



**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Part 204**

**[Docket DARS-2021-0017]**

**RIN 0750-AL48**

**Defense Federal Acquisition Regulation Supplement: Contract**

**Closeout Authority for DoD Services Contracts (DFARS Case 2021-D012)**

**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 implement a section of the National Defense Authorization Act for Fiscal Year 2021.

**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 2021-D012, using any of the following methods:

- o *Federal eRulemaking Portal:* <https://www.regulations.gov>. Search for "DFARS Case 2021-D012." Select "Comment" and follow the instructions to submit a comment. Please include your name, company name (if any), and "DFARS Case 2021-D012" on any attached document.

o *Email: osd.dfars@mail.mil.* Include DFARS Case 2021-D012 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

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

**SUPPLEMENTARY INFORMATION:**

**I. Background**

This rule proposes to amend DFARS subpart 204.8 to implement section 820 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116-283). Section 820 amends section 836(b) of the NDAA for FY 2017 (Pub. L. 114-328), as modified by section 824 of the NDAA for FY 2018 (Pub. L. 115-91). Section 836 authorizes DoD contracting officers to close out certain physically complete contracts or groups of contracts through modification of such contracts, without completing the requirements of Federal Acquisition Regulation (FAR) 4.804-5(a)(3) through (15) based upon the age of the contract action.

DoD published a final rule at 84 FR 18153 on April 30, 2019, to implement sections 836 of the NDAA for FY 2017 and 824 of the NDAA for FY 2018. The final rule provided similar authorities for contracts meeting certain criteria that were entered into on

a date that was at least 17 fiscal years prior to the current fiscal year.

## **II. Discussion and Analysis.**

Section 820 expands the application of the expedited contract closeout authority of section 836 of the NDAA for FY 2017, implemented at DFARS 204.804(3)(i)(A), to certain contracts or groups of contracts that were awarded at least 7 or 10 fiscal years before the current fiscal year and have completed performance or delivery at least four years prior to the current fiscal year.

DFARS 204.804(3)(i)(A) currently provides a blanket application of the 17 fiscal year standard, when certain requirements at 204.804(3)(i)(B) and (C) are met. Section 820 provides two new standards, one of which provides a similar blanket application, but the number of fiscal years is reduced from 17 to 7. The second standard of at least 10 fiscal years only applies to contracts or groups of contracts for military construction, as defined in 10 U.S.C. 2801, or shipbuilding. Both new standards require physical completion (see FAR 4.804-4) at least four years prior to the current fiscal year.

## **III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items**

This proposed rule does not create any new solicitation provisions or contract clauses. It does not impact any existing solicitation provisions or contract clauses or their

applicability to contracts valued at or below the simplified acquisition threshold or for commercial items, including COTS items.

#### **IV. Expected Impact of the Rule**

DFARS 204.804(3)(i) currently provides for the expedited closeout of contracts or groups of contracts without completion of a reconciliation audit or other corrective actions required by FAR 4.804-5(a)(3) through (15) if certain criteria are met. If a contract was entered into at least 17 years prior to the current fiscal year, is physically complete, and has been determined not reconcilable, the contracting officer may close the contract through a negotiated settlement.

This rule reduces the age requirement from 17 years to 10 years for military construction and shipbuilding and 7 years for all other contract actions. The rule adds a new requirement that these contracts must be physically complete at least four years prior to the current fiscal year.

The expanded authority will apply to more recent contracts, subject to the other criteria in DFARS 204.804(3)(i), to reduce the current backlog and administration requirements for contracts eligible for closeout.

#### **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 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.

#### **VI. 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**. This rule is not anticipated to be a major rule under 5 U.S.C. 804.

#### **VII. 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 this rule implements requirements primarily for the Government. 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 (DFARS) to implement section 820 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116-283). Section 820 expands the application of the expedited contract closeout authority of section 836 of the NDAA for FY 2017, implemented at DFARS 204.804(3)(i)(A), to certain contracts or groups of contracts that were awarded at least 7 to 10 FYs before the current FY and have completed performance or delivery at least four years prior to the current FY. The new 10-year standard will apply to contracts or groups of contracts for military construction, as defined in 10 U.S.C. 2801, or shipbuilding, while the 7-year standard will apply to all other contracts.

The objective of the rule is to implement the requirements of section 820, which expands the application of the expedited contract closeout authority of section 836 of the NDAA for FY 2017 to more recent, physically complete contracts. The legal basis of the rule is section 820 of the NDAA for FY 2021.

This rule will likely affect small entities that have been or will be awarded DoD contracts, including those under FAR part 12 procedures for the acquisition of commercial items, including commercially available off-the-shelf items. Data was obtained from the Electronic Data Access module of the Procurement Integrated Enterprise Environment for contracts that were physically completed at least four years ago and are eligible for closeout between the new standard of 7 or 10 years and the

previous standard of at least 17 fiscal years after award. The data were then compared to the Federal Procurement Data System (FPDS) to estimate the number of contracts awarded to small entities. Contracts subject to the previous standard of 17 years are included in this estimate.

As of April 2021, the FPDS data indicate that approximately 29,200 contracts, eligible for expedited closeout under the 7-year standard, were awarded to an estimated 4,490 unique small entities. An additional estimated 1,775 contracts, subject to the 10-year standard, were awarded to approximately 576 small entities. As a result, DoD estimates that approximately 5,066 small entities will have the opportunity to benefit from the expanded expedited contract authorities provided in this rule.

The rule does not impose any new reporting, recordkeeping, or compliance requirements.

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 invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

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 2021-D012), in correspondence.

### **VIII. Paperwork Reduction Act**

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### **List of Subjects in 48 CFR Part 204**

Government procurement.

**Jennifer D. Johnson,**

*Editor/Publisher, Defense Acquisition Regulations System.*

Therefore, 48 CFR part 204 is proposed to be amended as follows:

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

1. The authority citation for 48 CFR part 204 continues to read as follows:

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

2. Amend section 204.804 by revising paragraph (3)(i) to read as follows:

#### **204.804 Closeout of contract files.**

\* \* \* \* \*

(3)(i) In accordance with section 836 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328), section 824 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91), and section 820 of the National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116-



283), contracting officers may close out contracts or groups of contracts through issuance of one or more modifications to such contracts without completing a reconciliation audit or other corrective action in accordance with FAR 4.804-5(a)(3) through (15), as appropriate, if each contract—

(A)(1) For military construction (as defined at 10 U.S.C. 2801) or shipbuilding, was awarded at least 10 fiscal years before the current fiscal year; or

(2) For all other contracts, was awarded at least 7 fiscal years before the current fiscal year;

(B) The performance or delivery was completed at least 4 years prior to the current fiscal year; and

(C) Has been determined by a contracting official, at least one level above the contracting officer, to be not otherwise reconcilable, because—

(1) The contract or related payment records have been destroyed or lost; or

(2) Although contract or related payment records are available, the time or effort required to establish the exact amount owed to the U.S. Government or amount owed to the contractor is disproportionate to the amount at issue.

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