



**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 204, 212, and 252**

**[Docket DARS-2020-0007]**

**RIN 0750-AK30**

**Defense Federal Acquisition Regulation Supplement: Data Collection and Inventory for Services Contracts (DFARS Case 2018-D063)**

**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 to implement a section of the United States Code that requires the collection of data on certain DoD service contracts.

**DATES:** Effective **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Carrie Moore, telephone 571-372-6093.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD published a proposed rule in the **Federal Register** at 85 FR 34569 on June 5, 2020, to implement 10 U.S.C. 2330a, as amended by section 812 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328), which requires DoD

to establish a data collection system to provide certain management information with regard to an awarded contract or task order that is valued in excess of \$3 million and is for the following service acquisition portfolio groups: logistics management services, equipment-related services, knowledge-based services, or electronics and communications services.

DoD published a prior proposed rule under DFARS Case 2012-D051 in the **Federal Register** at 79 FR 32522 on June 5, 2014, to implement 10 U.S.C. 2330a (section 807 of the NDAA for FY 2008), which required DoD to establish a data collection system to provide certain data on the purchasing of services by DoD and to submit to Congress an annual inventory of services contracts awarded by or on behalf of DoD. The proposed rule for DFARS Case 2012-D051 required contractors to enter the required data into a DoD-unique system, Enterprise Contractor Manpower Reporting Application (ECMRA). In response to public comments received in response to the proposed rule for DFARS Case 2012-D051, DoD made the following changes in the proposed rule for DFARS Case 2018-D063:

- DoD has adopted the service contract reporting process used by other Federal agencies and no longer requires contractor reporting in ECMRA. This change enables DoD to use the Federal Procurement Data System (FPDS) to obtain a majority of the information required by 10 U.S.C. 2330a. FPDS does not provide data on the direct labor hours expended and dollar amounts invoiced for contracted services.

Therefore, both the proposed and final rules require applicable contractors to enter the labor hours and dollar amounts in SAM, which is the process used by other Federal agencies, in accordance with Federal Acquisition Regulation (FAR) subpart 4.17.

- To relieve burden and minimize impact for contractors and subcontractors, both the proposed and final rules require contractors to report the total number of hours worked (both contractor and subcontractor) under the contract for the entire fiscal year and does not require a breakdown of those hours by employee type or by subcontractor. The requirement to report subcontractor data is limited to first-tier subcontractors, consistent with the FAR requirement for service contract reporting. The proposed and final rules leave the process for collecting subcontractor data up to the discretion of each contractor; the rules do not prescribe a specific methodology that contractors must use to gather this data on applicable subcontracts, or prescribe a reporting requirement for subcontractors via the flow-down of the contract clause.
- The estimated burdens for respondents and responses published in the proposed rule for DFARS Case 2021-D051 have been updated to reflect the revised requirements of 10 U.S.C. 2330a, as amended.

The following is a summary of the public comments received in response to the proposed rule for DFARS Case 2012-D051:

## A. Exemptions

*Comment:* Several respondents recommended that the rule exempt certain areas including: Research and development projects; architect and engineering services; telecommunications and transmission and internet; and actions using criteria similar to the Service Contract Labor Standards exemptions in FAR 22.1003-4(d)(1).

*Response:* The proposed rule for DFARS Case 2018-D063 implements 10 U.S.C. 2330a, as amended by section 812 of the NDAA for FY 2017, which requires reporting for only four service acquisition portfolio groups: Logistics management services, equipment related services, knowledge-based services, and electronics and communications services. No further exemptions are available under the law.

*Comment:* Several respondents recommended that contracted services that meet the definition of commercial items be exempt from ECMRA reporting.

*Response:* An exception for services that meet the definition of a commercial item would exclude significant sums expended by DoD on commercial service acquisitions intended to be covered by the law. The intent of the statute is to enhance DoD's ability to manage the total force, inclusive of military, civilian, and contractor personnel. Specifically, section 2330a requires the military departments and defense agencies to ensure that the inventory of contracts for services required by the statute is used to inform strategic workforce planning decisions under 10

U.S.C. 129a, develop budget justification materials for services in accordance with 10 U.S.C. 235, and ensure services contracts are not for the performance of inherently governmental functions. Therefore, services meeting the definition of a commercial item are not exempt from the reporting requirement.

*Comment:* Several respondents recommended that firm fixed-price service contracts be exempt from the ECMRA reporting requirement, because these contracts acquire services in their entirety, not as individuals (full-time equivalents).

*Response:* In accordance with paragraph (b) of 10 U.S.C. 2330a, the data required to be collected under the statute includes service contracts and orders that contain firm fixed-prices for the specific tasks to be performed. Therefore, firm fixed-price contracts for the applicable services are not exempt under the proposed rule for DFARS Case 2018-D063.

*Comment:* One respondent recommended that the rule exempt DoD intelligence community agency contracts, because the existing exemption for "classified services" is not sufficient to cover the exempt contracts entered into by DoD intelligence community agencies.

*Response:* The statute does not provide for exemptions to the reporting requirement; therefore, the proposed rule for DFARS Case 2012-D051 does not provide for exemptions, in order to comply with the law.

*Comment:* One respondent recommended that, due to the difficulty in tracking labor for service contracts where

contractor employees may spend only small fractions of their time servicing the Government contract (such as refuse collection and software as a service), the rule should be changed to exempt such contracts by using the criteria similar to the Service Contract Labor Standards exemptions (see FAR 22.1003-4(d)(1)).

*Response:* Title 10 U.S.C. 2330a, as amended by section 812 of the NDAA for FY 2017, now limits data collection to four service acquisition portfolio groups: logistics management services, equipment related services, knowledge-based services, and electronics and communications services. Under the proposed rule for DFARS Case 2018-D063, only service contracts with a total estimated value exceeding \$3 million that are for services in one of the four portfolio groups must be reported in SAM.

*Comment:* One respondent questioned whether Congress intended DoD to report contracts for services that are integrally related to supplies, or contracts where the services are a relatively small dollar value in relation to the supplies.

*Response:* Title 10 U.S.C. 2330a requires the collection of data on "each purchase of services by a military department or Defense Agency" that meets a certain dollar threshold and is for certain services. The proposed rule for DFARS Case 2018-D063 clarifies that the requirement applies to contracts or orders that have a total estimated value, including options, exceeding \$3 million and are for services in one of the four service acquisition portfolio groups.

## *B. Expansion of Reporting Requirement*

*Comment:* Two respondents suggested that the ECMRA reporting requirement be extended to contracts for services valued at or below the simplified acquisition threshold (SAT). Doing so would be consistent with the congressional intent in 10 U.S.C. 2330a for DoD to provide a total inventory of contracted services.

*Response:* Title 10 U.S.C. 2330a(a), as amended by section 812 of the NDAA for FY 2017, now only requires the collection of data on service contracts, under certain portfolio groups, that exceed \$3 million. The proposed rule for DFARS Case 2018-D063 implements the statutory threshold. Applying the rule to service contracts below \$3 million is not necessary to implement the statute and would impose an unnecessary burden on the public and DoD.

*Comment:* One respondent suggested that the final rule clarify that services provided ancillary to a lease or rental contract (such as auto repair and maintenance services incidental to a vehicle lease) are subject to ECMRA reporting requirement. The respondent also recommended that the final rule clarify that the ECMRA reporting requirements apply to contracts for destruction, demolition, and removal.

*Response:* Title 10 U.S.C. 2330a(a), as amended by section 812 of the NDAA for FY 2017, specifies that the service acquisition portfolio group for equipment related services is included in the required reporting group. It is expected that contracts for

equipment-related services with a total estimated value, including options, exceeding \$3 million will be reported in SAM.

*C. Duplicative of Existing Systems*

*Comment:* Two respondents indicated that the rule is duplicative of the existing FAR rule on service contract reporting that applies to civilian agencies (see FAR subpart 4.17). Respondents stated that there should not be two parallel systems, one for civilian agencies and another for defense agencies, because this situation causes confusion and compliance problems within industry.

*Response:* FAR subpart 4.17 does not apply to DoD. The proposed rule for DFARS Case 2018-D063 enables DoD to fulfill its obligation under 10 U.S.C. 2330a. Since publication of the proposed rule under DFARS Case 2012-D051, DoD has adopted the use of FPDS to collect a majority of the required data, in an effort to standardize the reporting process for contractors across the Federal Government.

*Comment:* Several respondents suggested that the ECMRA system is duplicative of other Government systems, such as FPDS, which can also be used to estimate the data provided in the annual inventory of contracts for services.

*Response:* DoD has adopted the service contract reporting process used by other Federal agencies and no longer requires contractor reporting in ECMRA. This rule will enable DoD to use FPDS to obtain a majority of the information required by 10 U.S.C. 2330a. FPDS does not provide data on the direct labor



hours expended and dollar amounts invoiced for contracted services. Therefore, the proposed rule for DFARS Case 2018-D063 requires applicable contractors to enter the labor hours and dollar amounts in SAM, which is the process used by other Federal agencies, in accordance with FAR subpart 4.17.

*Comment:* Two respondents suggested that the separate instances of ECMRA (Army, Navy, Air Force, and other DoD agencies) be combined into one DoD-wide ECMRA system.

*Response:* The use of ECMRA is no longer necessary. The proposed rule for DFARS Case 2018-D063 requires contractors to enter information in SAM.

*Comment:* Two respondents suggested that the rule is duplicative of existing DoD reporting requirements, such as: (1) The Army's contractor manpower reporting requirement; and (2) the Secretary of Defense Memorandum entitled "Enterprise-wide Contractor Manpower Reporting Application," dated November 2012, that requires all new contracts for services to include a contract line item for contractor manpower reporting and a requirement in the performance work statement for contractor manpower reporting.

*Response:* This rule will replace, not duplicate, the existing Army contract manpower reporting requirement and the requirements in the November 2012 Memorandum from the Under Secretary of Defense for Acquisition, Technology, and Logistics and the Acting Principal Deputy Under Secretary of Defense for Personnel and Readiness.

*Comment:* Two respondents suggested that the rule exceeds the scope of congressional intent, because DoD is already using its internal records and systems to achieve the statutory objective of the inventory of contracts for services.

*Response:* The rule does not exceed the scope of congressional intent, because existing systems and reports do not fully capture all of the data required by 10 U.S.C. 2330a.

#### *D. Flow Down to Subcontracts*

*Comment:* Two respondents suggested that the requirement for subcontract reporting be changed. One respondent suggested that the prime contractor be required only to flow down the clause to subcontractors and relieved of the responsibility of reporting for subcontractors. The other respondent suggested that subcontractor data not be reported at all, as this is inconsistent with commercial practice.

*Response:* The proposed rule for DFARS Case 2018-D063 does not contain a requirement to flow down a clause. Instead, the proposed rule requires contractors to include its subcontractor labor hours in the total number of labor hours the contractor reports annually to SAM. The proposed rule leaves the process for collecting subcontractor data up to the discretion of each contractor.

#### *E. Need for Additional Resources*

*Comment:* One respondent suggested that more resources be provided to the Office of the Under Secretary of Defense for Personnel and Readiness workforce that administers and

coordinates the inventory of contracts for services.

*Response:* This suggestion is beyond the scope of the rule.

#### *F. ECMRA Process*

*Comment:* One respondent noted that the ECMRA interface for the Fourth Estate (other DoD agencies and field activities) is not yet fully operational, in contrast to what is stated in the proposed rule. For example, there is no operational help desk support for Fourth Estate activities. The respondent suggests that the final rule should be delayed until ECMRA is consolidated into a common portal for all DoD agencies, or until the ECMRA instance for Fourth Estate activities is fully resourced.

*Response:* The use of ECMRA is no longer necessary. The proposed rule for DFARS Case 2018-D063 requires contractors to enter information in SAM.

*Comment:* One respondent questioned how the Government validates data provided by contractors in ECMRA. The respondent suggested that ECMRA be linked to Wide Area WorkFlow and that the contracting officer or the contracting officer's representative be allowed to inspect payroll data in order to validate contractor data entered into ECMRA.

*Response:* Agencies are responsible for ensuring the contractor submits information in SAM that is reasonable and consistent with available contract information. Agencies may use any contract data available, as appropriate and necessary, to meet this responsibility.

*Comment:* One respondent suggested that the rule be clearer about how the ECMRA will protect nonpublic data, such as direct labor hours and cost data.

*Response:* The use of ECMRA is no longer necessary.

*Comment:* One respondent requested clarification on the procedures to follow when the services under one contract support two or more DoD services or agencies.

*Response:* The proposed rule for DFARS Case 2018-D063 requires contractors to enter information in SAM, which is a single system able to collect all requisite data under this rule.

*Comment:* One respondent suggested that ECMRA should have a built-in capability for an overall point of contact at each agency level who can gather and manage the ECMRA information and that data be gathered at a centralized location.

*Response:* The use of ECMRA is no longer necessary. The proposed rule for DFARS Case 2018-D063 requires contractors to enter information in SAM, which is a Governmentwide system.

*Comment:* One respondent noted that it is unduly restrictive to allow only one contractor user per contract to view the data for that contract in ECMRA.

*Response:* The use of ECMRA is no longer necessary. The proposed rule for DFARS case 2018-D063 requires contractors to enter information in SAM.

*Comment:* One respondent suggested that the rule should clarify the contractor's responsibilities in the event that the Government-populated information in ECMRA is incorrect.

*Response:* The use of ECMRA is no longer necessary. The proposed rule for DFARS Case 2018-D063 requires contractors to enter information in SAM. Contractors may contact the SAM Helpdesk or the contracting officer in the event that data needs to be updated in SAM.

*Comment:* One respondent suggested that the requiring activity, and not the contracting officer, be responsible for verifying the contractor's ECMRA compliance is documented.

*Response:* In accordance with FAR 1.602-2, the contracting officer is responsible for ensuring compliance with the terms of the contract.

*Comment:* A respondent suggested that a DD Form 1423, Contract Data Requirements List, be included as a requirement in the rule.

*Response:* The proposed DFARS clauses convey the requirement for contractor reporting to SAM; therefore, a DD Form 1423 is not necessary.

#### *G. Proposed Clause Changes*

*Comment:* One respondent requested clarification regarding the prescription for the clause at DFARS 252.237-70XX with regard to indefinite-delivery, indefinite-quantity contracts. The respondent asked whether the clause must be included only if the expected dollar value of the individual task or delivery orders will exceed the SAT or if the total dollar value of all the task or delivery orders issued under the contract will exceed the SAT.

*Response:* The rule requires information reporting on each task order that meets the criteria and threshold for service contract reporting. The proposed rule for DFARS Case 2018-D063 does not require reporting at the contract level for indefinite-delivery contracts. The rule proposes a basic clause that applies to solicitations, contracts (other than indefinite-delivery contracts), and task orders awarded under non-DoD indefinite-delivery contracts; and an alternate clause that applies to DoD issued solicitations and contracts for indefinite-delivery type contracts. The basic clause and the alternate clause implement the reporting requirement for contracts and/or task orders that have a total estimated value, including options, exceeding \$3 million and are for services in the four specified service acquisition portfolio groups. The basic clause advises contractors to report on the effort performed under the contract or the task order awarded under a non-DoD contract. The alternate clause advises the contractor to report on the effort performed under each task order awarded under a DoD indefinite-delivery contract that meets the criteria and threshold for service contract reporting.

*Comment:* One respondent suggested that the rule include a link to the product service code (PSC) manual available at [www.acquisition.gov](http://www.acquisition.gov), to aid contracting personnel in determining the types of services to which the proposed rule applies or does not apply.

*Response:* The applicable PSCs will be identified in the DFARS

Procedures, Guidance, and Information upon publication of the final rule.

*Comment:* One respondent suggested that the rule require the contracting officer to prepare a determination designating specifically the services to which the ECMRA reporting requirement would apply.

*Response:* It is not necessary for the contracting officer to prepare such a determination or provide further clarification to the contractor. The proposed rule for DFARS Case 2018-D063 only applies the requirement to report in SAM, via the DFARS clause, to those contracts and orders that meet the thresholds and criteria for service contract reporting, as expressed in 10 U.S.C. 2330a.

#### *H. Definition Clarification*

*Comment:* One respondent noted that many terms, including "direct labor hours" and "cost data," are not defined in the proposed rule.

*Response:* This proposed rule only uses the term "direct labor hours," which is defined in FAR 2.101.

*Comment:* Two respondents recommended that the term "services" be better defined for the purposes of informing both the Government and contractor when the proposed rule for DFARS Case 2012-D051 applies and when the contractor is responsible for entering data into ECMRA.

*Response:* The proposed rule for DFARS Case 2018-D063 only applies the requirement to report in SAM, via the DFARS clause,

to those contracts and orders that meet or are expected to meet the thresholds and criteria for service contract reporting, as expressed in 10 U.S.C. 2330a. When awarded a contract, or task order placed under a non-DoD contract, this rule proposes a basic clause to notify contractors of the requirement to report in SAM on the effort performed under the award. When awarded an indefinite-delivery contract under which orders will be placed that may meet the thresholds and criteria for service contract reporting, this rule proposes an alternate clause to notify contractors of the requirement to report in SAM on the effort performed for a task order issued under the contract that meets the service contract reporting thresholds and criteria.

#### *I. Major Rule*

*Comment:* One respondent suggested that the Government reconsider whether this is a major rule. Title 5 U.S.C. 804 defines a major rule as one which the Office of Management and Budget (OMB) determines will cause a major increase in costs or prices for individual industries, or have a significant adverse effect on competition, employment, investment, productivity, or innovation. This rule imposes new reporting requirements, particularly for commercial item contractors that provide professional services and supplies. These contractors would not have been previously subject to the type of manpower reporting required by this rule. For small businesses, the need to build compliant procedures and automated systems could be a barrier to participating in the federal market. This is particularly the



case when the cumulative effect of multiple and duplicative data reporting requirements is considered. The ultimate result over time will be a decrease in competition and innovation in the Federal market.

*Response:* This rule is not a major rule in that it does not have a significant impact on competition, employment, investment, productivity, innovation, or on the ability of U.S. enterprises to compete with foreign enterprises. Similar reporting requirements for civilian agencies have appeared in FAR subpart 4.17 since 2014, so many contractors already have experience with this type of reporting requirement. The scope of this rule has been decreased, because 10 U.S.C. 2330a, as amended by section 812 of the NDAA for FY 2017, limits data collection to four service acquisition portfolios and applies only to contracts and task orders exceeding \$3 million in total estimated value, including options.

#### *J. Initial Regulatory Flexibility Analysis*

*Comment:* Two respondents stated that the proposed reporting system did not have a goal of minimizing the burden to small business and that the constant flow of new regulations to businesses have little regard for the benefit to the Government or burden on businesses.

*Response:* The burden applied to small businesses is the minimum consistent with applicable laws, Executive orders, regulations, and prudent business practices. The information collection requirement has been narrowly tailored to maximize

the use of existing records already maintained by contractors and by the Government. To further minimize the impact, DoD is adopting the existing system and process used by the rest of the Government to obtain the requisite information from contractors, which maintains a familiar and consistent reporting requirement for contractors; and the information is collected electronically, help-desk support and user guides are available for SAM, and reporting requirements will be limited to a small number of data elements to facilitate ease of reporting and reduce contractor burden. In addition, the NDAA for FY 2017 raised the threshold for reporting to \$3 million from the SAT and limited the data reporting to four service acquisition portfolio groups.

*K. Paperwork Reduction Act*

1. Government Systems Already in Place

*Comment:* Two respondents stated that the Government has systems in place for collecting the required data and the rule would require duplicative contractor reporting that is not necessary for compliance. Two respondents noted that there will be two rules, one for DoD and the other non-DoD, which could potentially apply under a single contract vehicle and that determining which set of rules apply will be burdensome.

*Response:* The rule will not require duplicative reporting by contractors. The DoD and non-DoD reporting requirements are based on separate statutes. Further, the information collection requirement associated with this DFARS Case 2018-D063, once

cleared by OMB, will supersede the reporting requirements approved under OMB Control Number 0704-0491, entitled "DoD Inventory of Contracts for Services Compliance." Contracts awarded by DoD, or on behalf of DoD, will contain the proposed DFARS clauses.

## 2. Paperwork Reduction Act Constraints

*Comment:* One respondent stated that the rule conflicts with Paperwork Reduction Act constraints on rulemaking, namely that the rule must: (1) Be necessary for the proper performance of the agency; (2) not be duplicative of information otherwise reasonably accessible to the agency; and (3) reduce, to the extent practicable and appropriate, the burden on persons who shall provide information to or for the agency.

*Response:* The rule complies with the Paperwork Reduction Act. The information collection is necessary in order for DoD to meet the requirement of 10 U.S.C. 2330a, as amended, to collect certain service contract data and report annually to Congress. The rule is not duplicative of information otherwise reasonably accessible to DoD. DoD systems do not currently collect all of the data elements required by the statute.

The information collection requirement has been narrowly tailored to minimize the impact of reporting and maximize the use of existing records already maintained by contractors and by the Government. To minimize the impact, the information will be collected electronically, help-desk support will be provided to users, and reporting requirements will be limited to a small

number of data elements.

### 3. Burden Estimates

*Comment:* Two respondents commented that the rule underestimates the number of contractors that will be impacted. One respondent indicated that the total estimated number of respondents of 13,269, including 7,962 for small businesses, seems low, since the GSA Schedules alone have 20,000 contractors and 80% of the contractors are small businesses. One respondent stated that the estimate for the total number of annual responses of approximately 54,000 appears low. In addition, several respondents commented that the estimate of an average of 1.4 hours per response is too low, citing reasons such as: (1) The billions of dollars in services for which DoD contracts for annually and the corresponding volume of data required to be entered, (2) the limitation of the ECMRA bulk upload capability, or (3) the impact on response time resulting from the flow down of the reporting requirement to subcontractors. One respondent stated that the burden is disproportionately high for small businesses that are less likely to have the necessary internal infrastructure.

*Response:* The estimated burdens for respondents and responses published in the previously proposed rule have been updated to reflect the revised requirements of 10 U.S.C. 2330a, as amended.

As a result, this final rule amends the DFARS to require contractors to annually report certain data on applicable contracts in order to meet the data requirements of the statute

and DoD's total workforce management efforts. Three respondents submitted public comments in response to this second proposed rule.

## **II. Discussion and Analysis**

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and 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.*

No significant changes were made to the rule as a result of public comments. Minor changes were made to clarify the intent of the rule in regard to the requirement to report subcontract data. Public comments requested clarification on whether the rule required contractors to report direct labor hours and costs for all subcontracts that support the contract or just those subcontracts awarded to directly perform services under the contract, otherwise referred to as "first-tier subcontracts" under the similar service contract inventory reporting requirements at Federal Acquisition Regulation (FAR) 4.17. The intent of the rule is to require contractors to report the direct labor hours only for subcontracts the contractor directly awarded for the purpose of acquiring services for performance of the prime contract, similar to the subcontract reporting requirement at FAR 4.17. As a result, the term "first-tier" was added as a modifier to the definition of "subcontract" and a definition of "first-tier subcontract" was added to section

204.1701 and DFARS clause 252.204-7023, Reporting Requirements for Contracted Services, and its alternate I.

*B. Analysis of Public Comments*

A discussion of the comments is provided as follows:

a. General Support

*Comment:* Two respondents expressed general support for the rule.

*Response:* DoD acknowledges support for the rule.

b. Exemptions to Rule

*Comment:* Two respondents recommended that commercial service contracts be exempt from the rule, as companies providing commercial services may not have a system to track labor hours by contract and/or by subcontractor and may need to implement a new system to comply with the rule. Alternately, a respondent recommended that specific contracts or certain types of commercial contracts be exempt from the reporting requirements for the rule.

*Response:* The statute requires DoD to collect data on specific service purchases in excess of \$3 million, regardless of contract type, and does not provide for exemptions to the reporting requirement. As a result, the rule applies to all contracts that meet the criteria at 10 U.S.C. 2330a(a) and does not provide for exemptions.

c. Usefulness of Data

*Comment:* A respondent advised that the rule weakens the utility of service contract inventories by limiting them to

staff augmentation contracts and contracts closely associated with inherently governmental functions, and preventing the adoption of the Enterprise-wide Contractor Manpower Reporting Application (ECMRA).

*Response:* The rule implements the statute and supports DoD total workforce management efforts by requiring reporting on contracts valued in excess of \$3 million for logistics management services, equipment-related services, knowledge-based services, or electronics and communications services. The rule does not further limit the reporting requirement to only those contracts that are also staff augmentation contracts or contracts for services closely associated with inherently governmental functions.

The rule also incorporates the policy of Secretary of Defense Memorandum, *Revised Department of Defense Contractor Manpower Reporting Initiative*, dated October 16, 2019, jointly signed by the Under Secretary of Defense (USD) for Acquisition and Sustainment and Acting USD for Personnel and Readiness. The memo requires reporting of manpower data relating to the performance of services be done in the System for Award Management (SAM), instead of ECMRA, in order to be consistent with the existing service contract reporting requirements of the FAR.

*Comment:* A respondent expressed concern that the rule only requires reporting on the aggregate labor hours performed under the contract annually and, because of this, DoD will not have

the detailed information it needs to determine whether contractors are performing inherently governmental functions.

*Response:* The rule requires the collection of data that supplements information already available to DoD. The rule assists in the evaluation of DoD's workforce mix and the extent to which the Department's needs are being met through contracted support. It is not necessary to distinguish between the contractor and subcontractor labor hours performed under a contract in order to meet the requirements of the statute or support DoD's total workforce management efforts.

*Comment:* A respondent expressed concern that the rule's collection of labor data cannot be meaningfully used by officials, as the annual reporting cycle will not produce the timely, relevant data needed to inform decision making.

*Response:* The rule implements the reporting cycle required by 10 U.S.C. 2330a. The statute requires DoD, by the end of the third quarter of each fiscal year, to prepare an annual inventory of the activities performed during the preceding fiscal year pursuant to staff augmentation contracts and contracts closely associated with inherently governmental functions. To support this requirement, the rule requires contractors to input contract data for the preceding fiscal year in SAM no later than October 31 of each fiscal year. The rule's October 31 deadline facilitates DoD's compilation and submission of the annual inventory and summary before the third quarter of each fiscal year, as required by 10 U.S.C. 2330a.



d. Difficulties Reporting Direct Labor Hour Data

*Comment:* Two respondents advised that the reporting requirement of the rule may be difficult to meet, because many commercial services are offered at a fixed price and are not broken down into direct labor hours, and subcontractors may consider the data sensitive or proprietary and be hesitant to provide it to contractors. A respondent advised that, as a result of these issues, the rule may create cost and competition implications for the supply chain because contractors may have to create and price contractual requirements to obtain the information from their subcontractors, and the number of available vendors may be restricted if they choose not to provide the data required by the rule.

As an alternative solution, two respondents recommended that the rule limit the collection of data to the list explicitly identified at 10 U.S.C. 2330a(b). Respondents suggested that DoD could apply the methodology used to determine military or civilian full-time equivalents to the data at 10 U.S.C. 2330a(b) in order to fulfill the inventory summary required by 10 U.S.C. 2330a(c).

*Response:* The statute requires that "the number of contractor employees, expressed as full-time equivalents for direct labor, using direct labor hours and associated cost data collected from contractors" be provided for each contract included in the annual inventory. This information is not included in the list of data at 10 U.S.C. 2330a(b).

While the Federal Procurement Data System provides DoD with a majority of the requisite data, DoD cannot meet all of the statutory data requirements of the inventory summary, or support the needs of DoD's total workforce management efforts, using only the data listed at 10 U.S.C. 2330a(b). Therefore, this rule requires contractors to provide direct labor hour and cost data to implement the statute and support DoD workforce planning and analysis.

To relieve burden and minimize impact for contractors and subcontractors, the rule requires contractors to report the total number of hours (both contractor and subcontractor) worked under the contract for the entire fiscal year and does not require a breakdown of those hours by employee type or by subcontractor.

e. Reporting of Subcontractor Data

*Comment:* A respondent recommended that the requirement to report subcontractor data be limited to first-tier subcontractors, which is consistent with the current FAR requirements for civilian agencies.

*Response:* Concur. To reduce burden on and maintain consistency for contractors, DoD intends for the reporting requirements and procedures of this rule to be as similar as possible to the existing service contract reporting requirements of the FAR. The intent of the rule is for contractors to report the total number of direct labor hours expended in performing the contracted services during the preceding fiscal year. The

total number of hours reported to SAM should represent a combined total of the number of direct labor hours the contractor itself expended performing the contracted services, and the total number of direct labor hours any of the contractor's subcontractors expended performing the contracted services. To clarify this intent, the rule is amended to replace the term "subcontract" with "first-tier subcontract," based on the definition at FAR 4.1701.

*Comment:* A respondent recommended the rule be revised to specifically authorize contractors to rely on the direct labor hour data received from subcontractors when reporting total labor hours annually in SAM.

*Response:* The rule simply requires the reporting of the direct labor hours expended on the contracted service for the preceding fiscal year. The rule does not prescribe or suggest a specific methodology that contractors must use to gather this data on its applicable subcontracts, or prescribe a reporting requirement for subcontractors via the flow-down of the contract clause. Therefore, an amendment to the rule to authorize a specific methodology for gathering the data is not necessary.

### **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 apply the requirements of 10 U.S.C. 2330a, as amended by section 812 of the NDAA for FY 2017, to contracts at or below the simplified acquisition threshold (SAT) or for

commercially available off-the-shelf items (COTS) items, but does apply the rule to contracts for the acquisition of commercial items.

*A. Background*

Section 812 of the NDAA for FY 2017 is silent on applicability to contracts and subcontracts in amounts no greater than the SAT or for the acquisition of commercial items. 10 U.S.C. 2330a(a), as amended by section 812 of the NDAA for FY 2017, only requires the collection of data on service contracts, under certain portfolio groups, that exceed \$3 million, which effectively precludes application to acquisitions under the SAT. Also, the statute does not provide for civil or criminal penalties. Therefore, the statute does not apply to contracts or subcontracts in amounts not greater than the SAT or to the acquisition of commercial items unless the Principal Director, Defense Pricing and Contracting, makes a written determination as provided in 41 U.S.C. 1905 and 10 U.S.C. 2375.

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

10 U.S.C. 2375 exempts contracts and subcontracts for the acquisition of commercial items, including COTS items, from provisions of law enacted after October 13, 1994, that, as determined by the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)), set forth policies, procedures, requirements, or restrictions for the acquisition of property or services unless—

- The provision of law—
  - Provides for criminal or civil penalties;
  - Requires that certain articles be bought from American sources pursuant to 10 U.S.C. 2533a or that strategic materials critical to national security be bought from American sources pursuant to 10 U.S.C. 2533b;
  - Specifically refers to 10 U.S.C. 2375 and states that it shall apply to contracts and subcontracts for the acquisition of commercial items (including COTS items); or
  - USD(A&S) determines in writing that it would not be in the best interest of the Government to exempt contracts or subcontracts for the acquisition of commercial items from the applicability of the provision.

This authority has been delegated to the Principal Director, Defense Pricing and Contracting.

Consistent with 10 U.S.C. 2375, DoD has determined that it is in the best interest of the United States to apply the requirements of 10 U.S.C. 2330a to the acquisition of commercial items, excluding COTS items. The intent of the statute is to enhance DoD's ability to manage the total force, inclusive of military, civilian, and contractor personnel. Specifically, section 2330a, as amended, requires the military departments and defense agencies to ensure that the inventory of contracts for services required by the statute is used to inform

strategic workforce planning decisions under 10 U.S.C. 129a and develop budget justification materials for services in accordance with 10 U.S.C. 235. An exception for services that meet the definition of a commercial item would exclude significant sums expended by DoD on contracted services intended to be covered by the law, thereby undermining the overarching public policy purpose of the law. Therefore, this rule will apply to the acquisition of commercial items, excluding 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.

#### **V. Congressional Review Act**

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of

Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804(2).

## **VI. 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:

The objective of this rule is to implement 10 U.S.C. 2330a, as modified by section 812 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328), which requires DoD to establish a data collection system that provides management information on each purchase of services by a military department or defense agency in excess of \$3 million for the following service acquisition portfolio groups: logistics management services; equipment-related services; knowledge-based services; and electronics and communications services.

As a result, DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to require contractors to annually report certain data on applicable contracts in order to meet the data requirements of the statute and DoD's total workforce management efforts. No public comments were received in

response to the initial regulatory flexibility analysis.

Based on data from the Federal Procurement Data System for FY 2016 through 2018, DoD awards annually an average of 4,386 service contracts and orders to 1,934 unique entities that have an estimated value greater than \$3 million and are within the four portfolio groups outlined in the rule. Of the 4,386 contracts and orders awarded annually, approximately 2,059 (47 percent) are made to 1,227 (63 percent) unique small entities.

This rule requires all contractors that are awarded a contract or order in excess of \$3 million for services in any of the four service acquisition portfolio groups to report contract data in the System for Award Management (SAM). The contractor is required to report the total amount invoiced for services performed during the preceding fiscal year and the number of direct labor hours, including first-tier subcontractor hours, expended on services performed during the preceding fiscal year. The Government estimates that a journeyman level contractor employee with basic knowledge of the contract would be required to enter the data. The contractor employee may also need to gather additional billing information from the organization in order to complete the data input in SAM.

While this rule does not impose a significant economic impact on small entities, DoD has taken steps to minimize the impact of the rule on both small and large entities. Specifically, DoD now requires reporting under the rule to be done in SAM, instead of the Enterprise-wide Contractor Manpower Reporting Application



(ECMRA). This change permits contractors to report fewer data elements under the rule and implements a data collection system that is familiar to contractors under the existing service contract reporting requirements of the Federal Acquisition Regulation.

## **VII. Paperwork Reduction Act**

This rule contains information collection requirements that have been approved by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). This information collection requirement has been assigned OMB Control Number 0704-0519, entitled "Defense Federal Acquisition Supplement (DFARS); Subpart 204.17, Service Contracts Inventory, and Associated Clause."

### **List of Subjects in 48 CFR Parts 204, 212, and 252**

Government procurement.

**Jennifer D. Johnson,**

*Regulatory Control Officer, Defense Acquisition Regulations System.*

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

1. The authority citation for parts 204, 212, and 252 continues to read as follows:

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

### **PART 204—ADMINISTRATION AND INFORMATION MATTERS**

2. Add subpart 204.17, consisting of 204.1700, 204.1701, 204.1703, and 204.1705, to read as follows:

## **SUBPART 204.17—SERVICE CONTRACTS INVENTORY**

Sec.

- 204.1700 Scope of subpart.
- 204.1701 Definitions.
- 204.1703 Reporting Requirements.
- 204.1705 Contract clauses.

## **SUBPART 204.17—SERVICE CONTRACTS INVENTORY**

### **204.1700 Scope of subpart.**

This subpart prescribes the requirement to report certain contracted services in accordance with 10 U.S.C. 2330a.

### **204.1701 Definitions.**

As used in this subpart—

*First-tier subcontract* means a subcontract awarded directly by the contractor for the purpose of acquiring services for performance of a prime contract. It does not include the contractor's supplier agreements with vendors, such as long-term arrangements for materials or supplies or services that benefit multiple contracts and/or the costs of which are normally applied to a contractor's general and administrative expenses or indirect costs.

### **204.1703 Reporting requirements.**

(a) *Thresholds.* Service contractor reporting of information is required in the System for Award Management (SAM) when a contract or order—

(i) Has a total estimated value, including options, that exceeds \$3 million; and

(ii) Is for services in the following service acquisition portfolio groups (see PGI 204.1703 for a list of applicable

product and service codes):

- (A) Logistics management services.
- (B) Equipment-related services.
- (C) Knowledge-based services.
- (D) Electronics and communications services.

(b) *Agency reporting responsibilities.* In the event the agency believes that revisions to the contractor-reported information are warranted, the agency shall notify the contractor.

(S-70) *Contractor reporting.* (1) The basic and the alternate of the clause at 252.204-7023, Reporting Requirements for Contracted Services, require contractors to report annually, by October 31, on the services performed under the contract or order, including any first-tier subcontracts, during the preceding Government fiscal year.

(2) For indefinite-delivery contracts, basic ordering agreements, and blanket purchase agreements—

(i) Contractor reporting is required for each order issued under the contract or agreement that meets the requirements of paragraph (a) of this section; and

(ii) Service contract reporting is not required for the basic contract or agreement.

**204.1705 Contract clauses.**

(a) (i) Use the basic or the alternate of the clause 252.204-7023, Reporting Requirements for Contracted Services, in solicitations, contracts, agreements, and orders, including

solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that-

(A) Have a total estimated value, including options, that exceeds \$3 million; and

(B) Are for services in the following service acquisition portfolio groups:

(1) Logistics management services.

(2) Equipment-related services.

(3) Knowledge-based services.

(4) Electronics and communications services.

(ii) Use the basic clause in solicitations and contracts, except solicitations and resultant awards of indefinite-delivery contracts, and orders placed under non-DoD contracts that meet the criteria in paragraph (a)(i) of this section.

(iii) Use the alternate I clause in solicitations and resultant awards of indefinite-delivery contracts, basic ordering agreements, and blanket purchase agreements, when one or more of the orders under the contract or agreement are expected to meet the criteria in paragraph (a)(i) of this section.

#### **PART 212-ACQUISITION OF COMMERCIAL ITEMS**

3. Amend section 212.301 by adding paragraph (f)(ii)(N) to read as follows:

\* \* \* \* \*

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

\* \* \* \* \*

(f) \* \* \*

(ii) \* \* \*

(N) Use the clause at 252.204-7023, Reporting Requirements for Contracted Services, to comply with 10 U.S.C. 2330a.

(1) Use the basic clause as prescribed in 204.1705(a) (i) and (ii).

(2) Use the alternate I clause as prescribed in 204.1705(a) (i) and (iii).

\* \* \* \* \*

**Part 252-Solicitation Provisions and Contract Clauses**

4. Add section 252.204-7023 to read as follows:

**252.204-7023 Reporting Requirements for Contracted Services.**

*Basic.* As prescribed in 204.1705(a) (i) and (ii), use the following clause:

**REPORTING REQUIREMENTS FOR CONTRACTED SERVICES-BASIC (JUL 2021)**

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

*First-tier subcontract* means a subcontract awarded directly by the contractor for the purpose of acquiring services for performance of a prime contract. It does not include the contractor's supplier agreements with vendors, such as long-term arrangements for materials or supplies or services that benefit multiple contracts and/or the costs of which are normally applied to a contractor's general and administrative expenses or indirect costs.

(b) The Contractor shall report annually, by October 31, at <https://www.sam.gov>, on the services performed under this contract or order, including any first-tier subcontracts, during the preceding Government fiscal year (October 1 - September 30).

(c) The Contractor shall report the following information for the contract or order:

(1) The total dollar amount invoiced for services performed during the preceding Government fiscal year under the contract or order.

(2) The number of Contractor direct labor hours, to include first-tier subcontractor direct labor hours, as applicable, expended on the services performed under the contract or order during the previous Government fiscal year.

(d) The Government will review the Contractor's reported information for reasonableness and consistency with available contract information. In the event the Government believes that revisions to the Contractor's reported information are warranted, the Government will notify the Contractor. Upon notification, the Contractor shall revise the reported information or provide the Government with a supporting rationale for the information.

(End of clause)

*Alternate I.* As prescribed in 204.1705 (a) (i) and (iii), use the following clause, which substitutes "contract or agreement for each order" in lieu of "contract or order" in paragraph (b) and "order" in lieu of "contract or order" in paragraphs (c) and

(c) (1) and (2), and identifies the dollar threshold and service acquisition portfolio groups for which orders under the contract or agreement require service contract reporting.

**REPORTING REQUIREMENTS FOR CONTRACTED SERVICES—ALTERNATE I (JUL 2021)**

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

*First-tier subcontract* means a subcontract awarded directly by the contractor for the purpose of acquiring services for performance of a prime contract. It does not include the contractor's supplier agreements with vendors, such as long-term arrangements for materials or supplies or services that benefit multiple contracts and/or the costs of which are normally applied to a contractor's general and administrative expenses or indirect costs.

(b) The contractor shall report annually, by October 31, at <https://www.sam.gov>, on services performed during the preceding Government fiscal year (October 1 - September 30) under this contract or agreement for each order, including any first-tier subcontract, which exceeds \$3 million for services in the following service acquisition portfolio groups:

- (1) Logistics management services.
- (2) Equipment-related services.
- (3) Knowledge-based services.
- (4) Electronics and communications services.

(c) The Contractor shall report the following information for the order:

(1) The total dollar amount invoiced for services performed during the preceding Government fiscal year under the order.

(2) The number of Contractor direct labor hours, to include first-tier subcontractor direct labor hours, as applicable, expended on the services performed under the order during the previous Government fiscal year.

(d) The Government will review the Contractor's reported information for reasonableness and consistency with available contract information. In the event the Government believes that revisions to the Contractor's reported information are warranted, the Government will notify the Contractor. Upon notification, the Contractor shall revise the reported information or provide the Government with a supporting rationale for the information.

(End of clause)