

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 215, 217, and 243**

[Docket DARS–2016–0026]

RIN 0750–AI99

Defense Federal Acquisition Regulation Supplement: Undefinitized Contract Action Definitization (DFARS Case 2015–D024)**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).**ACTION:** Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to provide a more transparent means of documenting the impact of costs incurred during the undefinitized period of an undefinitized contract action on allowable profit.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before December 20, 2016, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2015–D024, using any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for “DFARS Case 2015–D024.” Select “Comment Now” and follow the instructions provided to submit a comment. Please include “DFARS Case 2015–D024” on any attached documents.

- *Email:* osd.dfars@mail.mil. Include DFARS Case 2015–D024 in the subject line of the message.

- *Fax:* 571–372–6094.

- *Mail:* Defense Acquisition Regulations System, Attn: Mr. Mark Gomersall, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

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

SUPPLEMENTARY INFORMATION:**I. Background**

DoD is proposing to revise the DFARS to provide a more transparent means of documenting the impact of costs incurred during the undefinitized period of an undefinitized contract action (UCA), and to recognize when contractors demonstrate efficient management and internal cost control systems through the submittal of a timely, auditable proposal in furtherance of definitization of a UCA. In some cases, DoD contracting personnel have not documented their consideration of the reduced risk to the contractor for costs incurred as of the date the contractor submits a qualifying proposal to definitize a UCA. While such costs generally present very little risk to the contractor, the contracting officer should consider the reasons for any delays in definitization in making their determination of the appropriate assigned value for contract type risk.

II. Discussion and Analysis

This rule proposes to make the following amendments to DFARS parts 215, 217, and 243:

- DFARS 215.404–71–2, Performance Risk. This section is amended to specify that if the contractor demonstrates efficient management and cost control through the submittal of a timely, auditable proposal in furtherance of definitization of an undefinitized contract action (UCA), and the proposal demonstrates effective cost control from the time of award to the present, the contracting officer may add 1 percentage point to the value determined for management/cost control up to the maximum of 7 percent.

- DFARS 215.404–71–3, Contract Type Risk and Working Capital Adjustment. This section is amended to reflect the separation of Item 24 on the DD Form 1547, Record of Weighted Guidelines, into Item 24a, Contract Type Risk (based on costs incurred as of the date the contractor submits a qualifying proposal); Item 24b, Contract Type Risk (based on Government estimated cost to complete); and Item 24c, Totals. Also, paragraph (d)(2)(ii) is added to require contracting officers to document the reason for assigning a specific contract type risk value in determining the negotiation objective.

- DFARS 217.7404–6, Allowable Profit. This section is amended to require contracting officers to document in the price negotiation memorandum the reason for assigning a specific contract type risk value.

- DFARS 243.204–70–6, Allowable Profit. This section is amended to require contracting officers to document

in the price negotiation memorandum the reason for assigning a specific contract type risk value.

In addition, the DD Form 1547, Record of Weighted Guidelines Application, is proposed to be amended to separate Item 24, Contract Type Risk, into Item 24a, Contract Type Risk (based on contractor incurred costs under a UCA), Item 24b, Contract Type Risk (based on Government projected costs), and Item 24c, Totals.

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 proposed 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.* However, an initial regulatory flexibility analysis has been prepared and is summarized as follows:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to provide a more transparent means of documenting the impact of costs incurred during the undefinitized period of an undefinitized contract action (UCA) on allowable profit, and to recognize when contractors demonstrate efficient management and internal cost control systems through the submittal of a timely, auditable proposal in furtherance of definitization of a UCA. In some cases, DoD contracting personnel have not documented their consideration of the reduced risk to the contractor of costs incurred during the undefinitized period of a UCA.

The objective of this proposed rule is to gain visibility into the contracting officer's rationale for the contract type risk values entered on the DD Form 1547, Record of Weighted Guidelines Application. Therefore, the proposed rule requires contracting officers to

enter separate contract type risk values on the DD Form 1547, one value based on incurred costs under an UCA and the other value based on Government estimated costs to complete.

This rule only changes processes that are internal to the Government by providing a more transparent means of documenting the impact of costs incurred during the undefinitized period of a UCA when calculating negotiation profit objectives. This rule does not revise the current regulatory requirements at DFARS 215.404–71–3(d)(2), which direct contracting officers to assess the extent to which costs have been incurred prior to definitization of the UCA. However, to recognize when contractors demonstrate efficient management and cost control through the submittal of a timely, auditable proposal in furtherance of definitization of a UCA, and the proposal demonstrates effective cost control from the time of award to the present, the contracting officer may add 1 percentage point to the value determined for management/cost control up to the maximum of 7 percent. Since this rule merely provides a more transparent means of documenting the impact of such incurred costs and contractors' efficient management and cost control, there is no impact to small entities who are awarded UCAs.

The rule does not impact reporting, recordkeeping, or other compliance requirements. The rule does not duplicate, overlap, or conflict with any

other Federal rules. There are no known significant alternative approaches to the rule that would meet the requirements.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2015–D024), in correspondence.

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 215, 217, and 243

Government procurement.

Jennifer L. Hawes,
Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 215, 217, and 243 are proposed to be amended as follows:

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

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

PART 215—CONTRACTING BY NEGOTIATION

■ 2. Amend section 215.404–71–2 by adding paragraph (e)(2)(iii) to read as follows:

215.404–71–2 Performance risk.

* * * * *

(e) * * *

(2) * * *

(iii) If the contractor demonstrates efficient management and cost control through the submittal of a timely, auditable proposal in furtherance of definitization of an undefinitized contract action, and the proposal demonstrates effective cost control from the time of award to the present, the contracting officer may add 1 percentage point to the value determined for management/cost control up to the maximum of 7 percent.

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■ 3. Amend section 215.404–71–3 by—
■ a. Revising paragraph (b) introductory text and paragraphs (b)(1) through (3); and

■ b. Revising paragraph (d)(2).

The revisions and addition read as follows:

215.404–71–3 Contract type risk and working capital adjustment.

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(b) *Determination.* The following extract from the DD 1547 is annotated to explain the process.

Item	Contractor risk factors	Assigned value	Base	Profit objective
24a	Contract Type Risk (based on incurred costs at the time of qualifying proposal submission).	(1)	(2)	(3)
24b	Contract Type Risk (based on Government estimated cost to complete)	(1)	(2)	(3)
24c	Totals	(3)	(3)

Item	Contractor risk factors	Costs financed	Length factor	Interest rate	Profit objective
25	Working Capital (4)	(5)	(6)	(7)	(8)

(1) Select a value from the list of contract types in paragraph (c) of this subsection using the evaluation criteria in paragraph (d) of this subsection. See paragraph (d)(2) of this section.

(2) Insert the amount of costs incurred as of the date the contractor submits a qualifying proposal, such as under an undefinitized contract action, (excluding facilities capital cost of money) into Block 24a, and the amount of Government estimated cost to

complete (excluding facilities capital cost of money) into Block 24b.

(3) Multiply (1) by (2) for Blocks 24a and 24b. Add Blocks 24a and 24b and insert the total in Block 24c.

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(d) * * *

(2) *Mandatory.* (i) The contracting officer shall assess the extent to which costs have been incurred prior to definitization of the contract action (also see 217.7404–6(a) and 243.204–70–6).

When costs have been incurred prior to definitization, generally regard the contract type risk to be in the low end of the designated range. If a substantial portion of the costs have been incurred prior to definitization, the contracting officer may assign a value as low as 0 percent, regardless of contract type.

(ii) Contracting officers shall document the reason for assigning a specific contract type risk value, to include the extent to which any reduced

cost risk during the undefinitized period of performance was considered, in determining the negotiation objective. This justification shall be documented in the price negotiation memorandum.

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PART 217—SPECIAL CONTRACTING METHODS

217.7404–6 [Amended]

- 4. Amend section 217.7404–6 by—
- a. In paragraph (b), removing “The contractor’s reduced cost risk for costs

incurred” and adding “Any reduced cost risk to the contractor for costs expected to be incurred” in its place; and

- b. In paragraph (c), removing “contract file” and adding “price negotiation memorandum” in its place.

PART 243—CONTRACT MODIFICATIONS

243.204–70–6 [Amended]

- 5. Amend section 243.204–70–6 by—

- a. In paragraph (b), removing “The contractor’s reduced cost risk for costs incurred” and adding “Any reduced cost risk to the contractor for costs expected to be incurred” in its place; and

- b. In paragraph (c), removing “contract action” and adding “unpriced change order” in its place and removing “contract file” and adding “price negotiation memorandum” in its place.

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