



5001-06-P

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 207, 215, 216, and 234**

**[Docket DARS-2019-0026]**

**RIN 0750-AK38**

**Defense Federal Acquisition Regulation Supplement: Reliability and Maintainability in Weapon System Design (DFARS Case 2019-D003)**

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

**ACTION:** Final rule.

**SUMMARY:** DOD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2018 that requires the use of reliability and maintainability sustainment factors in weapon system design.

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

**FOR FURTHER INFORMATION CONTACT:** Ms. Kimberly Bass, telephone 571-372-6174.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD published a proposed rule in the *Federal Register* at 84 FR 125 on June 28, 2019, to implement section 834 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018. Section 834 of the NDAA for FY 2018 amends 10 U.S.C. to add section 2443, sustainment factors in weapon system design which requires program managers or comparable requiring activity officials exercising program management responsibilities to ensure that reliability and maintainability are included in the performance attributes of the key performance parameters on sustainment during the development of capabilities requirements for major weapon systems design and contracts for the-

- Engineering and manufacturing development of a weapon system, including embedded software; or
- Production of a weapon system, including embedded software.

As a matter of policy, the Under Secretary of Defense for Acquisition and Sustainment directed the application of the requirements of 10 U.S.C. 2443 to the technical maturation and risk reduction phase. No public comments were received on the proposed rule, and no changes are made in the final rule.

## **II. 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.

### **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. Executive Order 13771**

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

### **V. Regulatory Flexibility Act**

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This final rule is necessary to implement section 834 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018. Section 834 of the NDAA for FY 2018 amends Title 10,

United States Code, to add section 2443, Sustainment factors in weapon system design. Section 2443 requires program managers or comparable requiring activity officials, exercising program management responsibilities, to ensure that reliability and maintainability are included in the performance attributes of the key performance parameters on sustainment during the development of capabilities requirements for major weapon systems design and contracts for the technical maturation and risk reduction and engineering and manufacturing development of a weapon system, including embedded software; or production of a weapon system. The objective of this final rule is to implement section 834 of the NDAA for FY 2018.

There were no issues raised by the public in response to the initial regulatory flexibility analysis provided in the proposed rule.

The final rule will apply to all small entities that have been or will be awarded contracts for the development of major weapon systems. Small business statistics were obtained from the Federal Procurement Data System for FY 2018 data identifying the DoD research and development engineering development awards issued, including task and delivery orders under single-award indefinite delivery indefinite quantity contracts and Basic Ordering Agreements as of February 26, 2019. Of the 78 contract

awards, 15 awards or approximately 19 percent were made to unique small business entities.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses.

There are no known significant alternative approaches to the proposed rule that would meet the proposed objectives of the statute.

## **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 207, 215, 216, and, 234**

Government procurement.

**Jennifer Lee Hawes,**

*Regulatory Control Officer, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 207, 215, 216, and 234 are amended as follows:

1. The authority citation for 48 CFR parts 207, 215, 216, and 234 continues to read as follows:

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

### **PART 207-ACQUISITION PLANNING**

2. Amend section 207.106 by-

- a. In paragraph (S-70) (1), removing "Section 802(a)" and adding "section 802(a)" in its place;
- b. Redesignating paragraphs (S-70) (2) (ii) through (iv) as paragraphs (iii) through (v), respectively;
- c. Adding a new paragraph (S-70) (2) (ii); and
- d. Adding paragraph (S-72) (5).

The additions read as follows:

**207.106 Additional requirements for major systems.**

\* \* \* \* \*

(S-70) \* \* \*

(2) \* \* \*

(ii) In accordance with 10 U.S.C. 2443, to emphasize reliability and maintainability in weapon system design, ensure that reliability and maintainability are included in the performance attributes of the key performance parameters on sustainment during the development of capabilities requirements. For additional guidance see PGI 207.105(b) (14) (ii) (2);

\* \* \* \* \*

(S-72) \* \* \*

(5) In accordance with 10 U.S.C. 2443, acquisition plans for engineering manufacturing and development and production of major systems as defined in 10 U.S.C. 2302 and 2302d and for major defense acquisition programs as defined in 202.101, shall include performance measures that are developed using best

practices for responding to the positive or negative performance of a contractor for the engineering and manufacturing development or production of a weapon system, including embedded software. At a minimum the contracting officer shall-

(i) Encourage the use of incentive fees and penalties as appropriate; and

(ii) Allow the program manager or comparable requiring activity official exercising program management responsibilities, to base determinations of a contractor's performance on reliability and maintainability data collected during the program. Such data collection and associated evaluation metrics shall be described in detail in the contract; and to the maximum extent practicable, the data shall be shared with appropriate contractor and Government organizations.

\* \* \* \* \*

**PART 215-CONTRACTING BY NEGOTIATION**

3. Amend section 215.304 by adding paragraph (c) (vi) to read as follows:

**215.304 Evaluation factors and significant subfactors.**

(c) \* \* \*

(vi) Ensure source selections emphasize sustainment factors and objective reliability and maintainability evaluation criteria in competitive contracts for the-

(A) Technical maturation and risk reduction phase of weapon system design (see guidance at PGI 207.105(b)(14)(ii)(2));

(B) Engineering and manufacturing development phase of a weapon system, including embedded software (10 U.S.C. 2443); or

(C) Production and deployment phase of a weapon system, including embedded software (10 U.S.C. 2443).

**PART 216--TYPES OF CONTRACTS**

4. Amend section 216.402-2 by-

a. Designating the text as paragraph (1); and

b. Adding paragraph (2).

The addition reads as follows:

**216.402-2 Technical performance incentives.**

\* \* \* \* \*

(2) Contracting officers shall ensure requirements about the payment of incentive fees or the imposition of penalties are included in the solicitation for a contract for the engineering and manufacturing development or production of a weapon system, including embedded software, if the program manager or comparable requiring activity official exercising program manager responsibilities includes-

(i) Provisions for the payment of incentive fees to the contractor, based on achievement of design specification

requirements for reliability and maintainability of weapons systems under the contract; or

(ii) The imposition of penalties to be paid by the contractor to the Government for failure to achieve such design specification requirements (10 U.S.C. 2443).

**PART 234-MAJOR SYSTEM ACQUISITION**

5. Amend section 234.004 by adding paragraph (3) to read as follows:

**234.004 Acquisition strategy.**

\* \* \* \* \*

(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. 2443).

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