



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 210, 212, 215, and 234

[Docket DARS-2019-0050]

RIN 0750-AK65

Defense Federal Acquisition Regulation Supplement: Market Research and Value Analysis for the Determination of Price Reasonableness (DFARS Case 2019-D027)

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 several sections of the National Defense Authorization Act for Fiscal Year 2017 to address how contracting officers may require the offeror to submit relevant information to support market research for price analysis and allow an offeror to submit information relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item.

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 2019-D027, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2019-D027" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2019-D027." Follow the instructions provided at the "Submit a Comment" screen. Please "DFARS Case 2019-D027" on any attached documents.

- o Email: osd.dfars@mail.mil. Include DFARS Case 2019-D027 in the subject line of the message.

- o Fax: 571-372-6094.

- o Mail: Defense Acquisition Regulations System, Attn: Ms. Amy G. Williams, 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. Amy G. Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to implement sections 871 and 872 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328). Section 871 modifies 10 U.S.C. 2377, Preference for acquisition of commercial items, to address how contracting officers may require the offeror to submit relevant information to support market research for price analysis for the acquisition of commercial items. Section 872 modifies 10 U.S.C. 2379, Requirement for determination by Secretary of Defense and notification to Congress before procurement of major weapon systems as commercial items, to allow an offeror to submit information or analysis relating to the value of a commercial item.

II. Discussion and Analysis

This proposed rule implements the requirements of section 871 at DFARS 212.209(a), which addresses the determination of price reasonableness when acquiring commercial items. The focus of this requirement is that agencies shall conduct market research to support the determination of price reasonableness for commercial items. The rule proposes to add the reference to 10 U.S.C. 2377 and directs contracting officers to use: the

information submitted under DFARS 234.7002(d) when acquiring major weapon systems as commercial items in accordance with 10 U.S.C. 2379; or, in the case of other items, other relevant information as described in DFARS 212.209.

This proposed rule implements the requirements of section 872 in DFARS subpart 234.70, which addresses the acquisition of major weapon systems as commercial items. DFARS 234.7002(d) addresses the relevant information necessary to make a determination of price reasonableness. To implement section 872, this rule proposes a new paragraph (d)(5) at DFARS 234.7002, which does not impose a requirement, but allows an offeror to submit information or analysis relating to the value of a commercial item, to aid in the determination of the reasonableness of the price of such item. A contracting officer may consider such information or analysis in addition to the information submitted pursuant to other paragraphs in DFARS 234.7002(d). To assist in understanding value analysis, a definition of "value analysis" is added at DFARS 234.7001. A cross-reference is also added at DFARS 210.001.

This rule does not impose additional requirements on offerors. The information required is consistent with the existing requirement at DFARS 215.404-1(b)(iii)(D), which requires an offeror to submit other relevant information that can serve as the basis for determining the reasonableness of price. The

DFARS provision 252.215-7010, Requirements for Certified Cost or Pricing Data and Data other Than Certified Cost or Pricing Data, is the existing mechanism for obtaining the minimum information necessary to permit a determination that the proposed price is fair and reasonable, to include the requirements of DFARS 215.404-1(b).

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 add or modify any provisions or clauses or the prescriptions for any provisions or clauses.

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. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not expected to be an E.O. 13771 regulatory action, because this rule is not significant 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. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This proposed rule is issued in order to implement sections 871 and 872 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328).

The objective of this rule is to address the use of market research and value analysis to support the determination of price reasonableness when acquiring commercial items. The legal basis of the rule is sections 871 and 872 of the NDAA for FY 2017.

Based on data from the Federal Procurement Data System, DoD awarded 38,000 new commercial contracts to 16,429 small entities in FY 2018. There are an additional unknown number of small entities that submitted offers and did not receive awards (estimated at several thousand).

This rule does not impose any new reporting, recordkeeping, or other compliance requirements on small entities. DFARS 252.215-7010, Requirements for Certified Cost or Pricing Data, and Data Other Than Certified Cost or Pricing Data, already requires offerors to provide information necessary to determine that the price is fair and reasonable. Offerors are allowed, but not required, to submit information or analysis relating to the value of a commercial item for consideration by the contracting officer in determining price reasonableness.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

DoD did not identify any significant alternatives that would minimize or reduce the significant economic impact, because there is no significant impact on small entities.

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 2019-D027), in correspondence.

VII. Paperwork Reduction Act

The rule does not contain any new 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) or impact any existing information collection requirements.

List of Subjects in 48 CFR Parts 210, 212, 215 and 234

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 210, 212, and 234 are proposed to be amended as follows:

1. The authority citation for 48 CFR parts 210, 212, and 234 continues to read as follows:

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

PART 210—MARKET RESEARCH

2. Amend section 210.001 by adding paragraph (a)(iii) to read as follows:

210.001 Policy.

(a) * * *

(iii) Use market research, where appropriate, to inform price reasonableness determinations (see 212.209 and 234.7002).

PART 212—ACQUISITION OF COMMERCIAL ITEMS

3. Amend section 212.209 by—
 - a. Revising paragraph (a); and
 - b. In paragraph (b), removing “market research pursuant to paragraph (a) of this section,” and adding “market research” in its place.

The revision reads as follows:

212.209 Determination of price reasonableness.

(a) In accordance with 10 U.S.C. 2377(d), agencies shall conduct or obtain market research to support the determination of the reasonableness of price for commercial items contained in any bid or offer submitted in response to an agency solicitation. To the extent necessary to support such market research, the contracting officer for the solicitation—

(1) In the case of major weapon systems items acquired under 10 U.S.C. 2379, shall use information submitted under 234.7002(d); and

(2) In the case of other items, may require the offeror to submit other relevant information as described in this section.

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PART 215—CONTRACTING BY NEGOTIATION

4. Amend section 215.403-3 by adding paragraph (c) to read as follows:

215.403-3 Requiring data other than certified cost or pricing data.

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(c) *Commercial items.* For determination of price reasonableness of major weapon systems acquired as commercial items, see 234.7002(d).

PART 234-MAJOR SYSTEMS ACQUISITION

5. Revise section 234.7001 to read as follows:

234.7001 Definitions.

As used in this subpart-

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

Value analysis means a systematic and objective evaluation of the function of a product and its related costs, whose purpose is to ensure optimum value.

6. Amend section 234.7002 by-

- a. Revising the paragraph (d) introductory text; and
- b. Adding a new paragraph (d) (5).

The revision and addition read as follows:

234.7002 Policy.

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(d) *Relevant information.* This section implements 10 U.S.C. 2379. See also DFARS 212.209(a).

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(5) An offeror may submit information or analysis relating to the value of a commercial item to aid in the determination of

the reasonableness of the price of such item. Value analysis is used to understand what features or characteristics of a given product or service, or offered terms and conditions warrant consideration as having legitimate value to the Government. A contracting officer may consider such information or analysis in addition to the information submitted pursuant to paragraphs (d) (1) and (d) (2) of this section. For additional guidance on use of value analysis see PGI 234.7002(d) (5).

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