



5001-06-P

DEPARTMENT OF DEFENSE

48 CFR Parts 203, 205, 211, 212, 217, 219, 225, 228, 236, 237, 246, 250, and 252

[Docket DARS-2020-0002]

RIN 0750-AK76

Defense Federal Acquisition Regulation Supplement:

Inflation Adjustment of Acquisition-Related Thresholds

(DFARS Case 2019-D036)

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 further implement 41 U.S.C. 1908, Inflation adjustment of acquisition-related dollar thresholds. This statute requires an adjustment every five years of acquisition-related thresholds for inflation using the Consumer Price Index for all urban consumers, except for the Construction Wage Rate Requirements statute (Davis-Bacon Act), Service Contract Labor Standards statute, and trade agreements thresholds. DoD is also proposing to use the same

methodology to adjust some nonstatutory DFARS acquisition-related thresholds in 2020.

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 the final rule.

ADDRESSES: Submit comments identified by DFARS Case 2019-D036, using any of the following methods:

- o *Federal eRulemaking Portal:*

http://www.regulations.gov. Search for "DFARS Case 2019-D036." Select "Comment Now" and follow the instructions to submit a comment. Please include your name, company name (if any), and "DFARS Case 2019-D036" on any attached document.

- o *Email:* *osd.dfars@mail.mil.* Include DFARS Case 2019-D036 in the subject line of the message.

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

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

Instructions: 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. Kimberly R. Ziegler, telephone 571-372-6095.

SUPPLEMENTARY INFORMATION:

I. Background

This rule proposes to amend multiple DFARS parts to further implement 41 U.S.C. 1908. Section 1908 requires an adjustment every five years (on October 1 of each year evenly divisible by five) of statutory acquisition-related thresholds for inflation, using the Consumer Price Index (CPI) for all urban consumers, except for the Construction Wage Rate Requirements statute (Davis-Bacon Act), Service Contract Labor Standards statute, and trade agreements thresholds (see Federal Acquisition Regulation (FAR) 1.109). As a matter of policy, DoD is also proposing to use the same methodology to adjust some nonstatutory DFARS acquisition-related thresholds on October 1, 2020. FAR case 2019-013 proposes comparable changes to acquisition-related thresholds in the FAR.

This is the fourth review of DFARS acquisition-related thresholds since the statute was enacted on October 28,

2004 (section 807 of the National Defense Authorization Act for FY 2004). The last review was conducted under DFARS case 2014-D025. The final rule was published under that case in the Federal Register on June 26, 2015 (80 FR 36903), effective October 1, 2015. DoD subsequently published a correction to DFARS case 2014-D025 on August 3, 2015 at 80 FR 45899.

II. Discussion and Analysis.

A. What is an acquisition-related threshold?

This case builds on the review of DFARS thresholds in 2005, 2010, and 2015, using the same interpretation of an acquisition-related threshold. 41 U.S.C. 1908 is applicable to "a dollar threshold that is specified in law as a factor in defining the scope of the applicability of a policy, procedure, requirement, or restriction provided in that law to the procurement of property or services by an executive agency, as the [FAR] Council determines."

There are other thresholds in the DFARS that, while not specified in law, nevertheless meet all the other criteria. These thresholds may have their origin in Executive order or regulation. Therefore, the FAR Council has determined, that in this case, "acquisition-related threshold" has a broader meaning, i.e., a threshold that is specified in law, Executive order, or regulation as a factor in defining

the scope of the applicability of a policy, procedure, requirement, or restriction provided in that law, Executive order, or regulation to the procurement of property or services by an Executive agency. Acquisition-related thresholds are generally tied to the value of a contract, subcontract, or modification.

Examples of thresholds that are not "acquisition-related," as defined in this case, are thresholds relating to claims, penalties, withholding, payments, required levels of insurance, small business size standards, liquidated damages, protests, etc. This report does not address thresholds that are not acquisition-related.

B. What acquisition-related thresholds are not subject to escalation adjustment under this case?

41 U.S.C. 1908 does not permit escalation of acquisition-related thresholds established by the Construction Wage Rate Requirements statute (Davis Bacon Act), the Service Contract Labor Standards statute, or the United States Trade Representative pursuant to the authority of the Trade Agreements Act of 1979.

Also, the statute does not authorize DoD to escalate thresholds originating in Executive order or the implementing agency (such as the Department of Labor or the

Small Business Administration), unless the Executive order or agency regulations are first amended.

C. How does DoD analyze escalation of a statutory acquisition-related threshold?

If an acquisition-related threshold is based on statute, the matrix at https://www.acq.osd.mil/dpap/dars/pgi/pgi_htm/current/PGI201_1.htm identifies the statute, and the statutory threshold, including the original threshold and any subsequent revisions to it.

With the exception of thresholds set by the Construction Wage Rate Requirements statute (Davis Bacon Act), the Service Contract Labor Standards statute, and trade agreements, 41 U.S.C. 1908 requires adjustment of the acquisition-related thresholds for inflation using the Consumer Price Index (CPI) for all-urban consumers. Acquisition-related thresholds in statutes that were in effect on October 1, 2000, are only subject to escalation from that date forward. Acquisition-related thresholds in statutes that took effect after October 1, 2000, are escalated from the date that they took effect. For purposes of this proposed rule, the matrix includes calculation of escalation based on the estimated CPI value for March 2020 (currently estimated at 258.6) divided by

the CPI for the date of enactment of the statute or regulation (October 2000, for statutes enacted prior to October 1, 2000). DoD will subsequently adjust as necessary before issuance of the final rule.

Once the escalation factor is applied to the acquisition-related threshold, then statutory thresholds must be rounded as follows:

<\$10,000 to nearest \$500

\$10,000 - <\$100,000 to nearest \$5,000

\$100,000 - <\$1 million to nearest \$50,000

\$1 million - <\$10 million to nearest \$500,000

\$10 million - <\$100 million to nearest \$5 million

\$100 million - <\$1 billion to nearest \$50 million

Note that since the last adjustment in 2015, the calculation formula for over \$1 million was revised in 41 U.S.C. 1908.

The calculations in this proposed rule are all based on the base year amount, because escalated amounts in the 2015 rule were subject to rounding and using those amounts as the base would distort future calculations.

In 2015, some thresholds, although subject to inflation calculation, did not actually change, because the inflation in 2015 was insufficient to overcome the rounding requirements - i.e., the escalation factor, when applied,

did not cause the escalated values to be high enough to round to the next higher value. However, for the FY 2020 calculations, some thresholds that did not escalate in 2015 have increased through other statutory actions or will now escalate because of five additional years of inflation. Likewise, some thresholds that were escalated in 2015 will not escalate in 2020.

This proposed rule is based on a projected CPI of 258.6 for March 2020. If the actual CPI for March 2020 is higher than 258.6, then additional statutory thresholds may be subject to escalation in the final rule, even though not included in the proposed rule.

D. How does DoD analyze a nonstatutory acquisition-related threshold?

No statutory authorization is required to escalate thresholds that are policy-based within the DFARS. For consistency, escalation of the DoD policy acquisition-related thresholds is generally recommended using the same formula applied to the statutory thresholds, unless a reason has been provided for not doing so.

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

This proposed rule does not create any new provisions or clauses, nor does it change the applicability of any existing provisions or clauses included in solicitations and contracts valued at or below the simplified acquisition threshold, or for commercial items, including COTS items.

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

The 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.

DoD does not expect this 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., because the rule maintains the status quo by adjusting thresholds for actual inflationary increases in the CPI. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This rule proposes to amend the Defense Federal Acquisition Regulation Supplement to implement 41 U.S.C. 1908 and to amend other acquisition-related dollar thresholds that are based on policy rather than statute in order to adjust for the changing value of the dollar. 41 U.S.C. 1908 requires adjustment every five years of statutory acquisition-related dollar thresholds, except for Construction Wage Rate Requirements statute (Davis-Bacon Act), Service Contract Labor Standards statute, and trade agreements thresholds. While reviewing all statutory acquisition-related thresholds, this case presented an opportunity to also review all nonstatutory acquisition-related thresholds in the DFARS that are based on policy.

The objective of the case is to maintain the status quo, by adjusting acquisition-related thresholds for inflation. The legal basis is 41 U.S.C. 1908. The statute does not

authorize escalation of thresholds originating in Executive orders or the implementing agency (such as the Department of Labor or the Small Business Administration), unless the Executive order or agency regulations are first amended.

This rule will likely affect to some extent all small business concerns that submit offers or are awarded contracts by DoD. However, most of the threshold changes proposed in this rule are not expected to have any significant economic impact on small business concerns because they are intended to maintain the status quo by adjusting for changes in the value of the dollar. Data generated from the Federal Procurement Data System (FPDS) for fiscal years 2017 through 2019, indicates that DoD has awarded an average of 1,494,202 contracts to 56,851 unique small entities during the three-year period. It is assumed that all 56,851 unique small entities may be affected by this rule, however, the impact will most likely be beneficial, by preventing burdensome requirements from applying to more and more acquisitions, as the dollar loses value.

The rule does not impose any new reporting, recordkeeping, or compliance requirements. Changes in thresholds for approved information collection requirements

are intended to maintain the status quo and prevent those requirements from increasing over time.

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

There are no practical alternatives that will accomplish the objectives of the statute.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by the 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 2019-D036), in correspondence.

VII. Paperwork Reduction Act

The Paperwork Reduction Act does apply. The proposed changes to the DFARS do not impose new information collection requirements that require the approval of the Office of Management and Budget (OMB) under 44 U.S.C. 3501, et seq. By adjusting the thresholds for inflation, the status quo for the current information collection requirements are maintained under OMB clearance numbers 0704-0229, DFARS Part 225, Foreign Acquisition and related clauses and 0704-0286, DFARS Part 205, Publicizing Contract Actions and Provision of Information to Cooperative Agreement Holders.

List of Subjects in 48 CFR Parts 203, 205, 211, 212, 217, 219, 225, 228, 236, 237, 246, 250, and 252

Government Procurement

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 203, 205, 211, 212, 217, 219, 225, 228, 236, 237, 246, 250, and 252 are proposed to be amended as follows:

1. The authority citation for 48 CFR parts 203, 205, 211, 212, 217, 219, 225, 228, 236, 237, 246, 250, and 252

continues to read as follows:

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

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

203.1004 [Amended]

2. Amend section 203.1004 in paragraph (b)(2)(ii) by removing "\$5.5 million" and adding "\$6 million" in its place.

PART 205—PUBLICIZING CONTRACT ACTIONS

205.303 [Amended]

3. Amend section 205.303 by removing "\$7 million" everywhere it appears and adding "\$7.5 million" in its place.

205.470 [Amended]

4. Amend section 205.470 by removing "\$1,000,000" and adding "\$1.5 million" in its place.

PART 211—DESCRIBING AGENCY NEEDS

211.503 [Amended]

5. Amend section 211.503 in paragraph (b) by removing "\$700,000" and adding "\$750,000" in its place in two places.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

212.271 [Amended]

6. Amend section 212.271 by removing "\$40,000" and adding "\$45,000" in its place.

PART 217—SPECIAL CONTRACTING METHODS

217.170 [Amended]

7. Amend section 217.170 in paragraphs (d)(1)(iv) and (d)(5) introductory text by removing "\$135.5 million" and adding "\$150 million" in both places.

217.171 [Amended]

8. Amend section 217.171 in paragraph (d) by removing "\$678.5 million" and adding "\$750 million" in its place.

217.172 [Amended]

9. Amend section 217.172 in paragraphs (c), (d), and (f)(1) and (2) by removing "\$678.5 million" and adding "\$750 million" in each place.

PART 219—SMALL BUSINESS PROGRAMS

219.502-2 [Amended]

10. Amend section 219.502-2 in paragraph (a) (i) by removing "\$2.5 million" and adding "\$3 million" in its place.

PART 225—FOREIGN ACQUISITION

225.7204 [Amended]

11. Amend section 225.7204 in paragraphs (a) and (b) by removing "\$13.5 million" and adding "\$15 million" in each place.

225.7703-2 [Amended]

12. Amend section 225.7703-2 by—

- a. In paragraph (b) (2) (i) by removing "\$93 million" and adding "\$100 million" in its place; and
- b. In paragraph (b) (2) (ii) introductory text by removing "Director, Defense Procurement and Acquisition Policy" and adding "Principal Director, Defense Pricing and Contracting" in its place and by removing "\$93 million" and adding "\$100 million" in its place.

PART 228—BONDS AND INSURANCE

228.102-1 [Amended]

13. Amend section 228.102-1, in the introductory text and paragraph (1), by removing "\$35,000" and adding "\$40,000" in its place in both places.

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

236.303-1 [Amended]

14. Amend section 236.303-1 in paragraph (a) (4) (i) introductory text and (a) (4) (ii) by removing "\$4 million" and adding "\$4.5 million" in its place in both places.

PART 237—SERVICE CONTRACTING

237.170-2 [Amended]

15. Amend section 237.170-2 in paragraphs (a) (1) and (2) by removing "\$93 million" and adding "\$100 million" in its place in both places.

PART 246—QUALITY ASSURANCE

16. Amend section 246.402 introductory text by removing "\$300,000" and adding "\$350,000" in its place.

PART 250—EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT

250.102-1 [Amended]

17. Amend section 250.102-1 in paragraph (b) by removing "\$70,000" and adding "\$75,000" in its place.

250.102-1-70 [Amended]

18. Amend section 250.102-1-70 in paragraph (b) (1) by removing "\$70,000" and adding "\$75,000" in its place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.225-7003 [Amended]

19. Amend section 252.225-7003 by—

- a. Removing the clause date "(OCT 2015)" and adding "(DATE)" in its place; and
- b. In paragraph (b) (1), removing "\$13.5 million" and adding "\$15 million" in its place; and
- c. In paragraph (b) (2) (i) removing "\$700,000" and adding "\$750,000" in its place.

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