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## 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](mailto: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

below the SAT, currently defined at FAR 2.201 as \$250,000, are excepted from the domestic source restrictions of the Berry Amendment.

This rule proposes to implement section 817 of the NDAA for FY 2021 by reducing the exception threshold from the SAT to \$150,000. DoD expects the reduction required by section 817 to result in an increase in the number of procurements of domestically sourced end products that are subject to 10 U.S.C. 2533a.

DoD estimates that approximately 970 procurements valued between \$150,000 and the SAT of \$250,000 are awarded to an estimated 400 entities annually, based upon data obtained from the Federal Procurement Data System (FPDS) for fiscal years 2018 through 2020. Until the final rule for FAR case 2018–004 (85 FR 40064), which increased the SAT from \$150,000 to \$250,000, became effective on August 31, 2020, these entities were required to comply with domestic source restrictions of the Berry Amendment, including the \$150,000 exception threshold. It has only been since August 31, 2020, that these entities have had the benefit of the higher exception threshold (*i.e.*, the SAT of \$250,000). DoD assumes that some of these entities may have adjusted their procurement sources in the short time since the threshold was raised, while some may have continued with their established supply chains. There is currently no data source that would identify the entities that made adjustments and would have to make additional adjustments to return to their previous practices.

#### 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.

#### VI. 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 to 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.

#### 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.*, because the types of end products or components subject to 10 U.S.C. 2533a are generally at a dollar value below the simplified acquisition threshold (SAT) and normally set aside for small entities. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This rule proposes to amend the DFARS to implement section 817 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116–283). Section 817 reduces the dollar threshold exception at DFARS 225.7002, which implements 10 U.S.C. 2533a (commonly known as the “Berry Amendment”), from the SAT to an amount not to exceed \$150,000.

The objective of the rule is to increase the number of acquisitions subject to the domestic source restrictions at DFARS 225.7002 by reducing the number of procurements subject to the exception at DFARS 225.7002–2(a). The legal basis of the rule is section 817 of the NDAA for FY 2021.

This rule is expected to affect small entities that participate in procurements subject to the domestic source restrictions at DFARS 225.7002. However, DoD does not expect a significant change in the number of actions awarded to small entities resulting from the reduction in the threshold from the current SAT of \$250,000 to \$150,000. To assess the impact of this reduction, data was obtained from the Federal Procurement Data System (FPDS). According to FPDS for fiscal years 2018 through 2020, DoD awarded an average of approximately 970 applicable actions valued above \$150,000 but below the SAT. Of those actions, an average of 200 contract actions were awarded to approximately 72 unique small entities.

The rule does not impose any new reporting, recordkeeping, or compliance requirements.

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

There are no practical alternatives that will accomplish the objectives of the 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 the 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 2021–D010), in correspondence.

#### VIII. Paperwork Reduction Act

This rule does not contain any 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).

#### List of Subjects in 48 CFR Parts 225 and 252

Government procurement.

#### Jennifer D. Johnson,

*Editor/Publisher, Defense Acquisition Regulations System.*

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

■ 1. The authority citation for 48 CFR Parts 225 and 252 continues to read as follows:

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

#### PART 225—FOREIGN ACQUISITION

##### 225.7002–2 [Amended]

■ 2. Amend section 225.7002–2 by—

- a. In paragraph (a), removing “at or below the simplified acquisition threshold” and adding “not exceeding \$150,000” in its place; and
- b. In paragraph (j)(2), removing “simplified acquisition threshold” and adding “threshold at 225.7002–2(a)” in its place.

##### 225.7002–3 [Amended]

■ 3. Amend section 225.7002–3, in paragraphs (b) and (c), by removing “simplified acquisition threshold” and adding “threshold at 225.7002–2(a)” in both places.

#### PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 252.225–7012 by—

- a. Revising the date of the clause;
- b. In paragraph (a), in the definition of “Structural component of a tent”, redesignating paragraphs (i) and (ii) as

paragraphs (1) and (2), and at the end of the newly redesignated paragraph (1) removing the semicolon and adding “; and” in its place, and

■ c. Revising paragraph (c)(2)(ii).

The revisions read as follows:

**252.225–7012 Preference for Certain Domestic Commodities.**

\* \* \* \* \*

**Preference for Certain Domestic Commodities (DATE)**

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(ii) Does not exceed the threshold at 225.7002–2(a);

\* \* \* \* \*

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**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

[FF09E21000 FXES11110900000 212]

**Endangered and Threatened Wildlife and Plants; Two Species Not Warranted for Listing as Endangered or Threatened Species**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notification of findings.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce findings that two species are not warranted for listing as endangered or threatened species under the

Endangered Species Act of 1973, as amended (Act). After a thorough review of the best available scientific and commercial information, we find that it is not warranted at this time to list Black Creek crayfish (*Procambarus pictus*) or hairy-peduncled beakrush (*Rhynchospora crinipes*). However, we ask the public to submit to us at any time any new information relevant to the status of any of the species mentioned above or their habitats.

**DATES:** The findings in this document were made on September 29, 2021.

**ADDRESSES:** Detailed descriptions of the bases for these findings are available on the internet at <http://www.regulations.gov> under the following docket numbers:

Species	Docket No.
Black Creek crayfish .....	FWS–R4–ES–2021–0045
Hairy-peduncled beakrush .....	FWS–R4–ES–2021–0046

Supporting information used to prepare this finding is available by contacting the appropriate person as specified under **FOR FURTHER**

**INFORMATION CONTACT.** Please submit any new information, materials, comments, or questions concerning this finding to the appropriate person, as specified

under **FOR FURTHER INFORMATION CONTACT.**

**FOR FURTHER INFORMATION CONTACT:**

Species	Contact information
Black Creek crayfish .....	Lourdes Mena, Chief of Listing and Recovery, Jacksonville Fish and Wildlife Office, 904–731–3134, <a href="mailto:lourdes_mena@fws.gov">lourdes_mena@fws.gov</a> .
Hairy-peduncled beakrush .....	Stephen Ricks, Field Supervisor, Mississippi Ecological Services Field Office, 601–321–1122, <a href="mailto:stephen_ricks@fws.gov">stephen_ricks@fws.gov</a> .

If you use a telecommunications device for the deaf (TDD), please call the Federal Relay Service at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

**Background**

Under section 4(b)(3)(B) of the Act (16 U.S.C. 1531 *et seq.*), we are required to make a finding whether or not a petitioned action is warranted within 12 months after receiving any petition for which we have determined contains substantial scientific or commercial information indicating that the petitioned action may be warranted (“12-month finding”). We must make a finding that the petitioned action is: (1) Not warranted; (2) warranted; or (3) warranted but precluded. We must publish a notification of these 12-month findings in the **Federal Register**.

**Summary of Information Pertaining to the Five Factors**

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations at part 424 of title 50 of the Code of Federal Regulations (50 CFR part 424)

set forth procedures for adding species to, removing species from, or reclassifying species on the Lists of Endangered and Threatened Wildlife and Plants (Lists). The Act defines “species” as any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature (16 U.S.C. 1532(16)). The Act defines “endangered species” as any species that is in danger of extinction throughout all or a significant portion of its range (16 U.S.C. 1532(6)), and “threatened species” as any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range (16 U.S.C. 1532(20)). Under section 4(a)(1) of the Act, a species may be determined to be an endangered species or a threatened species because of any of the following five factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species’ continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term “threat” to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term “threat” includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or