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[FR Doc. 2012-31086 Filed 12-28-12; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204, 215, 217, 219, 225, 239, 241, 242, and 252

RIN 0750-AH49

Defense Federal Acquisition Regulation Supplement: Definition of Cost or Pricing Data (DFARS Case 2011-D040)

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to update the text to reflect the distinction between “certified cost or pricing data” and “data other than certified cost or pricing data.” The DFARS changes are necessary to ensure consistency with the Federal Acquisition Regulation (FAR) which had been amended to clarify the distinction between those terms, as well as the requirements for the submission of cost or pricing data.

DATES: December 31, 2012.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Gomersall, telephone 571-372-6099.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the *Federal Register* at 77 FR 2680 on January 19, 2012. The comment period closed on March 19, 2012. This final rule updates the DFARS for consistency

with FAR changes addressing the definition of cost or pricing data which clarified the distinction between “certified cost or pricing data” and “data other than certified cost or pricing data,” as well as the requirements for the submission of cost or pricing data (75 FR 53135, August 30, 2010).

II. Discussion and Analysis

Two respondents submitted comments. One respondent supported the rule without further comment, and the second respondent’s comment was non-substantive. Therefore, the DFARS is revised as proposed.

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 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 merely aligns the DFARS with the FAR. However, a final regulatory flexibility analysis has been performed consistent with 5 U.S.C. 604. This rule amends the DFARS to update the text addressing the definition of cost or pricing data by inserting the word “certified” in front of “cost or pricing data.” The DFARS changes are necessary to ensure consistency with the FAR. The rule does not expand or diminish the existing rights of the contracting officer to obtain cost data or pricing data. Instead, this rule will benefit all entities, both large and small, by clarifying the requirements for the submission of “certified cost or pricing data” and “data other than certified cost or pricing data.” No comments were received in response to the initial regulatory flexibility analysis published with the proposed rule on January 19, 2012. No comments were filed by the Chief Counsel for Advocacy of the Small

Business Administration in response to the rule. The rule does not require any reporting, recordkeeping, or other compliances, or compel contractors to expend significant effort or cost. No known significant alternatives to the rule have been identified. A copy of the analysis may be obtained from the point of contact specified herein.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the 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 Parts 204, 215, 217, 219, 225, 239, 241, 242, and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

Therefore, DoD amends 48 CFR parts 204, 215, 217, 219, 225, 239, 241, 242, 244, and 252 as follows:

■ 1. The authority citation for 48 CFR parts 204, 215, 217, 219, 225, 239, 241, 242, and 252 continues to read as follows:

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

PART 204—ADMINISTRATIVE MATTERS

204.805 [Amended]

■ 2. Section 204.805 is amended in paragraph (5) by removing “subject to cost or pricing data” and adding “subject to certified cost or pricing data” in its place.

PART 215—CONTRACTING BY NEGOTIATION

■ 3. Section 215.403 is amended by revising the section heading to read as follows:

215.403 Obtaining certified cost or pricing data.

215.403-1 [Amended]

■ 4. Section 215.403-1 is amended by—

■ a. In paragraph (b) and the heading of paragraph (c) removing “*cost or pricing data requirements*” and adding “*certified cost or pricing data requirements*” in its place;

■ b. In paragraph (c)(4)(C) and the introductory text of paragraph (c)(4)(D) removing “cost or pricing data” and adding “certified cost or pricing data” in its place;

■ c. In paragraph (c)(4)(D)(1) removing “information other than cost or pricing

data” and adding “data other than certified cost or pricing data” in its place; and

■ d. In paragraph (c)(4)(D)(2) removing “Cost or pricing data” and adding “Certified cost or pricing data” in its place and removing “cost or pricing data threshold” and adding “certified cost or pricing data threshold” in its place.

■ 5. Section 215.403–3 is amended by revising the section heading to read as follows:

215.403–3 Requiring data other than certified cost or pricing data.

* * * * *

215.404–1 [Amended]

■ 6. Section 215.404–1 is amended in paragraph (2)(i) by removing the word “information” and adding the word “data” in its place.

215.404–2 [Amended]

■ 7. Section 215.404–2 is amended by revising the section heading to read as follows:

215.404–2 Data to support proposal analysis.

* * * * *

215.404–4 [Amended]

■ 8. Section 215.404–4 is amended by—

■ a. In the introductory text of paragraph (b)(1) removing “cost or pricing data” and adding “certified cost or pricing data” in its place; and

■ b. In paragraph (c)(2)(C)(1)(i) removing “cost or pricing data threshold” and adding “certified cost or pricing data threshold” in its place.

215.407–5–70 [Amended]

■ 9. Section 215.407–5–70 is amended in paragraphs (b)(2)(i) and (ii) by removing “cost or pricing data” and adding “certified cost or pricing data” in its place.

215.408 [Amended]

■ 10. Section 215.408 is amended by—

■ a. In paragraphs (1)(i) through (iii) by removing “Cost or Pricing Data” and adding “Certified Cost or Pricing Data” in its place;

■ b. In paragraph (2) by removing “cost or pricing data” and adding “certified cost or pricing data” in its place.

PART 217—SPECIAL CONTRACTING METHODS

217.7401 [Amended]

■ 11. Section 217.7401 is amended by—

■ a. In the introductory text of paragraph (c) by removing the word “information” and adding the word “data” in its place;

■ b. In paragraph (c)(1) by removing “Information in the proposal” and adding “Data in the proposal” in its place; and

■ c. In paragraph (c)(2) by removing the word “information” and adding the word “data” in its place.

217.7406 [Amended]

12. Section 217.7406 is amended in paragraph (b)(3) by removing “of cost or pricing data” and adding “of certified cost or pricing data” in its place and removing “and cost or pricing data” and adding “and certified cost or pricing data” in its place.

PART 219—SMALL BUSINESS PROGRAMS

219.806 [Amended]

■ 13. Section 219.806 is amended in paragraph (1) by removing “cost or pricing data” and adding “certified cost or pricing data” in its place and removing “FAR Subpart 15.4” and adding “FAR subpart 15.4” in its place.

PART 225—FOREIGN ACQUISITION

225.7303 [Amended]

■ 14. Section 225.7303 is amended in paragraph (b) by removing “cost or pricing data” and adding “certified cost or pricing data” in its place.

225.7304 [Amended]

■ 15. Section 225.7304 is amended by—

■ a. In paragraph (c) by removing “cost or pricing data” and adding “certified cost or pricing data” in its place,

■ b. In paragraph (e)(3) by removing “cost or pricing data” and adding “certified cost or pricing data” in its place, and removing “Subpart 201.4” and adding “subpart 201.4” in its place, and

■ c. In paragraph (h) by removing “additional information concerning” and adding “additional data concerning” in its place and removing “sufficient information to” and adding “sufficient data to demonstrate” in its place and removing “This information—” and adding “This data—” in its place.

PART 239—ACQUISITION OF INFORMATION TECHNOLOGY

■ 16. Section 239.7406 is revised to read as follows:

239.7406 Certified cost or pricing data and data other than certified cost or pricing data.

(a) Common carriers are not required to submit certified cost or pricing data before award of contracts for tariffed services. Rates or preliminary estimates quoted by a common carrier for tariffed

telecommunications services are considered to be prices set by regulation within the provisions of 10 U.S.C. 2306a. This is true even if the tariff is set after execution of the contract.

(b) Rates or preliminary estimates quoted by a common carrier for nontariffed telecommunications services or by a noncommon carrier for any telecommunications service are not considered prices set by law or regulation.

(c) Contracting officers shall obtain sufficient data to determine that the prices are reasonable in accordance with FAR 15.403–3 or 15.403–4. See *PGI 239.7406* for examples of instances where additional data may be necessary to determine price reasonableness.

PART 241—ACQUISITION OF UTILITY SERVICES

241.201 [Amended]

■ 17. Section 241.201 is amended in paragraph (3)(ii) by removing “cost or pricing data” and adding “certified cost or pricing data” in its place and removing “FAR Subpart 15.4” and adding “FAR subpart 15.4” in its place.

PART 242—CONTRACT ADMINISTRATION AND AUDIT SERVICES

242.7203 [Amended]

■ 18. Section 242.7203 is amended in paragraph (b) by removing “cost or pricing data” and adding “certified cost or pricing data” in its place.

242.7301 [Amended]

■ 19. Section 242.7301 is amended in paragraph (c) by removing the word “Subparts” and adding the word “subparts” in its place.

242.7302 [Amended]

■ 20. Section 242.7302 is amended by—

■ a. In paragraph (a)(2) by removing “cost or pricing data” and adding “certified cost or pricing data” in its place.

■ b. In paragraph (b)(1) by removing “Information reveals” and adding “Data reveals” in its place.

242.7502 [Amended]

■ 21. Section 242.7502 is amended in paragraph (g)(3)(ii) by removing “cost or pricing data” and adding “certified cost or pricing data” in its place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.209–7009 [Amended]

■ 22. Section 252.209–7009 is amended by removing the clause date “(DEC

2010)” and adding “(DEC 2012)” in its place, redesignating paragraphs (a)(1) and (2) as (a)(i) and (ii), and in newly designated paragraph (a)(i) removing “cost or pricing data” and adding “certified cost or pricing data” in its place.

252.215–7000 [Amended]

■ 23. Section 252.215–7000 is amended by removing the clause date “(DEC 1991)” and adding “(DEC 2012)” in its place and removing “Cost or Pricing Data-Modifications” and adding “Certified Cost or Pricing Data-Modifications” in its place wherever it appears.

252.215–7002 [Amended]

■ 24. Section 252.215–7002 is amended by—

■ a. Removing the clause date “(FEB 2012)” and adding “(DEC 2012)” in its place;

■ b. In the definition of “*Significant Deficiency*” in paragraph (a), removing “rely upon information” and adding “rely upon data and information” in its place;

■ c. In paragraph (d)(1) removing “protect the information as privileged” and adding “protect the data and information as privileged” in its place;

■ d. In paragraph (d)(4)(ix) removing the word “information” and adding the word “data” in its place; and

■ e. In paragraph (d)(4)(xi) removing “Integrate information available” and adding “Integrate data and information available” in its place.

252.217–7027 [Amended]

■ 25. Section 252.217–7027 is amended by removing the clause date “(OCT 1998)” and adding “(DEC 2012)” in its place, in paragraph (a) removing “*cost or pricing data*” and adding “*certified cost or pricing data*” in its place, and in paragraph (b) removing “*cost or pricing data*” and adding “*certified cost or pricing data*” in its place.

252.243–7002 [Amended]

■ 26. Section 252.243–7002 is amended by removing the clause date “(MAR 1998)” and adding “(DEC 2012)” in its place, in paragraph (c)(1) removing “Cost or pricing data” and adding “Certified cost or pricing data,” in its place, and in paragraph (c)(2) removing “Information other than cost or pricing data” and adding “Data other than certified cost or pricing data” in its place and removing “cost or pricing data” and adding “certified cost or pricing data” in its place.

[FR Doc. 2012–31088 Filed 12–28–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 225 and 252

RIN 0750–AH82

Defense Federal Acquisition Regulation Supplement: New Qualifying Country—Poland (DFARS Case 2012–D049)

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to add Poland as a qualifying country.

DATES: *Effective Date:* December 31, 2012.

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571–372–6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is amending the DFARS to add the Republic of Poland as a qualifying country. On August 27, 2011, the U.S. Secretary of Defense signed a new reciprocal defense procurement agreement with the Polish Minister of National Defense. This agreement was placed into force on July 19, 2012. The agreement removes discriminatory barriers to procurements of supplies and services produced by industrial enterprises of the other country to the extent mutually beneficial and consistent with national laws, regulations, policies, and international obligations. The agreement does not cover construction or construction material. Poland is already a designated country under the World Trade Organization Government Procurement Agreement.

II. Publication of This Final Rule for Public Comment Is Not Required by Statute

“Publication of proposed regulations”, 41 U.S.C. 1707, is the statute which applies to the publication of the Federal Acquisition Regulation. Paragraph (a)(1) of the statute requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal

operating procedures of the agency issuing the policy, regulation, procedure or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because it does not constitute a significant DFARS revision within the meaning of FAR 1.501–1, does not have a significant effect beyond the internal operating procedures of DoD, and will not have a significant cost or administrative impact on contractors or offerors. Poland is added to the list of 22 other countries that have similar reciprocal defense procurement agreements with DoD.

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

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant DFARS revision within the meaning of FAR 1.501–1 and 41 U.S.C. 1707 does not require publication for public comment.

V. Paperwork Reduction Act

This rule affects the certification and information collection requirements in the provisions at DFARS 252.225–7000 and 252.225–7035, currently approved under OMB Control Number 0704–0229, titled DFARS Part 225, Foreign Acquisition, and Associated Clauses, in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35). The impact, however, is negligible, because it merely shifts the category under which items from Poland must be listed.