



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215, 217, and 252

[Docket DARS-2022-0026]

RIN 0750-AL22

Defense Federal Acquisition Regulation Supplement:

Indefinitized Contract Actions (DFARS Case 2021-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) as recommended by the DoD Inspector General to refine the management of indefinitized contract actions.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: David Johnson, telephone 202-913-5764.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 87 FR 65507 on October 28, 2022, to amend the DFARS to refine the management of indefinitized contract actions (UCAs). This final rule implements recommendations regarding management of indefinitized contract actions (UCAs) as addressed in the DoD

Inspector General Audit of Military Department Management of
Undefinitized Contract Actions (Report No. DODIG-2020-084).
Three respondents submitted public comments in response to the
proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the
final rule. No changes are made to the final rule in response
to the public comments. A discussion of the comments is
provided, as follows:

A. Analysis of Public Comments

1. Possible subjectiveness associated with the term "qualified proposal"

Comment: Several respondents remarked that aspects of the
definition of "qualified proposal" in the context of UCAs appear
open to interpretation, and the resulting subjectivity could
result in unwarranted detrimental treatment of contractors.
Some respondents suggested DoD should change the DFARS to
provide additional details regarding what comprises a qualifying
proposal or otherwise require contracting officers to undertake
a dialogue to assist contractors developing and submitting
qualifying proposals.

Response: The term "qualified proposal," defined at DFARS
217.7401, was not proposed for revision in this rule, and the
definition is based on statute now found at 10 U.S.C.
3377(b)(2). This rule does not conceptually change the term or

its usage, and the comment is therefore outside the scope of this rule.

2. Contract risk factors

Comment: Several respondents commented on the language regarding contract risk factors at 215.404-71-3(d)(2)(i). Several respondents stated that this rule would limit the contracting officer's discretion and flexibility to review and assign risk factors that consider the circumstances of a particular UCA. One respondent noted that current language at DFARS 215.404-71-3(d)(2)(i) already instructs the contracting officer to consider the extent to which costs have been incurred prior to definitization rendering unnecessary the language this rule adds at DFARS 215.404-71-3(d)(2)(i), including any resulting updates to DD Form 1547, Record of Weighted Guidelines. One respondent suggested modifying DFARS 217.7404-6, Allowable Profit, to specify cost-risk factors, including "inflation and baseline fluidity, and reduced negotiating strength with suppliers and vendors in a UCA environment." Some respondents disagreed with the assumption reflected in the DFARS that a contractor's cost risk declines during the period of a UCA, therefore warranting a fee reduction based on lower risk.

Response: This rule is intended to incentivize both parties to definitize UCAs timely. The additional language in this rule at DFARS 215.404-71-3(d)(2)(i) provides contracting officers with flexibility and clarity to properly consider and assign fees to the relevant portions based upon their differing risk

profiles, and DoD declines to remove the additional language from the final rule. Regarding the comment centering on stating factors that affect cost risk, at least some of the factors or considerations the respondent listed are effectively reflected at DFARS 215.404-71-3(d)(1), and the contracting officer would already consider them when ascribing contract risk. The comment regarding contract risk declining over the course of a UCA speaks to DFARS language not proposed for revision in this rule; rather, the change in this rule provides guidance to contracting officers when completing DD Form 1547, Record of Weighted Guidelines, without conceptually changing the language regarding declining contract risk. DoD declines to revise this language in the final rule.

3. Concerns regarding the 5 percent maximum withhold

Comment: Several respondents remarked that the 5 percent maximum withhold specified under this rule, used to protect the Government's interest where a qualifying proposal is not submitted timely, would encourage a 5 percent withhold arbitrarily or as a matter of course without considering either extenuating circumstances or a lesser withholding percentage. Similarly, one respondent noted that the documentation requirement at DFARS 217.7404-3(b)(2) would encourage a 5 percent withhold as a matter of course. One respondent stated that applying a withhold where a qualifying proposal is not submitted timely would cause additional delay, counter to the intent of the rule. Additionally, one respondent indicated that

the 5 percent withhold is unnecessary in light of existing remedies.

Response: In accordance with DFARS language existing prior to this rule, contracting officers have discretion whether to withhold or take other appropriate action, where a qualifying proposal is not submitted timely. This rule does not change the discretionary nature either of such withholding or taking other appropriate action. This discretion allows for consideration of extenuating circumstances as appropriate. Additionally, the rule emphasizes that the withhold can be applied in a broad variety of contract financing situations.

4. Requests to withdraw the rule

Comment: Several respondents requested DoD withdraw this rule in its entirety as, for example, unnecessary to encourage submission of qualifying proposals.

Response: DoD declines to withdraw the rule because doing so would preclude implementing updates to management of UCAs per the DoDIG report.

5. Underlying causes of delays in submitting qualifying proposals

Comment: Several respondents remarked that circumstances outside the control of contractors often contribute to delays in submitting qualifying proposals and in negotiation of the final price, rendering aspects of this rule one-sided or punitive. For example, some respondents noted that delays in submitting qualified proposals are sometimes caused by the prime contractor

awaiting cost or pricing details from subcontractors. In this context, one respondent suggested changing the DFARS in the final rule to require explicit agreement by the contractor both to the definitization schedule and to the risk assessment negotiated in the price negotiation memorandum. Some respondents suggested DoD should consider minimizing Government-driven changes affecting contract definitization by disallowing changes to work statements or specifications after the parties initially enter into the UCA and before the contract is definitized.

Response: The contracting officer has discretion under this rule to consider extenuating circumstances surrounding a particular UCA, including delays caused by awaiting data from subcontractors, when developing a definitization schedule or before taking appropriate action such as a withhold. The nature of a UCA, which is inherently subject to some uncertainty, works against the suggestion to disallow changes to the work statement, and DoD therefore declines the suggestion. Further, the parties can bilaterally address scope changes that might necessitate revision to the proposal submission date.

6. Past Performance Evaluations

Comment: One respondent suggested deleting the reference to documenting the contractor's past performance evaluation as an appropriate action under DFARS 217.7404-3(b)(1) where a qualifying proposal is not submitted timely. One respondent suggested DoD should provide an appellate process to challenge

past performance evaluations that the contractor believes are inaccurate.

Response: DoD declines to delete the reference in this rule to documenting the contractor's past performance evaluation. This rule does not change the DFARS to compel documenting past performance information in this context but rather lists such documentation as an example of possible appropriate actions. Further, although this case adds a reference to documenting past performance information, the possibility of using this method as an appropriate action existed prior to this rule. Additionally, the suggestion to develop in this rule an appellate process to challenge past performance evaluations is outside the scope of this rule.

7. Underlying Causes of UCAs

Comment: Several respondents suggested that DoD should address underlying causes of UCAs, such as insufficient Government staffing or delayed acquisition planning. Similarly, some respondents stated that DoD should further specify in the DFARS proper or appropriate use of UCAs.

Response: DoD declines the suggestions because they are outside the scope of the rule.

B. Other changes. No other changes are made to the final rule.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Services, and for Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items

This rule amends the clause at DFARS 252.217-7027, Contract Definitization. However, this rule does not impose any new requirements on contracts at or below the SAT or for commercial services or commercial products, including COTS items. The clause will continue to not apply to acquisitions at or below the SAT and to acquisitions of commercial services and commercial products, including COTS items.

IV. Expected Impact of the Rule

The final rule will incentivize contractors to submit qualifying proposals according to the contract definitization schedule to avoid the withholding of an amount of up to 5 percent of all subsequent financing requests. DoD contracting officers will be required to consider applying separate and differing contract risk factors to costs incurred and estimated costs to complete, when completing the DD Form 1547, Record of Weighted Guidelines. Contracting officers will also be required to document the contract file to show justification for withholding or not withholding a portion of financing payment, when the qualifying proposal was not submitted according to the contract definitization schedule.

V. 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.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the *Federal Register*. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VII. 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:

DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) as recommended by the DoD Inspector General Audit of Military Department Management of Undefined Contract Actions (Report No. DODIG-2020-084) to refine the

management of undefinitized contract actions. This report recommends changes to the DFARS to encourage contractors to provide timely qualifying proposals, including the possibility of the Government withholding a percentage of payments yet to be paid under an undefinitized contract action until it receives a qualifying proposal from the contractor.

This rule incentivizes contractors to submit qualifying proposals in accordance with the contract definitization schedule; and, notwithstanding FAR 52.216-26, Payments of Allowable Costs Before Definitization, allows contracting officers to withhold an amount necessary to protect the interests of the Government, not to exceed 5 percent of all subsequent financing requests, or take other appropriate actions if a qualifying proposal is not submitted in accordance with the contract definitization schedule. Contracting officers will document in the contract file the justification for withholding or not withholding payments if the qualifying proposal was not submitted in accordance with the contract definitization schedule. This rule clarifies that, when considering the reduced cost risks associated with allowable incurred costs on an undefinitized contract action, it is appropriate to apply separate and differing contract risk factors for allowable incurred costs and estimated costs to complete when documenting the contract risk sections of DD Form 1547, Record of Weighted Guidelines.

DoD received no public comments in response to the initial regulatory flexibility analysis.

This rule will likely affect small entities that will be awarded undefinitized contract actions. Data was obtained from the Procurement Business Intelligence Service (PBIS) for all contracts and modifications containing DFARS clause 252.217-7027, Contract Definitization. Data from PBIS revealed DoD awarded 2,162 contracts to 971 small businesses from fiscal year 2019 through fiscal year 2021, which averages out to 324 small businesses per year. Therefore, this rule may apply to approximately 324 unique small entities.

The rule does not impose any new reporting, recordkeeping, or compliance requirements.

DoD did not identify any significant alternatives that would minimize or reduce the significant economic impact on small entities, because this rule is not expected to have a significant impact on small entities.

VIII. Paperwork Reduction Act

This 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, 217, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 215, 217, and 252 are amended as follows:

1. The authority citation for 48 CFR parts 215, 217, and 252 continues to read as follows:

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

PART 215—CONTRACTING BY NEGOTIATION

2. Amend section 215.404-71-3 by revising paragraph (d) (2) (i) to read as follows:

215.404-71-3 Contract type risk and working capital adjustment.

* * * * *

(d) * * *

(2) * * *

(i) The contracting officer shall assess the extent to which costs have been incurred prior to definitization of the contract action (also see 217.7404-6(a) and 243.204-70-6). When considering the reduced cost risks associated with allowable incurred costs on an undefinitized contract action, it is appropriate to apply separate contract risk factors for allowable incurred costs and estimated costs to complete when completing the contract risk sections of DD Form 1547, Record of Weighted Guidelines. When costs have been incurred prior to definitization, generally regard the contract type risk to be in the low end of the designated range. If a substantial portion of the costs has been incurred prior to definitization, the contracting officer may assign a value as low as zero percent, regardless of contract type. However, if a contractor submits a qualifying proposal to

definitize an undefinitized contract action and the contracting officer for such action definitizes the contract after the end of the 180-day period beginning on the date on which the contractor submitted the qualifying proposal as defined in 217.7401, the profit allowed on the contract shall accurately reflect the cost risk of the contractor as such risk existed on the date the contractor submitted the qualifying proposal.

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PART 217—SPECIAL CONTRACTING METHODS

3. Amend section 217.7404-3 by revising paragraph (b) to read as follows:

217.7404-3 Definitization schedule.

* * * * *

(b) (1) Submission of a qualifying proposal in accordance with the definitization schedule is a material element of the contract. If the contractor does not submit a qualifying proposal in accordance with the contract definitization schedule, notwithstanding FAR 52.216-26, Payments of Allowable Costs Before Definitization, the contracting officer may withhold an amount necessary to protect the interests of the Government, not to exceed 5 percent of all subsequent financing requests, or take other appropriate actions (e.g., documenting the noncompliance in the contractor's past performance evaluation or terminating the contract for default).

(2) Contracting officers shall document in the contract file the justification for withholding or not withholding payments if

the qualifying proposal was not submitted in accordance with the contract definitization schedule.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Revise section 252.217-7027 to read as follows:

252.217-7027 Contract Definitization.

As prescribed in 217.7406(b), use the following clause:

CONTRACT DEFINITIZATION (MAY 2023)

(a) A _____ [*insert specific type of contract action*] is contemplated. The Contractor agrees to begin promptly negotiating with the Contracting Officer the terms of a definitive contract that will include—

(1) All clauses required by the Federal Acquisition Regulation (FAR) on the date of execution of the undefinitized contract action;

(2) All clauses required by law on the date of execution of the definitive contract action; and

(3) Any other mutually agreeable clauses, terms, and conditions.

(b) The Contractor agrees to submit a _____ [*insert type of proposal; e.g., fixed-price or cost-and-fee*] proposal and certified cost or pricing data supporting its proposal.

Notwithstanding FAR 52.216-26, Payments of Allowable Costs Before Definitization, failure to meet the qualifying proposal date in the contract definitization schedule could result in the Contracting Officer withholding an amount up to 5 percent of all subsequent

requests for financing until the Contracting Officer determines that a proposal is qualifying.

(c) The schedule for definitizing this contract action is as follows *[insert target date for definitization of the contract action and dates for submission of proposal, beginning of negotiations, and, if appropriate, submission of the make-or-buy and subcontracting plans and certified cost or pricing data]*:

(d) If agreement on a definitive contract action to supersede this undefinitized contract action is not reached by the target date in paragraph (c) of this clause, or within any extension of it granted by the Contracting Officer, the Contracting Officer may, with the approval of the head of the contracting activity, determine a reasonable price or fee in accordance with FAR subpart 15.4 and part 31, subject to Contractor appeal as provided in the Disputes clause. In any event, the Contractor shall proceed with completion of the contract, subject only to the Limitation of Government Liability clause.

(1) After the Contracting Officer's determination of price or fee, the contract shall be governed by—

(i) All clauses required by the FAR on the date of execution of this undefinitized contract action for either fixed-price or cost-reimbursement contracts, as determined by the Contracting Officer under this paragraph (d);

(ii) All clauses required by law as of the date of the Contracting Officer's determination; and

(iii) Any other clauses, terms, and conditions mutually agreed upon.

(2) To the extent consistent with paragraph (d)(1) of this clause, all clauses, terms, and conditions included in this undefinitized contract action shall continue in effect, except those that by their nature apply only to an undefinitized contract action.

(e) The definitive contract resulting from this undefinitized contract action will include a negotiated _____ [*insert "cost/price ceiling" or "firm-fixed price"*] in no event to exceed _____ [*insert the not-to-exceed amount*].

(End of clause)