT FOR CONTRACTORS EMPLOYING PERSONS WITH DISABILITIES

Sec.

- 226.7200 Scope of subpart.
- 226.7201 Definitions.
- 226.7202 Policy and procedures.
- 226.7203 Solicitation provision.

**SUBPART 226.72—DEMONSTRATION PROJECT FOR CONTRACTORS EMPLOYING
PERSONS WITH DISABILITIES**

226.7200 Scope of subpart.

This subpart implements section 853 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136, 10 U.S.C. 2302 note). Nothing in this subpart supersedes the requirement to use the mandatory sources in FAR part 8 or the small business programs in FAR part 19.

226.7201 Definitions.

As used in this subpart—

Eligible contractor means a business entity operated on a for-profit or nonprofit basis that—

- (1) Employs severely disabled individuals at a rate that averages not less than 33 percent of its total workforce over the 12-month period prior to issuance of the solicitation;
- (2) Pays not less than the minimum wage prescribed pursuant to 29 U.S.C. 206 to the employees who are severely disabled individuals; and
- (3) Provides, for its employees, health insurance and a retirement plan comparable to those provided for employees by business entities of similar size in its industrial sector or geographic region.

Severely disabled individual means an individual with a disability (as defined in 42 U.S.C. 12102) who has a severe

physical or mental impairment that seriously limits one or more functional capacities.

226.7202 Policy and procedures.

(a) (1) Contracting officers may use this Demonstration Project to award one or more contracts to an eligible contractor for the purpose of providing defense contracting opportunities for entities that employ severely disabled individuals. To determine if there are eligible contractors capable of fulfilling the agency's requirement, conduct market research as described in 210.002 and FAR 10.002. For services, see also PGI 210.070.

(2) If the contracting officer elects to use this Demonstration Project, FAR 6.302-5 requires a written justification and approval to limit competition to eligible contractors. In the justification, identify the statutory authority for the Demonstration Project (10 U.S.C. 2302 note).

(b) When using this Demonstration Project, one of the evaluation factors shall be the percentage of the offeror's total workforce that consists of severely disabled individuals employed by the offeror. Contracting officers may use a rating method in which a higher percentage of the offeror's total workforce consisting of severely disabled individuals would result in a higher rating for this evaluation factor.

(c) (1) Contracts awarded to eligible contractors under this Demonstration Project shall be counted toward DoD's small disadvantaged business goal. The contractor must be an eligible contractor when options under the contract are exercised, in order for DoD to continue to receive credit for the contract toward its small disadvantaged business goal.

(2) Contracting officers shall verify the contractor's representation (e.g., by checking the System for Award Management) prior to exercising an option on a contract awarded under the Demonstration Project. Contracting officers may exercise the option if the contractor has represented that it is not an eligible contractor; however, the contract shall no longer be counted toward DoD's small disadvantaged business goal.

226.7203 Solicitation provision.

Use the provision at 252.226-7002, Representation for Demonstration Project for Contractors Employing Persons with Disabilities, in solicitations when using this Demonstration Project, including solicitations using FAR part 12 procedures for the acquisition of commercial items.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. Amend section 252.204-7007 by-

a. Removing clause date "(JUN 2019)" and adding "(DEC 2019)" in its place; and

b. Adding paragraph (d) (2) (vi).

The addition reads as follows:

**252.204-7007 Alternate A, Annual Representations and
Certifications.**

* * * * *

(d) * * *

(2) * * *

_____(vi) 252.226-7002, Representation for Demonstration
Project for Contractors Employing Persons with Disabilities.

* * * * *

8. Amend section 252.219-7003 by-

a. Removing clause date "(MAY 2019)" and adding "(DEC 2019)" in
its place;

b. In paragraph (b), removing "goal" and adding "goal (section
8025 of Pub. L. 108-87)" in its place;

c. In paragraph (d), removing "Contractor's cognizant contract
administration activity" and adding "cognizant contract
administration activity for the Contractor".

d. In the Alternate I clause-

i. Removing clause date "(MAY 2019)" and adding "(DEC 2019)" in
its place;

ii. In paragraph (b), removing "goal" and adding "goal (section
8025 of Pub. L. 108-87)" in its place;

iii. In paragraph (d), removing "Contractor's cognizant contract administration activity" and adding "cognizant contract administration activity for the Contractor"; and

e. Adding Alternate II clause to read as follows:

252.219-7003 Small Business Subcontracting Plan (DoD Contracts).

* * * * *

Alternate II. As prescribed in 219.708(b)(1)(A) and (b)(1)(A)(3), use the following clause, which uses different paragraphs (a) and (b) than the basic clause.

SMALL BUSINESS SUBCONTRACTING PLAN (DOD CONTRACTS)—ALTERNATE II (DEC 2019)

(a) *Definitions.* As used in this clause—

Eligible contractor means a business entity operated on a for-profit or nonprofit basis that—

(1) Employs severely disabled individuals at a rate that averages not less than 33 percent of its total workforce over the 12-month period prior to issuance of the solicitation;

(2) Pays not less than the minimum wage prescribed pursuant to 29 U.S.C. 206 to the employees who are severely disabled individuals; and

(3) Provides, for its employees, health insurance and a retirement plan comparable to those provided for employees by

business entities of similar size in its industrial sector or geographic region.

Summary Subcontract Report (SSR) Coordinator means the individual who is registered in the Electronic Subcontracting Reporting System (eSRS) at the Department of Defense level and is responsible for acknowledging receipt or rejecting SSRs submitted under an individual subcontracting plan in eSRS for the Department of Defense.

(b) (1) Subcontracts awarded to qualified nonprofit agencies designated by the Committee for Purchase From People Who are Blind or Severely Disabled (41 U.S.C. 8502-8504), may be counted toward the Contractor's small business subcontracting goal (section 8025 of Pub. L. 108-87).

(2) Subcontracts awarded to eligible contractors under the Demonstration Project for Contractors Employing Persons with Disabilities (see Defense Federal Acquisition Regulation Supplement (DFARS) 226.72) may be counted toward the Contractor's small disadvantaged business subcontracting goal (section 853 of Pub. L. 108-136, as amended by division H, section 110 of Pub. L. 108-199).

(c) A mentor firm, under the Pilot Mentor-Protege Program established under section 831 of Public Law 101-510, may count toward its small disadvantaged business goal, subcontracts awarded to—

(1) Protege firms which are qualified organizations employing the severely disabled; and

(2) Former protege firms that meet the criteria in section 831(g) (4) of Public Law 101-510.

(d) The master plan is approved by the cognizant contract administration activity for the Contractor.

(e) In those subcontracting plans which specifically identify small businesses, the Contractor shall notify the Administrative Contracting Officer of any substitutions of firms that are not small business firms, for the small business firms specifically identified in the subcontracting plan. Notifications shall be in writing and shall occur within a reasonable period of time after award of the subcontract. Contractor-specified formats shall be acceptable.

(f) (1) For DoD, the Contractor shall submit reports in eSRS as follows:

(i) The Individual Subcontract Report (ISR) shall be submitted to the contracting officer at the procuring contracting office, even when contract administration has been delegated to the Defense Contract Management Agency.

(ii) Submit the consolidated SSR for an individual subcontracting plan to the "Department of Defense."

(2) For DoD, the authority to acknowledge receipt or reject reports in eSRS is as follows:

(i) The authority to acknowledge receipt or reject the ISR resides with the contracting officer who receives it, as described in paragraph (f)(1)(i) of this clause.

(ii) The authority to acknowledge receipt of or reject SSRs submitted under an individual subcontracting plan resides with the SSR Coordinator.

(g) Include the clause at 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.

(End of clause)

9. Add section 252.226-7002 to read as follows:

252.226-7002 Representation for Demonstration Project for Contractors Employing Persons with Disabilities.

As prescribed in 226.7203, use the following provision:

REPRESENTATION FOR DEMONSTRATION PROJECT FOR CONTRACTORS EMPLOYING PERSONS WITH DISABILITIES (DEC 2019)

(a) *Definitions.* As used in this provision—

Eligible contractor means a business entity operated on a for-profit or nonprofit basis that—

(1) Employs severely disabled individuals at a rate that averages not less than 33 percent of its total workforce over the 12-month period prior to issuance of the solicitation;

(2) Pays not less than the minimum wage prescribed pursuant to 29 U.S.C. 206 to the employees who are severely disabled individuals; and

(3) Provides, for its employees, health insurance and a retirement plan comparable to those provided for employees by business entities of similar size in its industrial sector or geographic region.

Severely disabled individual means an individual with a disability (as defined in 42 U.S.C. 12102) who has a severe physical or mental impairment that seriously limits one or more functional capacities.

(b) *Demonstration Project.* This solicitation is issued pursuant to the Demonstration Project for Contractors Employing Persons with Disabilities. The purpose of the Demonstration Project is to provide defense contracting opportunities for entities that employ severely disabled individuals. To be eligible for award, an offeror must be an eligible contractor as defined in paragraph (a) of this provision.

(c) *Representation.* The offeror represents that it [] is [] is not an eligible contractor as defined in paragraph (a) of this provision.

(End of provision)

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