



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 206

[Docket DARS-2023-0021]

RIN 0750-AL79

Defense Federal Acquisition Regulation Supplement: Modification of Authority of the Department of Defense to Carry Out Certain Prototype Projects (DFARS Case 2023-D006)

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 2023.

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

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly R. Ziegler, telephone 703-901-3176.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is amending the DFARS to implement section 842 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2023 (Pub. L. 117-263), which amends 10 U.S.C. 4022(f)(2) to permit the award of a follow-on production contract without the

use of competitive procedures, even if explicit notification was not listed within the request for proposal for the prototype project transaction. This revision modifies the criteria required to award a follow-on production contract without the use of competitive procedures at DFARS 206.001-70(a), which requires other transaction solicitations and agreements to include provisions for a follow-on contract in order to qualify for an exception to competition requirements.

The statutory revision to the criteria does not implement new requirements; instead it removes one of the requirements. The statutes and regulations that implement DoD's other transactions authority permit DoD to provide, in the agreement, for the award of a follow-on production contract to a participant in the prototype project. Agreements made under DoD's other transactions authority are not subject to the Federal Acquisition Regulation (FAR) or DFARS; however, the award of a follow-on production contract resulting from such an other transaction agreement is subject to these acquisition regulations.

DoD issued a final rule for DFARS case 2019-D031 (87 FR 10989) on February 28, 2022, to implement section 815 of the NDAA for FY 2016 (Pub. L. 114-92), which modified the criteria required to exempt from competition certain follow-on production contracts at DFARS 206.001-70(a)(1) and (2).

This final rule removes from DFARS 206.001-70(a)(1) the other transaction solicitation requirement and clarifies that an

other transaction agreement is still statutorily required (10 U.S.C. 4022(f)(1)) to provide for the award of a follow-on production contract in order for a contracting officer to award the follow-on production contract without obtaining competition. DFARS 206.001-70(a)(2) is revised to require documentation from the agreements officer for the other transaction agreement that, where applicable for the prototype project, the threshold at 10 U.S.C. 4022(a)(2)(C) and the requirements at 10 U.S.C. 4022(f)(2)(A) and (B) have been met. These and additional revisions in 206.001-70(a) are intended to ensure an accurate interpretation of the statutory requirements of 10 U.S.C. 4022 that are subject to the DFARS.

II. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the FAR is 41 U.S.C. 1707, Publication of Proposed Regulations. Subsection (a)(1) of the statute requires that a procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because DoD is removing a

requirement that is no longer mandated by statute and that affects only the internal operating procedures of DoD.

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

This rule does not impose any new requirements on contracts at or below the simplified acquisition threshold, for commercial services, or for commercial products, including commercially available off-the-shelf items.

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.

V. 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 to 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.

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant DFARS revision within the meaning of FAR 1.501-1, and 41 U.S.C. 1707 does not require publication for public comment.

VII. 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 Part 206

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR part 206 is amended as follows:

PART 206—COMPETITION REQUIREMENTS

1. The authority citation for 48 CFR part 206 continues to read as follows:

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

2. Revise section 206.001-70 to read as follows:

206.001-70 Exception for prototype projects for follow-on production contracts.

(a) Also excepted from this part are follow-on production contracts for products developed pursuant to the "other transactions" authority of 10 U.S.C. 4022 for prototype projects, when the contracting officer receives sufficient documentation from the agreements officer issuing the other transaction agreement for the prototype project that—

(1) The other transaction agreement included provisions for a follow-on production contract (10 U.S.C. 4022(f)(1)); and

(2) Where applicable, the threshold at 10 U.S.C. 4022(a)(2)(C) and the requirements at 10 U.S.C. 4022(f)(2)(A) and (B) have been met.

(b) See PGI 206.001-70 for additional guidance.