

821(b) will be conducted under FAR Part 12, the clauses at FAR 52.212-4 and 52.212-5 will be incorporated into resulting contracts. In this regard, when soliciting offers, contracting officers may need to modify paragraph (a) of the provision at 52.212-4 in particular, addressing inspection and acceptance, as may be necessary to ensure the contract's remedies adequately protect the Government's interests. For example, contracting officers may wish to negotiate the inclusion of commercial remedies such as extension of contract performance or the right to reduce the contract price to reflect the reduced value of the services performed when defects in services cannot be corrected by reperformance.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

#### B. Regulatory Flexibility Act

DoD does not expect this 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 rule pertains only to those small entities that will be awarded performance-based service contracts or task orders meeting the conditions specified in the rule. Therefore, DoD has not prepared an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2000-D306.

#### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

#### D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements Section 821(b) of the National Defense Authorization Act for Fiscal Year 2001 (Public Law 106-398). Section 821(b) establishes an incentive for the use of performance-based service contracts by permitting DoD to treat a performance-based service contract as a contract for

the procurement of commercial items if certain conditions are met. Section 821(b) became effective on October 30, 2000, and the contracting authority provided under that section expires on October 30, 2003. Comments received in response to this interim rule will be considered in the formation of the final rule.

#### List of Subjects in 48 CFR Parts 212 and 237

Government procurement.

#### Michele P. Peterson,

*Executive Editor, Defense Acquisition Regulations Council.*

Therefore, 48 CFR Parts 212 and 237 are amended as follows:

1. The authority citation for 48 CFR Parts 212 and 237 continues to read as follows:

**Authority:** 41 U.S.C. 421 and 48 CFR Chapter 1.

#### PART 212—ACQUISITION OF COMMERCIAL ITEMS

2. Subpart 212.1 is added to read as follows:

##### Subpart 212.1—Acquisition of Commercial Items—General

Sec.

212.102 Applicability.

212.102 Applicability.

(a)(i) In accordance with Section 821 of the National Defense Authorization Act for Fiscal Year 2001 (Public Law 106-398), the contracting officer also may use FAR part 12 for any performance-based contracting for services if the procedures in FAR Subpart 13.5 are not used, and the contract or task order—

(A) Is entered into on or before October 30, 2003;

(B) Has a value of \$5 million or less;

(C) Meets the definition of performance-based contracting at FAR 2.101;

(D) Uses quality assurance surveillance plans;

(E) Includes performance incentives where appropriate;

(F) Specifies a firm-fixed price; and

(G) Is awarded to an entity that provides similar services at the same time to the general public under terms and conditions similar to those in the contract.

(ii) In exercising the authority specified in paragraph (a)(i) of this section, the contracting officer should modify paragraph (a) of the clause at FAR 52.212-4 as may be necessary to ensure the contract's remedies adequately protect the Government's interests.

#### PART 237—SERVICE CONTRACTING

3. Subpart 237.6 is added to read as follows:

##### Subpart 237.6—Performance-Based Contracting

Sec.

237.601 General.

237.601 General.

See 212.102 for the use of FAR part 12 procedures with performance-based contracting.

[FR Doc. 01-30262 Filed 12-5-01; 8:45 am]

**BILLING CODE 5000-04-U**

#### DEPARTMENT OF DEFENSE

#### 48 CFR Part 217

[DFARS Case 2000-D303/304]

#### Defense Federal Acquisition Regulation Supplement; Multiyear Contracting

**AGENCY:** Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Sections 802 and 806 of the National Defense Authorization Act for Fiscal Year 2001. Sections 802 and 806 amend requirements pertaining to multiyear contracting.

**EFFECTIVE DATE:** December 6, 2001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Sandra Haberman, Defense Acquisition Regulations Council, OUSD (AT&L) DP (DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0289; facsimile (703) 602-0350. Please cite DFARS Case 2000-D303/304.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

Section 802 of the National Defense Authorization Act for Fiscal Year 2001 (Pub. L. 106-398) relocated provisions relating to multiyear contracts for services from 10 U.S.C. 2306(g) to a new 10 U.S.C. 2306c. Section 806 of Public Law 106-398 amended 10 U.S.C. 2306b to add reporting requirements pertaining to multiyear contracts for property. This final rule updates DFARS Subpart 217.1 to reflect current statutory requirements pertaining to multiyear contracts.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

## B. Regulatory Flexibility Act

This final rule does not constitute a significant revision within the meaning of FAR 1.501 and Public Law 98-577 and publication for public comment is not required. However, DoD will consider comments from small entities concerning the affected DFARS subpart in accordance with 5 U.S.C. 610. Such comments should cite DFARS Case 2000-D303/304.

## C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

### List of Subjects in 48 CFR Part 217

Government procurement.

#### Michele P. Peterson,

*Executive Editor, Defense Acquisition Regulations Council.*

Therefore, 48 CFR Part 217 is amended as follows:

1. The authority citation for 48 CFR part 217 continues to read as follows:

**Authority:** 41 U.S.C. 421 and 48 CFR Chapter 1.

### PART 217—SPECIAL CONTRACTING METHODS

2. Sections 217.170 through 217.172 are revised to read as follows:

#### 217.170 General.

(a) Before awarding a multiyear contract, the head of the agency must compare the cost of that contract to the cost of an annual procurement approach, using a present value analysis. Do not award the multiyear contract unless the analysis shows that the multiyear contract will result in the lower cost (10 U.S.C. 2306b(l)(7); Section 8008(a) of Public Law 105-56 and similar sections in subsequent DoD appropriations acts).

(b) The head of the agency must provide written notice to the congressional defense committees at least 10 days before termination of any multiyear contract (10 U.S.C. 2306b(l)(6); 10 U.S.C. 2306c(d)(3); Section 8008(a) of Public Law 105-56 and similar sections in subsequent DoD appropriations acts).

(c) Every multiyear contract must comply with FAR 17.104(c), unless an exception is approved through the budget process in coordination with the cognizant comptroller.

(d)(1) DoD must receive authorization from, or provide notification to, Congress before entering into a

multiyear contract for certain procurements, including those expected to—

(i) Exceed \$500 million (see 217.171(a)(5); 217.172(c); and 217.173(b)(4));

(ii) Employ economic order quantity procurement in excess of \$20 million in any one year (see 217.174(a)(1));

(iii) Employ an unfunded contingent liability in excess of \$20 million (see 217.171(a)(4)(i) and 217.172(d)(1));

(iv) Involve a contract for advance procurement leading to a multiyear contract that employs economic order quantity procurement in excess of \$20 million in any one year (see 217.174(a)(2)); or

(v) Include a cancellation ceiling in excess of \$100 million (see 217.171(a)(4)(ii) and 217.172(d)(2)).

(2) A DoD component must submit a request for authority to enter into multiyear contracts described in paragraphs (d)(1)(i) through (iv) of this section as part of the component's budget submission for the fiscal year in which the multiyear contract will be initiated. DoD will include the request, for each candidate it supports, as part of the President's Budget for that year and in the Appendix to that budget as part of proposed legislative language for the appropriations bill for that year (Section 8008(b) of Public Law 105-56).

(3) If the advisability of using a multiyear contract becomes apparent too late to satisfy the requirements in paragraph (d)(2) of this section, the request for authority to enter into a multiyear contract must be—

(i) Formally submitted by the President as a budget amendment; or

(ii) Made by the Secretary of Defense, in writing, to the congressional defense committees. (Section 8008(b) of Public Law 105-56)

(4) Agencies must establish reporting procedures to meet the congressional notification requirements of paragraph (d)(1) of this section. The head of the agency must submit a copy of each notice to the Director of Defense Procurement, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics) (OUSD (AT&L) DP), and to the Deputy Under Secretary of Defense (Comptroller) (Program/Budget) (OUSD (C) (P/B)).

#### 217.171 Multiyear contracts for services.

(a) 10 U.S.C. 2306c. (1) The head of the agency may enter into a multiyear contract for a period of not more than 5 years for the following types of services (and items of supply relating to such services), even though funds are limited by statute to obligation only

during the fiscal year for which they were appropriated:

(i) Operation, maintenance, and support of facilities and installations.

(ii) Maintenance or modification of aircraft, ships, vehicles, and other highly complex military equipment.

(iii) Specialized training requiring high quality instructor skills (*e.g.*, training for pilots and aircrew members or foreign language training).

(iv) Base services (*e.g.*, ground maintenance, in-plane refueling, bus transportation, and refuse collection and disposal).

(2) The head of the agency must be guided by the following principles when entering into a multiyear contract for services:

(i) The portion of the cost of any plant or equipment amortized as a cost of contract performance should not exceed the ratio between the period of contract performance and the anticipated useful commercial life of the plant or equipment. As used in this section, "useful commercial life" means the commercial utility of the facilities rather than the physical life, with due consideration given to such factors as the location, specialized nature, and obsolescence of the facilities.

(ii) Consider the desirability of obtaining an option to extend the term of the contract for a reasonable period not to exceed 3 years at prices that do not include charges for plant, equipment, or other nonrecurring costs already amortized.

(iii) Consider the desirability of reserving the right to take title, under the appropriate circumstances, to the plant or equipment upon payment of the unamortized portion of the cost.

(3) Before entering into a multiyear contract for services, the head of the agency must make a written determination that—

(i) There will be a continuing requirement for the services consistent with current plans for the proposed contract period;

(ii) Furnishing the services will require—

(A) A substantial initial investment in plant or equipment; or

(B) The incurrence of substantial contingent liabilities for the assembly, training, or transportation of a specialized work force; and

(iii) Using a multiyear contract will promote the best interests of the United States by encouraging effective competition and promoting economies in operations.

(4) The head of the agency must provide written notice to the congressional defense committees at least 30 days before award of a

multiyear contract for services that include—

(i) An unfunded contingent liability in excess of \$20 million (Section 8008(a) of Public Law 105–56 and similar sections in subsequent DoD appropriations acts); or

(ii) A cancellation ceiling in excess of \$100 million.

(5) The head of the agency must not initiate a multiyear contract for services exceeding \$500 million unless a law specifically provides authority for the contract.

(b) *10 U.S.C. 2829.* (1) The head of the agency may enter into multiyear contracts for supplies and services required for management, maintenance, and operation of military family housing and may pay the costs of such contracts for each year from annual appropriations for that year.

(2) The head of the agency may use this authority only if the term of the contract does not exceed 4 years.

**217.172 Multiyear contracts for supplies.**

(a) This section applies to all multiyear contracts for supplies, including weapon systems. For policies that apply only to multiyear contracts for weapon systems, see 217.173.

(b) The head of the agency may enter into a multiyear contract for supplies if,

in addition to the conditions listed in FAR 17.105–1(b), the use of such a contract will promote the national security of the United States.

(c) The head of the agency must not enter into or extend a multiyear contract that exceeds \$500 million (when entered into or when extended) until the Secretary of Defense identifies the contract and any extension in a report submitted to the congressional defense committees (10 U.S.C. 2306b(l)(5)).

(d) The head of the agency must provide written notice to the congressional defense committees at least 30 days before award of a multiyear contract that includes—

(1) An unfunded contingent liability in excess of \$20 million (10 U.S.C. 2306b(l)(1); Section 8008(a) of Public Law 105–56 and similar sections in subsequent DoD appropriations acts); or

(2) A cancellation ceiling in excess of \$100 million (10 U.S.C. 2306b(g)).

(e) The Secretary of Defense may instruct the head of the agency proposing a multiyear contract to include in that contract negotiated priced options for varying the quantities of end items to be procured over the life of the contract (10 U.S.C. 2306b(j)).

3. Section 217.174 is revised to read as follows:

**217.174 Multiyear contracts that employ economic order quantity procurement.**

(a) The head of the agency must provide written notice to the congressional defense committees at least 30 days before awarding—

(1) A multiyear contract providing for economic order quantity procurement in excess of \$20 million in any one year; or

(2) A contract for advance procurement leading to a multiyear contract that employs economic order quantity procurement in excess of \$20 million in any one year. (10 U.S.C. 2306b(l)(1); Section 8008(a) of Public Law 105–56 and similar sections in subsequent DoD appropriations acts)

(b) Before initiating an advance procurement, the contracting officer must verify that it is consistent with DoD policy (e.g., Chapter 2 of DoD 5000.2–R, Mandatory Procedures for Major Defense Acquisition Programs (MDAPs) and Major Automated Information System (MAIS) Acquisition Programs, and the full funding policy in Volume 2A, Chapter 1, of DoD 7000.14–R, Financial Management Regulation).

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