

1707(a)(1) (see section IV. of this preamble), the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

## VII. 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, 209, 212, and 252

Government procurement.

Jennifer Lee Hawes,

*Regulatory Control Officer, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 204, 209, 212, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 204, 209, 212, and 252 continues to read as follows:

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

## PART 204—ADMINISTRATIVE AND INFORMATION MATTERS

### 204.7403 [Amended]

- 2. Amend section 204.7403 by—
- a. In the section heading, removing “Solicitation provision and contract” and adding “Contract” in its place;
  - b. Removing paragraph (a); and
  - c. Redesignating paragraphs (b) and (c) as paragraphs (a) and (b), respectively.

## PART 209—CONTRACTOR QUALIFICATIONS

■ 3. Revise section 209.505–4(b)(ii) to read as follows:

### 209.505–4 Obtaining access to proprietary information.

(b) \* \* \*

(ii) For litigation support contractors accessing litigation information, including that originating from third parties, use and non-disclosure requirements are addressed through the use of the clause at 252.204–7014, as prescribed at 204.7403(a). Pursuant to the clause, litigation support contractors are not required to enter into non-disclosure agreements directly with any third party asserting restrictions on any litigation information.

## PART 212—ACQUISITION OF COMMERCIAL ITEMS

### 212.301 [Amended]

- 4. Amend section 212.301 by—
- a. Removing paragraph (f)(ii)(E);
  - b. Redesignating paragraphs (f)(ii)(F) and (G) as paragraphs (f)(ii)(E) and (F), respectively;
  - c. In the newly redesignated (f)(ii)(E) removing “204.7403(b)” and adding “204.7403(a)” in its place; and
  - d. In the newly redesignated (f)(ii)(F) removing “204.7403(c)” and adding “204.7403(b)” in its place.

## PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

### 252.204–7013 [Removed and Reserved]

■ 5. Remove and reserve section 252.204–7013.

### 252.204–7014 [Amended]

■ 6. Amend section 252.204–7014, in the introductory text, by removing “204.7403(b)” and adding “204.7403(a)” in its place.

### 252.204–7015 [Amended]

■ 7. Amend section 252.204–7015, in the introductory text, by removing “204.7403(c)” and adding “204.7403(b)” in its place.

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

### 48 CFR Parts 207, 215, 216, and 234

[Docket DARS–2019–0026]

RIN 0750–AK38

### Defense Federal Acquisition Regulation Supplement: Reliability and Maintainability in Weapon System Design (DFARS Case 2019–D003)

**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 2018 that requires the use of reliability and maintainability sustainment factors in weapon system design.

**DATES:** Effective October 31, 2019.

**FOR FURTHER INFORMATION CONTACT:** Ms. Kimberly Bass, telephone 571–372–6174.

### SUPPLEMENTARY INFORMATION:

#### I. Background

DoD published a proposed rule in the **Federal Register** at 84 FR 125 on June 28, 2019, to implement section 834 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018. Section 834 of the NDAA for FY 2018 amends 10 U.S.C. to add section 2443, sustainment factors in weapon system design which requires program managers or comparable requiring activity officials exercising program management responsibilities to ensure that reliability and maintainability are included in the performance attributes of the key performance parameters on sustainment during the development of capabilities requirements for major weapon systems design and contracts for the—

- Engineering and manufacturing development of a weapon system, including embedded software; or
- Production of a weapon system, including embedded software.

As a matter of policy, the Under Secretary of Defense for Acquisition and Sustainment directed the application of the requirements of 10 U.S.C. 2443 to the technical maturation and risk reduction phase. No public comments were received on the proposed rule, and no changes 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 propose to create any new provisions or clauses or impact any existing provisions or clauses.

#### III. 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.

#### IV. Executive Order 13771

This final 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:

This final rule is necessary to implement section 834 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018. Section 834 of the NDAA for FY 2018 amends Title 10, United States Code, to add section 2443, Sustainment factors in weapon system design. Section 2443 requires program managers or comparable requiring activity officials, exercising program management responsibilities, to ensure that reliability and maintainability are included in the performance attributes of the key performance parameters on sustainment during the development of capabilities requirements for major weapon systems design and contracts for the technical maturation and risk reduction and engineering and manufacturing development of a weapon system, including embedded software; or production of a weapon system. The objective of this final rule is to implement section 834 of the NDAA for FY 2018.

There were no issues raised by the public in response to the initial regulatory flexibility analysis provided in the proposed rule.

The final rule will apply to all small entities that have been or will be awarded contracts for the development of major weapon systems. Small business statistics were obtained from the Federal Procurement Data System for FY 2018 data identifying the DoD research and development engineering development awards issued, including task and delivery orders under single-award indefinite delivery indefinite quantity contracts and Basic Ordering Agreements as of February 26, 2019. Of the 78 contract awards, 15 awards or approximately 19 percent were made to unique small business entities.

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

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

#### VI. Paperwork Reduction Act

The rule does not contain any information collection requirements that

require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### List of Subjects in 48 CFR Parts 207, 215, 216, and 234

Government procurement.

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

Therefore, 48 CFR parts 207, 215, 216, and 234 are amended as follows:

■ 1. The authority citation for 48 CFR parts 207, 215, 216, and 234 continues to read as follows:

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

#### PART 207—ACQUISITION PLANNING

■ 2. Amend section 207.106 by—

■ a. In paragraph (S-70)(1), removing “Section 802(a)” and adding “section 802(a)” in its place;

■ b. Redesignating paragraphs (S-70)(2)(ii) through (iv) as paragraphs (iii) through (v), respectively;

■ c. Adding a new paragraph (S-70)(2)(ii); and

■ d. Adding paragraph (S-72)(5).

The additions read as follows:

#### 207.106 Additional requirements for major systems.

\* \* \* \* \*

(S-70) \* \* \*

(2) \* \* \*

(ii) In accordance with 10 U.S.C. 2443, to emphasize reliability and maintainability in weapon system design, ensure that reliability and maintainability are included in the performance attributes of the key performance parameters on sustainment during the development of capabilities requirements. For additional guidance see PGI 207.105(b)(14)(ii)(2);

\* \* \* \* \*

(S-72) \* \* \*

(5) In accordance with 10 U.S.C. 2443, acquisition plans for engineering manufacturing and development and production of major systems as defined in 10 U.S.C. 2302 and 2302d and for major defense acquisition programs as defined in 202.101, shall include performance measures that are developed using best practices for responding to the positive or negative performance of a contractor for the engineering and manufacturing development or production of a weapon system, including embedded software. At a minimum the contracting officer shall—

(i) Encourage the use of incentive fees and penalties as appropriate; and

(ii) Allow the program manager or comparable requiring activity official exercising program management responsibilities, to base determinations of a contractor's performance on reliability and maintainability data collected during the program. Such data collection and associated evaluation metrics shall be described in detail in the contract; and to the maximum extent practicable, the data shall be shared with appropriate contractor and Government organizations.

\* \* \* \* \*

#### 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) Ensure source selections emphasize sustainment factors and objective reliability and maintainability evaluation criteria in competitive contracts for the—

(A) Technical maturation and risk reduction phase of weapon system design (see guidance at PGI 207.105(b)(14)(ii)(2));

(B) Engineering and manufacturing development phase of a weapon system, including embedded software (10 U.S.C. 2443); or

(C) Production and deployment phase of a weapon system, including embedded software (10 U.S.C. 2443).

#### PART 216—TYPES OF CONTRACTS

■ 4. Amend section 216.402-2 by—

■ a. Designating the text as paragraph (1); and

■ b. Adding paragraph (2).

The addition reads as follows:

#### 216.402-2 Technical performance incentives.

\* \* \* \* \*

(2) Contracting officers shall ensure requirements about the payment of incentive fees or the imposition of penalties are included in the solicitation for a contract for the engineering and manufacturing development or production of a weapon system, including embedded software, if the program manager or comparable requiring activity official exercising program manager responsibilities includes—

(i) Provisions for the payment of incentive fees to the contractor, based on achievement of design specification requirements for reliability and maintainability of weapons systems under the contract; or

(ii) The imposition of penalties to be paid by the contractor to the Government for failure to achieve such design specification requirements (10 U.S.C. 2443).

## PART 234—MAJOR SYSTEM ACQUISITION

■ 5. Amend section 234.004 by adding paragraph (3) to read as follows:

### 234.004 Acquisition strategy.

\* \* \* \* \*

(3) The contracting officer shall include in solicitations for contracts for the technical maturation and risk reduction phase, engineering and manufacturing development phase or production phase of a weapon system, including embedded software—

(i) Clearly defined measurable criteria for engineering activities and design specifications for reliability and maintainability provided by the program manager, or the comparable requiring activity official performing program management responsibilities; or

(ii) Ensure a copy of the justification, executed by the program manager or the comparable requiring activity official performing program management responsibilities for the decision that engineering activities and design specifications for reliability and maintainability should not be a requirement, is included in the contract file (10 U.S.C. 2443).

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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:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a Small Business Administration rule that implemented a section of the National Defense Authorization Act for Fiscal Year 2013

to revise and standardize the limitations on subcontracting and the nonmanufacturer rule, which apply to small business concerns, including participants in the 8(a) Program.

**DATES:** Effective October 31, 2019.

**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 12187 on April 1, 2019, 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 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 and 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. Two 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. Summary of Significant Changes

There are no significant changes made to the final rule from the proposed rule. One minor edit is made to the clause in paragraph (a)(3) to change "by the SBA" to "by SBA".

##### B. Analysis of Public Comments

##### 1. Support for the Rule

*Comment:* Both respondents expressed support for the proposed rule.

*Response:* DoD acknowledges the respondents' support.

##### 2. Scope of the Rule

*Comment:* The respondents recommended expanding the rule to include all small businesses instead of limiting the rule to 8(a) participants. One respondent noted that application of the nonmanufacturer rule to all small business set-asides would require contracting officers to make a good faith effort to locate small business manufacturers before requesting a waiver from SBA. The respondent further noted that, without the nonmanufacturer rule and the waiver process, small business

nonmanufacturers would serve as a pass-through for large global and foreign manufacturers.

*Response:* The scope of this final DFARS rule is limited to the 8(a) Program and cannot be expanded to all small business set-asides. Application of the nonmanufacturer rule to all small business set-asides is addressed in the FAR and will be updated in the final rule for FAR case 2016-011, Revision of Limitations on Subcontracting. DoD contracting officers must follow the FAR with regard to application of the nonmanufacturer rule to small business programs other than the 8(a) Program. In competitive procurements under the 8(a) Program, DoD contracting officers must use the clause at DFARS 252.219-7010, Notification of Competition Limited to Eligible 8(a) Participants—Partnership Agreement, which takes into account the Partnership Agreement between DoD and SBA.

##### III. Expected Impact of the Rule

Prior to publication of this final rule, the clause at DFARS 252.219-7010 required 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 provided 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 could 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 removes 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