

225.7301-1 Requirement to use firm-fixed-price contracts.

(a) *Requirement.* In accordance with section 830 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 14-328), a firm-fixed-price contract shall be used for FMS, unless the foreign country that is the counterparty to FMS—

(1) Has established in writing a preference for a different contract type; or

(2) Requests in writing that a different contract type be used for a specific FMS. See PGI 217.202(2) on the use of priced options for FMS requirements.

(b) *Waiver.* The requirement in paragraph (a) of this section may be waived, if the chief of the contracting office determines, on a case-by-case basis, that a different contract type is in the best interest of the United States and American taxpayers.

■ 8. Add section 225.7301-2 to read as follows:

225.7301-2 Solicitation approval for sole source contracts.

The contracting officer shall coordinate through agency channels with the Principal Director, Defense Pricing and Contracting, prior to issuing a solicitation for a sole source contract for U.S./FMS combined requirements for a major system that has an estimated contract value that exceeds \$500 million. See also 201.170 and PGI 216.403-1(1)(ii)(B) and (C).

PART 234—MAJOR SYSTEM ACQUISITION

■ 9. Amend section 234.004—

■ a. In paragraphs (2)(i)(A) and (2)(i)(C) introductory text, by removing “Milestone Decision Authority” and adding “milestone decision authority” in both places;

■ b. By revising paragraph (2)(ii)(A) introductory text;

■ c. In paragraph (2)(ii)(A)(2), by removing the word “when”; and

■ d. By adding paragraphs (2)(iii) and (2)(iv).

The revision and addition read as follows:

234.004 Acquisition strategy.

* * * * *

(2) * * *

(ii) * * *

(A) Not use cost-reimbursement line items for the acquisition of production of major defense acquisition programs, unless the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)), or the milestone decision authority when the milestone decision authority is the service acquisition executive of the military department

that is managing the program, submits to the congressional defense committees—

* * * * *

(iii) See 216.301-3 for additional contract type approval requirements for cost-reimbursement contracts.

(iv) For fixed-price incentive (firm target) contracts, contracting officers shall comply with the guidance provided at PGI 216.403-1(1)(ii)(B) and (C).

PART 235—RESEARCH AND DEVELOPMENT CONTRACTING

■ 10. Amend section 235.006—

■ a. By redesignating paragraphs (b)(i) and (b)(ii) as paragraphs (b)(ii) and (b)(iii);

■ b. In newly redesignated paragraph (b)(ii)(B) introductory text, by removing “Under Secretary of Defense (Acquisition, Technology, and Logistics (USD(AT&L)))” and adding “milestone decision authority” in its place;

■ c. In newly redesignated paragraphs (b)(iii)(A)(3) introductory text and (b)(iii)(A)(3)(i) and (ii), by removing “(b)(ii)(A)(1)”, “USD(AT&L)”, and “(b)(ii)(A)(3)(i)” and adding “(b)(iii)(A)(1)”, “USD(A&S)”, and “(b)(iii)(A)(3)(i)” in their places, respectively;

■ d. In the newly redesignated paragraph (b)(iii)(B) introductory text, by removing “USD(AT&L)” and adding “USD(A&S) in two places; and

■ e. By adding new paragraph (b)(i).

The addition reads as follows:

235.006 Contracting methods and contract type.

(b)(i) Consistent with section 829 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328), the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) has determined that the use of cost-reimbursement contracts for research and development in excess of \$25 million is approved, if the contracting officer executes a written determination and findings that—

(A) The level of program risk does not permit realistic pricing; and

(B) It is not possible to provide an equitable and sensible allocation of program risk between the Government and the contractor.

* * * * *

[FR Doc. 2019-06246 Filed 3-29-19; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204, 215, 226, and 252

[Docket DARS-2019-0009]

RIN 0750-AK19

Defense Federal Acquisition Regulation Supplement: Demonstration Project for Contractors Employing Persons With Disabilities (DFARS Case 2018-D058)

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 2019 that requires the DFARS to be updated to include an instruction on a demonstration project for contractors employing persons with disabilities.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before May 31, 2019, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2018-D058, using any of the following methods:
○ *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for “DFARS Case 2018-D058.” Select “Comment Now” and follow the instructions provided to submit a comment. Please include “DFARS Case 2018-D058” on any attached documents.

○ *Email:* osd.dfars@mail.mil. Include DFARS Case 2018-D058 in the subject line of the message.

○ *Fax:* 571-372-6094.

○ *Mail:* Defense Acquisition Regulations System, Attn: Jennifer D. Johnson, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

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

SUPPLEMENTARY INFORMATION:

I. Background

This rule proposes to revise the DFARS to implement section 888 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232). Section 888 requires that the DFARS be updated to include an instruction on the demonstration project authorized by section 853 of the NDAA for FY 2004 (Pub. L. 108–136, 10 U.S.C. 2302 note), as amended by division H, section 110 of the Consolidated Appropriations Act, 2004 (Pub. L. 108–199).

Section 853 of the NDAA for FY 2004 authorized a Demonstration Project for Contractors Employing Persons with Disabilities in order to provide defense contracting opportunities for entities employing individuals who are severely disabled. To participate in the Demonstration Project, an entity must meet the definition of “eligible contractor” provided in the proposed rule. Specifically, individuals with severe disabilities must comprise no less than 33 percent of the entity’s total workforce over the 12-month period prior to issuance of the solicitation; this percentage must be one of the evaluation factors used to evaluate offers for a contract under the Demonstration Project. In addition, the entity must pay not less than the minimum wage to those individuals and must provide for its employees’ health insurance and a retirement plan comparable to those provided by similar entities. The entity may be operated on a for-profit or nonprofit basis.

Contracts awarded under the Demonstration Project will be credited toward DoD’s small business goals established pursuant to the Small Business Act (15 U.S.C. 644(g)(1)). Subcontracts awarded to eligible contractors under these contracts will be credited toward DoD’s small business subcontracting goals.

II. Discussion and Analysis

This rule proposes to add coverage of the Demonstration Project in a new subpart in DFARS part 226, Other Socioeconomic Programs. The proposed new subpart 226.7X, Demonstration Project for Contractors Employing Persons with Disabilities, includes definitions and guidance for the contracting workforce regarding the Demonstration Project. Definitions are proposed for the terms “eligible contractor” and “severely disabled individual,” based on those provided in section 853 of the NDAA for FY 2004.

In addition, the new subpart provides a prescription for a new solicitation provision, 252.226–7XXX,

Representation for Demonstration Project for Contractors Employing Persons with Disabilities. This provision defines the terms “eligible contractor” and “severely disabled individual,” explains the purpose of the Demonstration Project, and requires the offeror to represent whether it is or is not an eligible contractor.

Offerors will complete the representation as part of their annual representations and certifications in the System for Award Management (SAM). Therefore, the new provision 252.226–7XXX is added to DFARS 204.1202, Solicitation provision, in the list of provisions that are not included separately in a solicitation when the provision at Federal Acquisition Regulation (FAR) 52.204–7, System for Award Management, is included in the solicitation. The new provision is also added to the provision at DFARS 252.204–7007, Alternate A, Annual Representations and Certifications. The contracting officer must check the appropriate box when the new provision 252.226–7XXX applies to a solicitation.

Contractors under the Demonstration Project may be required to have subcontracting plans per FAR 19.702. Therefore, this rule proposes to amend the clause at DFARS 252.219–7003, Small Business Subcontracting Plan (DoD Contracts), to define the term “eligible contractor” and to specify that subcontracts awarded to subcontractors who also meet the definition of eligible contractor under the Demonstration Project may be counted toward the prime contractor’s small disadvantaged business subcontracting goal.

To increase the visibility of the Demonstration Project, this rule proposes to add at DFARS 215.304, Evaluation factors and significant subfactors, a reference to new section 226.7X02. This section contains the requirement for contracting officers, when using the Demonstration Project, to use an evaluation factor that is the percentage of the offeror’s total workforce consisting of severely disabled individuals.

III. Expected Impact of the Proposed Rule

The Demonstration Project gives DoD a way to provide additional contracting opportunities to entities that employ individuals who are severely disabled and that may not qualify for approval by the Committee for Purchase From People Who Are Blind or Severely Disabled due to their for-profit status or for other reasons. Procurements under the Demonstration Project must be for products and services that are not

available from a mandatory source in FAR part 8, that are not on the AbilityOne Procurement List maintained by the Committee, or that are not available from AbilityOne participating nonprofit agencies in the time required.

The Demonstration Project is modeled after the Small Business Administration’s set-aside program, but uniquely includes an incentive for Federal contractors to hire people with disabilities, for whom the unemployment rate is more than twice the rate for people without disabilities. Such a demonstration project provides opportunities for severely disabled individuals to become gainfully employed taxpayers. Employing people with disabilities can be a way to offset the effects of an aging and shrinking workforce. In addition, people with disabilities bring different perspectives on solving problems and adapting to different circumstances. The Demonstration Project provides another incentive for both for-profit and nonprofit entities to recruit, employ, and retain people with disabilities.

The authority provided for the Demonstration Project has been available for use, at DoD’s discretion, since the NDAA for FY 2004 was signed into law. At the time, DoD considered the Demonstration Project to be similar to a pilot program, in that it provided a way to try a different approach without making broad changes in the way DoD buys supplies and services in general. DoD usually does not amend the DFARS to add guidance regarding pilot programs. Therefore, the DFARS was not amended to include guidance on the Demonstration Project. As noted in Section I of this preamble, DoD is proposing to amend the DFARS in order to comply with section 888 of the NDAA for FY 2019.

DoD estimates that there may be approximately 549 procurements that could be conducted under the Demonstration Project per year. This estimate is based on data obtained from the Federal Procurement Data System on the number of contracts awarded in Product Service Codes (PSCs) that may be suitable for award under the Demonstration Project. The selection of PSCs was informed by the Conference Report for the NDAA for FY 2004, which authorized the Demonstration Project. The Conference Report indicated that Congress expected opportunities to exist for the Demonstration Project in aerospace end items and components, as well as information technology products and services. Therefore, DoD obtained data

for contracts awarded in the following PSCs:

PSC	Description
1560	Airframe Structural Components.
All PSCs in Group 16.	Aerospace Craft Components and Accessories.
All PSCs in Group 70.	Information Technology Equipment (including firmware), Software, Supplies, and Support Equipment.
All PSCs in Category D3.	Information Technology and Telecommunications.

In certain PSCs, there is some overlap with the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled. The areas of overlap generally included a few items within a specific PSC, not the entire PSC. Therefore, relevant PSCs were included regardless of possible overlap with the Procurement List.

DoD also used awards to nonprofits as an indicator of suitability for the Demonstration Project because of its similarities to the AbilityOne Program, in terms of employment of individuals with severe disabilities. From FY 2016 through 2018, an average of 0.16% of those contracts (approximately 90 each year) were awarded to nonprofits. Since the Demonstration Project applies to both for-profit and nonprofit entities, DoD conservatively estimated that up to 1% of contracts (approximately 549 each year) awarded in those PSCs may be suitable for the Demonstration Project.

However, since 2004, DoD is aware of only one DoD contract issued pursuant to the Demonstration Project. The contract was awarded in 2006; Congress had provided funds specifically for this use. This limited use makes it difficult to predict the impact of the Demonstration Project. Depending on the extent to which it is used, it could create additional contract opportunities for entities employing people with severe disabilities, including service-disabled veterans. DoD invites public comment regarding whether more contractors and contracting officers will take advantage of the Demonstration Project if it is added to the DFARS.

This rule proposes to require offerors for procurements conducted under the Demonstration Project to represent whether they are or are not eligible contractors as defined in the rule. Public costs are expected to be de minimis since offerors will complete the representation in the System for Award Management.

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

DoD intends to apply the requirements of section 853 of the NDAA for FY 2004, as amended by division H, section 110 of the Consolidated Appropriations Act, 2004 (Pub. L. 108–199), to contracts at or below the SAT and to contracts 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 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.

Therefore, given that the requirements of section 853 of the NDAA for FY 2004 were enacted to provide defense contracting opportunities for contractors employing persons with disabilities and since many contracts that could be awarded under the Demonstration Project are likely to be 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 commercially available off-the-shelf items) and is intended to limit the applicability of laws to contracts 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.

Therefore, given that the requirements of section 853 of the NDAA for FY 2004 were enacted to provide defense contracting opportunities for contractors employing persons with disabilities, and since many of the products and services offered by these contractors are 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 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 a significant regulatory action and, therefore, was 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 proposed rule is not expected to be subject to the requirements of E.O. 13771, because it is expected to result in no more than de minimis costs.

VII. 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 include an instruction on the Demonstration Project for Contractors Employing Persons with Disabilities. The Demonstration Project allows DoD to provide defense contracting opportunities to entities that employ individuals who are severely disabled, even though those entities may not qualify for approval by the Committee for Purchase From People Who Are Blind or Severely Disabled. Procurements under the Demonstration Project must be for products and services that are not available from a mandatory source in Federal Acquisition Regulation part 8, that are not on the AbilityOne Procurement List maintained by the Committee, or that are not available from AbilityOne participating nonprofit agencies in the time required.

The objective of the rule is to implement section 888 of the NDAA for FY 2019 (Pub. L. 115–232) by including in the DFARS an instruction on the Demonstration Project described above. The Demonstration Project was authorized by section 853 of the NDAA for FY 2004 (Pub. L. 108–136, as amended; 10 U.S.C. 2302 note). The legal basis is section 888 of the NDAA for FY 2019 and 10 U.S.C. 2302 note.

The rule will apply to entities, including small entities, that meet the definition of “eligible contractor” in the rule and that are interested in competing for contracts under the Demonstration Project. Specifically, an eligible contractor employs severely disabled individuals at a rate of no less than 33 percent of the contractor’s workforce over the 12-month period prior to issuance of the solicitation; pays not less than the minimum wage to those individuals; and provides for its employees’ health insurance and a retirement plan comparable to those provided by similar entities. The entity may operate on a for-profit or nonprofit basis. According to data in the Federal Procurement Data System (FPDS), DoD awarded contracts to approximately 4,065 small entities each year from FY 2016 to FY 2018 in Product and Service Codes (PSCs) that may be suitable for award under the Demonstration Project, such as aerospace components and accessories and information technology equipment and services. DoD conservatively estimates that approximately 21 percent, or 870 small entities, may meet the definition of “eligible contractor” and be interested in competing for contracts under the Demonstration Project.

This rule proposes to require offerors to represent whether they are or are not eligible contractors under the Demonstration Project. This representation will be available for completion in the System for Award Management (SAM) and will be completed on an annual basis. This rule does not impose any new recordkeeping or other compliance requirements for small entities.

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

There are no known alternative approaches to the proposed rule that would accomplish the stated objectives 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 2018–D058), in correspondence.

VIII. Paperwork Reduction Act

The rule affects the information collection requirements in the provision at FAR 52.204–7, System for Award Management, and in the clause at FAR 52.204–13, System for Award Management Maintenance, currently approved under OMB Control Number 9000–0159, entitled System for Award Management Registration, in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35). The impact, however, is negligible, because the cost of providing the additional representation in the System for Award Management is de minimis and is within the estimate of public burden approved for OMB Control Number 9000–0159.

List of Subjects in 48 CFR Parts 204, 215, 226, and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 204, 215, 226, and 252 are proposed to be amended as follows:

■ 1. The authority citation for 48 CFR parts 204, 215, 226, and 252 continues to read as follows:

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

PART 204—ADMINISTRATIVE MATTERS

■ 2. Amend section 204.1202 by

- a. Redesignating paragraphs (2)(xi), (xii), and (xiii) as paragraphs (2)(xii), (xiii), and (xiv), respectively; and
- b. Adding new paragraph (xi).

The addition reads as follows:

204.1202 Solicitation provision.

* * * * *

(2) * * *

(xi) 252.226–7XXX, Representation for Demonstration Project for Contractors Employing Persons with Disabilities.

* * * * *

PART 215—CONTRACTING BY NEGOTIATION

■ 3. Amend section 215.304 by adding paragraph (c)(vi) to read as follows:

215.304 Evaluation factors and significant subfactors.

(c) * * *

(vi) See 226.7X02 for an additional evaluation factor required in solicitations when using the Demonstration Project for Contractors Employing Persons with Disabilities.

PART 226—OTHER SOCIOECONOMIC PROGRAMS

■ 4. Add subpart 226.7X, consisting of 226.7X00 through 226.7X03, to read as follows:

SUBPART 226.7X—DEMONSTRATION PROJECT FOR CONTRACTORS EMPLOYING PERSONS WITH DISABILITIES

Sec.

226.7X00 Scope of subpart.

226.7X01 Definitions.

226.7X02 Policy and procedures.

226.7X03 Solicitation provision.

SUBPART 226.7X—DEMONSTRATION PROJECT FOR CONTRACTORS EMPLOYING PERSONS WITH DISABILITIES

226.7X00 Scope of subpart.

This subpart implements section 853 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136, 10 U.S.C. 2302 note), as amended.

226.7X01 Definitions.

As used in this subpart—

Eligible contractor means a business entity operated on a for-profit or nonprofit basis that—

(1) Employs severely disabled individuals at a rate that averages not less than 33 percent of its total workforce over the 12-month period prior to issuance of the solicitation;

(2) Pays not less than the minimum wage prescribed pursuant to 29 U.S.C. 206 to the employees who are severely disabled individuals; and

(3) Provides for its employees’ health insurance and a retirement plan

comparable to those provided for employees by business entities of similar size in its industrial sector or geographic region.

Severely disabled individual means an individual with a disability (as defined in 42 U.S.C. 12102) who has a severe physical or mental impairment that seriously limits one or more functional capacities.

226.7X02 Policy and procedures.

(a) Contracting officers may use this demonstration project to award one or more contracts to an eligible contractor for the purpose of providing defense contracting opportunities for entities that employ severely disabled individuals. To determine if there are eligible contractors capable of fulfilling the agency's requirement, conduct market research as described in 210.002 and FAR 10.002. For services, see also PGI 210.070.

(b) When using this demonstration project, one of the evaluation factors shall be the percentage of the offeror's total workforce that consists of severely disabled individuals employed by the offeror. Contracting officers may use a rating method in which a higher percentage of the offeror's total workforce consisting of severely disabled individuals would result in a higher rating for this evaluation factor.

(c) Contracts awarded to eligible contractors under this demonstration project may be counted toward DoD's small disadvantaged business goal.

226.7X03 Solicitation provision.

Use the provision at 252.226-7XXX, Representation for Demonstration Project for Contractors Employing Persons with Disabilities, in solicitations when using this demonstration project.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 5. Amend section 252.204-7007 by—
a. Removing clause date "(DEC 2018)" and adding "(DATE)"; and
b. Adding paragraph (d)(2)(vi).
The addition reads as follows:

252.204-7007 Alternate A, Annual Representations and Certifications.

* * * * *

- (d) * * *
(2) * * *

(vi) 252.226-7XXX, Representation for Demonstration Project for Contractors Employing Persons with Disabilities.

* * * * *

- 6. Amend section 252.219-7003 by—

- a. Removing clause date "(DEC 2018)" and adding "(DATE)" in its place;
b. Revising paragraph (a);
c. Redesignating paragraph (b) as paragraph (b)(1);
d. In the newly redesignated paragraph (b)(1), adding "(section 8025 of Pub. L. 108-87)" at the end of the paragraph, before the period;
e. Adding paragraph (b)(2); and
f. In the Alternate I clause—
i. Removing the clause date of "(APR 2018)" and adding "(DATE)" in its place;
ii. Revising paragraph (a);
iii. Redesignating paragraph (b) as paragraph (b)(1);
iv. In the newly redesignated paragraph (b)(1), adding "(section 8025 of Pub. L. 108-87)" at the end of the paragraph, before the period; and
v. Adding paragraph (b)(2).

The revisions and additions read as follows:

252.219-7003 Small Business Subcontracting Plan (DoD Contracts).

* * * * *

(a) Definitions. As used in this clause—

Eligible contractor means a business entity operated on a for-profit or nonprofit basis that—

- (1) Employs severely disabled individuals at a rate that averages not less than 33 percent of its total workforce over the 12-month period prior to issuance of the solicitation;
(2) Pays not less than the minimum wage prescribed pursuant to 29 U.S.C. 206 to the employees who are severely disabled individuals; and
(3) Provides for its employees' health insurance and a retirement plan comparable to those provided for employees by business entities of similar size in its industrial sector or geographic region.

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.

- (b) * * *
(2) Subcontracts awarded to eligible contractors under the Demonstration Project for Contractors Employing Persons with Disabilities (see DFARS 226.7X) may be counted toward the Contractor's small disadvantaged business subcontracting goal (section 853 of Pub. L. 108-136, as amended by division H, section 110 of Pub. L. 108-199).

* * * * *

Alternate I. * * *
* * * * *

(a) Definitions. As used in this clause—

Eligible contractor means a business entity operated on a for-profit or nonprofit basis that—

- (1) Employs severely disabled individuals at a rate that averages not less than 33 percent of its total workforce over the 12-month period prior to issuance of the solicitation;
(2) Pays not less than the minimum wage prescribed pursuant to 29 U.S.C. 206 to the employees who are severely disabled individuals; and
(3) Provides for its employees' health insurance and a retirement plan comparable to those provided for employees by business entities of similar size in its industrial sector or geographic region.

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.

- (b) * * *
(2) Subcontracts awarded to eligible contractors under the Demonstration Project for Contractors Employing Persons with Disabilities (see DFARS 226.7X) may be counted toward the Contractor's small disadvantaged business subcontracting goal (section 853 of Pub. L. 108-136, as amended by division H, section 110 of Pub. L. 108-199).

* * * * *

- 7. Add section 252.226-7XXX to read as follows:

252.226-7XXX Representation for Demonstration Project for Contractors Employing Persons with Disabilities.

As prescribed in 226.7X03, use the following provision:

Representation for Demonstration Project for Contractors Employing Persons with Disabilities (Date)

(a) Definitions. As used in this provision— "Eligible contractor" means a business entity operated on a for-profit or nonprofit basis that—

- (1) Employs severely disabled individuals at a rate that averages not less than 33 percent of its total workforce over the 12-month period prior to issuance of the solicitation;
(2) Pays not less than the minimum wage prescribed pursuant to 29 U.S.C. 206 to the employees who are severely disabled individuals; and
(3) Provides for its employees' health insurance and a retirement plan comparable to those provided for employees by business

entities of similar size in its industrial sector or geographic region.

“Severely disabled individual” means an individual with a disability (as defined in 42 U.S.C. 12102) who has a severe physical or mental impairment that seriously limits one or more functional capacities.

(b) *Demonstration Project.* This solicitation is issued pursuant to the Demonstration Project for Contractors Employing Persons with Disabilities. The purpose of the Demonstration Project is to provide defense contracting opportunities for entities that employ severely disabled individuals. To be eligible for award, an offeror must be an eligible contractor as defined in paragraph (a) of this provision.

(c) *Representation.* The offeror represents that it is is not an eligible contractor as defined in paragraph (a) of this provision.

(End of provision)

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 219 and 252

[Docket DARS-2019-0015]

RIN 0750-AK39

Defense Federal Acquisition Regulation Supplement: Nonmanufacturer Rule for 8(a) Participants (DFARS Case 2019-D004)

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 the final rule published by the Small Business Administration implementing a section of the National Defense Authorization Act for Fiscal Year 2013 that provided revised and standardized limitations on subcontracting, including the nonmanufacturer rule, that apply to small business concerns, including participants in the 8(a) Program.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before May 31, 2019, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2019-D004, using any of the following methods:

○ *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for “DFARS Case 2019-D004.” Select “Comment Now” and follow the

instructions provided to submit a comment. Please include “DFARS Case 2019-D004” on any attached documents.

○ *Email:* osd.dfars@mail.mil. Include DFARS Case 2019-D004 in the subject line of the message.

○ *Fax:* 571-372-6094.

○ *Mail:* Defense Acquisition Regulations System, Attn: Jennifer D. Johnson, OUSD(A-S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

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

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to implement regulatory changes made by the Small Business Administration (SBA) in its final rule published in the *Federal Register* at 81 FR 34243 on May 31, 2016. SBA’s final rule implemented the requirements of section 1651 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112-239, 15 U.S.C. 657s). Section 1651 revised and standardized the limitations on subcontracting, including the nonmanufacturer rule, that apply to small business concerns, including 8(a) Program participants, under procurements conducted pursuant to Federal Acquisition Regulation (FAR) part 19, Small Business Programs.

Small business concerns must meet certain requirements when they offer to the Government an end item they did not manufacture, process, or produce. These requirements are known as the nonmanufacturer rule. For example, a small business nonmanufacturer must offer an end item that a small business manufactured, processed, or produced in the United States or its outlying areas (as defined in FAR 2.101). The clause at DFARS 252.219-7010, Notification of Competition Limited to Eligible 8(a) Concerns—Partnership Agreement, includes an outdated version of these requirements. This rule proposes to update DFARS 252.219-7010 to include the revised nonmanufacturer rule provided by section 1651 and implemented in SBA’s final rule.

II. Discussion and Analysis

This rule proposes to amend DFARS 252.219-7010, paragraph (d), to replace the outdated text regarding the nonmanufacturer rule with updated text that implements section 1651 and SBA’s final rule. The proposed, updated text is consistent with the proposed FAR rule published in the *Federal Register* on December 4, 2018, at 83 FR 62540 (FAR Case 2016-011, Revision of Limitations on Subcontracting). In addition, this rule proposes to revise the title of the clause at 252.219-7010 to align with the title of FAR 52.219-18, Notification of Competition Limited to Eligible 8(a) Participants.

III. Expected Impact of the Proposed Rule

The clause at DFARS 252.219-7010, Notification of Competition Limited to Eligible 8(a) Concerns—Partnership Agreement, currently requires 8(a) participants that offer end items they did not manufacture or produce (*i.e.*, nonmanufacturers) to offer end items manufactured or produced by small business concerns in the United States or its outlying areas. This requirement is known as the “nonmanufacturer rule.” DFARS 252.219-7010 provides an exemption from the nonmanufacturer rule for contracts valued at or below \$25,000 and awarded under simplified acquisition procedures. For these contracts, an 8(a) participant currently may offer end items manufactured or produced by any domestic firm.

SBA’s final rule applied the nonmanufacturer rule to 8(a) contracts at any dollar value. There was no exemption for contracts valued at or below \$25,000 and awarded under simplified acquisition procedures. Therefore, this rule proposes to remove that exemption from DFARS 252.219-7010. This change means the nonmanufacturer rule will apply to 8(a) contracts at any dollar value, and 8(a) participants that are nonmanufacturers will be required to offer end items manufactured, processed, or produced by small business concerns in the United States or its outlying areas.

To estimate the number of 8(a) participants that may be impacted by this change, DoD obtained data from the Federal Procurement Data System on DoD contracts, for products, awarded to 8(a) participants under the 8(a) Program. Contracts for services, including construction, were excluded because the nonmanufacturer rule only applies to products, not services. In FY 2016 through FY 2018, DoD awarded contracts for products to an average of 285 8(a) participants each year. An