SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 234—MAJOR SYSTEM ACQUISITION

Subpart 234.2—Earned Value Management System

Subpart 234.70—Acquisition of Major Weapon Systems as Commercial Products

Subpart 234.71—Cost and Software Data Reporting

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

234.001 Definitions.

As used in this subpart—

Acceptable earned value management system and *earned value management system* are defined in the clause at 252.234–7002, Earned Value Management System.

Production of major defense acquisition program means the production and deployment of a major system that is intended to achieve an operational capability that satisfies mission needs, or an activity otherwise defined as Milestone C under Department of Defense Instruction 5000.02 or related authorities.

Significant deficiency is defined in the clause at 252.234–7002, Earned Value Management System, and is synonymous with *noncompliance*.

[76 FR 28867, May 18, 2011, as amended at 79 FR 4632, Jan. 29, 2014]

234.003 Responsibilities.

DoDD 5000.01, The Defense Acquisition System, and DoDI 5000.02, Operation of the Adaptive Acquisition Framework, contain the DoD implementation of OMB Circular A–109 and OMB Circular A–11.

[70 FR 14575, Mar. 23, 2005, as amended at 76 FR 76320, Dec. 7, 2011; 88 FR 80466, Nov. 17, 2023]

234.004 Acquisition strategy.

(1) See 209.570 for policy applicable to acquisition strategies that consider the use of lead system integrators.

(2) *Contract type.*

(i) In accordance with section 818 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364), for major defense acquisition programs at Milestone B—

(A) The milestone decision authority shall select, with the advice of the contracting officer, the contract type for a development program at the time of Milestone B approval or, in the case of a space program, Key Decision Point B approval;

(B) The basis for the contract type selection shall be documented in the acquisition strategy. The documentation—

(*1*) Shall include an explanation of the level of program risk; and

(*2*) If program risk is determined to be high, shall outline the steps taken to reduce program risk and the reasons for proceeding with Milestone B approval despite the high level of program risk; and

(C) If a cost-reimbursement type contract is selected, the contract file shall include the milestone decision authority's written determination that—

(*1*) The program is so complex and technically challenging that it would not be practicable to reduce program risk to a level that would permit the use of a fixed-price type contract; and

(*2*) The complexity and technical challenge of the program is not the result of a failure to meet the requirements of 10 U.S.C. 4251.

(ii) In accordance with section 811 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112–239), the contracting officer shall—

(A) Not use cost-reimbursement line items for the acquisition of production of major defense acquisition programs, unless the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)), or the milestone decision authority when the milestone decision authority is the service acquisition executive of the military department that is managing the program, submits to the congressional defense committees—

(*1*) A written certification that the particular cost-reimbursement line items are needed to provide a required capability in a timely and cost effective manner; and

(*2*) An explanation of the steps taken to ensure that cost-reimbursement line items are used only to achieve the purposes of the exception; and

(B) Include a copy of such congressional certification in the contract file.

(iii) See 216.301–3 for additional contract type approval requirements for cost-reimbursement contracts.

(iv) For fixed-price incentive (firm target) contracts, contracting officers shall comply with the guidance provided at PGI 216.403–1(1)(ii)(B) and (C).

(v) In accordance with section 808 of the National Defense Authorization Act for Fiscal Year 2023 (Pub. L. 117–263)—

(A) The contracting officer shall not procure more than one lot for low-rate initial production, as defined at 10 U.S.C. 4231, associated with a major defense acquisition program if—

(*1*) The milestone decision authority authorizes the use of a fixed-price type contract at the time of Milestone B approval; and

(*2*) The scope of work of the fixed-price type contract includes both the development and low-rate initial production of items for such major defense acquisition program; and

(B) This limitation may be waived by the service acquisition executive for the department concerned, delegable to no lower than one level above the contracting officer, if—

(*1*) A written notification of the waiver, including associated rationale, is provided to the congressional defense committees no later than 30 days after issuance of the waiver in accordance with agency procedures; and

(*2*) A copy of the waiver and such congressional notification are included in the contract file.

(3) The contracting officer shall include in solicitations for contracts for the technical maturation and risk reduction phase, engineering and manufacturing development phase or production phase of a weapon system, including embedded software—

(i) Clearly defined measurable criteria for engineering activities and design specifications for reliability and maintainability provided by the program manager, or the comparable requiring activity official performing program management responsibilities; or

(ii) Ensure a copy of the justification, executed by the program manager or the comparable requiring activity official performing program management responsibilities for the decision that engineering activities and design specifications for reliability and maintainability should not be a requirement, is included in the contract file (10 U.S.C. 4328).

[73 FR 4118, Jan. 24, 2008, as amended at 79 FR 4632, Jan. 29, 2014; 79 FR 23278, Apr. 28, 2014; 79 FR 58694, Sept. 30, 2014; 84 FR 58334, Oct. 31, 2019, 84 FR 65307, Nov. 27, 2019; 87 FR 76995, Dec. 16, 2022; 88 FR 55940, Aug. 17, 2023; 89 FR 31657, Apr. 25, 2024]

234.005 General requirements.

234.005–1 Competition.

A contract that is initially awarded from the competitive selection of a proposal resulting from a broad agency announcement (see 235.016) may contain a contract line item or contract option using funds not limited to those identified in 235.016 for the development and demonstration or initial production of technology developed under the contract, or the delivery of initial or additional items if the item or a prototype thereof is created as the result of work performed under the contract, only when it adheres to the following limitations:

(1) The contract line item or contract option shall be limited to the delivery

of the minimal amount of initial or additional items or prototypes that will allow for timely competitive solicitation and award of a follow-on development or production contract for those items.

(2) The term of the contract line item or contract option shall be for not more than 2 years.

(3) The dollar value of the work to be performed pursuant to the contract line item or contract option shall not exceed $100 million in fiscal year 2017 constant dollars. (10 U.S.C. 4004)

(4) See PGI 234.005–1 for guidance on providing, upon request, the benefits derived from use of this competitive selection method.

[75 FR 32639, June 8, 2010, as amended at 81 FR 17045, Mar. 25, 2016; 84 FR 4365, Feb. 15, 2019; 87 FR 25145, Apr. 28, 2022; 87 FR 76995, Dec. 16, 2022; 88 FR 80466, Nov. 17, 2023]

234.005–2 Mission-oriented solicitation.

See 215.101–2–70(b)(2) for the prohibition on the use of the lowest price technically acceptable source selection process for engineering and manufacturing development of a major defense acquisition program for which budgetary authority is requested beginning in fiscal year 2019.

[84 FR 50789, Sept. 26, 2019]

Subpart 234.2—Earned Value Management System

SOURCE: 73 FR 21848, Apr. 23, 2008, unless otherwise noted.

234.201 Policy.

(1) DoD applies the earned value management system requirement as follows:

(i) For cost or incentive contracts and subcontracts valued at $20,000,000 or more, the earned value management system shall comply with the guidelines in the American National Standards Institute/Electronic Industries Alliance Standard 748, Earned Value Management Systems (ANSI/EIA–748).

(ii) For cost or incentive contracts and subcontracts valued at $50,000,000 or more, the contractor shall have an earned value management system that has been determined by the cognizant Federal agency to be in compliance with the guidelines in ANSI/EIA–748.

(iii) For cost or incentive contracts and subcontracts valued at less than $20,000,000—

(A) The application of earned value management is optional and is a risk-based decision;

(B) A decision to apply earned value management shall be documented in the contract file; and

(C) Follow the procedures at PGI 234.201(1)(iii) for conducting a cost-benefit analysis.

(iv) For firm-fixed-price contracts and subcontracts of any dollar value—

(A) The application of earned value management is discouraged; and

(B) Follow the procedures at PGI 234.201(1)(iv) for obtaining a waiver before applying earned value management.

(2) When an offeror proposes a plan for compliance with the earned value management system guidelines in ANSI/EIA–748, follow the review procedures at PGI 234.201(2).

(3) The Defense Contract Management Agency is responsible for determining earned value management system compliance when DoD is the cognizant Federal agency.

(4) See PGI 234.201(3) for additional guidance on earned value management.

(5) The cognizant contracting officer, in consultation with the functional specialist and auditor, shall—

(i) Determine the acceptability of the contractor's earned value management system and approve or disapprove the system; and

(ii) Pursue correction of any deficiencies.

(6) In evaluating the acceptability of a contractor's earned value management system, the contracting officer, in consultation with the functional specialist and auditor, shall determine whether the contractor's earned value management system complies with the system criteria for an acceptable earned value management system as prescribed in the clause at 252.234–7002, Earned Value Management System.

(7) *Disposition of findings*—(i) *Reporting of findings.* The functional specialist or auditor shall document findings and recommendations in a report

to the contracting officer. If the functional specialist or auditor identifies any significant deficiencies in the contractor's earned value management system, the report shall describe the deficiencies in sufficient detail to allow the contracting officer to understand the deficiencies.

(ii) *Initial determination.* (A) The contracting officer shall review all findings and recommendations and, if there are no significant deficiencies, shall promptly notify the contractor, in writing, that the contractor's earned value management system is acceptable and approved; or

(B) If the contracting officer finds that there are one or more significant deficiencies (as defined in the clause at 252.234–7002, Earned Value Management System) due to the contractor's failure to meet one or more of the earned value management system criteria in the clause at 252.234–7002, the contracting officer shall—

(*1*) Promptly make an initial written determination on any significant deficiencies and notify the contractor, in writing, providing a description of each significant deficiency in sufficient detail to allow the contractor to understand the deficiencies;

(*2*) Request the contractor to respond, in writing, to the initial determination within 30 days; and

(*3*) Evaluate the contractor's response to the initial determination, in consultation with the auditor or functional specialist, and make a final determination.

(iii) *Final determination.* (A) The contracting officer shall make a final determination and notify the contractor, in writing, that—

(*1*) The contractor's earned value management system is acceptable and approved, and no significant deficiencies remain, or

(*2*) Significant deficiencies remain. The notice shall identify any remaining significant deficiencies, and indicate the adequacy of any proposed or completed corrective action. The contracting officer shall—

(*i*) Request that the contractor, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies;

(*ii*) Disapprove the system in accordance with the clause at 252.234–7002, Earned Value Management System, when initial validation is not successfully completed within the timeframe approved by the contracting officer, or the contracting officer determines that the existing earned value management system contains one or more significant deficiencies in high-risk guidelines in ANSI/EIA–748 standards (guidelines 1, 3, 6, 7, 8, 9, 10, 12, 16, 21, 23, 26, 27, 28, 30, or 32). When the contracting officer determines that the existing earned value management system contains one or more significant deficiencies in one or more of the remaining 16 guidelines in ANSI/EIA–748 standards, the contracting officer shall use discretion to disapprove the system based on input received from functional specialists and the auditor; and

(*iii*) Withhold payments in accordance with the clause at 252.242–7005, Contractor Business Systems, if the clause is included in the contract.

(B) Follow the procedures relating to monitoring a contractor's corrective action and the correction of significant deficiencies at PGI 234.201(7).

(8) *System approval.* The contracting officer shall promptly approve a previously disapproved earned value management system and notify the contractor when the contracting officer determines that there are no remaining significant deficiencies.

(9) *Contracting officer notifications.* The cognizant contracting officer shall promptly distribute copies of a determination to approve a system, disapprove a system and withhold payments, or approve a previously disapproved system and release withheld payments to the auditor; payment office; affected contracting officers at the buying activities; and cognizant contracting officers in contract administration activities.

[73 FR 21848, Apr. 23, 2008, as amended at 76 FR 28867, May 18, 2011; 76 FR 76320, Dec. 7, 2011]

234.203 Solicitation provisions and contract clause.

For cost or incentive contracts valued at $20,000,000 or more, and for other

contracts for which EVMS will be applied in accordance with 234.201(1)(iii) and (iv)—

(1) Use the provision at 252.234–7001, Notice of Earned Value Management System, instead of the provisions at FAR 52.234–2, Notice of Earned Value Management System—Pre-Award IBR, and FAR 52.234–3, Notice of Earned Value Management System—Post-Award IBR, in the solicitation; and

(2) Use the clause at 252.234–7002, Earned Value Management System, instead of the clause at FAR 52.234–4, Earned Value Management System, in the solicitation and contract.

Subpart 234.70—Acquisition of Major Weapon Systems as Commercial Products

SOURCE: 71 FR 58538, Oct. 4, 2006, unless otherwise noted.

234.7000 Scope of subpart.

This subpart—

(a) Implements 10 U.S.C. 3455; and

(b) Requires a determination by the Secretary of Defense and a notification to Congress before acquiring a major weapon system as a commercial product.

[71 FR 58538, Oct. 4, 2006, as amended at 87 FR 76995, Dec. 16, 2022; 88 FR 6587, Jan. 31, 2023]

234.7001 Definition.

As used in this subpart—

Major weapon system means a weapon system acquired pursuant to a major defense acquisition program.

[85 FR 34532, June 5, 2020]

234.7002 Policy.

(a) *Major weapon systems.* (1) A DoD major weapon system may be treated as a commercial product, or acquired under procedures established for the acquisition of commercial products, only if—

(i) The Secretary of Defense determines that—

(A) The major weapon system is a commercial product as defined in FAR 2.101; and

(B) Such treatment is necessary to meet national security objectives; and

(ii) The congressional defense committees are notified at least 30 days before such treatment or acquisition occurs. Follow the procedures at PGI 234.7002.

(2) The authority of the Secretary of Defense to make a determination under paragraph (a)(1) of this section may not be delegated below the level of the Deputy Secretary of Defense.

(b) *Subsystems.* A subsystem of a major weapon system (other than a commercially available off-the-shelf item) shall be treated as a commercial product and acquired under procedures established for the acquisition of commercial products if—

(1) The subsystem is intended for a major weapon system that is being acquired, or has been acquired, under procedures established for the acquisition of commercial products in accordance with paragraph (a) of this section; or

(2) The contracting officer determines in writing that the subsystem is a commercial product in accordance with 212.102(a)(iii). For a subsystem of a major weapon system proposed as a commercial product that has not previously been determined to be a commercial product (see 212.102(a)(ii)), follow the procedures in paragraph (d) of this section.

(3) This paragraph (b) shall apply only to subsystems of major weapon systems that are acquired by DoD through a—

(i) Prime contract;

(ii) Modification to a prime contract; or

(iii) Subcontract under a prime contract for the acquisition of a subsystem proposed as a commercial product that has not previously been determined to be a commercial product (see 212.102(a)(ii)).

(c) *Components and spare parts.* (1) A component or spare part for a major weapon system (other than a commercially available off-the-shelf item) may be treated as a commercial product if—

(i) The component or spare part is intended for—

(A) A major weapon system that is being acquired, or has been acquired, under procedures established for the acquisition of commercial products in accordance with paragraph (a) of this section; or

(B) A subsystem of a major weapon system that is being acquired, or has

been acquired, under procedures established for the acquisition of commercial products in accordance with paragraph (b) of this section; or

(ii) The contracting officer determines in writing that the component or spare part is a commercial product in accordance with 212.102(a)(iii). For a component or spare part proposed as a commercial product that has not previously been determined to be a commercial product (see 212.102(a)(ii)), follow the procedures in paragraph (d) of this section.

(2) This paragraph (c) shall apply only to components and spare parts that are acquired by DoD through a—

(i) Prime contract;

(ii) Modification to a prime contract; or

(iii) Subcontract under a prime contract for the acquisition of a component or spare part proposed as a commercial product that has not previously been determined to be a commercial product (see 212.102(a)(ii)).

(d) *Commerciality determination.* To the extent necessary to make a commercial product determination in accordance with 212.102(a)(iii) that relies on paragraph (1), (2), (3), (4), or (5) of the ''commercial product'' definition at FAR 2.101 for a subsystem, component, or spare part as described in paragraphs (b) and (c) of this section, the provision at 252.215–7010, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, requires the offeror to—

(1) Identify the comparable commercial product the offeror sells to the general public or nongovernmental entities for other than governmental purposes;

(2) Provide a comparison between the physical characteristics and functionality of the comparable commercial product and the subsystem, component, or spare part, including—

(i) For products under paragraph (3)(i) of the ''commercial product'' definition at FAR 2.101, a description of the modification and documentation to support that the modification is customarily available in the marketplace; or

(ii) For products under paragraph (3)(ii) of the ''commercial product'' definition at FAR 2.101, a detailed description of the modification and detailed technical data to demonstrate that the modification is minor (e.g., information on production processes and material differences); and

(3) Provide the national stock number (NSN) for the comparable commercial product, if one is assigned, and the NSN for the subsystem, component, or spare part, if one is assigned; or

(4) If the offeror does not sell a comparable commercial product to the general public or nongovernmental entities for other than governmental purposes, then the offeror is required to—

(i) Notify the contracting officer in writing that it does not sell such a comparable product; and

(ii) Provide the contracting officer a comparison between the physical characteristics and functionality of the most comparable commercial product in the commercial market and the subsystem, component, or spare part, if available.

(e) *Relevant information to determine price reasonableness.* For products relying on paragraph (3)(ii) of the ''commercial product'' definition at FAR 2.101, see FAR 15.403–1(c)(3)(iii)(C). See 212.209(a) for requirements of 10 U.S.C. 3453 with regard to market research.

(1) Unless an exception at FAR 15.403–1(b)(1) or (2) applies—

(i) To the extent necessary to make a determination of price reasonableness, the contracting officer shall require the offeror to submit to or provide the contracting officer access to a representative sample, as determined by the contracting officer, of prices paid for the same or similar commercial products under comparable terms and conditions by both Government and commercial customers and the terms and conditions of such sales; or

(ii) If the contracting officer determines that the offeror cannot provide or give access to sufficient information described in this paragraph (e)(1) to determine the reasonableness of price, the contracting officer shall require the offeror to submit or provide the contracting officer access to a representative sample, as determined by the contracting officer, of the prices paid for the same or similar commercial products sold under different terms

and conditions and the terms and conditions of such sales.

(2) The contracting officer shall allow the offeror to redact only information provided pursuant to paragraph (e)(1) of this section that identifies the customer, if the offeror certifies in writing for each sale that the customer is a—

(i) Government customer (e.g., Federal, State, local, or foreign government);

(ii) Commercial customer purchasing the product for governmental purposes; or

(iii) Commercial customer purchasing the product for a commercial, mixed, or unknown purpose.

(3) If the contracting officer determines that the information submitted pursuant to paragraph (e)(1) of this section is not sufficient to determine the reasonableness of price because the comparable commercial product provided by the offeror is not a valid basis for price analysis or the proposed price is not reasonable after evaluating sales data, then the contracting officer shall obtain approval from an official one level above the contracting officer, without power of delegation, and require the offeror to submit other relevant information regarding the basis for price or cost, including information on labor costs, material costs, and overhead rates.

(4) An offeror shall not be required to submit information described in paragraph (e)(1) of this section with regard to a commercially available off-the-shelf item. An offeror may be required to submit such information with regard to any other item that was developed exclusively at private expense only after the head of the contracting activity determines in writing that the information submitted pursuant to paragraph (e)(1) of this section is not sufficient to determine the reasonableness of price.

(5) An offeror may submit information or analysis relating to the value of a commercial product to aid in the determination of the reasonableness of the price of such commercial product. A contracting officer may consider such information or analysis in addition to the information submitted pursuant to paragraph (e)(1) of this section. For additional guidance see PGI 234.7002(e)(5).

[74 FR 34264, July 15, 2009, as amended at 83 FR 4445, Jan. 31, 2018; 85 FR 34532, June 5, 2020; 87 FR 76995, Dec. 16, 2022; 88 FR 6587, Jan. 31, 2023; 89 FR 46808, May 30, 2024]

Subpart 234.71—Cost and Software Data Reporting

SOURCE: 75 FR 71561, Nov. 24, 2010, unless otherwise noted.

234.7100 Policy.

(a) The cost and software data reporting (CSDR) requirement is mandatory for major defense acquisition programs (as defined in 10 U.S.C. 4201) as specified in DoDI 5000.02, Operation of the Adaptive Acquisition Framework and the DoD 5000.04–M–1, CSDR Manual. The CSDR system is applied in accordance with the reporting requirements established in DoDI 5000.02. The two principal components of the CSDR system are contractor cost data reporting and software resources data reporting.

(b) Prior to contract award, contracting officers shall consult with the Defense Cost and Resource Center to determine that the offeror selected for award has proposed a standard CSDR system, as described in the offeror's proposal in response to the provision at 252.234–7003, that is in compliance with DoDI 5000.02, Operation of the Adaptive Acquisition Framework, and the DoD 5000.04–M–1, CSDR Manual.

(c) Contact information for the Defense Cost and Resource Center and the Deputy Director, Cost Assessment, is located at PGI 234.7100.

[75 FR 71561, Nov. 24, 2010, as amended at 87 FR 76995, Dec. 16, 2022; 88 FR 46904, July 20, 2023; 88 FR 80466, Nov. 17, 2023]

234.7101 Solicitation provision and contract clause.

(a) Use the basic or the alternate of the provision at 252.234–7003, Notice of Cost and Software Data Reporting System, in any solicitation that includes the basic or the alternate of the clause at 252.234–7004, Cost and Software Data Reporting.

(1) Use the basic provision when the solicitation includes the clause at

252.234–7004, Cost and Software Data Reporting—Basic.

(2) Use the alternate I provision when the solicitation includes the clause at 252.234–7004, Cost and Software Data Reporting—Alternate I.

(b) Use the basic or the alternate of the clause at 252.234–7004, Cost and Software Data Reporting System, in solicitations that include major defense acquisition programs as follows:

(1) Use the basic clause in solicitations and contracts for major defense acquisition programs that exceed $50 million.

(2) Use the alternate I clause in solicitations and contracts for major defense acquisition programs with a value equal to or greater than $20 million, but less than or equal to $50 million, when so directed by the program manager with the approval of the OSD Deputy Director, Cost Assessment.

[79 FR 65593, Nov. 5, 2014, as amended at 88 FR 46904, July 20, 2023]

PART 235—RESEARCH AND DEVELOPMENT CONTRACTING

Sec.

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

SOURCE: 56 FR 36416, July 31, 1991, unless otherwise noted.

235.001 Definitions.

''Research and development'' means those efforts described by the Research, Development, Test, and Evaluation (RDT&E) budget activity definitions found in the DoD Financial Management Regulation (DoD 7000.14–R), Volume 2B, Chapter 5.

[65 FR 32040, May 22, 2000]

235.006 Contracting methods and contract type.

(b)(i) For major defense acquisition programs as defined in 10 U.S.C. 4201—

(A) Follow the procedures at 234.004; and

(B) Notify the milestone decision authority of an intent not to exercise a fixed-price production option on a development contract for a major weapon system reasonably in advance of the expiration of the option exercise period.

(ii) For other than major defense acquisition programs—

(A) Do not award a fixed-price type contract for a development program effort unless—

(*1*) The level of program risk permits realistic pricing;

(*2*) The use of a fixed-price type contract permits an equitable and sensible allocation of program risk between the Government and the contractor; and

(*3*) A written determination that the criteria of paragraphs (b)(ii)(A)(*1*) and (*2*) of this section have been met is executed—

(*i*) By the USD(A&S) if the contract is over $25 million and is for: research and development for a non-major system; the development of a major system (as defined in FAR 2.101); or the development of a subsystem of a major system; or

(*ii*) By the contracting officer for any development not covered by paragraph (b)(ii)(A)(*3*)(*i*) of this section.

(B) Obtain USD(A&S) approval of the Government's prenegotiation position before negotiations begin, and obtain USD(A&S) approval of the negotiated agreement with the contractor before the agreement is executed, for any action that is—

(*1*) An increase of more than $250 million in the price or ceiling price of a fixed-price type development contract,