

U.S.C. 601, *et seq.* The FRFA is summarized as follows:

The Department of Defense is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to modify the text of DFARS clause 252.204-7002, Payment for Subline Items Not Separately Priced, to simplify and conform the clause text to current Government contract line item structure terminology.

The objective of this rule is to clarify the intent of the clause for contractors, when submitting invoices under contracts that contain items that are not separately priced. The modification of this DFARS clause supports a recommendation from the DoD Regulatory Reform Task Force. No public comments were received in response to the initial regulatory flexibility analysis.

Based on an average of data for fiscal year 2016 through 2018 from the Federal Procurement Data System and Electronic Document Access, DoD awards approximately 12,435 contracts annually that includes the DFARS clause 252.204-7002. Of the 12,435 awards, approximately 4,924 contracts (40%) are awarded to 1,564 unique small business entities. Based on the available data and the objective of the rule, DoD does not anticipate that this proposed rule will significantly impact small business entities. This rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. This rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known significant alternative approaches to the rule that would meet the stated objectives.

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 204 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

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

■ 1. The authority citation for 48 CFR parts 204 and 252 continues to read as follows:

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

PART 204—ADMINISTRATIVE AND INFORMATION MATTERS

- 2. Amend section 204.7104-1:
 - a. In paragraph (b)(3)(iii), by removing “subsection” and adding “section” in its place; and
 - b. By revising paragraph (b)(3)(iv). The revision reads as follows:

204.7104-1 Criteria for establishing.

* * * * *

(b) * * *

(3) * * *

(iv) When the price for items not separately priced is included in the price of another contract line or subline item, it may be necessary to withhold payment on the priced contract line or subline item until the included line or subline items that are not separately priced have been delivered. See the clause at 252.204-7002, Payment for Contract Line or Subline Items Not Separately Priced.

- 3. Revise section 204.7109 to read as follows:

204.7109 Contract clauses.

(a) Use the clause at 252.204-7002, Payment for Contract Line or Subline Items Not Separately Priced, in solicitations and contracts when the price for items not separately priced is included in the price of another contract line or subline item.

(b) Use the clause at 252.204-7006, Billing Instructions, in solicitations and contracts if Section G includes—

(1) Any of the standard payment instructions at PGI 204.7108(b)(2); or

(2) Other payment instructions, in accordance with PGI 204.7108(d)(12), that require contractor identification of the contract line item(s) on the payment request.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 4. Revise section 252.204-7002 to read as follows:

252.204-7002 Payment for Contract Line or Subline Items Not Separately Priced.

As prescribed in 204.7109(a), use the following clause:

Payment for Contract Line or Subline Items Not Separately Priced (APR 2020)

(a) If the schedule in this contract contains any contract line or subline items identified as not separately priced (NSP), it means that the unit price for the NSP line or subline item is included in the unit price of another, related line or subline item.

(b) The Contractor shall not invoice the Government for an item that includes in its price an NSP item until—

- (1) The Contractor has also delivered the NSP item included in the price of the item being invoiced; and
- (2) The Government has accepted the NSP item.
- (c) This clause does not apply to technical data.

(End of clause)

252.204-7006 [Amended]

- 5. Amend section 252.204-7006 introductory text by removing “204.7109” and adding “204.7109(b)” in its place.

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 232, and 252

[Docket DARS-2019-0025]

RIN 0750-AK25

Defense Federal Acquisition Regulation Supplement: Prompt Payments of Small Business Contractors (DFARS Case 2018-D068)

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2019 that provides for accelerated payments to small business contractors and subcontractors.

DATES: Effective April 8, 2020.

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

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 84 FR 25225 on May 31, 2019, to implement section 852 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232). Section 852 provides for accelerated payments to DoD contractors that are small businesses and to small business subcontractors by accelerating payments to their prime contractors. Thirteen respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

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

discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule

This final rule adds a definition of “accelerated payment” to the clause at DFARS 252.232–7017, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration. The definition specifies that accelerated payments are made as quickly as possible, with a goal of 15 days or less after receipt of payment from the Government or receipt of a proper invoice from the subcontractor, whichever is later.

B. Analysis of Public Comments

1. Support for the Rule

Comment: Most respondents expressed support for the proposed rule.

Response: DoD acknowledges the respondents’ support.

2. Timely Payments to Small Business Subcontractors

Comment: One respondent expressed overall support for the proposed rule if the rule ensures all large business prime contractors are required to pay their subcontractors within 15 days of receiving an invoice from their small business subcontractors, regardless of whether the prime has been paid by the Federal Government. Another respondent suggested an authority to enforce, and a forum to address, grievances for payments from the Government that are past due.

Response: This final rule incorporates the statutory language of section 852 of the NDAA for FY 2019, as implemented via 10 U.S.C. 2307, which establishes the 15-day timeframe as a goal, rather than a firm deadline. The rule provides for prime contractors to make accelerated payments to small business subcontractors after receipt of payment from the Government because a prime contractor who subcontracts with small businesses could be a small business itself. Federal Acquisition Regulation (FAR) subpart 32.9 implements the statutory requirements concerning required documentation for invoice and acceptance, the establishment of payment due dates, and the payment of late payment interest penalties after the due date established under the Prompt Payment Act (e.g., 30 days). DoD payment offices must adhere to these requirements and make payments as quickly as possible, to the fullest extent permitted by law.

Concerning the respondent’s suggestion regarding a forum to address

late payments, as prescribed in 5 CFR 1315.18, questions concerning delinquent payments should be directed to the designated agency office, or the office responsible for issuing the payment if different from the designated agency office. Questions about disagreements over payment amount or timing should be directed to the contracting officer for resolution. Small business concerns may obtain additional assistance on payment issues by contacting the agency’s Office of Small Business Programs.

3. Interest Penalties for Late Payments to Subcontractors

Comment: One respondent suggested that the rule could be improved by also imposing an interest penalty on all small business invoices submitted to the prime contractor that are not paid within 15 days of receipt. Another respondent recommended an authority for the Government to pay interest penalties to both contractors when invoices are past due.

Response: Section 852 does not provide for interest penalties to be paid by the prime contractor for late payments to a subcontractor. Therefore, this final rule does not impose interest penalties beyond those implemented in FAR subpart 32.9 under the Prompt Payment Act. The subcontract between the prime contractor and the subcontractor is a business arrangement between two private parties, and therefore Prompt Payment Act interest penalties do not apply.

4. 15-Day Payment Goal

Comment: Two respondents expressed a preference for the proposed rule to mandate prompt payment instead of making it a goal, however, they commended the DoD proposal to revise the DFARS to implement section 852 of the NDAA for FY 2019 to pay small businesses within 15 days, rather than the current 30-day standard. It is viewed as an important first step for DoD small business contractors. Two other respondents stated that FAR 52.232–40 does not provide for the 15-day payment goal “to the fullest extent permitted by law,” which creates a conflict with the specific 15-day goal that section 852 directs DoD to adopt. One of the respondents recommends a new DFARS prescription and contract clause to supplement FAR 52.232–40 be added that provides for the 15-day payment goal “to the fullest extent permitted by law.” The respondent supports the revision to DFARS 232.903 to comport with the provisions of section 852 with respect to small business prime contractors.

Response: DoD recognizes the respondents’ preference to mandate payment within 15 days instead of making it a goal; and agrees that the goal is an important step for small business contractors working with the DoD. DoD also affirms support for the revision to DFARS 232.903 to implement the provisions of section 852.

Regarding a conflict with the FAR, this final DFARS rule provides details to supplement, rather than conflict with, the requirements of FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors. The rule relies on the FAR clause and the DFARS clause at 252.232–7017, used together in a contract, to communicate to prime contractors the requirements concerning accelerated payments. See section III of this preamble for a more detailed explanation of how the clauses are used together. DoD agrees that it is important to clarify what constitutes an accelerated payment from a prime contractor to a small business subcontractor in the context of this DFARS rule. Therefore, the final rule revises the clause at DFARS 252.232–7017 to define “accelerated payment” as a payment made to a small business subcontractor as quickly as possible, with a goal of 15 days or less after receipt of payment from the Government or receipt of a proper invoice from the subcontractor, whichever is later.

5. Clarifications

a. Small Business Subcontractors

Comment: One respondent suggested that the definition of small business subcontractors be clarified for the purposes of accelerated payments as those that are directly supporting or charged to a DoD contract in which the prime contractor is receiving accelerated payments (i.e., not those supporting indirect, commercial, or foreign efforts by the prime contractor).

Response: This final rule does not provide a definition of “small business subcontractor.” This term is defined at FAR 2.101. The definition provided in the FAR applies to the DFARS, including this rule.

b. Section Heading for DFARS 232.009

Comment: One respondent suggested that the heading to DFARS 232.009 be changed to read “Providing accelerated payments to small business contractors and small business subcontractors” because DFARS 232.009–1 adds coverage for both small business and small business subcontractors. In addition, the respondent suggested that the term “small business primes” in

both DFARS 232.009 and DFARS 232.009-1 would be clearer than “small business contractor”.

Response: The final rule does not include the respondent’s suggested edits. Revising the heading of DFARS 232.009 as suggested would create a disconnect with the title of the new contract clause prescribed in this section. In addition, DFARS 232.009 is numbered to correspond to FAR 32.009, which addresses the same subject matter. This drafting convention allows contracting officers to locate more easily coverage of similar topics in the FAR and DFARS. It is not necessary to add “prime contractors” to the heading because, in the FAR and DFARS, the term “contractor” means the prime contractor.

6. Governmentwide Application of the Rule

Comment: One respondent stated that section 852 addresses two types of accelerated payments, but noted both are applicable to DoD only. The first type addresses payments to small business prime contractors; the second type addresses payments to any DoD prime contractor that subcontracts with small businesses. The respondent indicated a preference for both types of accelerated payments to be made applicable governmentwide. The respondent also stated that, at a minimum, the rule should acknowledge the governmentwide application of making accelerated payments to small business prime contractors, as provided for in FAR clause 52.232-25, Prompt Payment.

Response: DoD affirms the respondent’s statement that section 852 of the NDAA for FY 2019 applies to DoD only. As such, this final DFARS rule will be applicable to DoD only. DoD notes, however, that FAR Case 2020-007, Accelerated Payments Applicable to Contracts with Certain Small Business Concerns, is in process to implement section 873 of the NDAA for FY 2020, which modifies 31 U.S.C. 3903(a) to require accelerated payments for small business prime contractors and prime contractors that subcontract with small business concerns.

7. Definition of “small business”

Comment: One respondent expressed concern that the rule could be improved by defining what constitutes a small business.

Response: The FAR defines “small business concern” in subpart 2.1, Definitions. The definition of “small business concern” in the FAR applies throughout the DFARS, including to this rule.

8. Estimate of Fees Paid by Small Business Subcontractors

Comment: One respondent commented on DoD’s inability to estimate the number of small business subcontractors who have been required to pay fees or provide consideration in return for accelerated payments from prime contractors, or the dollar value of these fees or consideration. The respondent asked if it was feasible to survey a sample of subcontractors to DoD prime contractors regarding the average fees paid to the prime contractors, and use that data to estimate fees paid by subcontractors to DoD prime contractors in general. The respondent also asked if the contractors could be sorted by size (*i.e.*, small, medium, and large), with an average fee for each size contractor, to find a weighted average number of contractors and fee.

Response: Resources are not available for a survey such as the respondent suggested. DoD does not have any data on which to base an estimate of the number of subcontractors required to pay fees or provide consideration to the prime contractor in return for accelerated payments, or the dollar value of the fees or consideration. Public comments did not provide insight into whether small business subcontractors had been required to pay fees or provide consideration for accelerated payments, or the dollar value of such fees or consideration.

9. Initial Regulatory Flexibility Analysis

Comment: One respondent expressed concern that the initial regulatory flexibility analysis prepared for the proposed rule lacked adequate information to allow small businesses to determine the impact of the rule.

Response: See section VII. of this preamble.

C. Other Changes

This final rule adds a reference to the statute (10 U.S.C. 2307(a) to the instruction at DFARS 212.301(f)(xiii)(G) for use of the clause at DFARS 252.232-7017 in commercial item acquisitions. In the contract clause, this final rule adds a new paragraph (a) to provide a definition for “Accelerated payment” also adds the paragraph heading of “Subcontracts” to paragraph (c).

III. Expected Impact of the Rule

Current DoD policy, as stated in DFARS 232.903, is to pay small business contractors as quickly as possible after receipt of invoices and proper documentation. This rule specifies that DoD will provide payment as quickly as possible, to the fullest

extent permitted by law, with a goal of 15 days after receipt of proper invoices and documentation, and before normal payment due dates. For items that ordinarily require payment in less than 15 days (*e.g.*, perishable food), DoD will provide payment as quickly as possible after receipt of proper invoices and documentation, and before the normal payment due date.

With few exceptions, DoD will provide accelerated payments to small business contractors and to prime contractors that agree to provide accelerated payments to their small business subcontractors without further consideration or fees. DoD will not be able to provide accelerated payments to prime contractors if such payments would result in a violation of the Antideficiency Act. An example would be a lapse in appropriated funds.

This final DFARS rule relies on a FAR clause and a DFARS clause, used together in a contract, to—

(1) Communicate to the prime contractor the requirement to provide accelerated payments to small business subcontractors; and

(2) Obtain the prime contractor’s agreement, by signature of the contract, to provide accelerated payments without requiring further consideration from, or charging fees to, the small business subcontractor.

DoD contracting officers do not use the DFARS in isolation; they use the DFARS together with the FAR. The FAR currently requires contracting officers to insert the clause at FAR 52.232-40, Providing Accelerated Payments to Small Business Subcontractors, in solicitations and contracts. This final DFARS rule will require DoD contracting officers to insert the new DFARS clause 252.232-7017, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration, in solicitations and contracts that include FAR 52.232-40. This means both clauses will be included in DoD contracts.

The FAR clause and the DFARS clause will work together to require accelerated payments to small business subcontractors when DoD provides accelerated payments to the prime contractor. FAR 52.232-40 currently requires prime contractors to provide accelerated payments to their small business subcontractors when the Government provides accelerated payments to the prime contractors. DFARS clause 252.232-7017 defines “accelerated payment” as “a payment made to a small business subcontractor as quickly as possible, with a goal of 15 days or less after receipt of payment

from the Government or receipt of a proper invoice from the subcontractor, whichever is later.” By using both clauses together in a contract, this final DFARS rule requires a prime contractor who receives an accelerated payment from the Government to pay its small business subcontractors as quickly as possible, with a goal of 15 days or less after receipt of payment from the Government or receipt of a proper invoice from the subcontractor, whichever is later.

DoD estimates that 40,282 contractors (including 30,498 small businesses) will receive accelerated payments each year, based on data obtained from the Federal Procurement Data System (FPDS) and input from subject matter experts from the Defense Finance and Accounting Services and the Office of the Under Secretary of Defense (Comptroller). Specifically, DoD awarded contracts to an average of 40,689 unique entities (including 30,806 small businesses) each year from FY 2016 through FY 2018. Subject matter experts estimated that DoD would not provide accelerated payments to approximately 1 percent of these contractors (407, including 308 small businesses) because such payments could result in a violation of the Antideficiency Act (e.g., during a lapse in appropriated funds). Therefore, approximately 40,282 contractors (including 30,498 small businesses) per year would receive accelerated payments.

DoD estimates that there were approximately 9,483 small business subcontractors on DoD prime contracts in FY 2018, based on data from *USASpending.gov* cross-referenced with size representations for DoD contracts. DoD further estimates that approximately 1 percent (95) small business subcontractors may not receive accelerated payments because DoD was not able to provide accelerated payments to the prime contractor (see the previous paragraph).

This rule prohibits contractors from requiring any further consideration from, or charging fees to, their small business subcontractors when making accelerated payments. This prohibition would benefit small business subcontractors who have been required to provide consideration or pay fees to the prime contractor in order to receive accelerated payments. Any costs for prime contractors to implement the prohibition on fees and consideration are expected to be de minimis since DoD expects that only a small number of contractors have required such consideration or fees from their small business subcontractors.

As noted in a preceding paragraph, DoD estimates there were approximately 9,483 small business subcontractors on DoD prime contracts in FY 2018. It is not possible for DoD to estimate how many of these small business subcontractors may have been required to provide consideration or pay fees to the prime contractor in order to receive accelerated payments, nor is it possible to estimate the dollar value of the consideration provided or fees paid. Despite a request for comments on this specific topic, DoD received no information from the public that would inform these estimates. If any small business subcontractors have been required to provide consideration or pay fees in return for accelerated payments, the prohibition on such consideration or fees could result in cost savings. However, if no small business subcontractors have been required to provide consideration or pay fees, there would be no cost savings as a result of this rule.

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

This rule applies the requirements of section 852 of the NDAA for FY 2019 to contracts at or below the simplified acquisition threshold (SAT) and to contracts for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items.

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

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

Given that the requirements of section 852 of the NDAA for FY 2019 were enacted to provide accelerated payments to small business contractors and subcontractors, and since approximately 96 percent of DoD

contracts are valued at or below the SAT, DoD has determined that it is in the best interest of the Federal Government to apply the rule to contracts at or below the SAT. An exception for contracts at or below the SAT would exclude contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

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

10 U.S.C. 2375 governs the applicability of laws to DoD contracts and subcontracts for the acquisition of commercial items, including COTS items, and is intended to limit the applicability of laws to contracts and subcontracts for the acquisition of commercial items, including COTS items. 10 U.S.C. 2375 provides that if a provision of law contains criminal or civil penalties, or if the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Due to delegations of authority from USD(A&S), the Principal Director, DPC, is the appropriate authority to make this determination.

Given that the requirements of section 852 of the NDAA for FY 2019 were enacted to provide accelerated payments to small business contractors and subcontractors, and since more than half of DoD’s contractors are small businesses providing commercial items, including COTS items, DoD has determined that it is in the best interest of the Federal Government to apply the rule to contracts for the acquisition of commercial items, including COTS items, as defined at FAR 2.101. An exception for contracts for the acquisition of commercial items, including COTS items, would exclude the contracts intended to be covered by the law, thereby undermining the overarching public policy purpose of the law.

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. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VII. Regulatory Flexibility Act

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

This final rule is necessary in order to amend the DFARS to implement section 852 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232). Section 852 provides for accelerated payments to DoD contractors that are small businesses and to small business subcontractors by accelerating payments to their prime contractors. Specifically, section 852 requires DoD, to the fullest extent permitted by law, to establish an accelerated payment date for small business contractors, with a goal of 15 days after receipt of a proper invoice, if a specific payment date is not established by contract. For contractors that subcontract with small businesses, section 852 requires DoD, to the fullest extent permitted by law, to establish an accelerated payment date, with a goal of 15 days after receipt of a proper invoice, if—

(a) A specific payment date is not established by contract; and

(b) The contractor agrees to make accelerated payments to the subcontractor without any further consideration from, or fees charged to, the subcontractor.

The objective of the rule is to implement section 852 by providing accelerated payments to small business contractors and to small business subcontractors via accelerated payments to prime contractors.

DoD received comments from the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, which are summarized below:

(a) *Number of subcontractors required to pay fees:* DoD did not provide the number of small business subcontractors who have been required to provide consideration or pay fees in return for accelerated payments from prime contractors.

(b) *Conclusion regarding cost savings:* DoD concludes, without sound data, that the rule could result in cost savings because of the proposed prohibition on fees and consideration in return for accelerated payments.

(c) *Conflict with FAR:* The rule conflicts with FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors, which does not require payment within 15 days.

(d) *Reason for not accelerating payment:* According to DoD, subject matter experts have estimated that DoD would not provide accelerated payments to approximately 1 percent of contractors because such payments would put DoD at risk of a violation of law. DoD did not qualify these individuals as subject matter experts or provide the bases or assumptions that support their conclusions. DoD did not provide small businesses with information on what would constitute a violation of law that would result in DoD not providing accelerated payments to small businesses.

(e) *Action plan when payments are not accelerated:* The rule does not provide a sound action plan for small businesses who may be denied the legal right to accelerated payments.

DoD provides the following responses, including changes made to the final rule as a result of the comments:

(a) *Number of subcontractors required to pay fees:* DoD has no data on which to base an estimate of the number of small business subcontractors who have been required to pay fees or provide consideration to prime contractors in return for accelerated payments. In the proposed rule, DoD requested public comment on the topic of consideration or fees in return for accelerated payments. However, none of the public comments addressed this topic. Therefore, in the final rule DoD has provided a rough estimate of the number of small business subcontractors on DoD contracts. DoD estimates there were approximately 9,483 small business subcontractors on DoD contracts in FY 2018.

(b) *Conclusion regarding cost savings:* The conclusion that the rule could result in cost savings was based on a reasonable assumption that, if a small business was required to pay a fee in return for accelerated payments, and the rule prohibits that fee, then the small business will not be required to pay the fee in the future. If no small businesses have been required to pay a fee, then there would be no cost savings as a result of this rule. In the final rule, DoD

has made this clarification in section III of the preamble for this final rule.

(c) *Conflict with FAR:* The rule provides details to supplement, rather than conflict with, the requirements of FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors. DoD agrees that it is important to clarify what constitutes an accelerated payment from a prime contractor to a small business subcontractor in the context of this DFARS rule. Therefore, the final rule revises the clause at DFARS 252.232–7017, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration, to clarify that “accelerated payment” means “a payment made to a small business subcontractor as quickly as possible, with a goal of 15 days or less after receipt of payment from the Government or receipt of a proper invoice from the subcontractor, whichever is later.” See paragraph (e) for an explanation of how the FAR clause and the DFARS clause will be used together to provide for accelerated payments to small business subcontractors.

(d) *Reason for not accelerating payment:* The estimate that 1 percent of contractors would not receive accelerated payments was based on DoD’s expectation that this would be a rare occurrence. DoD’s subject matter experts from the Defense Finance and Accounting Service and the Office of the Under Secretary of Defense (Comptroller) have provided clarification on the circumstances that could result in DoD not providing accelerated payments to small businesses. DoD would not be able to provide accelerated payments if such payments would result in a violation of the Antideficiency Act. An example would be a lapse in appropriated funds. DoD has made this clarification in section III of the preamble for this final rule.

(e) *Action plan when payments are not accelerated:* DoD’s interpretation of section 852 of the NDAA for FY 2019 is that section 852 does not create a right to accelerated payments. It requires DoD, to the fullest extent permitted by law, to pay contractors on an accelerated basis, with a goal of 15 days. It also requires the prime contractor’s agreement to provide accelerated payments without requiring further consideration from, or charging fees to, the small business subcontractor. As with any issue or concern related to payments, small businesses may seek assistance from the Office of Small Business Programs for DoD or for the DoD component that awarded the prime

contract. This final DFARS rule relies on a FAR clause and a DFARS clause used together in a contract to—

- (i) Communicate to the prime contractor the requirement to provide accelerated payments to small business subcontractors; and
- (ii) Obtain the prime contractor's agreement, by signature of the contract, to provide accelerated payments without requiring further consideration from, or charging fees to, the small business subcontractor.

DoD contracting officers use the FAR and DFARS together to award contracts, not one or the other in isolation. The FAR currently requires contracting officers to insert FAR 52.232–40 in solicitations and contracts. This final rule will require contracting officers to insert the new DFARS clause 252.232–7017 in solicitations and contracts that include FAR 52.232–40. This means both clauses will exist in DoD contracts and will work together to require accelerated payments to small business subcontractors when DoD provides accelerated payments to the prime contractor. FAR 52.232–40 currently requires prime contractors to make accelerated payments to their small business subcontractors upon receipt of accelerated payments from the Government. DFARS clause 252.232–7017 defines accelerated payment as “a payment made to a small business subcontractor as quickly as possible, with a goal of 15 days or less after receipt of payment from the Government or receipt of a proper invoice from the subcontractor, whichever is later.” By using both clauses together, this final DFARS rule requires a prime contractor who receives an accelerated payment from the Government to pay its small business subcontractors as quickly as possible, with a goal of 15 days or less after receipt of payment from the Government or receipt of a proper invoice from the subcontractor, whichever is later.

This rule applies to small businesses that are DoD prime contractors. According to data obtained from the Federal Procurement Data System, DoD awarded contracts to an average of 30,806 unique small entities each year from FY 2016 through FY 2018. DoD estimates that it may not be possible to provide accelerated payments to approximately 308 small business contractors (1 percent) because such payments would put DoD at risk of a violation of the Antideficiency Act (e.g., during a lapse in appropriated funds). Therefore, approximately 30,498 small contractors per year would receive accelerated payments.

This rule also applies to small businesses that are subcontractors on DoD prime contracts. DoD estimates that there were approximately 9,483 small business subcontractors on DoD prime contracts in FY 2018, based on data from www.USASpending.gov cross-referenced with size representations for DoD contracts. DoD estimates that approximately 95 small business subcontractors (1 percent) may not receive accelerated payments because DoD was not able to provide accelerated payments to the prime contractor. With regard to the impact of the prohibition on fees or other consideration in return for accelerated payments, it is not possible for DoD to estimate how many of these small business subcontractors may have been required to provide consideration or pay fees to the prime contractor in order to receive accelerated payments.

This rule does not impose any new reporting, recordkeeping, or other compliance requirements for small entities.

There are no known, significant alternatives that would accomplish the objectives of the applicable statute.

VIII. 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 212, 232, and 252

Government procurement.

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

Therefore, 48 CFR parts 212, 232, and 252 are amended as follows:

- 1. The authority citations for 48 CFR part 212, 232, and 252 continue to read as follows:

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

PART 212—ACQUISITION OF COMMERCIAL ITEMS

- 2. Amend section 212.301 by adding paragraph (f)(xiii)(G) to read as follows:

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

* * * * *

(f) * * *
(xiii) * * *

(G) Use the clause at 252.232–7017, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration, as

prescribed in 232.009–2(2), to comply with 10 U.S.C. 2307(a).

* * * * *

PART 232—CONTRACT FINANCING

- 3. Add sections 232.009, 232–009–1, and 232.009–2 to read as follows:

232.009 Providing accelerated payments to small business subcontractors.

232.009–1 General.

Section 852 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232) requires DoD to provide accelerated payments to small business contractors and subcontractors, to the fullest extent permitted by law, with a goal of 15 days.

232.009–2 Contract clause.

Use the clause at 252.232–7017, Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial items, that include the clause at FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors.

- 4. Revise section 232.903 to read as follows:

232.903 Responsibilities.

In accordance with section 852 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232), DoD shall assist small business concerns by providing payment as quickly as possible, to the fullest extent permitted by law, with a goal of 15 days after receipt of proper invoices and all required documentation, including acceptance, and before normal payment due dates established in the contract (see 232.906(a)).

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 5. Add section 252.232–7017 to read as follows:

252.232–7017 Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration.

As prescribed in 232.009–2, use the following clause:

Accelerating Payments to Small Business Subcontractors—Prohibition on Fees and Consideration (APR 2020)

(a) **Definition.** *Accelerated payment*, as used in this clause, means a payment made to a small business subcontractor as quickly as possible, with a goal of 15 days or less after receipt of payment from the Government or receipt of a proper invoice from the subcontractor, whichever is later.

(b) In accordance with section 852 of Public Law 115–232, the Contractor shall not require any further consideration from or charge fees to the small business subcontractor when making accelerated payments, as defined in paragraph (a) of this clause, to subcontractors under the clause at FAR 52.232–40, Providing Accelerated Payments to Small Business Subcontractors.

(c) *Subcontracts*. Include the substance of this clause, including this paragraph (c), in all subcontracts with small business concerns, including those for the acquisition of commercial items.

(End of clause)

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 229 and 252

[Docket DARS–2019–0036]

RIN 0750–AK13

Defense Federal Acquisition Regulation Supplement: Modification of DFARS Clause “Tax Relief” (DFARS Case 2018–D049)

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to modify the text of an existing DFARS clause to include the text of another DFARS clause on the same subject, in an effort to streamline contract terms and conditions for contractors, pursuant to action taken by the Regulatory Reform Task Force.

DATES: Effective April 8, 2020.

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 84 FR 48512 on September 13, 2019, to modify DFARS clause 252.229–7001, Tax Relief, to incorporate the information included in DFARS clause 252.229–7000, Invoices Exclusive of Taxes or Duties. Combining these clauses results in DFARS clause 252.229–7000 being removed from the DFARS. The rule implements a recommendation of the DoD Regulatory Reform Task Force established under Executive Order (E.O.) 13777, “Enforcing the Regulatory Reform Agenda.”

No public comments were received in response to the proposed rule. No changes from the proposed rule are made in the final rule.

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. The rule combines two clauses into a single clause and does not change the applicability of the affected clauses.

III. Executive Orders 12866 and 13563

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 20, 1993. This rule is not a major rule as defined at 5 U.S.C. 804.

IV. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

V. Regulatory Flexibility Act

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

DoD is amending DFARS clause 252.229–7001, Tax Relief, to incorporate the information included in DFARS clause 252.229–7000, Invoices Exclusive of Taxes or Duties. Combining these clauses will result in DFARS clause 252.229–7000 being removed from the DFARS. The objective of this rule is to streamline DoD contract terms and conditions and contractor responsibilities pertaining to foreign taxes and duties. The modification of these DFARS clauses supports a recommendation from the DoD Regulatory Reform Task Force under E.O. 13771.

No public comments were received in response to the initial regulatory flexibility analysis.

This rule is combines two existing clauses that address the same topic into

a single comprehensive clause. These clauses apply to solicitations and contracts awarded to a foreign concern for contract performance in a foreign country.

This rule is not expected to impact small business entities because this rule only applies to foreign entities. The Small Business Administration (SBA) identifies a “small business” as a “a business entity organized for profit, with a place of business located in the United States, and which operated primarily within the United States or which makes a significant contribution to the U.S. economy through the payment of taxes or use of American products, materials, or labor” (13 CFR 121.102(a)). This rule only applies to foreign contractors, which do not meet the SBA definition of “small business” entities.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. This rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known significant alternative approaches to the rule that would meet the stated objectives. This rule is not expected to have a significant economic impact on small entities.

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 229 and 252

Government procurement.

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

Therefore, 48 CFR parts 229 and 252 are amended as follows:

- 1. The authority citation for 48 CFR parts 229 and 252 continues to read as follows:

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

PART 229—TAXES

229.402–1 [Removed]

- 2. Remove section 229.402–1.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.229–7000 [Removed and Reserved]

- 3. Remove and reserve section 252.229–7000.