

will apply to contracts or groups of contracts for military construction, as defined in 10 U.S.C. 2801, or shipbuilding, while the 7-year standard will apply to all other contracts.

The objective of the rule is to implement the requirements of section 820, which expands the application of the expedited contract closeout authority of section 836 of the NDAA for FY 2017 to more recent, physically complete contracts. The legal basis of the rule is section 820 of the NDAA for FY 2021.

This rule will likely affect small entities that have been or will be awarded DoD contracts, including those under FAR part 12 procedures for the acquisition of commercial items, including commercially available off-the-shelf items. Data was obtained from the Electronic Data Access module of the Procurement Integrated Enterprise Environment for contracts that were physically completed at least four years ago and are eligible for closeout between the new standard of 7 or 10 years and the previous standard of at least 17 fiscal years after award. The data were then compared to the Federal Procurement Data System (FPDS) to estimate the number of contracts awarded to small entities. Contracts subject to the previous standard of 17 years are included in this estimate.

As of April 2021, the FPDS data indicate that approximately 29,200 contracts, eligible for expedited closeout under the 7-year standard, were awarded to an estimated 4,490 unique small entities. An additional estimated 1,775 contracts, subject to the 10-year standard, were awarded to approximately 576 small entities. As a result, DoD estimates that approximately 5,066 small entities will have the opportunity to benefit from the expanded expedited contract authorities provided in this rule.

The rule does not impose any new reporting, recordkeeping, or compliance requirements.

The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no practical alternatives that will accomplish the objectives of the statute.

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 the 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 2021-D012), in correspondence.

VIII. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 204

Government procurement.

Jennifer D. Johnson, Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR part 204 is proposed to be amended as follows:

PART 204—ADMINISTRATIVE AND INFORMATION MATTERS

1. The authority citation for 48 CFR part 204 continues to read as follows:

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

2. Amend section 204.804 by revising paragraph (3)(i) to read as follows:

§ 204.804 Closeout of contract files.

(3)(i) In accordance with section 836 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328), section 824 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91), and section 820 of the National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116-283), contracting officers may close out contracts or groups of contracts through issuance of one or more modifications to such contracts without completing a reconciliation audit or other corrective action in accordance with FAR 4.804-5(a)(3) through (15), as appropriate, if each contract—

(A)(1) For military construction (as defined at 10 U.S.C. 2801) or shipbuilding, was awarded at least 10 fiscal years before the current fiscal year; or

(2) For all other contracts, was awarded at least 7 fiscal years before the current fiscal year;

(B) The performance or delivery was completed at least 4 years prior to the current fiscal year; and

(C) Has been determined by a contracting official, at least one level above the contracting officer, to be not otherwise reconcilable, because—

(1) The contract or related payment records have been destroyed or lost; or

(2) Although contract or related payment records are available, the time or effort required to establish the exact amount owed to the U.S. Government or

amount owed to the contractor is disproportionate to the amount at issue.

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215 and 242

[Docket DARS-2021-0015]

RIN 0750-AK95

Defense Federal Acquisition Regulation Supplement: Requiring Data Other Than Certified Cost or Pricing Data (DFARS Case 2020-D008)

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 implement a section of the National Defense Authorization Act for Fiscal Year 2020 that provides additional requirements relating to the submission of data other than certified cost or pricing data.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before October 29, 2021, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2020-D008, using any of the following methods:

o Federal eRulemaking Portal: https://www.regulations.gov. Search for "DFARS Case 2020-D008." Select "Comment" and follow the instructions to submit a comment. Please include your name, company name (if any), and "DFARS Case 2020-D008" on any attached document.

o Email: osd.dfars@mail.mil. Include DFARS Case 2020-D008 in the subject line of the message.

Comments received generally will be posted without change to https://www.regulations.gov, including any personal information provided. To confirm receipt of your comment(s), please check https://www.regulations.gov, approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Mr. David E. Johnson, telephone 571-372-6115.

SUPPLEMENTARY INFORMATION:

## I. Background

DoD is proposing to amend the DFARS to implement section 803 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Pub. L. 116–92), which amends 10 U.S.C. 2306a(d) as follows: To prohibit contracting officers from determining that the price of a contract or subcontract is fair and reasonable based solely on historical prices paid by the Government; and, when an offeror fails to make a good faith effort to comply with a reasonable request to submit data, to state that an offeror is ineligible for award if the contracting officer is unable to determine, by any other means, that the proposed prices are fair and reasonable, unless the head of the contracting activity (HCA) determines that it is in the best interest of the Government to make the award to that offeror.

## II. Discussion and Analysis

This rule proposes changes to DFARS 215.403–3(a). The amendment to 10 U.S.C. 2306a(d)(1) is implemented in DFARS 215.403–3(a)(1), by prohibiting contracting officers from basing the determination that the price of a contract is fair and reasonable solely on historical prices paid by the Government.

The new paragraph (d)(2) at 10 U.S.C. 2306a states that offerors who fail to comply with a reasonable request to submit data needed to determine price reasonableness are ineligible for award, unless the HCA determines that it is in the best interest of the Government to make the award. This requirement is already implemented in the Federal Acquisition Regulation (FAR) at 15.403–3(a)(4). However, the criteria in 10 U.S.C. 2306a(d)(2) for the determination made by the HCA are included in DFARS 215.403–3(a)(4), in lieu of the criteria in the FAR, because the criteria for DoD are not the same as the criteria for the civilian agencies.

In accordance with 10 U.S.C. 2306a(d)(2)(B)(ii), this proposed rule amends DFARS 242.1502(g), to add the requirement that, unless exempted by the HCA, a notation is required in the Contractor Performance Assessment Reporting System that, despite receiving an award, the contractor has denied multiple requests for submission of data other than certified cost or pricing data over the preceding three-year period.

This proposed amendment to the DFARS also makes conforming changes to 215.404–1.

## III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule does not propose to create any new solicitation provisions or contract clauses. It does not impact any existing solicitation provisions or contract clauses or their applicability to contracts valued at or below the simplified acquisition threshold or for commercial items, including COTS items.

## IV. 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.

## V. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not anticipated to be a major rule under 5 U.S.C. 804.

## VI. 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.*, because it does not add any new compliance requirements on small entities. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This proposed rule is necessary in order to implement section 803 of the National Defense Authorization Act

(NDAA) for Fiscal Year (FY) 2020, which amends 10 U.S.C. 2306a(d).

The objective of this rule is to implement section 803 of the NDAA for FY 2020, which is the legal basis for this rule. Section 803 provides additional requirements for contracting officers and the head of the contracting activity relating to obtaining data other than certified cost or pricing data.

This rule does not directly impose requirements on small entities. The requirement making certain offerors ineligible for award is already in the Federal Acquisition Regulation (FAR). This rule impacts: (1) The contracting officer's need for data other than historical prices paid by the Government, unless there is adequate price competition; and (2) the criteria for use by the head of the contracting activity for a determination to make an award. In some cases, the contracting officer's need for data other than historical prices paid by the Government may result in a request for additional data from an offeror. Based on data from the Federal Procurement Data System for FY 2018 through FY 2020, DoD estimates that 1,672 small entities may receive a request for additional data.

There are no new reporting, recordkeeping, or other compliance requirements on small entities.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no significant alternatives, which would accomplish the stated objectives of the rule and minimize the impact on small entities. However, the rule has no significant economic impact on small entities.

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 2020–D008), in correspondence.

## VII. 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 and 242

Government procurement.

Jennifer D. Johnson, Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 215 and 242 are proposed to be amended as follows:

■ 1. The authority citation for parts 215 and 242 continues to read as follows:

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

PART 215—CONTRACTING BY NEGOTIATION

■ 2. Amend section 215.403–3 by adding paragraph (a) to read as follows:

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

(a)(1) Contracting officers shall not determine the price of a contract to be fair and reasonable based solely on historical prices paid by the Government (see PGI 215.403–3(4)) (10 U.S.C. 2306a(d)).

(4) In accordance with 10 U.S.C. 2306a(d) and in lieu of the factors for consideration listed in FAR 15.403–3(a)(4), a determination by the head of the contracting activity that it is in the best interest of the Government to make the award to an offeror that does not comply with a requirement to submit data other than certified cost or pricing data shall be based on consideration of pertinent factors, including the following:

- (A) The effort to obtain the data.
(B) Availability of other sources of supply of the item or service.
(C) The urgency or criticality of the Government’s need for the item or service.
(D) Reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract based on information available to the contracting officer.
(E) Rationale or justification made by the offeror for not providing the requested data.
(F) Risk to the Government if award is not made.

■ 3. Amend section 215.404–1 by revising paragraphs (b)(ii) and (v) introductory text to read as follows:

§ 215.404–1 Proposal analysis techniques.

(b) If the contracting officer determines that the information obtained through market research is insufficient to determine the

reasonableness of price, the contracting officer shall consider information submitted by the offeror of recent purchase prices paid by the Government and commercial customers for the same or similar commercial items under comparable terms and conditions in establishing price reasonableness on a subsequent purchase if the contracting officer is satisfied that the prices previously paid remain a valid reference for comparison. Price reasonableness shall not be based solely on historical prices paid by the Government (see 215.403–3(a)(1)). The contracting officer shall consider the totality of other relevant factors such as the time elapsed since the prior purchase and any differences in the quantities purchased (10 U.S.C. 2306a(b)(5)).

(v) When evaluating pricing data, the contracting officer shall consider materially differing terms and conditions, quantities, and market and economic factors (see PGI 215.404–1(b)(v)). For similar items, the contracting officer shall also consider material differences between the similar item and the item being procured (see FAR 15.404–1(b)(2)(ii)(B)). Material differences are those that could reasonably be expected to influence the contracting officer’s determination of price reasonableness. The contracting officer shall consider the following factors when evaluating the relevance of the information available:

PART 242—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 4. Revise section 242.1502 to read as follows:

§ 242.1502 Policy.

(g) Past performance evaluations in the Contractor Performance Assessment Reporting System—
(i) Shall include an assessment of the contractor’s performance against, and efforts to achieve, the goals identified in its comprehensive small business subcontracting plan when the contract contains the clause at 252.219–7004, Small Business Subcontracting Plan (Test Program); and
(ii) Shall, unless exempted by the head of the contracting activity, include a notation on contractors that have denied multiple requests for submission of data other than certified cost or pricing data over the preceding 3-year period, but nevertheless received an award (10 U.S.C. 2306a(d)(2)(B)(ii)).

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 225 and 252

[Docket DARS–2021–0012]

RIN 0750–AK85

Defense Federal Acquisition Regulation Supplement: Maximizing the Use of American-Made Goods (DFARS Case 2019–D045)

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 implement an Executive order regarding maximizing the use of American-made goods, products, and materials.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before October 29, 2021, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2019–D045, using any of the following methods:

Federal eRulemaking Portal: https://www.regulations.gov. Search for “DFARS Case 2019–D045” in the search box and select “Search.” Select “Comment” and follow the instructions to submit a comment. Please include your name, company name (if any), and “DFARS Case 2019–D045” on any attached document.

Email: osd.dfars@mail.mil. Include DFARS Case 2019–D045 in the subject line of the message.

Comments received generally will be posted without change to https://www.regulations.gov, including any personal information provided. To confirm receipt of your comment(s), please check https://www.regulations.gov, approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly Bass, telephone 571–372–6174.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement section 2(a)(i) of Executive Order (E.O.) 13881, Maximizing Use of American-Made Goods, Products, and Materials, which changes the percentages used to determine whether a product is