

only the clause with its Alternate I will accomplish the purpose of this case.

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 Part 215

Government procurement.

Mary Overstreet,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 215 is amended as follows:

PART 215—CONTRACTING BY NEGOTIATION

■ 1. The authority citation for 48 CFR part 215 continues to read as follows:

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

■ 2. Section 215.209 is added as follows:

215.209 Solicitation provisions and contract clauses.

(a) For source selections when the procurement is \$100 million or more, contracting officers should use the provision at FAR 52.215-1, Instructions to Offerors—Competitive Acquisition, with its Alternate I.

■ 3. Section 215.306 is added as follows:

215.306 Exchanges with offerors after receipt of proposals.

(c) *Competitive range.*

(1) For acquisitions with an estimated value of \$100 million or more, contracting officers should conduct discussions. Follow the procedures at FAR 15.306(c) and (d).

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BILLING CODE 5001-08-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 217 and 241

RIN 0750-AG89

Defense Federal Acquisition Regulation Supplement; Multiyear Contracting (DFARS Case 2009-D026)

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 update and clarify the requirements for multiyear contracting.

DATES: *Effective date:* September 20, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Manuel Quinones, telephone (703) 602-8383.

SUPPLEMENTARY INFORMATION:

I. Background

This DFARS case was initiated by DoD to perform a comprehensive review of DFARS subpart 217.1, Multiyear Contracting. On March 2, 2011, the DoD published a proposed rule to update and clarify the requirements relating to multiyear contracting. This final rule reorganizes and updates existing coverage for multiyear acquisitions.

A minor editorial change was made to the final rule at DFARS 217.170 to remove the redundant introductory sentence that had been proposed at 217.170(a) and to revert to the original paragraph numbering of this section. At DFARS 217.172(f)(1), the references to 217.172(g)(4) and (5) were corrected to refer to 217.172(g)(3) and (4). Coverage at 217.175 was renumbered to 217.174 to follow in sequence, and this required a reference citation change at 241.103. No changes to existing DoD policy, including implementation of any statutorily mandated acquisition-related thresholds, are being made in this rule.

II. 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 regulatory flexibility. This is not a significant regulatory action and, therefore, is 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.

III. Regulatory Flexibility Act

DoD certifies that this rule will not have a significant economic impact upon a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not change

the existing requirements of subpart 217.1. Furthermore, these requirements are primarily internal procedures for DoD. No comments were received from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610.

IV. 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 217 and 241:

Government procurement.

Mary Overstreet

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 217 and 241 are amended as follows:

■ 1. The authority citation for 48 CFR parts 217 and 241 continues to read as follows:

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

PART 217—SPECIAL CONTRACTING METHODS

■ 2. Section 217.170 is amended by—

■ a. Amending paragraph (a), by removing “Section” and adding in its place “section” and removing “Public Law 105-56” and adding in its place “Pub. L. 105-56,”;

■ b. Amending paragraph (b), by removing “217.172(f)(2)” and adding in its place “217.172(g)(2)”;

■ c. Amending paragraph (c) by removing “Section” and adding in its place “section” and removing “Public Law 105-56” and adding in its place “Pub. L. 105-56,”;

■ d. Amending paragraph (c) by removing in the listing of references “;” in two places and adding in its place “;”;

■ e. Revising paragraph (e) to read as follows:

217.170 General.

* * * * *

(e)(1) DoD must provide notification to the congressional defense committees at least 30 days before entering into a multiyear contract for certain procurements, including those expected to—

(i) Employ an unfunded contingent liability in excess of \$20 million (see 10 U.S.C. 2306b(l)(1)(B)(i)(II), 10 U.S.C. 2306c(d)(1), and section 8008(a) of Pub. L. 105-56 and similar sections in subsequent DoD appropriations acts);

(ii) Employ economic order quantity procurement in excess of \$20 million in any one year of the contract (10 U.S.C. 2306b(l)(1)(B)(i)(I));

(iii) Involve a contract for advance procurement leading to a multiyear contract that employs economic order quantity procurement in excess of \$20 million in any one year (see 10 U.S.C. 306b(l)(1)(B)(ii) and section 8008(a) of Pub. L. 105–56 and similar sections in subsequent DoD appropriations acts); or

(iv) Include a cancellation ceiling in excess of \$100 million (see 10 U.S.C. 2306c(d)(4), 10 U.S.C. 2306b(g), and section 8008(a) of Pub. L. 105–56 and similar sections in subsequent DoD appropriations acts).

(2) A DoD component must submit a request for authority to enter into a multiyear contract described in paragraphs (e)(1)(i) through (iv) of this section as part of the component's budget submission for the fiscal year in which the multiyear contract will be initiated. DoD will include the request, for each candidate it supports, as part of the President's budget for that year and in the Appendix to that budget as part of proposed legislative language for the appropriations bill for that year (section 8008(b) of Pub. L. 105–56).

(3) If the advisability of using a multiyear contract becomes apparent too late to satisfy the requirements in paragraph (e)(2) of this section, the request for authority to enter into a multiyear contract must be—

(i) Formally submitted by the President as a budget amendment; or

(ii) Made by the Secretary of Defense, in writing, to the congressional defense committees (see section 8008(b) of Pub. L. 105–56).

(4) Agencies must establish reporting procedures to meet the congressional notification requirements of paragraph (e)(1) of this section. The head of the agency must submit a copy of each notice to the Director of Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics) (OUSD(AT&L)DPAP), and to the Deputy Under Secretary of Defense (Comptroller) (Program/Budget) (OUSD(C)(P/B)).

(5) If the budget for a contract that contains a cancellation ceiling in excess of \$100 million does not include proposed funding for the costs of contract cancellation up to the cancellation ceiling established in the contract—

(i) The notification required by paragraph (e)(1) of this section shall include—

(A) The cancellation ceiling amounts planned for each program year in the proposed multiyear contract, together with the reasons for the amounts planned;

(B) The extent to which costs of contract cancellation are not included in the budget for the contract; and

(C) A financial risk assessment of not including budgeting for costs of contract cancellation (10 U.S.C. 2306b(g) and 10 U.S.C. 2306c(d)); and

(ii) The head of the agency shall provide copies of the notification to the Office of Management and Budget at least 14 days before contract award.

■ 3. Amend section 217.171 by—

■ (a) Removing paragraphs (a)(4) through (a)(6) and paragraph (b);

■ (c) Redesignating paragraphs (a)(2), (a)(2)(i), (a)(2)(ii), and (a)(2)(iii) as paragraphs (b), (b)(1), (b)(2), and (b)(3), respectively;

■ (d) Redesignating paragraphs (a)(3), (a)(3)(i), (a)(3)(ii), (a)(3)(ii)(A), (a)(3)(ii)(B) and (a)(3)(iii) as paragraphs (c), (c)(1), (c)(2), (C)(2)(i), (c)(2)(ii) and (c)(3), respectively; and

■ (f) Revising paragraph (a) as set forth below. The revision reads as follows:

217.171 Multiyear contracts for services.

(a) The head of the agency may enter into a multiyear contract for a period of not more than 5 years for the following types of services (and items of supply relating to such services), even though funds are limited by statute to obligation only during the fiscal year for which they were appropriated (10 U.S.C. 2306c). Covered services are—

(1) Operation, maintenance, and support of facilities and installations;

(2) Maintenance or modification of aircraft, ships, vehicles, and other highly complex military equipment;

(3) Specialized training requiring high-quality instructor skills (e.g., training for pilots and aircrew members or foreign language training);

(4) Base services (e.g., ground maintenance, in-plane refueling, bus transportation, and refuse collection and disposal); and

(5) Environmental remediation services for—

(i) An active military installation;

(ii) A military installation being closed or realigned under a base closure law as defined in 10 U.S.C. 2667(h)(2); or

(iii) A site formerly used by DoD.

* * * * *

■ 4. Section 217.172 is revised to read as follows:

217.172 Multiyear contracts for supplies.

(a) This section applies to all multiyear contracts for supplies,

including weapon systems and other multiyear acquisitions specifically authorized by law (10 U.S.C. 2306b).

(b) The head of the agency may enter into a multiyear contract for supplies if, in addition to the conditions listed in FAR 17.105–1(b), the use of such a contract will promote the national security of the United States (10 U.S.C. 2306b(a)(6)).

(c) Multiyear contracts in amounts exceeding \$500 million must be specifically authorized by law (10 U.S.C. 2306b and 10 U.S.C. 2306c). A multiyear supply contract may be authorized by an appropriations act or a law other than an appropriations act (10 U.S.C. 2306b(i)(3) and (l)(3)).

(d) The head of the agency shall not enter into a multiyear contract unless—

(1) The Secretary of Defense has submitted to Congress a budget request for full funding of units to be procured through the contract; and

(2) In the case of a contract for procurement of aircraft, the budget request includes full funding of procurement funds for production beyond advance procurement activities of aircraft units to be produced in the fiscal year covered by the budget.

(e)(1) The head of the agency must not enter into or extend a multiyear contract that exceeds \$500 million (when entered into or extended until the Secretary of Defense identifies the contract and any extension in a report submitted to the congressional defense committees (10 U.S.C. 2306b(1)(5)).

(2) In addition, for contracts equal to or greater than \$500 million, the head of the contracting activity must determine that the conditions required by paragraph (g)(2)(i) through (vi) of this section will be met by such contract, in accordance with the Secretary's certification and determination required by paragraph (g)(2) of this section (10 U.S.C. 2306b(a)(1)(7)).

(f) The head of the agency may enter into a multiyear contract for—

(1) A weapon system and associated items, services, and logistics support for a weapon system; and

(2) Advance procurement of components, parts, and materials necessary to manufacture a weapon system, including advance procurement to achieve economic lot purchases or more efficient production rates (see 217.172(g)(3) and (4) regarding economic order quantity procurements). Before initiating an advance

procurement, the contracting officer must verify that it is consistent with DoD policy (e.g., the full funding policy in Volume 2A, chapter 1, of DoD 7000.14–R, Financial Management Regulation).

(g) The head of the agency shall ensure that the following conditions are satisfied before awarding a multiyear contract under the authority described in paragraph (b) of this section:

(1) The multiyear exhibits required by DoD 7000.14–R, Financial Management Regulation, are included in the agency's budget estimate submission and the President's budget request.

(2) The Secretary of Defense certifies to Congress in writing, by no later than March 1 of the year in which the Secretary requests legislative authority to enter into such contracts, that each of the conditions in paragraphs (g)(2)(i) through (vii) of this section is satisfied (10 U.S.C. 2306b(i)(1)(A) through (G)).

(i) The Secretary has determined that each of the requirements in FAR 17.105, paragraphs (b)(1) through (5) will be met by such contract and has provided the basis for such determination to the congressional defense committees (10 U.S.C. 2306b(i)(1)(A)).

(ii) The Secretary's determination under paragraph (g)(2)(i) of this section was made after the completion of a cost analysis performed by the Defense Cost and Resource Center of the Department of Defense and such analysis supports the findings (10 U.S.C. 2306b(i)(1)(B)).

(iii) The system being acquired pursuant to such contract has not been determined to have experienced cost growth in excess of the critical cost growth threshold pursuant to 10 USC 2433(d) within 5 years prior to the date the Secretary anticipates such contract (or a contract for advance procurement entered into consistent with the authorization for such contract) will be awarded (10 U.S.C. 2306b(i)(1)(C)).

(iv) A sufficient number of end items of the system being acquired under such contract have been delivered at or within the most current estimates of the program acquisition unit cost or procurement unit cost for such system to determine that current estimates of such unit costs are realistic (10 U.S.C. 2306b(i)(1)(D)).

(v) Sufficient funds will be available in the fiscal year in which the contract is to be awarded to perform the contract, and the future-years defense program for such fiscal year will include the funding required to execute the program without cancellation (10 U.S.C. 2306b(i)(1)(E)).

(vi) The contract is a fixed price type contract (10 U.S.C. 2306b(i)(1)(F)).

(vii) The proposed multiyear contract provides for production at not less than minimum economic rates, given the existing tooling and facilities. The head of the agency shall submit to USD(C)(P/B) information supporting the agency's

determination that this requirement has been met (10 U.S.C. 2306b(i)(1)(G)).

(viii) The head of the agency shall submit information supporting this certification to USD(C)(P/B) for transmission to Congress through the Secretary of Defense.

(A) The head of the agency shall, as part of this certification, give written notification to the congressional defense committees of—

(1) The cancellation ceiling amounts planned for each program year in the proposed multiyear contract, together with the reasons for the amounts planned;

(2) The extent to which costs of contract cancellation are not included in the budget for the contract; and

(3) A financial risk assessment of not including the budgeting for costs of contract cancellation (10 U.S.C. 2306b(g)); and

(B) The head of the agency shall provide copies of the notification to the Office of Management and Budget at least 14 days before contract award.

(3) The contract is for the procurement of a complete and usable end item (10 U.S.C. 2306b(i)(4)(A)).

(4) Funds appropriated for any fiscal year for advance procurement are obligated only for the procurement of those long-lead items that are necessary in order to meet a planned delivery schedule for complete major end items that are programmed under the contract to be acquired with funds appropriated for a subsequent fiscal year (including an economic order quantity of such long-lead items when authorized by law (10 U.S.C. 2306b(i)(4)(B)).

(5) The Secretary may make the certification under paragraph (g)(2) of this section notwithstanding the fact that one or more of the conditions of such certification are not met if the Secretary determines that, due to exceptional circumstances, proceeding with a multiyear contract under this section is in the best interest of the Department of Defense and the Secretary provides the basis for such determination with the certification (10 U.S.C. 2306b(i)(5)).

(6) The Secretary of Defense may not delegate this authority to make the certification under paragraph (g)(2) of this section or the determination under paragraph (g)(5) of this section to an official below the level of the Under Secretary of Defense for Acquisition, Technology, and Logistics (10 U.S.C. 2306b(i)(6)).

(7) The Secretary of Defense shall send a notification containing the findings of the agency head under FAR 17.105–1(b), and the basis for such findings, 30 days prior to the award of

a multiyear contract or a defense acquisition program that has been specifically authorized by law to the congressional defense committees (10 U.S.C. 2306b(i)(7)).

(8) All other requirements of law are met and there are no other statutory restrictions on using a multiyear contract for the specific system or component (10 U.S.C. 2306b(i)(2)). One such restriction may be the achievement of specified cost savings. If the agency finds, after negotiations with the contractor(s), that the specified savings cannot be achieved, the head of the agency shall assess the savings that, nevertheless, could be achieved by using a multiyear contract. If the savings are substantial, the head of the agency may request relief from the law's specific savings requirement. The request shall—

(i) Quantify the savings that can be achieved;

(ii) Explain any other benefits to the Government of using the multiyear contract;

(iii) Include details regarding the negotiated contract terms and conditions; and

(iv) Be submitted to OUSD(AT&L)DPAP for transmission to Congress via the Secretary of Defense and the President.

(h) The Secretary of Defense may instruct the head of the agency proposing a multiyear contract to include in that contract negotiated priced options for varying the quantities of end items to be procured over the life of the contract (10 U.S.C. 2306b(j)).

■ 5. Section 217.173 is revised to read as follows:

217.173 Multiyear contracts for military family housing.

The head of the agency may enter into multiyear contracts for periods up to 4 years for supplies and services required for management, maintenance, and operation of military family housing and may pay the costs of such contracts for each year from annual appropriations for that year (10 U.S.C. 2829).

217.174 [Removed]

■ 6. Section 217.174 is removed.

■ 7. Section 217.175 is redesignated as 217.174 and the newly redesignated section 217.174 paragraph (b) is revised as set forth below.

217.174 Multiyear contracts for electricity from renewable energy sources.

* * * * *

(b) *Limitations.* The head of the contracting activity may exercise the authority in paragraph (a) of this section to enter into a contract for a period in

excess of 5 years only if the head of the contracting activity determines, on the basis of a business case analysis (see PGI 217.174 for a business case analysis template and guidance) prepared by the requiring activity, that—

(1) The proposed purchase of electricity under such contract is cost effective; and

(2) It would not be possible to purchase electricity from the source in an economical manner without the use of a contract for a period in excess of 5 years.

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PART 241—ACQUISITION OF UTILITY SERVICES

■ 8. Section 241.103 paragraph (2) is revised to read as follows:

241.103 Statutory and delegated authority.

* * * * *

(2) See 217.174 for authority to enter into multiyear contracts for electricity from renewable energy sources.

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[FR Doc. 2011–23963 Filed 9–19–11; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 236

RIN 0750–AG91

Defense Federal Acquisition Regulation Supplement; Construction and Architect-Engineer Services Performance Evaluation (DFARS Case 2010–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 remove the requirement to use DoD-unique forms to prepare contractor performance evaluations for construction and architect-engineer services.

DATES: *Effective Date:* September 20, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Manuel Quinones, telephone, (703) 602–8383.

SUPPLEMENTARY INFORMATION:

I. Background

This rule removes the requirement to use DoD-unique forms to document

contractor past performance for construction and Architect-Engineer services. On April 19, 2011, DoD published a proposed rule in the **Federal Register** at 75 FR 21851 to delete outdated procedures and references to obsolete DD forms. No public comments were received in response to the proposed rule.

One editorial change is being made to the final rule. The references to “A–E” are revised to read “architect-engineer” in sections 236.102, 236.602–70, 236.606–70, and in 236.609–70.

II. 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, is 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.

III. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, and is summarized as follows.

DoD is amending the DFARS to reflect the current automated process being used by and delete outdated procedures and references to obsolete DD forms. The objective of this rule is to remove the requirement to use DD Form 2626, Performance Evaluation (Construction), and DD Form 2631, Performance Evaluation (Architect-Engineer), to evaluate contractor performance.

The Contractor Performance Assessment Report System (CPARS) is now the Governmentwide system for electronically collecting past performance data; there is no need to specify separate DoD forms to collect the data. Accordingly, this rule removes the requirement to use DD forms 2626 and 2631 from the DFARS.

On April 19, 2011, DoD published a proposed rule at 75 FR 21851. The period for public comments closed on June 20, 2011. DoD made no changes to the proposed rule because public comments were not received in response to the initial regulatory flexibility analysis.

There are no reporting, recordkeeping, or other compliance requirements associated with this rule. Thus, there are no professional skills necessary on the part of small businesses. In a like manner, there are no direct costs to small entities to comply with this rule other than the cost of internet access should small entities choose to comment on their past performance evaluation entered into CPARS by Government personnel.

There are no known relevant Federal rules that may duplicate, overlap or conflict with this rule. Instead, the rule aligns the DFARS to the Federal Acquisition Regulation (FAR) ensuring that agencies submit past performance reports electronically per FAR 42.15 eliminating the need for paper reports.

No mitigation steps were taken, since the rule does not have a significant adverse economic impact on small entities.

IV. 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 Part 236

Government procurement.

Mary Overstreet,
Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 236 is amended as follows:

PART 236—CONSTRUCTION AND ARCHITECT–ENGINEER CONTRACTS

■ 1. The authority citation for 48 CFR part 236 continues to read as follows:

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

236.102 [Amended]

- 2. Amend section 236.102 by—
- (a) Removing paragraph designations (1) through (4);
- (b) Redesignating paragraphs (i) and (ii) in the definitions of “Construction activity” as paragraphs (1) and (2); and
- (c) Removing the definition of “A–E”.

236.201 [Removed]

■ 3. Section 236.201 is removed.

236.602–70 [Amended]

- 4. Amend section 236.602–70 by removing “A–E” and adding in its place “architect-engineer”.
- 5. Revise section 236.604 to read as follows: