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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 202, 207, 209, 216, and 234

RIN 0750-AI16

Defense Federal Acquisition Regulation Supplement: Limitation on Use of Cost-reimbursement Line Items (DFARS Case 2013-D016)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD)

ACTION: Final rule.

SUMMARY: DoD has adopted as final, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 811 of the National Defense Authorization Act for Fiscal Year 2013, which prohibits DoD from entering into cost-type contracts for production of major defense acquisition programs (MDAPs). In implementing section 811 of the NDAA for FY 2013, DoD further defined the prohibition on entering into cost-type contracts to explicitly state the prohibition also applies to entering into cost-reimbursement line items for the production of MDAPs.

DATES: Effective [Insert date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ms. Janetta Brewer, telephone 571-372-6104.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule at 79 FR 4631 on January 29, 2014, to implement section 811 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112-239), which was enacted January 2, 2013. Two comments were submitted on the interim rule.

Section 811(a) instructs DoD to modify the acquisition regulations to prohibit DoD from entering into cost-type contracts for the production of major defense acquisition programs (MDAPs) for contracts entered into on or after October 1, 2014, with one exception in section 811(b). Under section 811(b), the Under Secretary of Defense for Acquisition, Technology, and Logistics may submit to the congressional defense committees: (1) A written certification that the particular cost-type contract is needed to provide a required capability in a timely, cost-effective manner; and (2) An explanation of the steps taken to ensure that the use of cost-type pricing is limited to only those line items or portions of the contract where such pricing is needed to achieve the purpose of the exception. In implementing section 811 of the NDAA for FY 2013, DoD further defined the prohibition on entering into cost-type contracts to explicitly state the prohibition also

applies to entering into cost-reimbursement line items for the production of MDAPs.

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:

Comment: The respondent stated that the term "cost-type reimbursement contract" at DFARS 234.004(2)(i)(C) was ambiguous and recommended that the term "cost-reimbursement contract" be used instead to maintain consistency with other references within the acquisition regulations.

Response: The text at DFARS 234.004(2)(i)(C) has been revised to replace the term "cost-type reimbursement contract" with "cost-reimbursement type contract."

Comment: The respondent stated that the reference to DFARS 201.101 within Section II, Discussion and Analysis, of the Federal Register Notice published for the proposed rule should be DFARS 202.101.

Response: The respondent is correct. However, the comment did not necessitate changes to the interim rule as the rule itself cited DFARS 202.101 accurately.

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 has prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

This rule amends the DFARS to implement section 811 of the NDAA for FY 2013, which prohibits the DoD from entering into cost-type contracts for the production of major defense acquisition programs (MDAPs) unless the Under Secretary of Defense for Acquisition, Technology, and Logistics submits an exception to the congressional defense committees. In implementing section 811 of the NDAA for FY 2013, DoD further

defined the prohibition on entering into cost-type contracts to explicitly state the prohibition also applies to entering into cost-reimbursement line items for the production of MDAPs.

Small entities do not have or are exempt from having the complex, expensive business and management systems required to manage the complex, higher risk, and expensive major defense acquisition programs (MDAPs). Small entities do play a significant role in performing as subcontractors and component manufacturers for MDAPs, but this rule does not apply to subcontractors and component manufacturers.

No comments were received from the public in response to the initial regulatory flexibility analysis.

This rule does not impose new recordkeeping or reporting requirements and 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 of the statute.

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 202, 207, 209, 216, and 234

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

Therefore, DoD adopts as final the interim rule published at 79 FR 4631 on January 29, 2014, with the following changes:

PART 234—MAJOR SYSTEM ACQUISITION

1. The authority citation for part 234 continues to read as follows:

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

234.004 [Amended]

2. Section 234.004(2)(i)(C) introductory text is amended by removing "cost-type reimbursement contract" and adding "cost-reimbursement type contract" in its place.

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