



5001-06-P

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 215 and 252**

**[Docket DARS-2019-0038]**

**RIN 0750-AJ78**

**Defense Federal Acquisition Regulation Supplement: Management of Should-Cost Review Process (DFARS Case 2018-D015)**

**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 implement a section of the National Defense Authorization Act for Fiscal Year 2018, which requires an amendment to the DFARS to provide for the appropriate use of the should-cost review process of a major weapon system.

**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-D015, using any of the following methods:

- o *Federal eRulemaking Portal:* <http://www.regulations.gov>.

Search for "DFARS Case 2018-D015". Select "Submit a Comment Now" and follow the instructions provided to submit a comment. Please include "DFARS Case 2018-D015" on any attached document.

- o *Email:* *osd.dfars@mail.mil*. Include DFARS Case 2018-D015 in the subject line of the message.

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

- o *Mail:* Defense Acquisition Regulations System, Attn: Ms. Heather Kitchens, 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](http://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. Heather Kitchens, telephone 571-372-6104.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

This rule proposes to amend the DFARS to implement section 837 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91). Section 837 requires an amendment to the DFARS to provide for the appropriate use of the should-cost review process of a major weapon system in a manner that is

transparent, objective, and provides for the efficiency of the systems acquisition process in the Department of Defense. A weapon system is considered to be a "major weapon system," as defined by DFARS 234.7001, when it is "a weapon system acquired pursuant to a major defense acquisition program." At a minimum, DoD is required to address the following:

- A description of the features of the should-cost review process.
- Establishment of a process for communicating with the prime contractor on the program the elements of a proposed should-cost review.
- A method for ensuring that identified should-cost savings opportunities are based on accurate, complete, and current information and can be quantified and tracked.
- A description of the training, skills, and experience that Department of Defense and contractor officials carrying out a should-cost review should possess.
- A method for ensuring appropriate collaboration with the contractor throughout the review process.
- Establishment of review process requirements that provide for sufficient analysis and minimize any impact on program schedule.

## **II. Discussion and Analysis**

Federal Acquisition Regulation (FAR) 15.407-4(b) establishes when a program should-cost review should be considered in the case of a major system acquisition. DoD is proposing to add a new paragraph (b) to DFARS 215.407-4 to address the six elements of a program should-cost review, as required by section 837. In addition, DoD is proposing to add a new contract clause at DFARS 252.215-701X, Program Should-Cost Review, for use in solicitations and contracts for the development or production of a major weapon system, as defined in DFARS 234.7001, to ensure objectivity and efficiency in the should-cost review process, if a program should-cost review is performed.

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

This rule does not propose to create any new provisions or clauses or impact any existing provisions or clauses for contracts at or below the simplified acquisition threshold or for contracts for the acquisition of commercial items, including commercially available off-the-shelf items. Contracts for the development and or production of a major weapon system do not include contracts valued at or below the simplified acquisition threshold and are unlikely to include contracts for commercial items.

#### **IV. Executive Orders 12866 and 13563**

Executive Order (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 and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

#### **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 rulemaking 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 only applies to major weapon system acquisition programs. However, an initial regulatory

flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement to implement section 837 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91). Section 837 requires an amendment to the DFARS to provide for the appropriate use of the should-cost review process of a major weapon system in a manner that is transparent, objective and provides for the efficiency of the systems acquisition process in the Department of Defense.

The objective of this rulemaking is to incorporate in the DFARS the six elements of a program should-cost review required to be addressed by section 837, and to provide a new contract clause for use in solicitations and contracts for the development or production of a major weapon system, in order to ensure objectivity and efficiency in the should-cost review process. The legal basis for these changes is section 837 of the NDAA for FY 2018.

DoD estimates that there are 150 major systems, which include major weapon systems. DoD further estimates that the prime contractors for major weapon systems are other than small business and only one program should-cost review occurs per year for major weapon systems, so this rule will have minimal impact on small businesses.

This proposed rule does not include any new reporting or recordkeeping requirements for small entities.

The 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 requirements of the applicable statute.

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-D015), 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 215 and 252**

Government procurement.

**Jennifer Lee Hawes,**

*Regulatory Control Officer, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 215 and 252 are proposed to be amended as follows:

1. The authority citations for 48 CFR parts 215 and 252 continue to read as follows:

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

**PART 215-CONTRACTING BY NEGOTIATION**

2. Amend section 215.407-4 by designating the text as paragraph(a), adding a heading to newly designated paragraph (a) and adding paragraph (b) to read as follows:

**215.407-4 Should-cost review.**

(a) *General.* \* \* \*

(b) *Program should-cost review.* Major weapon system should-cost program reviews shall be conducted in a manner that is transparent, objective, and provides for the efficiency of the DoD systems acquisition process (section 837 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91)).

(i) Major weapon system should-cost reviews may include the following features:

(A) A thorough review of each contributing element of the program cost and the justification for each cost.

(B) An analysis of non-value added overhead and unnecessary reporting requirements.

(C) Benchmarking against similar DoD programs, similar commercial programs (where appropriate), and other programs by the same contractor at the same facility.

(D) An analysis of supply chain management to encourage competition and incentive cost performance at lower tiers.

(E) A review of how to restructure the program (Government and contractor) team in a streamlined manner, if necessary.

(F) Identification of opportunities to break out Government-furnished equipment versus prime contractor-furnished materials;

(G) Identification of items or services contracted through third parties that result in unnecessary pass-through costs.

(H) Evaluation of ability to use integrated developmental and operational testing and modeling and simulation to reduce overall costs.

(I) Identification of alternative technology and materials to reduce developmental or lifecycle costs for a program.

(J) Identification and prioritization of cost savings opportunities.

(K) Establishment of measurable targets and ongoing tracking systems.

(ii) The should-cost review shall provide for sufficient analysis while minimizing the impact on program schedule by engaging stakeholders early, relying on information already available before requesting additional data, and establishing a team with the relevant expertise early.

(iii) The should-cost review team shall be comprised of members, including third-party experts if necessary, with the training, skills, and experience in analysis of cost elements, production or sustainment processes, and technologies relevant to the program under review. The review team may include members from the Defense Contract Management Agency, the department or agency's cost analysis center, and appropriate functional organizations, as necessary.

(iv) The should-cost review team shall establish a process for communicating and collaborating with the contractor throughout the should-cost review, including notification to the contractor regarding which elements of the contractor's operations will be reviewed and what information will be necessary to perform the review, as soon as practicable, both prior to and during the review.

(v) The should-cost review team report shall ensure, to the maximum extent practicable, review of current, accurate, and

complete data, and shall identify cost savings opportunities associated with specific engineering or business changes that can be quantified and tracked.

3. Amend section 215.408 by adding paragraph (8) to read as follows:

**215.408 Solicitation provisions and contract clauses.**

\* \* \* \* \*

(8) Use the clause at 252.215-701X, Program Should-Cost Review, in all solicitations and contracts for the development or production of a major weapon system, as defined in 234.7001.

**PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

4. Add section 252.215-701X to read as follows:

**252.215-701X Program Should-Cost Review.**

As prescribed in 215.408(8), use the following clause:

PROGRAM SHOULD-COST REVIEW (DATE)

(a) The Government has the right to perform a program should-cost review, as described in Federal Acquisition Regulation (FAR) 15.407-4(b). The review may be conducted in support of a particular contract proposal or during contract performance to find opportunities to reduce program costs. The Government will communicate the elements of the proposed should-cost review to the prime contractor (Pub. L. 115-91).

(b) If the Government performs a program should-cost review, upon the Government's request, the Contractor shall provide

access to accurate and complete cost data and Contractor facilities and personnel necessary to permit the Government to perform the program should-cost review.

(c) The Government has the right to use third-party experts to supplement the program should-cost review team. The Contractor shall provide access to the Contractor's facilities and information necessary to support the program should-cost review to any third-party experts who have signed non-disclosure agreements in accordance with the FAR 52.203-16.

(End of clause)

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