

## PART 209—CONTRACTOR QUALIFICATIONS

■ 2. Add section 209.105 to subpart 209.1 to read as follows:

### 209.105 Procedures

■ 3. Add section 209.105–2–70 to read as follows:

#### 209.105–2–70 Inclusion of determination of contractor fault in Federal Awardee Performance and Integrity Information System (FAPIS)

If the contractor or a subcontractor at any tier is not subject to the jurisdiction of the U.S. courts and the DoD appointing official that requested a DoD investigation makes a final determination that a contractor's or subcontractor's gross negligence or reckless disregard for the safety of civilian or military personnel of the Government caused serious bodily injury or death of such personnel, the contracting officer shall enter in FAPIS the appropriate information regarding such determination within three days of receiving notice of the determination, pursuant to section 834 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111–383). Information posted in FAPIS regarding such determinations will be publicly available.

## PART 216—TYPES OF CONTRACTS

■ 4. Amend section 216.405–2–70 by revising paragraphs (b) and (c) to read as follows:

#### 216.405–2–70 Award fee reduction or denial for jeopardizing the health or safety of Government personnel.

\* \* \* \* \*

(b) The contracting officer shall include in the evaluation criteria of any award-fee plan, a review of contractor and subcontractor actions that jeopardized the health or safety of Government personnel, through gross negligence or reckless disregard for the safety of such personnel, as determined through—

(1) Conviction in a criminal proceeding, or finding of fault and liability in a civil or administrative proceeding (in accordance with section 823 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84)); or

(2) If a contractor or a subcontractor at any tier is not subject to the jurisdiction of the U.S. courts, a final determination of contractor or subcontractor fault resulting from a DoD investigation (in accordance with section 834 of the National Defense

Authorization Act for Fiscal Year 2011 (Pub. L. 111–383)).

(c) In evaluating the contractor's performance under a contract that includes the clause at 252.216–7004, Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel, the contracting officer shall consider reducing or denying award fees for a period if contractor or subcontractor actions cause serious bodily injury or death of civilian or military Government personnel during such period. The contracting officer's evaluation also shall consider recovering all or part of award fees previously paid for such period.

## PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Revise section 252.216–7004 to read as follows:

#### 252.216–7004 Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel.

As prescribed in 216.406 use the following clause:

##### Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel (SEP 2011)

(a) *Definitions.* As used in this clause—  
*Covered incident*—

(i) Means any incident in which the Contractor, through a criminal, civil, or administrative proceeding that results in a disposition listed in paragraph (a)(ii) of this definition—

(A) Has been determined in the performance of this contract to have caused serious bodily injury or death of any civilian or military personnel of the Government through gross negligence or with reckless disregard for the safety of such personnel; or  
(B) Has been determined to be liable for actions of a subcontractor of the Contractor that caused serious bodily injury or death of any civilian or military personnel of the Government through gross negligence or with reckless disregard for the safety of such personnel.

(ii) Includes those incidents that have resulted in any of the following dispositions:

(A) In a criminal proceeding, a conviction.  
(B) In a civil proceeding, a finding of fault or liability that results in the payment of a monetary fine, penalty, reimbursement, restitution, or damage of \$5,000 or more.  
(C) In an administrative proceeding, a finding of fault and liability that results in—  
(1) The payment of a monetary fine or penalty of \$5,000 or more; or  
(2) The payment of a reimbursement, restitution, or damages in excess of \$100,000.

(D) In a criminal, civil, or administrative proceeding, a disposition of the matter by consent or compromise with an acknowledgment of fault by the Contractor if the proceeding could have led to any of the

outcomes specified in subparagraphs

(a)(ii)(A), (a)(ii)(B), or (a)(ii)(C).

(E) In a DoD investigation of the Contractor or its subcontractors at any tier not subject to the jurisdiction of the U.S. courts, a final determination by the Secretary of Defense of Contractor or subcontractor fault (see DFARS 216.405–2–70).

*Serious bodily injury* means a grievous physical harm that results in a permanent disability.

(b) If, in the performance of this contract, the Contractor's or its subcontractor's actions cause serious bodily injury or death of civilian or military Government personnel, the Government may reduce or deny the award fee for the period in which the covered incident occurred, including the recovery of all or part of any award fees paid for any previous period during which the covered incident occurred.

(End of clause)

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Part 216

[DFARS Case 2011–D010]

RIN 0750–AH15

#### Defense Federal Acquisition Regulation Supplement; Increase the Use of Fixed-Price Incentive (Firm Target) Contracts

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

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the DFARS to increase the use of fixed-price incentive (firm target) contracts, with particular attention to share lines and ceiling prices.

**DATES:** *Effective date:* September 16, 2011.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy Williams, telephone 703–602–0328.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

This DFARS case was initiated to implement an initiative to incentivize productivity and innovation in industry, as set forth in a memorandum from the Under Secretary of Defense for Acquisition, Technology, & Logistics (USD(AT&L)), dated November 3, 2010. The memorandum provided guidance to the secretaries of the military departments and directors of defense

agencies on obtaining greater efficiency and productivity in defense spending. In support of this initiative, DoD published a proposed rule in the **Federal Register** on March 2, 2011 (76 FR 11410). The proposed rule required that contracting officers must—

(1) Give particular consideration to the use of fixed-price incentive (firm target) contracts, especially for acquisitions moving from development to production; and

(2) Pay particular attention to share line and ceiling prices for fixed-price incentive (firm target) contracts, with 120 percent ceiling and a 50/50 share ratio as the default arrangement.

The comment period closed on May 2, 2011. DoD received comments from one respondent.

## II. Discussion/Analysis

The respondent considered that the incorporation of a broad preference to use a 50/50 share line with a ceiling of 120 percent is a mistake for Government acquisitions for the reasons discussed in the following comments.

*Comment:* The respondent provided anecdotal evidence that currently acquisition leadership translates this preference as a mandatory requirement.

*Response:* All of the documentation for this case, and all of the presentations by senior acquisition leaders within DoD, have emphasized that this initiative is to be implemented in a way that makes sense for each individual acquisition. The guidance in the DFARS companion Procedures, Guidance, and Information (PGI) reiterates that each situation must be evaluated in terms of the degree and nature of the risk presented in order to select the proper contract type. The PGI also provides additional guidance on establishing the target cost, share lines, and ceiling price. This regulation is not a “one-size-fits-all” mandate.

However, to make the final rule more consistent with the terminology of the USD(AT&L) memo of November 3, 2010, and to clarify that each contract must be considered on a case-by-case basis, DoD has revised the description of the use of a fixed-price incentive (firm target) contract with a 50/50 share ratio and a 120 percent ceiling from “the default arrangement” to “the point of departure for establishing the incentive arrangement.”

*Comment:* According to the respondent, the Institute for Defense Analyses (IDA) study, *Can Profit Policy and Contract Incentives Improve Defense Contract Outcomes?*, makes a strong case for the ineffectiveness of incentive contracts.

*Response:* The majority of incentive contracts covered by the IDA study were award-fee contracts, not fixed-price incentive (firm target) contracts. Furthermore, DoD is actively taking steps to ensure that incentives are linked to acquisition outcomes and the profits are tied to performance in achieving those outcomes.

*Comment:* The respondent stated that in order to correct the use of incentives, DoD should mandate that contracting officers use a true pessimistic/optimistic weighted average and ensure that their cost curves do not mirror cost-plus-fixed-fee cost curves.

*Response:* DoD endorses the respondent’s concept that contracting officers should carefully develop a realistic target cost and that an incentive contract should provide adequate incentives. The reason for specifying the 120 percent ceiling and the 50/50 cost sharing arrangement as the point of departure for establishing the incentive arrangement is to promote cost realism and discourage an incentive arrangement that does not provide adequate incentive to the contractor to control costs. An excessively flat share line approaches a cost-plus-fixed-fee arrangement (100/0), thereby providing almost no incentive to the contractor to control costs. A 50/50 share line suggests that the Government and the contractor have a common view of the likely contract execution cost. A 50/50 share line should represent a point where the estimate is deemed equally likely to be too high or too low. However, as already stated, rather than issuing mandates, DoD encourages the evaluation of each situation in terms of the degree and nature of the risk presented in order to select the proper contract type and, if an incentive contract type is selected, the appropriate incentive arrangement.

## 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. Regulatory Flexibility Act

DoD has prepared a final regulatory flexibility analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This rule amends the Defense Federal Acquisition Regulation Supplement to implement the initiative on incentivizing productivity and innovation in industry, as presented by the Under Secretary of Defense for Acquisition, Technology, & Logistics in a memorandum dated November 3, 2010. The objective of the rule is to incentivize contractors to control costs. The legal basis is 41 U.S.C. 1303 and 48 CFR chapter 1.

There were no public comments in response to the initial regulatory flexibility analysis.

The final rule will not have much impact on small entities, because the focus of the rule is on development efforts that are moving into early production. Small entities are more likely to receive awards for commercial products, including commercially available off-the-shelf products, for which firm-fixed-price contracts are appropriate. In Fiscal Year 2010, 93 percent of awards to small businesses were firm-fixed-price contracts, and 99.99 percent of awards to small businesses were other than fixed-price incentive contracts.

The final rule imposes no reporting, recordkeeping, or other information collection requirements.

There are no known alternatives to the rule that would adequately implement the DoD policy. There is no significant economic impact on small entities.

There are no other alternatives that will accomplish the objectives of the rule.

## V. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require 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 Part 216

Government procurement.

**Ynette R. Shelkin,**

*Editor, Defense Acquisition Regulations System.*

Therefore, 48 CFR part 216 is amended as follows:

**PART 216—TYPES OF CONTRACTS**

■ 1. The authority citation for 48 CFR part 216 continues to read as follows:

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

■ 2. Add section 216.403–1 to read as follows:

**216.403–1 Fixed-price incentive (firm target) contracts.****(b) Application.**

(1) The contracting officer shall give particular consideration to the use of fixed-price incentive (firm target) contracts, especially for acquisitions moving from development to production.

(2) The contracting officer shall pay particular attention to share lines and ceiling prices for fixed-price incentive (firm target) contracts, with a 120 percent ceiling and a 50/50 share ratio as the point of departure for establishing the incentive arrangement.

(3) See PGI 216.403–1 for guidance on the use of fixed-price incentive (firm target) contracts.

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**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 679**

[Docket No. 101126522–0640–02]

RIN 0648–XA704

**Fisheries of the Exclusive Economic Zone Off Alaska; Shallow-Water Species by Vessels Using Trawl Gear in the Gulf of Alaska**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Temporary rule; modification of a closure.

**SUMMARY:** NMFS is opening directed fishing for shallow-water species by vessels using trawl gear in the Gulf of Alaska (GOA) for 48 hours. This action is necessary to fully use the fourth seasonal apportionment of the 2011 Pacific halibut bycatch allowance specified for the trawl shallow-water species fishery in the GOA.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), September 14, 2011, through 1200 hrs, A.l.t., September 16, 2011. Comments must be received at the following address no later than 4:30 p.m., A.l.t., September 28, 2011.

**ADDRESSES:** You may submit comments on this document, identified by FDMS Docket Number NOAA–NMFS–2011–0224, by any one of the following methods:

- **Electronic Submissions:** Submit all electronic public comments via the Federal eRulemaking Portal Web site at <http://www.regulations.gov>. To submit comments via the e-Rulemaking Portal, first click the “submit a comment” icon, then enter NOAA–NMFS–2011–0224 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the “Submit a Comment” icon on the right of that line.

- **Mail:** Submit written comments to Glenn Merrill, Assistant Regional Administrator, NMFS, P.O. Box 21668, Juneau, AK 99802.

- **Fax:** (907) 586–7557; Attn: Glenn Merrill.

**Instructions:** Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on <http://www.regulations.gov> without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Obren Davis, 907–586–7228.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

NMFS closed directed fishing for shallow-water species by vessels using trawl gear in the GOA under § 679.21(d)(7)(i) on September 3, 2011 (76 FR 55726, September 7, 2011).

As of September 12, 2011, NMFS has determined that approximately 149 metric tons remain in the fourth seasonal apportionment of the 2011 Pacific halibut bycatch allowance specified for the trawl shallow-water species fishery in the GOA. Therefore, in accordance with § 679.25(a)(1)(i), (a)(2)(i)(C) and (a)(2)(iii)(D), and to fully utilize the fourth seasonal apportionment of the 2011 Pacific halibut bycatch allowance specified for the trawl shallow-water species fishery in the GOA, NMFS is terminating the previous closure and is opening directed fishing for trawl shallow-water species by vessels using trawl gear in the GOA. This will enhance the socioeconomic well-being of harvesters dependent upon shallow-water species in this area. The Administrator, Alaska Region (Regional Administrator) considered the following factors in reaching this decision: (1) The current catch of halibut by trawl vessels participating in the shallow-water species fisheries and, (2) the harvest capacity and stated intent on future harvesting patterns of vessels participating in this fishery.

In accordance with § 679.21(d)(7)(i), the Regional Administrator has determined that the fourth seasonal apportionment of the Pacific halibut bycatch allowance specified for the trawl shallow-water species fishery in the GOA will be reached after 48 hours. Consequently, NMFS is prohibiting directed fishing for the shallow-water species fishery by vessels using trawl gear in the GOA. The species and species groups that comprise the shallow-water species fishery are pollock, Pacific cod, shallow-water flatfish, flathead sole, Atka mackerel, skates, and “other species.” This prohibition does not apply to fishing for pollock by vessels using pelagic trawl gear in those portions of the GOA open to directed fishing for pollock. This inseason action does not apply to vessels fishing under a cooperative quota permit in the cooperative fishery in the Rockfish Program for the Central GOA.

**Classification**

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public