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

* * * * *

■ 9. Amend section 52.244–6 by—

■ a. Revising the date of the clause; and

■ b. Removing from paragraph (c)(1)(xix) ''(DEC 2013)'' and adding ''(DATE)'' in its place.

The revision reads as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (DATE)

* * * * *

[FR Doc. 2021–20852 Filed 9–28–21; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 225, 231, 242, and 252

[Docket DARS–2019–0039]

RIN 0750–AJ27

Defense Federal Acquisition Regulation Supplement: Treatment of Incurred Independent Research and Development Costs (DFARS Case 2017–D018)

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 2017 that makes amendments regarding the treatment of independent research and development expenditures and requires the Defense Contract Audit Agency to provide an annual report to Congress on independent research and development and bid and proposal expenditures.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before November 29, 2021, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2017–D018, using any of the following methods:

○ *Federal eRulemaking Portal: https://www.regulations.gov.* Search for ''DFARS Case 2017–D018.'' Select ''Comment'' and follow the instructions to submit a comment. Please include your name, company name (if any), and ''DFARS Case 2017–D018'' on any attached documents.

○ *Email: osd.dfars@mail.mil.* Include DFARS Case 2017–D018 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: Mr. David E. Johnson, telephone 571–372–6115.

SUPPLEMENTARY INFORMATION:

I. Background

Section 824 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328) amends 10 U.S.C. 2372 to require that regulations may not infringe on the independence of a contractor to choose which technologies to pursue in its independent research and development (IR&D) program if the chief executive officer (CEO) of the contractor determines that IR&D expenditures will advance the needs of DoD for future technology and advanced capability.

Section 824 amends 10 U.S.C. 2372 to remove the list that limits the allowability of IR&D costs to seven activities of potential interest to DoD. In lieu of the list of activities of potential interest to DoD, section 824 requires a CEO determination that IR&D expenses will advance the needs of DoD for future technology and advanced capability.

Section 824 also decouples IR&D and bid and proposal (B&P) costs by moving the language pertaining to B&P costs out of 10 U.S.C. 2372 and placing it in the new 10 U.S.C. 2372a. This change ensures that regulations pertaining to B&P costs are separated from regulations pertaining to IR&D costs.

Section 824 also amends 10 U.S.C. 2313a by adding a requirement for the Defense Contract Audit Agency to submit an annual report to Congress of all incurred IR&D and B&P costs of contractors in the prior Government fiscal year.

II. Discussion and Analysis

In accordance with 10 U.S.C. 2372(d), the rule adds language at DFARS 231.205–18(c)(iii)(A)(*1*) to require contractor CEOs to determine that IR&D expenditures will advance the needs of DoD for future technology and advanced capability. In addition, the rule adds a requirement at DFARS 231.205–18(iii)(c)(A)(*2*) for major contractors to include a statement in the submission to the Defense Technical Information Center (DTIC) that the CEO of the contractor has made the determination required by 10 U.S.C. 2372. This statement serves as evidence for DoD, when determining whether IR&D costs are allowable. Major contractors are already required to upload IR&D activities in DTIC in order to provide DoD with information on the progress of these activities; this rule simply adds a requirement for those major contractors to include a statement in the DTIC input that the determination required by 10 U.S.C. 2372 has been made as a means for DoD to know that those costs are allowable.

Since the list of seven activities of potential interest to DoD was deleted from 10 U.S.C. 2372, the requirement for the Defense Contract Management Agency (DCMA) administrative contracting officer (ACO) or corporate ACO (CACO) to compare the IR&D activities uploaded in DTIC to the list of seven IR&D activities of potential interest to DoD no longer exists. Therefore, DFARS 242.771–3(a) is modified to remove the ACO and CACO responsibilities for determining if an activity is of potential interest to DoD.

The rule also adds language to clarify that IR&D and B&P costs will be reported independently from other incurred indirect costs in a new paragraph at DFARS 231.205–18(c)(iv). This change corresponds to 10 U.S.C. 2372(a) and 10 U.S.C. 2372a(a), which require allowable IR&D and B&P costs to be reported independently.

The proposed rule decouples IR&D and B&P by stating ''IR&D and B&P'' instead of ''IR&D/B&P'' throughout the text based on the amendment to 10 U.S.C. 2372, which segregates IR&D and B&P costs. However, for the purposes of calculating the threshold that requires major contractors to submit IR&D activities and statements regarding the CEO determinations in DTIC, the rule does not change the calculation, which combines IR&D and B&P, to ensure the definition of ''major contractor'' remains the same.

DFARS 242.771–3(c)(1) is modified in the proposed rule to change the content of the communication from DoD to contractors from the ''planned or expected DoD future needs'' to the ''planned or expected needs of DoD for future technology and advanced capability.'' In addition, the responsibilities of the Office of the Under Secretary of Defense for Research and Engineering are expanded to include providing on the DTIC website

communities of interest on DoD's future needs. An email address for additional information is also provided. This change ensures that timely and comprehensive information on DoD's planned or expected needs for future technology and advanced capability is being transmitted from DoD to contractors, as required by 10 U.S.C. 2372(c)(2)(A).

To support DCAA's compliance with 10 U.S.C. 2313a, the proposed rule adds a contract clause at DFARS 252.242–70XX, Independent Research and Development and Bid and Proposal Incurred Costs, which requires all contractors with noncommercial awards exceeding the simplified acquisition threshold to provide an incurred cost submission of IR&D and B&P costs for the prior Government fiscal year to a website for DCAA to access. The related clause prescription is at DFARS 242.771–4.

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

This rule proposes to create a new clause at DFARS 252.242–70XX, Independent Research and Development and Bid and Proposal Incurred Costs. However, this clause does not impact contracts at or below the simplified acquisition threshold or contracts for the acquisition of commercial items, including commercially available off-the-shelf items.

IV. Executive Orders 12866 and 13563

Executive Order (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**. This rule is not anticipated to be a major rule under 5 U.S.C. 804.

VI. Regulatory Flexibility Act

DoD does not expect this proposed 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, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the DFARS to implement section 824 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328). Section 824 modifies 10 U.S.C. 2372 to require the chief executive officer (CEO) of the contractor to make a determination that independent research and development (IR&D) expenditures will advance the needs of the Department of Defense for future technology and advanced capability. Section 824 also amends 10 U.S.C. 2313a to require the Defense Contract Audit Agency (DCAA) to submit an annual report to Congress on incurred IR&D and bid and proposal (B&P) costs for all contractors in the prior Government fiscal year. The legal basis for the amendment to the DFARS is section 824 of the NDAA for FY 2017.

In accordance with 10 U.S.C. 2372(d), the proposed rule adds language applicable to contractors at DFARS 231.205–18(c)(iii)(A)(*1*) requiring the CEO of the contractor to determine that IR&D expenditures will advance the needs of DoD for future technology and advanced capability. The proposed rule also adds, at DFARS 231.205–18(iii)(A)(*2*), a requirement for major contractors to include a statement in the Defense Technical Information Center (DTIC) submission that the CEO of the contractor made the determination required by 10 U.S.C. 2372. To support DCAA's compliance with 10 U.S.C. 2313a, the proposed rule includes a contract clause that requires contractors with noncommercial awards exceeding the simplified acquisition threshold to provide an incurred cost submission of IR&D and B&P costs for the prior Government fiscal year to a website for DCAA to access.

The proposed rule will only apply to small entities that have incurred IR&D costs or B&P costs associated with noncommercial DoD awards exceeding the simplified acquisition threshold or small businesses that have an IR&D program and are considered to be a major contractor, which is defined as having annual expenditures of $1.1 million in combined IR&D and B&P expenditures.

Based on an internal DoD website, on average for FY 2017 through FY 2019, there were 69 other than small business major contractors that submitted IR&D activities to DTIC. DoD does not have a list of other than major contractors or small entities that have IR&D programs. As a result, the burden on the public for developing a statement of the CEO determination in DTIC is expected to be close to 69 contractors. DoD expects a minimal number of the contractors to be small entities.

DoD determined that for FY 2020, a total of 1,869 contractors submitted incurred cost proposals to the Government claiming IR&D or B&P costs. This number represents the estimated number of contractors that will be required under the new clause 252.242–70XX, Independent Research and Development and Bid and Proposal Incurred Costs, to annually report IR&D and B&P costs to the Defense Contract Audit Agency. The ratio of small entities to other than small entities is unknown. However, DoD expects the proposed rule will have minimal impact on small entities.

This proposed rule does include new reporting or recordkeeping requirements for small entities. The annual reporting burden is related to adding the statement that the CEO has made a determination to IR&D project submissions in DTIC and submitting IR&D and B&P incurred costs to a DCAA website. It is expected that, if applicable to a small entity, the CEO of the contractor and an attorney of the contractor would be required to support including a statement that the CEO made a determination with IR&D project submissions in DTIC and a financial analyst of the contractor would be required to support submitting IR&D and B&P incurred costs to a website. As stated previously, it is expected that a minimal number of small entities will be impacted by the major contractor requirement to upload to DTIC a statement that the CEO made a determination as there are currently no known small entities classified as major contractors. It is expected that fewer than 1,869 small businesses would be required to upload IR&D and B&P incurred costs to a DCAA website.

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.

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 this 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 2017–D018), in correspondence.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies. The rule contains 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). Accordingly, DoD plans to submit a request for approval of a new information collection requirement concerning DFARS Case 2017–D018, Treatment of Incurred Independent Research and Development Costs, to OMB.

A1. DFARS 231.205–18(c)(iii)(A)(2)(iii)

Based on the proposed revisions to DFARS 231.205–18(c)(iii)(A)*(2)(iii),* an upward adjustment is being made to the burden hours for reporting per response. Public reporting burden for this collection of information is estimated to average 1 hour per response for submission of the confirming statement into DTIC that the chief executive officer of the contractor has made a determination that the expenditures will advance the needs of DoD future technology and advanced capability. The annual reporting burden is estimated as follows:

Respondents: 69.

Responses per respondent: 90, approximately.

Total annual responses: 6,244.

Hours per response: 1.

Total annual burden hours: 6,244.

A2. DFARS 252.242–70XX, Independent Research and Development and Bid and Proposal Incurred Costs

Public reporting burden results from the collection of information regarding contractor submission of an annual report of IR&D and B&P costs incurred during performance of any DoD contract in the prior Government fiscal year. Reports are required no later than December 31 each year. Approximately 0.25 hour per response is expected for the contractor to submit incurred IR&D and B&P costs for the prior Government fiscal year to a website provided in the clause that DCAA can access. The annual reporting burden is estimated as follows:

Respondents: 1,869.

Responses per respondent: 1.

Total annual responses: 1,869.

Hours per response: 0.25.

Total response Burden Hours: 467.

B. Request for Comments Regarding Paperwork Burden

Written comments and recommendations on the proposed information collection, including suggestions for reducing this burden, should be sent to Ms. Susan Minson at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, or email *Susan_M_Minson@omb.eop.gov,* with a copy to the Defense Acquisition Regulations System, Attn: David E. Johnson, OUSD(A&S)DPC/DARS, Room 3B938, 3060 Defense Pentagon, Washington, DC 20301–3060. Comments can be received from 30 to 60 days after the date of this notice, but comments to OMB will be most useful if received by OMB within 30 days after the date of this notice.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the DFARS, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Acquisition Regulations System, Attn: David E. Johnson, OUSD(A&S)DPC/DARS, Room 3B938, 3060 Defense Pentagon, Washington, DC 20301–3060, or email *osd.dfars@mail.mil.* Include DFARS Case 2017–D018 in the subject line of the message.

List of Subjects in 48 CFR Parts 225, 231, 242, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 225, 231, 242, and 252 are proposed to be amended as follows:

■ 1. The authority citation for parts 225, 231, 242, and 252 continues to read as follows:

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

PART 225—FOREIGN ACQUISITION

■ 2. Amend section 225.7303–2 by revising paragraphs (b) and (c) to read as follows:

225.7303–2 Cost of doing business with a foreign government or an international organization.

* * * * *

(b) Costs not allowable under FAR part 31 are not allowable in pricing FMS contracts, except as noted in paragraphs (c) and (e) of this section.

(c) The limitations for all contractors described in 231.205–18(c)(iii) and (iv) do not apply to FMS contracts, except as provided in 225.7303–5. The allowability of IR&D and B&P costs on contracts for FMS not wholly paid for from funds made available on a nonrepayable basis is limited to the contract's allocable share of the contractor's total IR&D and total B&P expenditures. In pricing contracts for such FMS—

(1) Use the best estimate of reasonable costs in forward pricing; and

(2) Use actual expenditures, to the extent that they are reasonable, in determining final cost.

* * * * *

PART 231—CONTRACT COST PRINCIPLES AND PROCEDURES

■ 3. Revise section 231.205–18 to read as follows:

231.205–18 Independent research and development and bid and proposal costs.

(a) *Definitions.* As used in this section—

Covered contract means a DoD prime contract for an amount exceeding the simplified acquisition threshold, except for a fixed-price contract without cost incentives. The term also includes a subcontract for an amount exceeding the simplified acquisition threshold, except for a fixed-price subcontract without cost incentives under such a prime contract.

Covered segment means a product division of the contractor that allocated more than $1,100,000 in independent research and development (IR&D) and bid and proposal (B&P) costs to covered contracts during the preceding fiscal year. In the case of a contractor that has no product divisions, the term means that contractor as a whole. A product division of the contractor that allocated less than $1,100,000 in IR&D and B&P

costs to covered contracts during the preceding fiscal year is not subject to the limitations in paragraph (c) of this section.

Major contractor means any contractor whose covered segments allocated a total of more than $11,000,000 in IR&D and B&P costs to covered contracts during the preceding fiscal year. For purposes of calculating the dollar threshold amounts to determine whether a contractor meets the definition of ''major contractor,'' do not include contractor segments allocating less than $1,100,000 of IR&D and B&P costs to covered contracts during the preceding fiscal year.

(c) *Allowability.* (i) Departments/agencies shall not supplement this regulation in any way that limits IR&D and B&P cost allowability.

(ii) See 225.7303–2(c) for allowability provisions affecting foreign military sale contracts.

(iii)(A) For incurred IR&D costs to be allowable—

(*1*) The chief executive officer (CEO) of the contractor must have determined that the expenditures will advance the needs of DoD for future technology and advanced capability (10 U.S.C. 2372(d)) (see 242.771–3); and

(*2*) For major contractors only—

(*i*) The IR&D projects generating the IR&D costs must be reported to the Defense Technical Information Center (DTIC) using the DTIC's online input form and instructions at *https://defenseinnovationmarketplace.dtic.mil/industry-portal/;*

(*ii*) The DTIC inputs must be updated at least annually, no later than 3 months after the end of the contractor's fiscal year, and when the project is completed; and

(*iii*) For each IR&D project beginning on or after October 1, 2017, the DTIC input must include a statement that the CEO of the contractor determined that the expenditures will advance the needs of DoD for future technology and advanced capability.

(B) The amount of IR&D costs allowable under DoD contracts shall not exceed the lesser of—

(1) Such contracts' allocable share of total incurred IR&D costs; or

(2) The total amount of incurred IR&D costs that the CEO of the contractor has determined will advance the needs of DoD for future technology and advanced capability.

(C) Contractors not meeting the threshold of a major contractor are encouraged to use the DTIC online input form and instructions at *https://defenseinnovationmarketplace.dtic.mil/industry-portal/* to report IR&D projects in order to provide DoD with visibility into the technical content of the contractors' IR&D projects.

(iv) Incurred IR&D and B&P costs must be reported independently from each other and other incurred indirect costs.

PART 242—CONTRACT ADMINISTRATION

■ 4. Amend section 242.302 by revising paragraph (a)(9) to read as follows:

242.302 Contract administration functions.

(a) * * *

(9) For additional contract administration functions related to IR&D and B&P projects performed by major contractors, see 242.771–3(a).

* * * * *

■ 5. Revise sections 242.771–1, 242.771–2, and 242.771–3 to read as follows:

Sec.

* * * * *

242.771–1 Scope.
242.771–2 Policy.
242.771–3 Responsibilities.

* * * * *

242.771–1 Scope.

This section implements 10 U.S.C. 2372, Independent research and development costs: Allowable costs; 10 U.S.C. 2372a, Bid and proposal costs: Allowable costs; and 10 U.S.C. 2313a, Defense Contract Audit Agency: annual report.

242.771–2 Policy.

Defense contractors are encouraged to engage in independent research and development (IR&D) projects that will advance the needs of DoD for future technology and advanced capability (see 231.205–18(c)(iii)).

242.771–3 Responsibilities.

(a) The cognizant administrative contracting officer (ACO) or corporate ACO shall determine cost allowability of IR&D and B&P costs as set forth in 231.205–18 and FAR 31.205–18.

(b) The Defense Contract Audit Agency (DCAA) shall—

(1) For the DoD-wide B&P program, submit an annual report to the Principal Director, Defense Pricing and Contracting, Office of the Under Secretary of Defense for Acquisition and Sustainment, as required by 10 U.S.C. 2372a(c); the Defense Contract Management Agency or the military department responsible for performing contract administration functions is responsible for providing DCAA with statistical information, as necessary; and

(2) For IR&D and B&P costs incurred under any DoD contract in the previous Government fiscal year, submit an annual report to the congressional defense committees as required by 10 U.S.C. 2313a.

(c) The Office of the Under Secretary of Defense for Research and Engineering (OUSD(R&E)), is responsible for establishing a regular method for communication—

(1)(i) From DoD to contractors, of timely and comprehensive information regarding planned or expected needs of DoD for future technology and advanced capability, by posting information on communities of interest and upcoming meetings on the Defense Technical Information Center (DTIC) website at *https://defenseinnovationmarketplace.dtic.mil/communities-of-interest;* and

(ii) From contractors to DoD, of brief technical descriptions of contractor IR&D projects; and

(2) By providing OUSD(R&E) contact information: *osd.pentagon.ousd-re.mbx.communications@mail.mil.*

■ 6. Add section 242.771–4 to subpart 242.7 to read as follows:

242.771–4 Contract clause.

Use the clause at 252.242–70XX, Independent Research and Development and Bid and Proposal Incurred Costs, in solicitations and contracts that exceed the simplified acquisition threshold.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Add section 252.242–70XX to read as follows:

252.242–70XX Independent Research and Development and Bid and Proposal Incurred Costs.

As prescribed in 242.771–4, use the following clause:

Independent Research and Development and Bid and Proposal Incurred Costs (DATE)

(a) In order for the Defense Contract Audit Agency to submit the annual report required by 10 U.S.C. 2313a, the Contractor shall—

(1) Report to *[website TBD]* a consolidated spreadsheet of all independent research and development (IR&D) and bid and proposal (B&P) costs incurred by the Contractor during performance of any DoD contract in the previous fiscal year, beginning October 1 through September 30; and

(2) Submit this report no later than December 31 of each year.

(b) IR&D and B&P incurred costs shall be reported separately and shall be reported by costs attributable to—

(1) The Department of Defense (non-foreign military sales);

(2) Foreign military sales; and

(3) Other.

(End of clause)

[FR Doc. 2021–20938 Filed 9–28–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 225 and 252

[Docket DARS–2021–0018]

RIN 0750–AL29

Defense Federal Acquisition Regulation Supplement: Modification of Small Purchase Threshold Exceptions (DFARS Case 2021–D010)

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, which reduces the dollar threshold at which an acquisition is excepted from certain source restrictions.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before November 29, 2021, to be considered in the formation of the final rule.

ADDRESSES: Submit comments identified by DFARS Case 2021–D010, using any of the following methods:

○ *Federal eRulemaking Portal: https://www.regulations.gov.* Search for ''DFARS Case 2021–D010.'' Select ''Comment'' and follow the instructions to submit a comment. Please include your name, company name (if any), and ''DFARS Case 2021–D010'' on any attached documents.

○ *Email: osd.dfars@mail.mil.* Include DFARS Case 2021–D010 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 225.70 to implement section 817 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116–283). Section 817 amends 10 U.S.C. 2533a (commonly known as the ''Berry Amendment''), by reducing the dollar threshold at which an acquisition is excepted from the source restrictions of the Berry Amendment from the simplified acquisition threshold (SAT) to an amount not to exceed $150,000.

DFARS 225.7002 identifies the domestic source restrictions of 10 U.S.C. 2533a on food, clothing, fabrics, fibers, hand or measuring tools, and flags, unless an exception applies. DFARS 225.7002–2, Exceptions, has historically referred to ''actions at or below the small purchase threshold,'' rather than a specific dollar value, as an exception to the domestic source restrictions of the Berry Amendment. As a result, each time the SAT increased, the exception threshold also increased to align with the new SAT, to include the most recent SAT increase to $250,000. Federal Acquisition Regulation (FAR) Case 2018–004, published July 2, 2020 (85 FR 40064) raised the SAT at FAR 2.101 from $150,000 to $250,000.

II. Discussion and Analysis

The proposed rule implements section 817 of the NDAA for FY 2021 by revising the exception at DFARS 225.7002–2(a) from ''at or below the simplified acquisition threshold'' to ''not exceeding $150,000''. The net effect of this revision will be to increase the number of acquisitions subject to the domestic source requirements at DFARS 225.7002. Conforming changes will also be made at DFARS 225.7002–2(j)(2), 225.7002–3(b) and (c), and the associated contract clause 252.225–7012, Preference for Certain Domestic Commodities.

While the statute reduces the dollar value of the current exception threshold, it also authorizes the adjustment of this statutory threshold for inflation every five years, in accordance with 41 U.S.C. 1908.

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 rule proposes to amend the applicability of the following DFARS clauses: (1) 252.225–7006, Acquisition of the American Flag; (2) 252.225–7012, Preference for Certain Domestic Commodities; and (3) 252.225–7015, Restriction on Acquisition of Hand or Measuring Tools. DoD does intend to apply the rule to contracts valued above $150,000 but at or below the SAT. The clauses impacted by the rule are already prescribed for use in solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, including 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 Federal Acquisition Regulatory 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. DoD does intend to make that determination. Therefore, this rule will apply below the simplified acquisition threshold.

B. Determination

DoD plans to apply the rule to contracts valued above $150,000 but at or below the SAT for the following DFARS clauses: (1) 252.225–7006, Acquisition of the American Flag; (2) 252.225–7012, Preference for Certain Domestic Commodities; and (3) 252.225–7015, Restriction on Acquisition of Hand or Measuring Tools.

Not applying these clauses to contracts valued above $150,000 but at or below the SAT would exclude contracts intended to be covered by this rule and undermine the overarching purpose of the rule, which is to increase the number of acquisitions subject to the domestic source restrictions at DFARS 225.7002 by reducing the volume of procurements subject to the exception at DFARS 225.7002–2(a). The clauses already apply to commercial items, including COTS items.

IV. Expected Impact of the Rule

DFARS 225.7002 identifies the domestic source restrictions of 10 U.S.C. 2533a on food, clothing, fabrics, fibers, hand or measuring tools, and flags, unless an exception at DFARS 225.7002–2 applies. Acquisitions valued