

- (3) Basic ordering agreements;  
 (4) Indefinite-delivery contracts;  
 (5) Any other type of contract providing for the use of UCAs; and  
 (6) Unpriced change orders with an estimated value exceeding \$5 million.
- (b)(1) Use the clause at 252.217-7027, Contract Definitization, in—  
 (i) All UCAs;  
 (ii) Solicitations associated with UCAs;  
 (iii) Basic ordering agreements;  
 (iv) Indefinite-delivery contracts;  
 (v) Any other type of contract providing for the use of UCAs; and  
 (vi) Unpriced change orders with an estimated value exceeding \$5 million.
- (2) Insert the applicable information in paragraphs (a), (b), and (d) of the clause.
- (3) If, at the time of entering into the UCA or unpriced change order, the contracting officer knows that the definitive contract action will meet the criteria of FAR 15.403-1, 15.403-2, or 15.403-3 for not requiring submission of cost or pricing data, the words “and cost or pricing data” may be deleted from paragraph (a) of the clause.

#### **PART 243—CONTRACT MODIFICATIONS**

■ 7. Revise section 243.204 to read as follows:

##### **243.204 Administration.**

Follow the procedures at PGI 243.204 for administration of change orders.

##### **243.204-70 [Redesignated as 243.204-71]**

■ 8. Redesignate section 243.204-70 as section 243.204-71.

■ 9. Add a new section 243.204-70 to read as follows:

##### **243.204-70 Definitization of change orders.**

###### **243.204-70-1 Scope.**

- (a) This subsection applies to unpriced change orders with an estimated value exceeding \$5 million.
- (b) Unpriced change orders for foreign military sales and special access programs are not subject to this subsection, but the contracting officer shall apply the policy and procedures to them to the maximum extent practicable. If the contracting officer determines that it is impracticable to adhere to the policy and procedures of this subsection for an unpriced change order for a foreign military sale or a special access program, the contracting officer shall provide prior notice, through agency channels, to the Deputy Director, Defense Procurement and Acquisition Policy (Contract Policy and International Contracting), 3060 Defense Pentagon, Washington, DC 20301-3060.

##### **243.204-70-2 Price ceiling.**

Unpriced change orders shall include a not-to-exceed price.

##### **243.204-70-3 Definitization schedule.**

(a) Unpriced change orders shall contain definitization schedules that provide for definitization by the earlier of—

(1) The date that is 180 days after issuance of the change order (this date may be extended but may not exceed the date that is 180 days after the contractor submits a qualifying proposal); or

(2) The date on which the amount of funds obligated under the change order is equal to more than 50 percent of the not-to-exceed price.

(b) Submission of a qualifying proposal in accordance with the definitization schedule is a material element of the contract. If the contractor does not submit a timely qualifying proposal, the contracting officer may suspend or reduce progress payments under FAR 32.503-6, or take other appropriate action.

##### **243.204-70-4 Limitations on obligations.**

(a) The Government shall not obligate more than 50 percent of the not-to-exceed price before definitization. However, if a contractor submits a qualifying proposal before 50 percent of the not-to-exceed price has been obligated by the Government, the limitation on obligations before definitization may be increased to no more than 75 percent (*see* 232.102-70 for coverage on provisional delivery payments).

(b) Obligations should be consistent with the contractor's requirements for the undefinitized period.

##### **243.204-70-5 Exceptions.**

(a) The limitations in 243.204-70-2, 243.204-70-3, and 243.204-70-4 do not apply to unpriced change orders for the purchase of initial spares.

(b) The limitations in 243.204-70-4(a) do not apply to unpriced change orders for ship construction and ship repair.

(c) The head of the agency may waive the limitations in 243.204-70-2, 243.204-70-3, and 243.204-70-4 for unpriced change orders if the head of the agency determines that the waiver is necessary to support—

- (1) A contingency operation; or  
 (2) A humanitarian or peacekeeping operation.

##### **243.204-70-6 Allowable profit.**

When the final price of an unpriced change order is negotiated after a substantial portion of the required performance has been completed, the

head of the contracting activity shall ensure the profit allowed reflects—

(a) Any reduced cost risk to the contractor for costs incurred during contract performance before negotiation of the final price;

(b) The contractor's reduced cost risk for costs incurred during performance of the remainder of the contract; and

(c) The extent to which costs have been incurred prior to definitization of the contract action (*see* 215.404-71-3(d)(2)). The risk assessment shall be documented in the contract file.

##### **243.204-70-7 Plans and reports.**

To provide for enhanced management and oversight of unpriced change orders, departments and agencies shall—

(a) Include in the Consolidated Undefinitized Contract Action (UCA) Management Plan required by 217.7405, the actions planned and taken to ensure that unpriced change orders are definitized in accordance with this subsection; and

(b) Include in the Consolidated UCA Management Report required by 217.7405, each unpriced change order with an estimated value exceeding \$5 million.

■ 10. Add section 243.205-72 to read as follows:

##### **243.205-72 Unpriced change orders.**

*See* the clause prescriptions at 217.7406 for all unpriced change orders with an estimated value exceeding \$5 million.

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## **DEPARTMENT OF DEFENSE**

### **Defense Acquisition Regulations System**

#### **48 CFR Parts 215, 231, and 252**

[DFARS Case 2006-D057]

#### **Defense Federal Acquisition Regulation Supplement; Excessive Pass-Through Charges**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule to delete the DFARS language implementing section 852 of the National Defense Authorization Act for Fiscal Year 2007 that ensures that pass-through charges on contracts or subcontracts that are entered into for or on behalf of DoD are not excessive in

relation to the cost of work performed by the relevant contractor or subcontractor. The interim DFARS rule language, which implements the requirements of section 852, was made obsolete with the publication of the FAR interim rule at 74 FR 52853 on October 14, 2009.

**DATES:** *Effective Date:* August 10, 2010.

**FOR FURTHER INFORMATION CONTACT:** Mr. Mark Gomersall, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 703-602-0302; facsimile 703-602-0350. Please cite DFARS Case 2006-D057.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

Section 852 of the National Defense Authorization Act (NDAA) for Fiscal Year 2007 required DoD to prescribe regulations to ensure that pass-through charges on contracts or subcontracts that are entered into for or on behalf of DoD are not excessive in relation to the cost of work performed by the relevant contractor or subcontractor. DoD published an interim rule at 72 FR 20758 on April 26, 2007, to amend the DFARS to include a solicitation provision and contract clause in DoD contracts to implement the requirements of section 852.

Fourteen sources submitted comments on the interim rule. Public comments were addressed in a second interim rule published at 73 FR 27464 on May 13, 2008, when the interim rule language was revised in response to comments received. DoD determined at that time that it did not expect the rule to have a significant impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* FAR interim rule 2008-031, published at 74 FR 52853 on October 14, 2009, implemented the requirements of section 866 of the NDAA for FY09 on the issue of excessive pass-through charges. The FAR rule language is duplicative of the interim DFARS rule language implementing section 852.

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 removes interim rule DFARS language made obsolete by publication of FAR rule language on October 14, 2009. Therefore, the Regulatory Flexibility Act does not apply to this final rule because it does not constitute a significant DFARS

revision within the meaning of 41 U.S.C. 418b and FAR 1.501, and publication for public comment was not required.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the rule does not impose additional 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 Parts 215, 231, and 252**

Government procurement.

Ynette R. Shelkin,

*Editor, Defense Acquisition Regulations System.*

■ Therefore, 48 CFR parts 215, 231, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 215, 231, and 252 continues to read as follows:

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

**PART 215—CONTRACTING BY NEGOTIATION**

**215.408 [Amended]**

■ 2. Section 215.408 is amended by removing paragraphs (3) and (4).

**PART 231—CONTRACT COST PRINCIPLES AND PROCEDURES**

**231.201-2 [Removed]**

■ 3. Section 231.201-2 is removed.

**231.203 [Removed]**

■ 4. Section 231.203 is removed.

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

**252.217-7003 [Removed and Reserved]**

■ 5. Section 252.217-7003 is removed and reserved.

**252.217-7004 [Removed and Reserved]**

■ 6. Section 252.217-7004 is removed and reserved.

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**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 225 and 252**

[DFARS Case 2009-D024]

**Defense Federal Acquisition Regulation Supplement; Reporting of Commercially Available Off-the-Shelf Items That Contain Specialty Metals—Deletion of Obsolete Clause**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing this final rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) by deleting the requirement for contractors to report commercially available off-the-shelf items that contain foreign specialty metals and are incorporated into noncommercial end items.

**DATES:** *Effective Date:* August 10, 2010.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy Williams, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301-3060. Telephone 703-602-0328; facsimile 703-602-0350. Please cite DFARS Case 2009-D024.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This final rule deletes DFARS clause 252.225-7029, Reporting of Commercially Available Off-the-Shelf Items that Contain Specialty Metals and are Incorporated into Noncommercial End Items. This requirement was incorporated in the DFARS to implement section 804, paragraph (i), of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181). Paragraph (i) requires the Government to report to Congress for fiscal years 2008 and 2009 on the use of the exception to the specialty metals restrictions of 10 U.S.C. 2533b for commercially available off-the-shelf items that are incorporated in noncommercial end items. In order to obtain information for this report, the DFARS clause 252.225-7029, Reporting of Commercially Available Off-the-Shelf Items that Contain Specialty Metals and are Incorporated into Noncommercial End Items, was added to the DFARS on July 29, 2009 (74 FR 37626). This requirement is now obsolete, because the reporting requirement does not extend beyond fiscal year 2009.