

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 212, 237, and 252**

[Docket DARS–2021–0021]

RIN 0750–AK47

Defense Federal Acquisition Regulation Supplement: Requirement for Firms Used To Support Department of Defense Audits (DFARS Case 2019–D010)

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 implement a section of the National Defense Authorization Act for Fiscal Year 2019, as amended by a section of the National Defense Authorization Act for Fiscal Year 2020, that requires accounting firms that provide financial statement auditing or audit remediation services in support of the Financial Improvement and Audit Remediation Plan to provide to DoD a statement setting forth the details of any disciplinary proceedings with respect to the accounting firm or its associated persons before any entity with the authority to enforce compliance with rules or laws applying to audit services offered by the accounting firm. DoD policy extends this requirement to firms other than accounting firms.

DATES: Effective October 28, 2022.

FOR FURTHER INFORMATION CONTACT: Mr. David E. Johnson, telephone 202–913–5764.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD published a proposed rule in the **Federal Register** at 86 FR 59947 on October 29, 2021, to implement section 1006 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232), as amended by section 1011 of the NDAA for FY 2020 (Pub. L. 116–92). Section 1006 applies to accounting firms that provide financial statement auditing to DoD in support of the audit under 31 U.S.C. 3521 or audit remediation services in support of the Financial Improvement and Audit Remediation Plan described in 10 U.S.C. 240b. Such firms, when responding to a solicitation or awarded a contract for the acquisition of covered services, must disclose to DoD before any contract action

(including award, renewals, and amendments) the details of any disciplinary proceedings with respect to the accounting firm or its associated persons before any entity with the authority to enforce compliance with rules or laws applying to audit services offered by the accounting firm. DoD, as a matter of policy to provide a level playing field between firms that provide audit services to support certain DoD audits, is extending this requirement to firms other than accounting firms that provide such services. Section 1011 amended section 1006 to require any disclosures to be treated as confidential to the extent required by the court or agency in which the proceeding occurred and to be treated in a manner consistent with any protections or privileges established by any other provision of Federal Law.

There were no public comments submitted in response to the proposed rule. There are no changes made to the final rule.

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

Consistent with the determinations that DoD made with regard to application of the requirements of section 1006 of the NDAA for FY 2019, as amended by section 1011 of the NDAA for FY 2020, DoD is not applying the requirements of section 1006 of the NDAA for FY 2019 to contracts at or below the SAT; however, DoD is applying the rule to contracts for the acquisition of commercial items, excluding COTS items.

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.

IV. 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**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

V. Regulatory Flexibility Act

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

This final rule is necessary to implement section 1006 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019, as amended by section 1011 of the NDAA for FY 2020, and DoD policy. Section 1006 applies to accounting firms that provide financial statement auditing to DoD in support of the audit under 31 U.S.C. 3521 or audit remediation services in support of the Financial Improvement and Audit Remediation Plan described in 10 U.S.C. 240b. Such firms, when responding to a solicitation or awarded a contract for the acquisition of covered services, must disclose to DoD before any contract action (including award, renewals, and amendments) the details of any disciplinary proceedings with respect to the accounting firm or its associated persons before any entity with the authority to enforce compliance with rules or laws applying to audit services offered by the accounting firm. DoD policy extends this requirement to firms other than accounting firms, in order to provide a level playing field in competitive acquisitions.

DoD received no public comments in response to the initial regulatory flexibility analysis in the proposed rule.

DoD estimates there are 12 respondents that submit offers and 10 respondents that receive award of a contract covered by this rule. Of the estimated 12 respondents, DoD further estimates that only two of these respondents are small entities.

This rule adds a provision and a clause that require reporting details of any disciplinary proceedings with respect to the firm or its associated persons before any contract action on a covered contract in support of certain DoD audits. There are no other reporting or recordkeeping requirements.

There are no significant alternatives that would meet the intent of the

statutes. The rule could be applied to only accounting firms, but that would not be fair to accounting firms competing against other than accounting firms. Applying the rule to other than accounting firms does not create a significant burden for small entities.

VI. Paperwork Reduction Act

This rule contains information collection requirements that have been approved by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). This information collection requirement has been assigned OMB Control Number 0750-0006, entitled Defense Federal Acquisition Regulation Supplement (DFARS) Part 237 Clauses 252.237-7025 and 252.237-7026.

List of Subjects in 48 CFR Parts 212, 237, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 237, and 252 are amended as follows:

■ 1. The authority citation for parts 212, 237, and 252 continues to read as follows:

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

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Amend section 212.301 by adding paragraphs (f)(xiv)(C) and (D) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(xiv) * * *

(C) Use the provision at 252.237-7025, Preaward Transparency Requirements for Firms Offering to Support Department of Defense Audits—Representation and Disclosure, as prescribed in 237.270(e)(3), to comply with section 1006 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232) and section 1011 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92).

(D) Use the clause at 252.237-7026, Postaward Transparency Requirements for Firms that Support Department of Defense Audits, as prescribed in 237.270(e)(4), to comply with section 1006 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232) and section 1011 of

the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92).

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PART 237—SERVICE CONTRACTING

- 3. Amend section 237.270 by—
 - a. Redesignating paragraph (d) as paragraph (e);
 - b. Adding a new paragraph (d); and
 - c. Adding paragraphs (e)(3) and (4).
- The additions read as follows:

237.270 Acquisition of audit services.

* * * * *

(d) *Transparency requirement for firms used to support DoD audits.*

(1) This paragraph (d) implements the requirements of section 1006 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232) and section 1011 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92) for transparency of accounting firms used to support DoD audits; and extends the statutory requirement, as a matter of DoD policy, to firms other than accounting firms in order to ensure consistent availability of data for contracting officer evaluation and appropriate use.

(2) This requirement applies to solicitations and contracts for—

- (i) Financial statement auditing required under 31 U.S.C. 3521(e); or
- (ii) Audit remediation services in support of the Financial Improvement and Audit Remediation Plan described in 10 U.S.C. 240b.

(3) Any firm responding to a solicitation or awarded a contract for the acquisition of the services described in paragraph (d)(2) of this section is required to represent with regard to whether it has been subject to disciplinary proceedings within the last 3 years and, if the offeror represents that it has, to disclose to DoD before any contract action (including award, renewals, and modifications)—

- (i) The details of any disciplinary proceedings, with respect to the firm or its associated persons (including principals and employees), before an entity with the authority to enforce compliance with rules or laws applying to audit services or audit remediation services offered by accounting firms or firms other than accounting firms; and
- (ii) For subsequent contract actions after contract award, whether there has been any change with regard to previously reported disciplinary proceedings since the last contract action.

(e) * * *

(3) Use the provision at 252.237-7025, Preaward Transparency Requirements for Firms Offering to Support

Department of Defense Audits—Representation and Disclosure, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items, that include the clause at 252.237-7026, Postaward Transparency Requirements for Firms that Support Department of Defense Audits.

(4) Use the clause at 252.237-7026, Postaward Transparency Requirements for Firms that Support Department of Defense Audits, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that—

- (i) Exceed the simplified acquisition threshold; and
- (ii) Are for the acquisition of financial statement auditing or audit remediation services as described in paragraph (d)(2) of this section.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.237-7000 [Amended]

■ 4. Amend section 252.237-7000 introductory text by removing “237.270(d)(1)” and adding “237.270(e)(1)” in its place.

252.237-7001 [Amended]

■ 5. Amend section 252.237-7001 introductory text by removing “237.270(d)(2)” and adding “237.270(e)(2)” in its place.

■ 6. Add section 252.237-7025 to read as follows:

252.237-7025 Preaward Transparency Requirements for Firms Offering to Support Department of Defense Audits—Representation and Disclosure.

As prescribed in 237.270(e)(3), use the following provision:

Preaward Transparency Requirements For Firms Offering To Support Department of Defense Audits—Representation and Disclosure (OCT 2022)

(a) *Representation.* The Offeror represents that within the 3-year period preceding this offer, the Offeror and/or any of its principals or employees have [] have not [] been the subject of disciplinary proceedings before an entity with the authority to enforce compliance with rules or laws applying to audit services or audit remediation services offered by the Offeror, that—

(1) Are not yet fully adjudicated or settled; or

(2) Were fully adjudicated or settled against the Offeror and/or its principals or employees.

(b) *Disclosure.* If the Offeror checked “have” in the representation in paragraph (a) of this provision, the Offeror shall, at a minimum, disclose for each such proceeding—

(1) The entity hearing the case;
 (2) The case or file number; and
 (3) The allegation or conduct at issue and, if fully adjudicated or settled, a brief description of the outcome.

(c) *Treatment of the statements.* The Government will safeguard and treat as confidential all statements provided pursuant to this provision where the statement has been marked “confidential” or “proprietary” by the Offeror. Statements so marked will not be released by the Government to the public pursuant to a request under the Freedom of Information Act, 5 U.S.C. 552, without prior notification to the Offeror and opportunity for the Offeror to claim an exemption from release. The Government will treat any statement provided pursuant to this provision as confidential to the extent required by any other applicable law.

(End of provision)

■ 7. Add section 252. 237–7026 to read as follows:

252.237–7026 Postaward Transparency Requirements for Firms that Support Department of Defense Audits.

As prescribed in 237.270(e)(4), use the following clause:

Postaward Transparency Requirements for Firms That Support Department of Defense Audits (OCT 2022)

(a) Prior to each contract action under this contract (including renewal or modification), the Contractor shall disclose the details of any disciplinary proceedings, with respect to the firm and/or its principals or employees, before an entity with the authority to enforce compliance with rules or laws applying to audit services or audit remediation services offered by the Contractor, and whether there has been any change with regard to previously reported proceedings since the last contract action.

(b) The disclosure shall, at a minimum, include—

(1) The entity hearing the case;
 (2) The case or file number; and
 (3) A brief description of the allegation or conduct at issue and, if fully adjudicated or settled, a brief description of the outcome.

(c) The Government will safeguard and treat as confidential all statements provided pursuant to this clause where the statement has been marked “confidential” or “proprietary” by the Contractor. Statements so marked will not be released by the Government to the public pursuant to a request under the Freedom of Information Act, 5 U.S.C. 552, without prior notification to the Contractor and opportunity for the Contractor to claim an exemption from release. The Government will treat any statement provided pursuant to this clause as confidential to the extent required by any other applicable law.

(End of clause)

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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: Final rule.

SUMMARY: DoD is issuing a final rule amending 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 cost or pricing data.

DATES: Effective October 28, 2022.

FOR FURTHER INFORMATION CONTACT: David E. Johnson, telephone 202–913–5764.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 86 FR 48368 on August 30, 2021, to implement section 803 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Pub. L. 116–92). Section 803 amends 10 U.S.C. 2306a(d) (redesignated as 10 U.S.C. 3705) 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 to state that an offeror is ineligible for award if the contracting officer is unable to determine proposed prices are fair and reasonable by any other means, when an offeror fails to make a good faith effort to comply with a reasonable request to submit data other than certified cost or pricing data, 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. Five respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the

changes made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule

DoD revised DFARS 215.403–3(a)(1) to include the word “subcontract” to clarify that, in accordance with section 803 of the NDAA for FY 2020, the rule applies to subcontractors. One respondent suggested this revision.

DoD revised DFARS 215.403–3(a)(4) to include, in accordance with section 803 of the NDAA for FY 2020, the requirement that offerors make a good faith effort to comply with the Government’s reasonable requests to furnish data other than certified cost or pricing data. Two respondents suggested this revision.

B. Analysis of Public Comments

1. Clarification of the Requirement Not To Base Price-Reasonableness Solely on Historical Prices Paid by the Government

Comment: Three respondents expressed confusion with the requirement not to base price reasonableness solely on historical prices paid by the Government. Multiple respondents requested clarification on the restriction of use of previously performed cost and price analysis. Another respondent expressed concern with inclusion of the requirement in multiple sections and recommended that the requirement should be clearly connected to other relevant factors such as time elapsed since prior purchase, and any differences in quantities purchased as part of the price reasonableness determination.

Response: The rule does not prohibit contracting officers from utilizing prior cost or price analyses, nor does it absolutely prohibit contracting officers from utilizing historical prices paid by the Government to determine prices fair and reasonable. Rather, the rule prohibits contracting officers from determining the price of a contract to be fair and reasonable based solely on historical prices paid by the Government. Under this rule, historical prices paid by the Government cannot properly comprise the only factor when determining prices fair and reasonable, but rather may be used as one factor among several. Inclusion of the requirement in DFARS 215.403–3 was intentional to ensure the contracting officer is aware of the requirement in the event that prior prices paid by the Government are the only information available, and other than certified cost or pricing data will likely have to be