



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 239 and 252

[Docket DARS-2019-0018]

RIN 0750-AJ97

Defense Federal Acquisition Regulation Supplement: Modification of DFARS Clause "Cancellation or Termination of Orders" (DFARS Case 2018-D035)

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 modify the text of an existing DFARS clause to clarify DoD's liability in the event DoD cancels or terminates a telecommunications services order, and include the text of another DFARS clause to streamline terms and conditions for contractors subject to both of the clauses, pursuant to action taken by the DoD Regulatory Reform Task Force.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2018-D035, using any of the following methods:

- o *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for "DFARS Case 2018-D035." Select "Comment Now" and follow the instructions provided to submit a comment. Please include "DFARS Case 2018-D035" on any attached documents.

- o *Email:* osd.dfars@mail.mil. Include DFARS Case 2018-D035 in the subject line of the message.

- o *Fax:* 571-372-6094.

- o *Mail:* Defense Acquisition Regulations System, Attn: Carrie Moore, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Moore, telephone 571-372-6093.

SUPPLEMENTARY INFORMATION:

I. Background

This rule proposes to modify the DFARS clause 252.239-7007, Cancellation or Termination of Orders, to: (1) clarify

limitations on the Government's obligation to reimburse a Contractor for nonrecoverable costs when the Government cancels an order for telecommunications services; and (2) incorporate the information currently included in DFARS clause 252.239-7008, Reuse Arrangements. Combining these clauses will result in 252.239-7008 being removed from the DFARS.

II. Discussion and Analysis

The clauses at DFARS 252.239-7007 and 252.239-7008 are both included in solicitations, contracts, and basic agreements for telecommunications services. The clause at 252.239-7007 provides contractors with terms and conditions that apply in the event the Government cancels any of the services ordered under the agreement or contract, while the clause at 252.239-7008 is provides contractors with terms and conditions for the reuse of equipment and facilities purchased under a telecommunications order that is cancelled or terminated by the Government. Since both clauses are included in the same contracts and both clauses establish terms and conditions for the cancellation or termination of telecommunications orders, the text of the two clauses can be combined, without changing the intent. This will help minimize the number of clauses contained in the contract and streamline content for the contractor.

This rule also amends DFARS clause 252.239-7007 to clarify that the Government will not reimburse the contractor for

certain costs incurred prior to the issuance of an order under a communication services agreement or other contractual document. This clarification intends to prevent the contractor from incurring costs in anticipation of, but prior to, the establishment of a formal agreement/contract for services and the award of an order for such services. This rule also establishes within the clause a cap, based on the recurring and nonrecurring charges included in the contract, on the Government's maximum liability for the cancellation or termination of services. The purpose of this clarification is to create an upfront mutual understanding of the maximum amount of reimbursement due to the contractor in the event of cancellation or termination.

The modification of this DFARS text supports a recommendation from the DoD Regulatory Reform Task Force. On February 24, 2017, the President signed Executive Order (E.O.) 13777, "Enforcing the Regulatory Reform Agenda," which established a Federal policy "to alleviate unnecessary regulatory burdens" on the American people. In accordance with E.O. 13777, DoD established a Regulatory Reform Task Force to review and validate DoD regulations, including the DFARS. A public notice of the establishment of the DFARS Subgroup to the DoD Regulatory Reform Task Force, for the purpose of reviewing DFARS provisions and clauses, was published in the *Federal Register* at 82 FR

35741 on August 1, 2017, and requested public input. One public comment was received on these clauses. The respondent recommended DFARS clause 252.239-7007 be removed from the DFARS, because the content of the clause is redundant to information provided in Federal Acquisition Regulation (FAR) part 15, Contracting by Negotiation. However, the purpose of the clause is to implement standardized policy across DoD that addresses critical issues associated with the acquisition of telecommunication services. FAR part 15 provides contracting officers with the processes and procedures related to the solicitation, evaluation, and award of competitive and noncompetitive negotiated acquisitions; it does not provide the guidance contained in the clause, which ensures that all DoD telecommunications services contractors are subject to the same and equal terms and conditions regarding the Government's cancellation or termination of services. As such, DFARS clause 252.239-7007 is necessary to support DoD's needs. Subsequently, the DoD Task Force reviewed the requirements of DFARS clauses 252.239-7007 and 252.239-7008 and determined that the clauses could be clarified and combined, which is the basis for this proposed rule.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, including Commercially Available Off-The-Shelf Items

This proposed rule does not create any new provisions or clauses. The rule combines two clauses on the same topic into a single clause and makes minor modifications to clarify current practices. This rule does not change the applicability of the affected clauses, which are included in solicitations and contracts for telecommunications services, including those valued at or below the simplified acquisition threshold or for commercial services.

IV. Executive Orders 12866 and 13563

Executive Order (E.O.) 12866, Regulatory Planning and Review; and E.O. 13563, Improving Regulation and Regulatory Review, 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. The Office of Management and Budget, Office of Information and Regulatory Affairs, has determined that this is not a significant regulatory action as defined under section 3(f) of E.O. 12866 and, therefore, was not subject to review under section 6(b). This rule is not a major rule as defined at 5 U.S.C. 804(2).

V. Executive Order 13771

This rule is not expected to be subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

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 the rule is not creating any new requirements or changing any existing requirements for contractors. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The Department of Defense is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to modify the text of DFARS clause 252.239-7007, Cancellation or Termination of Orders, to: clarify DoD's liability in the event DoD cancels or terminates a telecommunications services order, and incorporate the text of DFARS clause 252.239-7008, Reuse Arrangements. Combining the requirements of these two clauses permits DFARS 252.239-7008 to be removed from the DFARS.

The objectives of this proposed rule are to: streamline contract terms and conditions pertaining to telecommunications services; prevent costs from being incurred in anticipation of, but prior to, the establishment of a formal agreement or

contract and award of an order for telecommunications services; and, to create an upfront mutual understanding of the maximum amount of reimbursement due to the contractor in the event of cancellation or termination. The modification of these DFARS clauses supports a recommendation from the DoD Regulatory Reform Task Force.

This rule is not expected 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 is simply combining two existing clauses that address the same topic into a single comprehensive clause, and clarifies the current practices regarding DoD liability to reimburse telecommunication services contractors in certain circumstances.

Based on fiscal year (FY) 2018 data from the Federal Procurement Data System, the Government awarded approximately 8,670 contracts and orders for services under the Product and Supply Code (PSC) D3 - Information Technology and Telecommunications. Of the 8,670 contracts and orders awarded, approximately 28 percent of the awards were made to 1,050 unique small businesses entities. The PSC D3 does not break down further into information technology services and telecommunications services; therefore, the number of contracts and orders awarded in FY 2018 exclusively for telecommunications

services is estimated to be fewer than the number awarded in FY 2018 under PSC D3 in its entirety.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. This rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known significant alternative approaches to the proposed rule that would meet the proposed objectives.

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 2018-D035) in correspondence.

VI. 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 239 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 239 and 252 are proposed to be amended as follows:

1. The authority citation for parts 239 and 252 continues to read as follows:

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

PART 239—ACQUISITION OF INFORMATION TECHNOLOGY

239.7411 [Amended]

2. Amend section 239.7411 by—

- a. In paragraph (a) introductory text, removing the em dash and replacing it with a period;
- b. In paragraphs (a)(1) through (5), removing the semicolons and adding periods in their places; and
- c. Removing paragraph (a)(6).

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Revise section 252.239-7007 to read as follows:

252.239-7007 Cancellation or Termination of Orders.

As prescribed in 239.7411(a)(5), use the following clause:

CANCELLATION OR TERMINATION OF ORDERS (DATE)

(a) Definitions: As used in this clause—

Actual nonrecoverable costs means the installed costs of the facilities and equipment, less cost of reusable materials, and less net salvage value.

Basic cancellation liability means the actual nonrecoverable cost, which the Government shall reimburse the Contractor at the time services are cancelled.

Basic termination liability means the nonrecoverable cost amortized in equal monthly increments throughout the liability period.

Installed costs means the actual cost of equipment and materials specifically provided or used, plus the actual cost of installing (including engineering, labor, supervision, transportation, rights-of-way, and any other items which are chargeable to the capital accounts of the Contractor), less any costs the government may have directly reimbursed the Contractor under the Special Construction and Equipment Charges clause of this agreement/contract.

Net salvage value means the salvage value less the cost of removal.

(b) If the Government cancels any of the services ordered under this agreement/contract, before the services are made available to the Government, or terminates any of these services after they are made available to the Government, the Government will reimburse the Contractor for the actual nonrecoverable costs the Contractor has reasonably incurred in providing facilities and equipment for which the Contractor has no foreseeable reuse. The Government will not reimburse the Contractor for any actual nonrecoverable costs

incurred after notice of award, but prior to execution of the order.

(c) When feasible, the Contractor shall reuse cancelled or terminated facilities or equipment to minimize the charges to the Government.

(d) If at any time the Government requires that telecommunications facilities or equipment be relocated within the Contractor's service area, the Government will have the option of paying the costs of relocating the facilities or equipment in lieu of paying any termination or cancellation charge under this clause. The basic cancellation liability or basic termination liability applicable to the facilities or equipment in their former location shall continue to apply to the facilities and equipment in their new location. Monthly recurring charges shall continue to be paid during the period.

(e) When there is another requirement or foreseeable reuse in place of cancelled or terminated facilities or equipment, no charge shall apply and the basic cancellation liability or basic termination liability shall be appropriately reduced. When feasible, the Contractor shall promptly reuse discontinued channels or facilities, including equipment for which the Government is obligated to pay a minimum service charge.

(f) The amount of the Government's liability upon cancellation or termination of any of the services ordered under this

agreement/contract will be determined under applicable tariffs governing cancellation and termination charges that—

(1) Are filed by the Contractor with a governmental regulatory body, as defined in the Orders For Facilities and Services clause of this agreement/contract;

(2) Are in effect on the date of termination; and

(3) Provide specific cancellation or termination charges for the facilities and equipment involved or show how to determine the charges.

(g) The amount of the Government's liability upon cancellation or termination of any of the services ordered under this agreement/contract that are not subject to a governmental regulatory body will be determined under a mutually agreed schedule in the communication services authorization (CSA) or other contractual document.

(h) If no applicable tariffs are in effect on the date of cancellation or termination or set forth in the applicable CSA or other contractual document, the Government's liability will be determined under the following settlement procedures—

(1) The Contractor agrees to provide the Contracting Officer, in such reasonable detail as the Contracting Officer may require, inventory schedules covering all items of property or facilities in the Contractor's possession, the cost of which is

included in the Basic Cancellation or Termination Liability for which the Contractor has no foreseeable reuse.

(2) The Contractor shall use its best efforts to sell property or facilities when the Contractor has no foreseeable reuse or when the Government has not exercised its option to take title under the Title to Telecommunications Facilities and Equipment clause of this agreement/contract. The Contractor shall apply any proceeds of the sale to reduce any payments by the Government to the Contractor under a cancellation or termination settlement.

(3) The Contractor shall record actual nonrecoverable costs under established accounting procedures prescribed by the cognizant governmental regulatory authority or, if no such procedures have been prescribed, under generally accepted accounting procedures applicable to the provision of telecommunication services for public use.

(4) The net salvage value shall be deducted from the Contractor's installed cost. In determining net salvage value the Contractor shall consider the foreseeable reuse of the facilities and equipment by the Contractor. The Contractor shall make allowance for the cost of dismantling, removal, reconditioning, and disposal of the facilities and equipment when necessary either for the sale of facilities or their reuse by the Contractor in another location.

(5) Upon termination of services, the Government will reimburse the Contractor for the nonrecoverable cost less such costs amortized to the date services are terminated—and establish the liability period as mutually agreed to but not to exceed ten years. In the case of either a cancellation or a termination, the Government's presumed maximum liability will be capped by the unpaid nonrecurring charges and the monthly recurring charges (MRCs) set out in the contract/agreement. The presumed maximum liability for MRCs will be capped at MRCs for the minimum service period and any required notice period.

(6) When the basic cancellation liability or basic termination liability established by the CSA or other contractual document is based on estimated costs, the Contractor agrees to settle on the basis of actual cost at the time of cancellation or termination.

(7) The Contractor agrees that, if after settlement but within the termination liability period of the services, should the Contractor make reuse of equipment or facilities which were treated as nonreusable or nonsalvable in the settlement, the Contractor shall reimburse the Government for the value of the equipment or facilities.

(8) The Contractor agrees to exclude—

(i) Any costs that are not included in determining cancellation and termination charges under the Contractor's standard practices or procedures; and

(ii) Charges not ordinarily made by the Contractor for similar facilities or equipment, furnished under similar circumstances.

(i) The Government may, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the Contractor in connection with the cancelled or terminated portion of this agreement/ contract. The Government may make these payments if the Contracting Officer determines that the total of the payments is within the amount the Contractor is entitled. If the total of the payments is in excess of the amount finally agreed or determined to be due under this clause, the Contractor shall pay the excess to the Government upon demand.

(j) Failure to agree shall be a dispute concerning a question of fact within the meaning of the Disputes clause.

(End of clause)

252.239-7008 [Removed and Reserved]

4. Remove and reserve section 252.239-7008.

[FR Doc. 2019-08483 Filed: 4/29/2019 8:45 am; Publication Date: 4/30/2019]