

Resubmission of a previously denied claim includes only those claims that were previously denied and refiled under the Act.

(4) Any violation of paragraph (b) of this section shall result in a fine of not more than \$5,000.

\* \* \* \* \*

Dated: August 2, 2010.

Eric H. Holder, Jr.,  
Attorney General.

[FR Doc. 2010-19633 Filed 8-9-10; 8:45 am]

BILLING CODE 4410-12-P

**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 117**

[Docket No. USCG-2010-0659]

**Drawbridge Operation Regulations; Pequonnock River, Bridgeport, CT, Maintenance**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of temporary deviation from regulations.

**SUMMARY:** The Commander, First Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Metro North (Peck) Bridge across the Pequonnock River, mile 0.3, at Bridgeport, Connecticut. The deviation allows the bridge to remain in the closed position to facilitate scheduled maintenance for three months.

**DATES:** This deviation is effective from August 7, 2010 through November 7, 2010.

**ADDRESSES:** Documents mentioned in this preamble as being available in the docket are part of docket USCG-2010-0659 and are available online at [www.regulations.gov](http://www.regulations.gov), inserting USCG-2010-0659 in the "Keyword" and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or e-mail Ms. Judy Leung-Yee, Project Officer, First Coast Guard District, telephone (212) 668-7165, e-mail [judy.k.leung-ye@uscg.mil](mailto:judy.k.leung-ye@uscg.mil). If you have questions on viewing the docket, call Renee V. Wright, Program Manager,

Docket Operations, telephone 202-366-9826.

**SUPPLEMENTARY INFORMATION:** The Metro North (Peck) Bridge, across the Pequonnock River at mile 0.3, at Bridgeport, Connecticut, has a vertical clearance in the closed position of 26 feet at mean high water and 32 feet at mean low water. The drawbridge operation regulations are listed at 33 CFR 117.219(c).

The owner of the bridge, Metro North Railroad, requested a temporary deviation from the regulations to facilitate scheduled bridge maintenance, mitre rail rehabilitation, at the bridge.

Under this temporary deviation the Metro North (Peck) Bridge may remain in the closed position from August 7, 2010 through November 7, 2010. Vessels that can pass under the bridge in the closed position may do so at all times.

The Metro North (Peck) Bridge received no requests to open in both 2008 and 2009. Waterway users were advised of the requested bridge closure and offered no objection.

In accordance with 33 CFR 117.35(e), the bridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: July 30, 2010.

Gary Kassof,  
Bridge Program Manager, First Coast Guard District.

[FR Doc. 2010-19631 Filed 8-9-10; 8:45 am]

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**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 215, 217, and 243**

[DFARS Case 2008-D034]

RIN 0750-AG27

**Defense Federal Acquisition Regulation Supplement; Management of Unpriced Change Orders**

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

**ACTION:** Final rule.

**SUMMARY:** The Department of Defense (DoD) is adopting as final a proposed rule amending the DFARS to make requirements for DoD management and oversight of unpriced change orders consistent with those that apply to other undefinitized contract actions. This final rule adds new policy to address

section 812 of the National Defense Authorization Act for Fiscal Year 2010.

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

**FOR FURTHER INFORMATION CONTACT:** Ms. Meredith Murphy, Defense Acquisition Regulations System, OUSD (AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060, Telephone 703-602-1302; facsimile 703-602-0350. Please cite DFARS Case 2008-D034.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

The proposed rule addressed DFARS subpart 217.74, which prescribes policies and procedures for the management and oversight of undefinitized contract actions (UCAs). In the current DFARS, unpriced change orders that are issued in accordance with FAR part 43 and DFARS part 243 are excluded from the scope of subpart 217.74. A rule was proposed because of the need for full accountability and enhanced oversight of unpriced contractual actions, including unpriced change orders.

The proposed rule was published in the **Federal Register** at 74 FR 37669 on July 29, 2009. Two respondents submitted comments in response to the proposed rule. One respondent deemed this "a new rule that is very much needed," while the other respondent requested that the proposed rule be withdrawn. To enhance transparency and accountability, DoD has determined to proceed with this rule. The comments submitted by the respondents are addressed in the following paragraphs.

*Comment:* Make a separate limitation on obligations applicable to small businesses.

One respondent addressed the percentage limitation on obligations prior to definitization, which the proposed rule, at DFARS 243.204-70-4(a), set at 50 percent. There is an exception in the proposed rule allowing an increase from 50 percent to 75 percent when a contractor submits a qualifying proposal before 50 percent of the not-to-exceed price has been obligated by the Government. The respondent recommended that the latter percentage be increased from 75 percent to 95 percent for small, small disadvantaged, and HUBZone businesses. In support of its position, the respondent cited frequent instances where it believed that a particular agency had requested multiple audits as a delaying tactic to avoid definitization. When definitization is delayed, the contractor can perform up to half of the work that has been required unilaterally by the Government without being

reimbursed. According to the respondent, this burden would impact small and small disadvantaged businesses disproportionately, because they do not have the internal cash flow generally available to large businesses.

*Response:* This is an issue of faulty execution on the part of the agency cited, not a problem with the policy. Enabling an unpriced contract action to continue in an unpriced state up to 95 percent of the not-to-exceed price, would only place contractors at greater risk and give contracting officers even less incentive to definitize the action in a timely manner.

*Comment:* Limiting a contractor's profit for reduced risk doesn't consider that the contractor's risk is increased while a contract obligation is undefinitized.

The new section 243.204-70-6 (Allowable profit) requires the Government to consider "(a) Any reduced cost risk to the contractor" when a substantial portion of the required performance has been completed before the contract action is definitized. Both respondents objected to the regulation's assumption that a contractor's cost risk declines in this situation. One respondent stated that it would be grossly unfair for DoD to retain the uniquely Government right to issue unilateral change orders and then penalize contractors by decrementing allowable profit on incurred costs. The other respondent claimed that the contractor experiences increased, not decreased, cost risk during the period that the change order remains undefinitized.

*Response:* The respondents have not acknowledged that the Government also incurs increased cost risk during the period prior to definitization of the contract action. The intent of this coverage is to (1) increase transparency; (2) provide management oversight to prevent abuses in the definitization process; and (3) provide incentives for both the Government and contractors to definitize UCAs as quickly as reasonably possible. Therefore, this portion of the proposed rule will not be changed because doing so would reduce a big incentive to definitize an action in the minimum reasonable time. Further, the 50 percent and 75 percent limitations are established by statute (10 U.S.C. 2326(b)(3)), and DoD does not have authority to modify them.

*Comment:* Foreign military sales, special access programs, congressionally mandated long-lead procurement contracts, and purchases under the simplified acquisition threshold are exempted from the definition of undefinitized contract action (UCA).

One respondent cites 10 U.S.C. 2326 as exempting the above categories from the definition of UCA. Therefore, according to the respondent, DoD is prohibited from including these types of change orders in the UCA definition.

*Response:* The Congress recently took a different position on this issue. It is a matter of statutory construction that later-enacted laws take precedence over prior-enacted laws. This rule of statutory construction is particularly relevant here. In this case, section 812 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84), enacted October 28, 2009, requires DoD to extend the limitations on cost reimbursement and profit/fee to all categories of undefinitized contract actions.

This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

## B. Regulatory Flexibility Act

DoD certifies that this final rule will not 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 change is to internal Government operating procedures. The rule makes requirements for DoD management and oversight of unpriced change orders consistent with those that apply to other undefinitized contract actions.

## C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the final 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 Parts 215, 217, and 243

Government procurement.

**Ynette R. Shelkin,**

*Editor, Defense Acquisition Regulations System.*

■ Therefore, 48 CFR parts 215, 217, and 243 are amended as follows:

■ 1. The authority citation for 48 CFR parts 215, 217, and 243 continues to read as follows:

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

## PART 215—CONTRACTING BY NEGOTIATION

### 215.404-71-3 [Amended]

■ 2. Amend section 215.404-71-3 in the first sentence of paragraph (d)(2), by revising the parenthetical to read "(also see 217.7404-6(a) and 243.204-70-6)".

## PART 217—SPECIAL CONTRACTING METHODS

■ 3. Amend section 217.7401 in paragraph (d) by adding a third sentence to read as follows:

### 217.7401 Definitions.

\* \* \* \* \*

(d) \* \* \* For policy relating to definitization of change orders, see 243.204-70.

■ 4. Revise section 217.7402 to read as follows:

### 217.7402 Exceptions.

(a) The following undefinitized contract actions (UCAs) are not subject to this subpart. However, the contracting officer shall apply the policy and procedures to them to the maximum extent practicable (also see paragraph (b) of this section):

- (1) UCAs for foreign military sales;
- (2) Purchases at or below the simplified acquisition threshold;
- (3) Special access programs;
- (4) Congressionally mandated long-lead procurement contracts.

(b) If the contracting officer determines that it is impracticable to adhere to the policy and procedures of this subpart for a particular contract action that falls within one of the categories in paragraph (a)(1), (3), or (4) of this section, 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.

■ 5. Amend section 217.7405 by adding paragraph (c) to read as follows:

### 217.7405 Plans and reports.

\* \* \* \* \*

(c) Consolidated UCA Management Reports shall include information about all change orders that are not forward priced (*i.e.*, unpriced) and have an estimated value exceeding \$5 million.

■ 6. Revise section 217.7406 to read as follows:

### 217.7406 Contract clauses.

(a) Use the clause at FAR 52.216-24, Limitation of Government Liability, in—

- (1) All UCAs;
- (2) Solicitations associated with UCAs;

- (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.

[FR Doc. 2010-19674 Filed 8-9-10; 8:45 am]

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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