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 [FR Doc. 2019-11179 Filed 5-30-19; 8:45 am]
 BILLING CODE 6560-50-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 201, 209, and 252

[Docket DARS-2018-0059]

RIN 0750-AJ85

Defense Federal Acquisition Regulation Supplement: Applicability of Inflation Adjustment of Acquisition-Related Thresholds (DFARS Case 2018-D023)

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2018 to require that inflation adjustments of statutory acquisition-related thresholds under 41 U.S.C. 1908 apply to existing contracts and subcontracts in effect on the date of the adjustment that contain the adjusted clauses.

DATES: Effective May 31, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Heather Kitchens, telephone 571-372-6104.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the *Federal Register* at 83 FR 65618 on December 21, 2018, to revise the DFARS to implement section 821 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91). Section 821 amends 41 U.S.C. 1908(d) to require inflation adjustments of statutory acquisition-related thresholds under 41 U.S.C. 1908 apply to existing contracts and subcontracts in effect on the date of the adjustment. Section 821 adds the words “and shall apply, in the case of the procurement of property or services by contract, to a contract, and any subcontract at any tier under the contract, in effect on that date without regard to the date of award of the contract or subcontract” at the end of 41 U.S.C. 1908(d).

41 U.S.C. 1908, Inflation adjustment of acquisition-related dollar thresholds, requires an adjustment every five years of acquisition-related thresholds for inflation using the Consumer Price Index for All Urban Consumers (CPI-U), except for the Construction Wage Rate Requirements statute (formerly known as the Davis-Bacon Act), Service Contract Labor Standards statute (formerly known as the Service Contract Act), and trade agreements thresholds.

There were no public comments submitted in response to the proposed rule. There are no changes made to the final rule except for conforming changes to the current version of the DFARS.

II. 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 create any new provisions or clauses or impact any existing provisions or clauses, except for moving dollar values of thresholds in the stated clauses to DFARS text locations and adding references to the DFARS text locations in these clauses.

III. Executive Orders 12866 and 13563

Executive Order (E.O.s) 12866, Regulatory Planning and Review; and E.O. 13563, Improving Regulation and Regulatory Review, 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 is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This final rule is not an E.O. 13771 regulatory action, because this rule is not significant under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this final 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.* However, a final regulatory flexibility analysis has been performed and is summarized as follows:

DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 821 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018. Section 821 amends 41 U.S.C. 1908(d) by including a statement that the inflation adjusted acquisition-related dollar thresholds apply to existing contracts and subcontracts in effect on the date of the adjustment.

There were no comments made by the public in response to the initial regulatory flexibility analysis.

This rule will likely affect, to some extent, all small business concerns that submit offers or are awarded contracts by the Federal Government. For Fiscal Year 2017, there were 106,438 unique vendors in the Federal Procurement Data System (FPDS) identified as small business concerns.

This rule is not expected to have any significant economic impact on small business concerns, because this rule: (1) Is not creating any new requirements with which small entities must comply, and (2) is only establishing the framework to apply the inflation adjustments of statutory acquisition-related thresholds under 41 U.S.C. 1908 to existing contracts and subcontracts in effect on the date of the adjustment. The rule will have minimal impact on small businesses when responding to solicitations where an inflation-adjusted threshold applies. Any impacts of this rule will have a positive impact on small business entities.

The next inflation adjustment to the thresholds will be implemented through a future DFARS rule. The inflation adjustments are intended to maintain the status quo by adjusting for changes in the value of the dollar. Often any impact on small business concerns will be beneficial by preventing burdensome requirements from applying to small dollar value acquisitions, which are the acquisitions for which small business concerns are most likely to participate.

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

There are no known significant alternative approaches to the proposed rule that would meet the requirements of the applicable statute.

VI. Paperwork Reduction Act

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

List of Subjects in 48 CFR Parts 201, 209, and 252

Government procurement.

Jennifer Lee Hawes,
Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 201, 209, and 252 are amended as follows:

- 1. The authority citation for parts 201, 209, and 252 continues to read as follows:

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

PART 201—FEDERAL ACQUISITION REGULATIONS SYSTEM

- 2. Amend section 201.109 by—
 - a. Redesignating paragraph (a) as paragraph (a)(ii); and
 - b. Adding a new paragraph (a)(i).
 The addition reads as follows:

201.109 Statutory acquisition-related dollar thresholds—adjustment for inflation.

(a)(i) 41 U.S.C. 1908(d) requires the adjustment for inflation of all statutory acquisition-related dollar thresholds in the DFARS be applied to contracts and subcontracts without regard to the date of award of the contract or subcontract, except thresholds based on the Wage Rate Requirements statute, the Service Contract Labor Standards statute, or established by the United States Trade Representative pursuant to the Trade Agreement Act, which are not escalated by the statute.

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PART 209—CONTRACTOR QUALIFICATION

- 3. Amend section 209.571–1 by revising the definitions of “Lead system integrator” and “Major subcontractor” to read as follows:

209.571–1 Definitions.

* * * * *

Lead system integrator includes *lead system integrator with system responsibility* and *lead system integrator without system responsibility*.

(i) *Lead system integrator with system responsibility* means a prime contractor for the development or production of a major system, if the prime contractor is not expected at the time of award to perform a substantial portion of the work on the system and the major subsystems.

(ii) *Lead system integrator without system responsibility* means a prime contractor under a contract for the procurement of services, the primary purpose of which is to perform acquisition functions closely associated

with inherently governmental functions (see section 7.503(d) of the Federal Acquisition Regulation) with respect to the development or production of a major system.

Major subcontractor means a subcontractor that is awarded a subcontract that equals or exceeds—

- (i) Both the certified cost or pricing data threshold and 10 percent of the value of the contract under which the subcontract is awarded; or
- (ii) \$55 million.

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PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 4. Amend section 252.203–7004 by—
 - a. Removing the clause date of “(OCT 2016)” and adding “(MAY 2019)” in its place; and
 - b. Revising paragraphs (a) and (d).
 The revisions read as follows:

252.203–7004 Display of Hotline Posters.

* * * * *

(a) *Definition.* As used in this clause—
United States means the 50 States, the District of Columbia, and outlying areas.

(d) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (d), in all subcontracts that exceed the threshold specified in Defense Federal Acquisition Regulation Supplement 203.1004(b)(2)(ii) on the date of subcontract award, except when the subcontract is for the acquisition of a commercial item.

* * * * *

252.209–7004 [Amended]

- 5. Amend section 252.209–7004 by—
 - a. Removing the clause date of “(OCT 2015)” and adding “(MAY 2019)” in its place;
 - b. In paragraph (a), removing “\$35,000” and adding “the threshold specified in Federal Acquisition Regulation 9.405–2(b) on the date of subcontract award” in its place.
- 6. Amend section 252.209–7009 by—
 - a. Removing the clause date of “(OCT 2015)” and adding “(MAY 2019)” in its place; and
 - b. Revising paragraph (a).
 The revision reads as follows:

252.209–7009 Organizational Conflict of Interest—Major Defense Acquisition Program.

* * * * *

(a) *Definition.* As used in this clause—
Major subcontractor means a subcontractor that is awarded a subcontract that equals or exceeds—

(1) Both the certified cost or pricing data threshold and 10 percent of the value of the contract under which the subcontract is awarded; or

(2) The threshold specified in the definition of “major subcontractor” at Defense Federal Acquisition Regulation Supplement 209.571–1 on the date of subcontract award.

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- 7. Amend section 252.219–7003 by—
 - a. Removing the clause date of “(DEC 2018)” and adding “(MAY 2019)” in its place;
 - b. Revising paragraphs (a) and (g); and
 - c. In Alternate I—
 - i. Removing the clause date of “(DEC 2018)” and adding “(MAY 2019)” in its place; and
 - ii. Revising paragraphs (a) and (g).
 The revisions read as follows:

252.219–7003 Small Business Subcontracting Plan (DoD Contracts)

* * * * *

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

* * * * *

(g) Include the clause at Defense Federal Acquisition Regulation Supplement (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.

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

* * * * *

(g) Include the clause at Defense Federal Acquisition Regulation Supplement (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.

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- 8. Amend section 252.219-7004 by—
Revising the section heading;
■ a. Removing the clause date of “(APR 2018)” and adding “(MAY 2019)” in its place;
■ b. Revising paragraph (g) introductory text.
■ c. In paragraph (g)(1), removing “252.219-7003” and adding “Defense Federal Acquisition Regulation Supplement (DFARS) 252.219-7003” in its place;
■ d. In paragraph (g)(2), removing “252.219-7003” and adding “DFARS 252.219-7003” in its place; and
■ e. In paragraph (g)(3), removing “252.219-7004” and adding “DFARS 252.219-7004” in its place.

The revisions read as follows:

252.219-7004 Small Business Subcontracting Plan (Test Program).

* * * * *

(g) Subcontracts. The Contractor shall include in subcontracts that offer subcontracting opportunities, are expected to exceed the applicable threshold specified in FAR 19.702(a) on the date of subcontract award, and are required to include the clause at FAR 52.219-8, Utilization of Small Business Concerns, the clauses at—

* * * * *

- 9. Amend section 252.225-7004 by—
■ a. Removing the clause date of “(OCT 2015)” and adding “(MAY 2019)” in its place;
■ b. Revising paragraphs (a) and (b)(1).
The revisions read as follows:

252.225-7004 Report of Intended Performance Outside the United States and Canada—Submission after Award.

* * * * *

(a) Definition. As used in this clause— United States means the 50 States, the District of Columbia, and outlying areas.

(b) * * *

(1) Exceeds the threshold specified in Defense Federal Acquisition Regulation Supplement 225.870-4(c)(2)(i)(A)(1) on the date of award of this contract; and

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- 10. Amend section 252.249-7002 by—
■ a. Revising the section heading;
■ b. Removing the clause date of “(OCT 2015)” and adding “(MAY 2019)” in its place;
■ c. Revising paragraph (a); and
■ d. Revising paragraphs (d)(1) and (d)(2).

The revisions read as follows:

252.249-7002 Notification of Anticipated Contract Termination or Reduction.

* * * * *

(a) Definition. As used in this clause— Major defense program means a program that is carried out to produce or acquire a major system (as defined in 10 U.S.C. 2302(5)).

* * * * *

(d) * * *

(1) Provide notice of the anticipated termination or reduction to each first-tier subcontractor with a subcontract that equals or exceeds the threshold specified in Defense Federal Acquisition Regulation Supplement (DFARS) 225.870-4(c)(2)(i)(A)(1) at the time of the notice; and

(2) Require that each such subcontractor—

(i) Provide notice to each of its subcontractors with a subcontract that equals or exceeds the threshold specified in DFARS 225.870-4(c)(2)(i)(C) at the time of the notice; and

(ii) Impose a similar notice and flowdown requirement to subcontractors with subcontracts that equal or exceed the threshold specified in DFARS 225.870-4(c)(2)(i)(C) at the time of the notice.

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[FR Doc. 2019-11308 Filed 5-30-19; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204, 212, 225, and 252

[Docket DARS-2018-0060]

RIN 0750-AJ82

Defense Federal Acquisition Regulation Supplement: Foreign Commercial Satellite Services and Certain Items on the Commerce Control List (DFARS Case 2018-D020)

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

ACTION: Final rule.

SUMMARY: DoD has adopted as final, without change, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Act for Fiscal Years 2017 and 2018. One section imposes additional prohibitions with regard to acquisition of certain foreign

commercial satellite services, such as cybersecurity risk and source of satellites and launch vehicles used to provide the foreign commercial satellite services, and expands the definition of “covered foreign country” to include Russia. Another section prohibits purchase of items originating in the People’s Republic of China that meet the definition of goods and services controlled as munitions items when moved to the Commerce Control List of the Export Administration Regulations of the Department of Commerce.

DATES: Effective May 31, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule in the Federal Register at 83 FR 66066 on December 21, 2018, to implement section 1603 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91) and section 1296 of the NDAA for FY 2017 (Pub. L. 114-328). Section 1603 amends 10 U.S.C. 2279 to impose additional prohibitions with regard to acquisition of certain foreign commercial satellite services, such as cybersecurity risk and source of satellites and launch vehicles used to provide the foreign commercial satellite services. Section 1603 also expands the definition of “Covered foreign country” to include Russia. Section 1296 prohibits purchase of items from a Communist Chinese military company. One respondent submitted a public comment in response to the interim rule.

II. Discussion and Analysis

DoD reviewed the public comment received. It was favorable to implementation of the rule. No changes from the interim rule are made in the final rule.

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

A. The Interim Rule Amended the Applicability of Existing DFARS Solicitation Provisions and Contract Clauses and Added a New Clause as Follows

- To implement section 1603 of the NDAA for FY 2018, this rule amended the provision at DFARS 252.225-7049, Prohibition on Acquisition of Commercial Satellite Services from Certain Foreign Entities—Representation, and added a clause to