

Payments for Foreign Military Sales Acquisitions, of this contract, the Contractor shall—

(1) Submit separate progress payment requests for each lot identified in the contract;

(2) Identify the contract price for the lot as the sum of all fixed-priced line items identified to the lot, in accordance with FAR 32.501–3;

(3) Identify the lot on each progress payment request to which the request applies;

(4) Calculate each request on the basis of the price, costs (including the cost to complete), subcontractor financing, and progress payment liquidations of the lot to which it applies; and

(5) Distribute costs among lots in a manner acceptable to the Administrative Contracting Officer.

(c) Submit a separate progress payment request for U.S. and FMS requirements in accordance with the DFARS clause 252.232–7002, Progress Payments for Foreign Military Sales Acquisitions, of this contract.

(End of clause)

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 206

[Docket DARS–2023–0021]

RIN 0750–AL79

Defense Federal Acquisition Regulation Supplement: Modification of Authority of the Department of Defense To Carry Out Certain Prototype Projects (DFARS Case 2023–D006)

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 2023.

DATES: Effective May 25, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly R. Ziegler, telephone 703–901–3176.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is amending the DFARS to implement section 842 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2023 (Pub. L. 117–263),

which amends 10 U.S.C. 4022(f)(2) to permit the award of a follow-on production contract without the use of competitive procedures, even if explicit notification was not listed within the request for proposal for the prototype project transaction. This revision modifies the criteria required to award a follow-on production contract without the use of competitive procedures at DFARS 206.001–70(a), which requires other transaction solicitations and agreements to include provisions for a follow-on contract in order to qualify for an exception to competition requirements.

The statutory revision to the criteria does not implement new requirements; instead it removes one of the requirements. The statutes and regulations that implement DoD's other transactions authority permit DoD to provide, in the agreement, for the award of a follow-on production contract to a participant in the prototype project. Agreements made under DoD's other transactions authority are not subject to the Federal Acquisition Regulation (FAR) or DFARS; however, the award of a follow-on production contract resulting from such an other transaction agreement is subject to these acquisition regulations.

DoD issued a final rule for DFARS case 2019–D031 (87 FR 10989) on February 28, 2022, to implement section 815 of the NDAA for FY 2016 (Pub. L. 114–92), which modified the criteria required to exempt from competition certain follow-on production contracts at DFARS 206.001–70(a)(1) and (2).

This final rule removes from DFARS 206.001–70(a)(1) the other transaction solicitation requirement and clarifies that an other transaction agreement is still statutorily required (10 U.S.C. 4022(f)(1)) to provide for the award of a follow-on production contract in order for a contracting officer to award the follow-on production contract without obtaining competition. DFARS 206.001–70(a)(2) is revised to require documentation from the agreements officer for the other transaction agreement that, where applicable for the prototype project, the threshold at 10 U.S.C. 4022(a)(2)(C) and the requirements at 10 U.S.C. 4022(f)(2)(A) and (B) have been met. These and additional revisions in 206.001–70(a) are intended to ensure an accurate interpretation of the statutory requirements of 10 U.S.C. 4022 that are subject to the DFARS.

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

The statute that applies to the publication of the FAR is 41 U.S.C. 1707, Publication of Proposed Regulations. Subsection (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 DoD is removing a requirement that is no longer mandated by statute and that affects only the internal operating procedures of DoD.

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

This rule does not impose any new requirements on contracts at or below the simplified acquisition threshold, for commercial services, or for commercial products, including commercially available off-the-shelf 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 to 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.

VI. 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.

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 Part 206

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR part 206 is amended as follows:

PART 206—COMPETITION REQUIREMENTS

■ 1. The authority citation for 48 CFR part 206 continues to read as follows:

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

■ 2. Revise section 206.001-70 to read as follows:

206.001-70 Exception for prototype projects for follow-on production contracts.

(a) Also excepted from this part are follow-on production contracts for products developed pursuant to the “other transactions” authority of 10 U.S.C. 4022 for prototype projects, when the contracting officer receives sufficient documentation from the agreements officer issuing the other transaction agreement for the prototype project that—

(1) The other transaction agreement included provisions for a follow-on production contract (10 U.S.C. 4022(f)(1)); and

(2) Where applicable, the threshold at 10 U.S.C. 4022(a)(2)(C) and the requirements at 10 U.S.C. 4022(f)(2)(A) and (B) have been met.

(b) See PGI 206.001-70 for additional guidance.

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215, 217, and 252

[Docket DARS-2022-0026]

RIN 0750-AL22

Defense Federal Acquisition Regulation Supplement: Undefinitized Contract Actions (DFARS Case 2021-D003)

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) as recommended by the DoD Inspector General to refine the management of undefinitized contract actions.

DATES: Effective May 25, 2023.

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

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 87 FR 65507 on October 28, 2022, to amend the DFARS to refine the management of undefinitized contract actions (UCAs). This final rule implements recommendations regarding management of undefinitized contract actions (UCAs) as addressed in the DoD Inspector General Audit of Military Department Management of Undefinitized Contract Actions (Report No. DODIG-2020-084). Three 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. No changes are made to the final rule in response to the public comments. A discussion of the comments is provided, as follows:

A. Analysis of Public Comments

1. Possible Subjectiveness Associated With the Term “Qualified Proposal”

Comment: Several respondents remarked that aspects of the definition of “qualified proposal” in the context of UCAs appear open to interpretation, and the resulting subjectivity could result in unwarranted detrimental treatment of

contractors. Some respondents suggested DoD should change the DFARS to provide additional details regarding what comprises a qualifying proposal or otherwise require contracting officers to undertake a dialogue to assist contractors developing and submitting qualifying proposals.

Response: The term “qualified proposal,” defined at DFARS 217.7401, was not proposed for revision in this rule, and the definition is based on statute now found at 10 U.S.C. 3377(b)(2). This rule does not conceptually change the term or its usage, and the comment is therefore outside the scope of this rule.

2. Contract Risk Factors

Comment: Several respondents commented on the language regarding contract risk factors at 215.404-71-3(d)(2)(i). Several respondents stated that this rule would limit the contracting officer’s discretion and flexibility to review and assign risk factors that consider the circumstances of a particular UCA. One respondent noted that current language at DFARS 215.404-71-3(d)(2)(i) already instructs the contracting officer to consider the extent to which costs have been incurred prior to definitization rendering unnecessary the language this rule adds at DFARS 215.404-71-3(d)(2)(i), including any resulting updates to DD Form 1547, Record of Weighted Guidelines. One respondent suggested modifying DFARS 217.7404-6, Allowable Profit, to specify cost-risk factors, including “inflation and baseline fluidity, and reduced negotiating strength with suppliers and vendors in a UCA environment.” Some respondents disagreed with the assumption reflected in the DFARS that a contractor’s cost risk declines during the period of a UCA, therefore warranting a fee reduction based on lower risk.

Response: This rule is intended to incentivize both parties to definitize UCAs timely. The additional language in this rule at DFARS 215.404-71-3(d)(2)(i) provides contracting officers with flexibility and clarity to properly consider and assign fees to the relevant portions based upon their differing risk profiles, and DoD declines to remove the additional language from the final rule. Regarding the comment centering on stating factors that affect cost risk, at least some of the factors or considerations the respondent listed are effectively reflected at DFARS 215.404-71-3(d)(1), and the contracting officer would already consider them when ascribing contract risk. The comment regarding contract risk declining over