DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 202, 216, 217, 225, 234, and 235

[Docket DARS–2019–0008]

RIN 0750–AJ32

Defense Federal Acquisition Regulation Supplement: Use of Fixed-Price Contracts (DFARS Case 2017–D024)

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 2017 that requires a preference for fixed-price contracts, review and approval for certain cost-reimbursement contract types, and the use of firm-fixed-price contract types for foreign military sales unless an exception or waiver applies.

DATES: Effective November 27, 2019.

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 12179 on April 1, 2019, to implement sections 829 and 830 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328). On May 29, 2019, a document was published in the **Federal Register** at 84 FR 24734 to extend the comment period for 14 days until June 14, 2019.

Section 829 of the NDAA for FY 2017 requires contracting officers to first consider fixed-price contracts, including fixed-price incentive contracts, when determining contract type and to obtain approval from the head of the contracting activity (HCA) for—

- Cost-reimbursement contracts in excess of $50 million to be awarded after October 1, 2018, and before October 1, 2019; and
- Cost-reimbursement contracts in excess of $25 million to be awarded on or after October 1, 2019.

Section 830 provides requirements, exceptions, and waiver authority for the use of firm-fixed-price contracts for foreign military sales (FMS). It requires contracting officers to use firm fixed-price contracts, unless an exception or a waiver applies.

Seven 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. A discussion of the comments received and changes from the proposed rule made in the final rule are provided as follows:

A. Summary of Significant Changes From the Proposed Rule

There is one change from the proposed rule made in the final rule in response to the public comments. In order to properly align with the Federal Acquisition Regulation (FAR) requirements for approval of the determination and findings for use of incentive- and award-fee contracts, the content of DFARS Procedures, Guidance, and Information (PGI) 216.401(e)(iii) is relocated to DFARS 216.401(d)(i).

B. Analysis of Public Comments

1. Section 829 of the NDAA for FY 2017

a. Increased Administrative Burden

Comment: A respondent recommended that approval requests to use other than firm-fixed-price or fixed-price incentive contracts be included in the acquisition strategy, rather than in a separate approval document.

Response: This rule does not create a requirement for a separate approval document; rather, this rule instructs contracting officers to obtain HCA approval of their decision to use a cost-reimbursement type contract when the value of the contract is in excess of $25 million (on or after October 1, 2019). In accordance with FAR 7.105(b)(3), contracting officers are already required to include in an acquisition plan a discussion of the rationale for the selection of contract type, to include details regarding the complexity of the requirements and the associated reasoning essential to support the contract type selection. Departments and agencies have the latitude to establish the internal procedures for obtaining HCA approval of the use of cost-reimbursement contracts, which may include HCA approval of the acquisition plan.

Comment: Respondents expressed concern with increased administrative burdens in the acquisition process, to include the timeliness of required approvals for contract type selection as a result of the rule. The respondents believed the rule will create difficulty for contracting officers when determining contract types based on risk.

Response: The proposed rule implements the statutory requirement to obtain higher-level approval of the use of cost- reimbursement contracts at the specified thresholds. Section 829 of the NDAA for FY 2017 does not prohibit redelegation and FAR 1.102–4(b) authorizes decision making and the accountability for the decisions made to be delegated to the lowest level. As such, this rule delegates the section 829 approval authority to the head of the contracting activity, which should reduce any perceived impacts on administrative lead times. In addition, the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) has already determined that the use of cost-reimbursement contracts for research and development in excess of $25 million is approved, subject to a written determination by the contracting officer, as specified at DFARS 235.006(b)(i). This upfront approval should alleviate unnecessary burden associated with research and development contracts, which are frequently and appropriately awarded as cost-reimbursement contracts.

b. Contract Type Selection

Comment: A respondent expressed concerns that established programs may require cost-reimbursement and time-and-materials contracts when the program does not have a relevant or appropriate cost history, and that defense contractors use firm-fixed-price contracts to obtain high profits and do not disclose actual costs.

Response: The proposed rule is consistent with DoD's current policies for the selection of contract type, which should balance risk fairly between the contractor and the Government, providing the opportunity to earn a reasonable profit/fee for successful delivery of products and services. Per DFARS 216.104, contracting officers are required to consider the principles and procedures in Director, Defense Procurement and Acquisition Policy (DPAP) (now Defense Pricing and Contracting (DPC)), memorandum dated April 1, 2016, entitled ''Guidance on Using Incentive and Other Contract Types,'' when selecting and negotiating the most appropriate contract type for a given procurement. As stated in the memorandum, ''Profit should not be targeted as a cost-cutting measure, but should instead be reflective of actual performance, with higher profit levels tied to better performance and lower levels to poorer performance.''

c. Congressional Intent

Comment: A respondent expressed concern that section 829 of the NDAA for FY 2017 requirements permit risks to be placed on the contractor, rather than on the Government.

Response: Section 829 specifically established a preference for fixed-price contracts, including fixed-price incentive fee contracts, in the determination of contract type, and mandated approval of the use of cost-reimbursement contracts at established thresholds and time periods.

Comment: A respondent was concerned that contracting officers would no longer have the flexibility during contract type determination to use tradeoffs (cost, schedule, and performance).

Response: DFARS 216.104, Factors in selecting contract type, requires contracting officers to follow the principles and procedures in the DPAP (now DPC) memorandum, ''Guidance on Using Incentive and Other Contract Types,'' dated April 1, 2016, when selecting and negotiating the most appropriate contract type for a given procurement. Section 829 requirements will in no way impede the requirement for contracting officers to consider the factors associated with cost, schedule, and performance, as required by FAR 16.104 in the determination of contract type.

d. Location of Approval Requirements

Comment: A respondent recommended that all DoD approval requirements for incentive and award-fee contracts be located in the DFARS instead of the PGI for coherency.

Response: DoD agrees with the respondent's comment. In order to properly align with the FAR requirements for approval of the determination and findings for use of incentive- and award-fee contracts, the content of DFARS PGI 216.401(e)(iii) has been relocated to DFARS 216.401(d). The relocated text in DFARS 216.401(d) has been revised to reflect that approval of the HCA is required for cost-reimbursement incentive- or award-fee contracts valued in excess of $50 million or above to align with the section 829 implementation.

2. Section 830 of the NDAA for FY 2017

a. Foreign Military Sales

Comment: A respondent recommended the waiver authority be revised to the Service Acquisition Executive, Combatant Commander, or USD(A&S). The respondent also stated the Secretary of Defense justification delegating authority to the chief of contracting office should have been included in the proposed rule; to ensure only a DoD official appointed and confirmed by the Senate made the best interest determination applicable to the FMS.

Response: FAR 1.102–4(b), authorizes decision making and the accountability for the decisions made to be delegated to the lowest level. Section 830 does not prohibit redelegation. Therefore, DoD has the discretion to delegate approval authority associated with section 830 waiver approval authority to the chief of the contracting office.

Comment: A respondent recommended deletion of DFARS 225.7301–2, which requires the contracting officer to coordinate through agency channels with the Principal Director of DPC prior to issuance of an FMS solicitation exceeding $500 million. The respondent expressed concern that the requirement created an extension of the peer review process, beyond service contracts in excess of $1 billion, without any statutory basis and without public comment.

Response: The policy guidance at DFARS 225.7301–2 implements internal procedures for contracting officers negotiating sole source major system requirements for U.S. and U.S./FMS procurements contained in the DPAP (now DPC) policy memorandum, Negotiations of Sole Source Major Systems for U.S. and U.S/FMS Combined Procurements, dated June 28, 2018. Internal operating procedures of the Government are not subject to the requirements of the Office of Federal Procurement Policy statute (see section 41 U.S.C. 1707).

Comment: A respondent asked if the changes in the rule associated with FMS are indicative of a Department-wide shift for all contracting. And, if not, the respondent further asked how the proposed rule aligns with DoD's commitment to buy for the foreign customer as it would for itself.

Response: This policy requirement implements section 830 and the DPAP (now DPC) policy memorandum, Negotiations of Sole Source Major Systems for U.S. and U.S./FMS Combined Procurements, dated June 28, 2018. This policy requirement is not applicable to all DoD procurements. Section 830 does not limit DoD's use of established defense acquisition regulations and procedures for FMS.

Comment: A respondent asked if DoD will utilize firm-fixed-price contracts for FMS cases if a more effective acquisition approach is available.

Response: Section 830 specifically requires the use of firm-fixed-price contracts for FMS. This requirement may be waived if the chief of the contracting office determines, on a case-by-case basis, that a different contract type is in the best interest of the United States and American taxpayers.

Comment: A respondent asked what discretion the contracting authority will have to deviate from this default approach or advise the foreign purchaser that different contractual terms would better satisfy their requirement.

Response: The Letter of Offer and Acceptance facilitates the Government and the foreign country's agreement to specified terms and conditions on the FMS. Section 830 specifically requires the use of firm-fixed-price contracts for FMS unless an exception or a waiver applies.

The exception applies only if the foreign country (that is a counterparty to a FMS) has established a preference for a different contract type or requests in writing that a different contract type be used for a specific FMS.

The waiver is determined on a case-by-case basis that a different contract type is in the best interest of the United States and American taxpayers.

Comment: A respondent asked whether the foreign customer will no longer have access to the full DoD purchasing options, but rather just a portion of them given the default contract option being proposed.

Response: Under FMS, the foreign customer is assured that the acquisition process will be subject to DoD standards through every step of the process. DoD standards dictate the defense acquisition system process, which includes the primary guiding principle that acquisitions must be in the best interest of the Government. In accordance with DFARS 225.7301(a) and (b), the Government sells defense articles and services to foreign governments or international organizations through FMS agreements and conducts FMS acquisitions under the same acquisition and contract management procedures used for other defense acquisitions. The agreement is documented in a Letter of Offer and Acceptance as required by the Defense Security Cooperation Agency (DSCA) Security Assistance Management Manual (DSCA 5105.38–M). Section 830 requirements will in no way impede the requirement for contracting officers to consider the factors associated with the FMS requirement process required by the defense acquisition system.

Comment: Two respondents requested DoD provide clarity on the exemption language regarding the ''in the best interest of the U.S. and U.S. taxpayer.''

Response: FMS procurements are funded using both foreign funds (which become appropriated funds when deposited into the Department of the Treasury) and appropriated funding for FMS requirements. In both instances they are considered Federal Government funds. This may also include funds expended for Government administrative costs associated with execution of the acquisition process. In accordance with FAR 1.102(d), Statement of guiding principles for the Federal Acquisition System, contracting officers are required to use sound business judgement as a member of the acquisition team to ensure decisions are made ensuring it is in the best interest of the Government, and ultimately the U.S. taxpayer. This rule does not remove the requirement for contracting officers to consider risk when determining the appropriate contract type for FMS. Inherently, a firm-fixed-price contract is used when the requirement is well defined, market conditions are stable, and when financial risks are otherwise insignificant; an example being commercial items. A cost-reimbursement contract is used when a requirement is unable to be adequately defined and uncertainty exists, increasing financial risks. Cost-reimbursement contracts may be used in research and development efforts, major system development, and prototype development, testing or low rate initial production efforts.

b. Congressional Intent

Comment: A respondent stated that the use of fixed-price incentive contracts for FMS was not in line with the intent of Congress for section 830 of the NDAA for 2017.

Response: The rule implements the section 830 requirement to use of firm-fixed-price contracts for foreign military sales, unless an exception or a waiver applies. The exception applies only if the foreign country (that is a counterparty to a foreign military sale) has established a preference for a different contract type or requests in writing that a different contract type be used for a specific FMS. The waiver is determined on a case-by-case basis that a different contract type is in the best interest of the United States and American taxpayers.

Comment: A respondent expressed concern that section 830 of the NDAA for 2017 permits risks to be placed on the contractor, rather than the Government.

Response: Section 830 specifically requires the use of firm-fixed-price contracts for foreign military sales, unless an exception or a waiver applies. Inherently, a firm-fixed-price contract is used when the requirement is well defined, market conditions are stable, and when financial risks are otherwise insignificant. Typical use would be for commercial supplies and services. The contractor is required to provide an acceptable deliverable at the time, place, and total price specified in the contract.

c. Increased Administrative Burden

Comment: A respondent recommended deletion of 225.7301–2, ''Solicitation approval for sole source contracts'', because contracting officers should not have to seek approval to follow the law.

Response: This internal operating procedural policy is established in accordance with the DPAP (now DPC) memorandum, ''Negotiations of Sole Source Major Systems for U.S. and U.S./FMS Combined Procurements,'' dated June 28, 2018.

d. Out of Scope

Comment: A respondent inquired about a future legislative proposal for the potential repeal of section 830 of the NDAA for FY 2017.

Response: The respondent's inquiry regarding a potential legislative proposal is out of scope of the requirement for the implementation of section 830 of the NDAA for FY 2017.

C. Other Changes

The following additional changes from the proposed rule are made in the final rule:

1. The requirement to obtain head of contracting activity approval prior to awarding cost-reimbursement contracts in excess of $50 million awarded after October 1, 2018, and before October 1, 2019, is removed from DFARS 216.301–3. This requirement applies to contracts awarded prior to the effective date of this rule.

2. The requirement for HCA approval of cost-reimbursement incentive- or award fee contracts valued in excess of $25 million is relocated to DFARS 216.401(d)(ii).

3. The statement ''for contracts entered into on or after October 1, 2014'' is removed from DFARS 234.004.

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 DFARS clauses or amend any existing DFARS 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 final rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. 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 829 and 830 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017.

Section 829 requires contracting officers to first consider fixed-price contracts when determining contract type and to obtain approval from the head of the contracting activity (HCA) for cost-reimbursement contracts in excess of $25 million to be awarded on or after October 1, 2019. Section 830 directs DoD to prescribe regulations requiring the use of firm-fixed-price (FFP) contracts for foreign military sales (FMS).

The objective of the final rule is to implement the statutory requirements in section 829 and 830 of the NDAA for FY 2017 to: (1) Establish a preference for the use of fixed-price contracts in the determination of contract price; and (2) accelerate the contracting and pricing process of FMS by basing price reasonableness determinations on actual cost and pricing data for purchases of the same product for DoD.

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 small entities competing on cost-reimbursement contracts. According to

data obtained from the Federal Procurement Data System (FPDS) for FY 2017, DoD awarded 1,674 cost-reimbursement contracts, task orders, and delivery orders, valued over $50 million. Only 58 awards, approximately five percent, were made to unique small businesses.

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) or other compliance requirements for small entities.

DoD has not identified any alternatives that would meet the requirements of the applicable statutes.

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 Parts 202, 216, 217, 225, 234, and 235

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 202, 216, 217, 225, 234, and 235 are amended as follows:

■ 1. The authority citation for 48 CFR parts 202, 216, 217, 225, 234, and 235 continues to read as follows:

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

PART 202—DEFINITION OF WORDS AND TERMS

■ 2. Amend section 202.101 by adding in alphabetical order a definition for ''Milestone decision authority'' to read as follows:

202.101 Definitions.

* * * * *

Milestone decision authority, with respect to a major defense acquisition program, major automated information system, or major system, means the official within the Department of Defense designated with the overall responsibility and authority for acquisition decisions for the program or system, including authority to approve entry of the program or system into the next phase of the acquisition process (10 U.S.C. 2431a).

* * * * *

PART 216—TYPES OF CONTRACTS

■ 3. Amend section 216.102 by—

■ a. Designating the text as paragraph (2); and

■ b. Adding paragraphs (1) and (3).

The additions read as follows:

216.102 Policies.

(1) In accordance with section 829 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328), the contracting officer shall first consider the use of fixed-price contracts, including fixed-price incentive contracts, in the determination of contract type. See 216.301–3(2) for approval requirements for certain cost-reimbursement contracts.

* * * * *

(3) See 225.7301–1 for the requirement to use fixed-price contracts for acquisitions for foreign military sales.

216.104–70 [Amended]

■ 4. Amend section 216.104–70 by removing ''contract type'' and adding ''contract type, and see 235.006(b) for additional approval requirements'' in its place.

■ 5. Amend section 216.301–3 by—

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

■ b. Adding paragraph (2).

The addition reads as follows:

216.301–3 Limitations.

* * * * *

(2) Except as provided in 235.006(b), in accordance with section 829 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328), approval of the head of the contracting activity is required prior to awarding cost-reimbursement contracts in excess of $25 million.

■ 6. Amend section 216.401 by adding paragraph (d) to read as follows:

216.401 General.

* * * * *

(d)(i) Except as provided in paragraph (d)(ii), the determination and findings justifying that the use of an incentive- or award-fee contract is in the best interest of the Government, may be signed by the head of contracting activity or a designee—

(A) No lower than one level below the head of the contracting activity for award fee contracts; or

(B) One level above the contracting officer for incentive fee contracts.

(ii) For cost-reimbursement incentive- or award fee contracts valued in excess of $25 million, the determination and findings justifying that the use of this type of contract is in the best interest of the Government shall be signed by the head of the contracting activity. See DFARS 216.301–3(2).

* * * * *

PART 217—SPECIAL CONTRACTING METHODS

■ 7. Amend section 217.202 by adding paragraphs (1)(i) and (ii) to read as follows:

217.202 Use of options.

(1) * * *

(i) See PGI 217.202(1) for guidance on the use of options with foreign military sales (FMS).

(ii) See PGI 217.202(2) for the use options with sole source major systems for U.S. and U.S./FMS combined procurements.

* * * * *

PART 225—FOREIGN ACQUISITION

■ 8. Add section 225.7301–1 to read as follows:

225.7301–1 Requirement to use firm-fixed-price contracts.

(a) *Requirement.* In accordance with section 830 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328), a firm-fixed-price contract shall be used for FMS, unless the foreign country that is the counterparty to FMS—

(1) Has established in writing a preference for a different contract type; or

(2) Requests in writing that a different contract type be used for a specific FMS. See PGI 217.202(2) on the use of priced options for FMS requirements.

(b) *Waiver.* The requirement in paragraph (a) of this section may be waived, if the chief of the contracting office determines, on a case-by-case basis, that a different contract type is in the best interest of the United States and American taxpayers.

■ 9. Add section 225.7301–2 to read as follows:

225.7301–2 Solicitation approval for sole source contracts.

The contracting officer shall coordinate through agency channels with the Principal Director, Defense Pricing and Contracting, prior to issuing a solicitation for a sole source contract for U.S./FMS combined requirements for a major system that has an estimated contract value that exceeds $500 million. See also 201.170 and PGI 216.403–1(1)(ii)(B) and (C).

PART 234—MAJOR SYSTEM ACQUISITION

■ 10. Amend section 234.004 by—

■ a. In paragraph (2)(i)(A), removing ''Milestone Decision Authority'' and adding ''milestone decision authority'' in its place;
■ b. In paragraph (2)(i)(C) introductory text, removing ''Milestone Decision Authority's'' and adding ''milestone decision authority's'' in its place;
■ c. Revising paragraphs (2)(ii) introductory text and (2)(ii)(A) introductory text;
■ d. In paragraph (2)(ii)(A)(*2*), removing the word ''when''; and
■ e. Adding paragraphs (2)(iii) and (2)(iv).

The revision and addition read as follows:

234.004 Acquisition strategy.

* * * * *

(2) * * *

(ii) In accordance with section 811 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112–239), the contracting officer shall—

(A) Not use cost-reimbursement line items for the acquisition of production of major defense acquisition programs, unless the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)), or the milestone decision authority when the milestone decision authority is the service acquisition executive of the military department that is managing the program, submits to the congressional defense committees—

* * * * *

(iii) See 216.301–3 for additional contract type approval requirements for cost-reimbursement contracts.

(iv) For fixed-price incentive (firm target) contracts, contracting officers shall comply with the guidance provided at PGI 216.403–1(1)(ii)(B) and (C).

PART 235—RESEARCH AND DEVELOPMENT CONTRACTING

■ 11. Amend section 235.006 by—
■ a. Redesignating paragraphs (b)(i) and (ii) as paragraphs (b)(ii) and (iii);
■ b. In newly redesignated paragraph (b)(ii)(B) introductory text, removing ''Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L))'' and adding ''milestone decision authority'' in its place;
■ c. In newly redesignated paragraph (b)(iii)(A)(*3*) introductory text, removing ''(b)(ii)(A)(*1*)'' and adding ''(b)(iii)(A)(*1*)'' in its place;
■ d. In newly redesignated paragraph (b)(iii)(A)(*3*)(*i*), removing ''USD(AT&L)'' and adding ''USD(A&S)'' in its place;
■ e. In newly redesignated paragraph (b)(iii)(A)(*3*)(*ii*), removing ''(b)(ii)(A)(*3*)(*i*)'' and adding ''(b)(iii)(A)(*3*)(*i*)'' in its place;
■ f. In the newly redesignated paragraph (b)(iii)(B) introductory text, removing ''USD(AT&L)'' and adding ''USD(A&S)'' in two places; and
■ g. Adding new paragraph (b)(i).

The addition reads as follows:

235.006 Contracting methods and contract type.

(b)(i) Consistent with section 829 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328), the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) has determined that the use of cost-reimbursement contracts for research and development in excess of $25 million is approved, if the contracting officer executes a written determination and findings that—

(A) The level of program risk does not permit realistic pricing; and

(B) It is not possible to provide an equitable and sensible allocation of program risk between the Government and the contractor.

* * * * *

[FR Doc. 2019–25658 Filed 11–26–19; 8:45 am]

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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: Final rule.

SUMMARY: DoD is issuing a final rule 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: Effective November 27, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571–372–6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 84 FR 39254 on August 9, 2019, 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. There were no public comments submitted in response to the proposed rule. There are no changes from the proposed rule 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 create a new clause at DFARS 252.215–7015, Program Should-Cost Review, but this clause is not applicable to contracts valued at or below the simplified acquisition threshold or 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.

III. 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.

IV. Executive Order 13771

This 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: