

possibly adding coverage in DFARS part 242 relating to contract administration.

Response: DoD has added a cross reference to FAR 37.104(d) at DFARS 237.503. In this final rule, no changes are made to DFARS subpart 242.

E. Editorial Recommendations

Comment: A respondent proposed several clarifying edits. The respondent suggested moving some coverage from DFARS 237.503 to DFARS 237.104 and providing additional cross references. The respondent also proposed to revise the title of the form at PGI 237.503(c).

Response: Some of these recommendations have been accommodated in the changes noted above and as follows:

- New coverage at DFARS 237.104(d) has been added to point readers to the section entitled “Agency-head responsibilities” at DFARS 237.503 to ensure awareness of the certification requirement.

- The title of the certification at PGI 237.503(c) has been changed to “Certification of Nonpersonal Services.”

III. Executive Order 12866 and Executive Order 13563

Executive Orders 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). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD certifies that this final rule will not 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.*, because the change solely impacts internal Government operating procedures and will therefore not have a significant cost or administrative impact on contractors, subcontractors, or offerors. An initial regulatory flexibility analysis was not performed. No comments were received from small entities on this rule.

V. Paperwork Reduction Act

The final 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 211 and 237

Government procurement.

Mary Overstreet,

Editor, Defense Acquisition Regulations System.

Therefore, the Defense Acquisition Regulations system confirms as final the interim rule published at 75 FR 54524 on September 8, 2010, with the following changes:

- 1. The authority citation for 48 CFR parts 211 and 237 continues to read as follows:

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

PART 211—DESCRIBING AGENCY NEEDS

- 2. Revise section 211.106 to read as follows:

211.106 Purchase descriptions for service contracts.

Agencies shall require that purchase descriptions for service contracts and resulting requirements documents, such as statements of work or performance work statements, include language to provide a clear distinction between Government employees and contractor employees. Agencies shall be guided by the characteristics and descriptive elements of personal-services contracts at FAR 37.104. Service contracts shall require contractor employees to identify themselves as contractor personnel by introducing themselves or being introduced as contractor personnel and displaying distinguishing badges or other visible identification for meetings with Government personnel. In addition, contracts shall require contractor personnel to appropriately identify themselves as contractor employees in telephone conversations and in formal and informal written correspondence.

PART 237—SERVICE CONTRACTING

- 3. Amend section 237.104 by adding paragraph (d) as follows:

237.104 Personal services contracts.

* * * * *

(d) See 237.503(c) for requirements for certification and approval of requirements for services to prevent

contracts from being awarded or administered in a manner that constitutes an unauthorized personal services contract.

* * * * *

- 4. Revise section 237.503 to read as follows:

237.503 Agency-head responsibilities.

(c) The agency head or designee shall employ procedures to ensure that requirements for service contracts are vetted and approved as a safeguard to prevent contracts from being awarded or administered in a manner that constitutes an unauthorized personal services contract. Contracting officers shall follow the procedures at PGI 237.503, include substantially similar certifications in conjunction with service contract requirements, and place the certification in the contract file. The program manager or other official responsible for the requirement, at a level specified by the agency, should execute the certification. In addition, contracting officers and program managers should remain aware of the descriptive elements at FAR 37.104(d) to ensure that a service contract does not inadvertently become administered as a personal-services contract.

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 216 and 252

RIN 0750-AH20

Defense Federal Acquisition Regulation Supplement (DFARS); Electronic Ordering Procedures (DFARS Case 2009-D037)

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 address electronic business procedures for placing orders. This final rule adds a new DFARS clause to clarify this process.

DATES: *Effective date:* May 5, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Julian Thrash, Telephone 703-602-0310.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 75 FR 60690, on October 1, 2010. This case establishes a standard method for the issuance of orders via electronic means. DoD currently has the capability to distribute orders electronically on a routine basis and can post to a Web site that any contractor can access. In order to make this possible, the DFARS needs to provide language that will make those procedures a routine part of contract order distribution. This will enable DoD to further the goals of the E-Government Act of 2002 (Pub. L. 107-347).

The public comment period closed November 30, 2010. Five respondents submitted comments to the proposed rule, which are addressed below.

II. Discussion and Analysis

A. Effective Way To Do Business

Comment: One respondent opined that requiring vendors and the Government to communicate exclusively via electronic means will be the most effective way for the Government to do business in the future.

Response: Concur this could be the most effective way to communicate, however, e-mail and facsimile will continue to be permitted as a means of communication.

B. Elements of an Order

Comment: One respondent expressed concern that many elements of an order are not universal, and are not automatically posted to the Electronic Document Access (EDA) system from the contract writing systems (*i.e.*, attachments and appendices). The respondent opined that ordering officials would thus be forced to either use e-mail to get some elements of the order to the contractor or, alternatively, to manually replace the automatically uploaded documents in EDA with manually compiled complete documents. The respondent suggested that neither approach would be efficient.

Response: As a matter of policy, DoD already requires posting of the contract or order, including its attachments, to EDA. This rule merely leverages that existing requirement to codify rules for electronic issuance of orders. Use of e-mail will not be necessary.

C. Use of E-Mail

Comment: A respondent questioned whether it is wise to take e-mail totally off the table, when FAR 52.216-18, Ordering, currently permits ordering officials to specify e-mail as an

“electronic commerce method” so long as it is authorized in the schedule. The respondent recommended that the DFARS clause should explicitly permit the use of e-mail as a recognized electronic commerce method. The respondent recommended, in the alternative, that the Government permit the use of e-mail on a “by-exception basis” or at the discretion of the contracting officer.

Response: DoD considered the use of e-mail as a primary method of distribution, but rejected its use because of the lack of an audit trail. DoD was also concerned that the delivery and receipt of e-mail is subject to interruption without notice due to firewall and spam filter configurations.

D. Changes to 252.216-70XX(c)(1), Ordering

Comment: A respondent suggested that the term “notice” in 252.216-70XX(c)(1), Ordering, should be defined. Another respondent stated the final rule should be clearer about who in the company will be receiving the awards to reduce the possibility for miscommunication. Another respondent stated that electronic commerce is a term specifically identified in Federal Acquisition Regulation (FAR) Part 2, and is broader than just the EDA, which is not defined in the FAR or DFARS. The respondent further stated that limiting the Government’s electronic communication options to the EDA only will prevent ordering officials from using other means of electronic commerce in the event EDA is not accessible (e.g., system is down or contingency contracting where EDA may not be available), and that use of the broader term “electronic commerce” would allow for the flexibility to adopt the use of new methods of electronic communication as they arise.

Response: Contract load notification lists can be set up in EDA for a specific contract or delivery order. Each contract or delivery order requires its own notification list. Notification lists may be created for contracts that do not yet exist in EDA. When a contract loads into EDA, the notification process activates and EDA e-mails the notification to the addresses on the lists. Notification e-mail messages are sent once per day. Therefore, it is not necessary to define what constitutes a notice.

DoD has chosen EDA as its primary means of establishing an official shared copy of the contract. This case leverages that decision. This case is not intended to prohibit the use of other electronic commerce tools to transmit data about the contract, but only to address EDA as the location of the document.

E. Encryption

Comment: A respondent suggested that DoD should allow for an alternate means of electronic communication that provides for secure transmission of files (such as deliverables, reports, financial, and Privacy Act data) back to the issuer. The respondent further stated that e-mail is a very simple, widespread, and known technology, and that many regulations require strong encryption when sending sensitive (controlled unclassified information, personally identifiable information, *etc.*) data over the internet. The respondent recommended that DoD should be encrypting files before transmitting them, and that including (in the clause) the option to use e-mail would set the stage for enhanced, electronic communications between DoD and its many small contractors, via the Internet’s ubiquitous direct communication tool.

Response: EDA shares data using secure hypertext transfer protocol (https), which encrypts all data in transit, and is universally used by both industry and Government to protect sensitive data. EDA fulfills DoD’s requirement for the secure transmission of data.

F. Registration in EDA

Comment: A respondent asked whether contractor registration in EDA will eventually become mandatory like Central Contractor Registration (CCR) (*i.e.*, a pre-condition for receiving a contract). The respondent went on to suggest that DoD would have a difficult time getting industry (and particularly small businesses) to use EDA without a mandatory registration requirement.

Response: An implicit condition of this ordering clause is that vendors who wish to receive notice of electronic orders must create an account in EDA. In order to create an account, the vendor must know the Commercial and Government Entity (CAGE) or the Data Universal Numbering System (DUNS) number for the business unit, and specify it in their EDA registration. The electronic business point of contact for that CAGE/DUNS as identified in CCR must authorize, via e-mail, the applicant for the EDA vendor user account as someone who may access documents for that CAGE/DUNS.

G. Access to EDA

Comment: A respondent noted that there is a general lag between the time when an order is released in the contract writing system, and the time when it is available in EDA, and that this is a practical downside of not

permitting the use of e-mail to issue orders. Two respondents expressed concern that there may be occasions when contractors cannot readily gain access to EDA or that there may be contractors who object to registering in the EDA system.

Response: Historical data shows that, on average, actions are posted to EDA within one to two days. This average compares very favorably with the averages associated with mailing or any other distribution process. There are two EDA sites, one at <http://eda.ogden.disa.mil/>, and the other at <http://eda.cols.disa.mil/>, to ensure connectivity. These two sites allow for an overall 99.1% average system availability. EDA is a very reliable means of conducting DoD's business, and the issue of EDA nonavailability is not considered significant.

H. Exceptions

Comment: A respondent recommended striking facsimile and mail as acceptable methods of issuing orders in order to more firmly promote the use of electronic business.

Response: The objective of the case is not to eliminate paper methods but to establish a regular process for electronic methods.

DoD has considered the public comments, and has decided to make no major changes to the text that was proposed in the **Federal Register** at 75 FR 60690, on October 1, 2010. However, there is one small change made at 216.506(a), where the name "Ordering" was added to the clause prescription as the title for FAR 52.216-18. This final rule makes the following DFARS changes:

- Adds DFARS 216.506(a) to require a new clause 252.216-7006, Ordering, in lieu of the clause at 52.216-18, Ordering, in solicitations, and contracts when a definite-quantity contract, a requirements contract, or an indefinite-quantity contract is contemplated; and
- Add a new clause at DFARS 252.216-7006, Ordering.

III. Executive Order 12866 and Executive Order 13563

Executive Orders 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). Executive Order 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 Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD has prepared a final regulatory flexibility analysis consistent with 5 U.S.C. 604 and is summarized below. A copy of the analysis may be obtained from the point of contact specified herein.

The objective of this rule is to establish a standard method for distributing orders via electronic means. DoD currently has the capability to distribute orders electronically on a routine basis, and posts those orders to a Web site that any contractor can access.

This DFARS change will provide standard contract language that will make those order distribution procedures a routine part of contract order placement. This rule will enable DoD to further the goals of the E-Government Act of 2002.

For Fiscal Year 2009, DoD made awards to 6,097 small business unique Data Universal Numbering System (DUNS) numbers using the clause at FAR 52.216-18, Ordering. The benefit of this rule to small business is that it will make electronic distribution procedures a routine part of order issuance. This change will ultimately help improve the management, and promotion of electronic Government services and processes, and will establish a framework to improve public access to Government information, and services.

This rule was published as a proposed rule in the **Federal Register** at 75 FR 60690, on October 1, 2010. No comments were received from small entities on the affected DFARS subpart with regard to small businesses. We anticipate that there will be limited, if any, additional costs imposed on small businesses.

V. Paperwork Reduction Act

This rule does not impose 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 216 and 252

Government procurement.

Mary Overstreet,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 216 and 252 are amended as follows:

- 1. The authority citation for 48 CFR parts 216 and 252 continues to read as follows:

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

PART 216—TYPES OF CONTRACTS

- 2. Amend section 216.506 by adding paragraph (a) to read as set forth below.

216.506 Solicitation provisions and contract clauses.

(a) Insert the clause at 252.216-7006, Ordering, in lieu of the clause at 52.216-18, Ordering, in solicitations and contracts when a definite-quantity contract, a requirements contract, or an indefinite-quantity contract is contemplated.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 3. Add section 252.216-7006 to read as follows:

252.216-7006 Ordering.

As prescribed in 216.506(a), use the following clause:

ORDERING (MAY 2011)

(a) Any supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders or task orders by the individuals or activities designated in the contract schedule. Such orders may be issued from

_____ through _____ [insert dates].

(b) All delivery orders or task orders are subject to the terms and conditions of this contract. In the event of conflict between a delivery order or task order and this contract, the contract shall control.

(c)(1) If issued electronically, the order is considered "issued" when a copy has been posted to the Electronic Document Access system, and notice has been sent to the Contractor.

(2) If mailed or transmitted by facsimile, a delivery order or task order is considered "issued" when the Government deposits the order in the mail or transmits by facsimile. Mailing includes transmittal by U.S. mail or private delivery services.

(3) Orders may be issued orally only if authorized in the schedule.

(End of Clause)

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