

List of Subjects in 48 CFR Parts 207, 215, 216, and 234

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 207, 215, 216, and 234 are proposed to be amended as follows:

1. The authority citation for 48 CFR parts 207, 215, 216, and 234 continues to read as follows:

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

PART 207—ACQUISITION PLANNING

- 2. Amend section 207.106 by—
a. In paragraph (S-70)(1), removing "Section 802(a)" and adding "section 802(a)" in its place;
b. Redesignating paragraphs (S-70)(2)(ii) through (iv) as paragraphs (iii) through (v), respectively;
c. Adding a new paragraph (S-70)(2)(ii); and
d. Adding paragraph (S-72)(5).
The additions read as follows:

207.106 Additional requirements for major systems.

* * * * *

(S-70) * * *

(2) * * *

(ii) In accordance with 10 U.S.C. 2443, to emphasize reliability and maintainability in weapon system design, ensure that reliability and maintainability are included in the performance attributes of the key performance parameters on sustainment during the development of capabilities requirements. For additional guidance see PGI 207.105(b)(14)(ii)(2);

* * * * *

(S-72) * * *

(5) In accordance with 10 U.S.C. 2443, acquisition plans for engineering manufacturing and development and production of major systems as defined in 10 U.S.C. 2302 and 2302d and for major defense acquisition programs as defined in 202.101, shall include performance measures that are developed using best practices for responding to the positive or negative performance of a contractor for the engineering and manufacturing development or production of a weapon system, including embedded software. At a minimum the contracting officer shall—

- (i) Encourage the use of incentive fees and penalties as appropriate; and
(ii) Allow the program manager or comparable requiring activity official exercising program management responsibilities, to base determinations

of a contractor's performance on reliability and maintainability data collected during the program. Such data collection and associated evaluation metrics shall be described in detail in the contract; and to the maximum extent practicable, the data shall be shared with appropriate contractor and Government organizations.

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PART 215—CONTRACTING BY NEGOTIATION

3. Amend section 215.304 by adding paragraph (c)(vi) to read as follows:

215.304 Evaluation factors and significant subfactors.

(c) * * *
(vi) Ensure source selections emphasize sustainment factors and objective reliability and maintainability evaluation criteria in competitive contracts for the—

(A) Technical maturation and risk reduction phase of weapon system design (see guidance at PGI 207.105(b)(14)(ii)(2));

(B) Engineering and manufacturing development phase of a weapon system, including embedded software (10 U.S.C. 2443); or

(C) Production and deployment phase of a weapon system, including embedded software (10 U.S.C. 2443).

PART 216—TYPES OF CONTRACTS

- 4. Amend section 216.402-2 by—
a. Designating the text as paragraph (1); and
b. Adding paragraph (2).
The addition reads as follows:

216.402-2 Technical performance incentives.

* * * * *

(2) Contracting officers shall ensure requirements about the payment of incentive fees or the imposition of penalties are included in the solicitation for a contract for the engineering and manufacturing development or production of a weapon system, including embedded software, if the program manager or comparable requiring activity official exercising program manager responsibilities includes—

(i) Provisions for the payment of incentive fees to the contractor, based on achievement of design specification requirements for reliability and maintainability of weapons systems under the contract; or

(ii) The imposition of penalties to be paid by the contractor to the Government for failure to achieve such design specification requirements (10 U.S.C. 2443).

PART 234—MAJOR SYSTEM ACQUISITION

5. Amend section 234.004 by adding paragraph (3) to read as follows:

234.004 Acquisition strategy.

* * * * *

(3) The contracting officer shall include in solicitations for contracts for the technical maturation and risk reduction phase, engineering and manufacturing development phase or production phase of a weapon system, including embedded software—

(i) Clearly defined measurable criteria for engineering activities and design specifications for reliability and maintainability provided by the program manager, or the comparable requiring activity official performing program management responsibilities; or

(ii) Ensure a copy of the justification, executed by the program manager or the comparable requiring activity official performing program management responsibilities for the decision that engineering activities and design specifications for reliability and maintainability should not be a requirement, is included in the contract file (10 U.S.C. 2443).

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 228 and 252

[Docket DARS-2019-0030]

RIN 0750-AK12

Defense Federal Acquisition Regulation Supplement: Modification of DFARS Clause "Accident Reporting and Investigation Involving Aircraft, Missiles, and Space Launch Vehicles" (DFARS Case 2018-D047)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to modify the text of an existing clause prescription to require, instead of permit, the clause be included in applicable solicitations and contracts, pursuant to action taken by the Regulatory Reform Task Force.

DATES: Comments on the proposed rule should be submitted in writing to the

address shown below on or before August 27, 2019, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2018–D047, using any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering “DFARS Case 2018–D047” under the heading “Enter keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “DFARS Case 2018–D047.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “DFARS Case 2018–D047” on your attached document.

- *Email:* osd.dfars@mail.mil. Include DFARS Case 2018–D047 in the subject line of the message.

- *Fax:* 571–372–6094.

- *Mail:* Defense Acquisition Regulations System, Attn: Carrie Moore, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Moore, telephone 571–372–6093.

SUPPLEMENTARY INFORMATION:

I. Background

This rulemaking proposes to modify the clause prescription at DFARS 228.370 to require that DFARS clause 252.228–7005, Accident Reporting and Investigation Involving Aircraft, Missiles, and Space Launch Vehicles, be included in all solicitations and contracts, when applicable, and updates the text of the clause to follow current DFARS convention regarding the use of the word “shall” to indicate a mandatory requirement or action.

DFARS 252.239–7005 was implemented to ensure the Government receives timely notification of accidents involving aircraft, missile, or space launch vehicles being manufactured, modified, repaired, or overhauled by a contractor in connection with a contract and contractor cooperation with Government investigation of such accidents. The clause is included in solicitations and contracts that involve the manufacture, modification, overhaul, or repair of aircraft, missiles,

and space launch vehicles. The clause requires contractors to promptly notify the contracting officer of all facts related to an accident involving such items, cooperate with and assist in the Government’s investigation of an accident, and include a similar clause in subcontracts under the contract.

II. Discussion and Analysis

This rulemaking proposes to amend the clause prescription from permitting use of the clause (*i.e.*, this clause “may” be used) to requiring use of the clause (*i.e.*, this clause “shall” be used), as there is no situation in which the requirements of the clause would not be necessary to the Government when contracting for the manufacture, modification, overhaul, or repair of aircraft, missiles, and space launch vehicles. In order to follow current DFARS convention regarding the use of “shall” to indicate a mandatory requirement, this rule also amends the text of the clause from “will” to “shall” to clarify the intent of the clause.

The modification of this DFARS text supports a recommendation from the DoD Regulatory Reform Task Force. On February 24, 2017, the President signed Executive Order (E.O.) 13777, “Enforcing the Regulatory Reform Agenda,” which established a Federal policy “to alleviate unnecessary regulatory burdens” on the American people. In accordance with E.O. 13777, DoD established a Regulatory Reform Task Force to review and validate DoD regulations, including the DFARS. A public notice of the establishment of the DFARS Subgroup to the DoD Regulatory Reform Task Force, for the purpose of reviewing DFARS provisions and clauses, was published in the **Federal Register** at 82 FR 35741 on August 1, 2017, and requested public input. No public comments were received on these clauses. Subsequently, the DoD Task Force reviewed the requirements of DFARS clause 252.228–7005 and determined that the clause should be modified.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This proposed rule does not create any new provisions or clauses. This proposed rule, if adopted, would amend a clause provision to require its inclusion in applicable contracts and clarifies the intent of the clause. The rulemaking does not change the applicability of the clause to commercial or commercially available off-the-shelf (COTS) items, or items

valued at or below the simplified acquisition threshold (SAT). The clause remains applicable to items valued below the SAT, but not applicable to commercial or COTS items.

IV. Executive Orders 12866 and 13563

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 proposed rule is not expected to be subject to E.O. 13771, because this proposed rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule to 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 rule is not creating any new requirements or changing any existing requirements for contractors. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The Department of Defense is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to amend the clause prescription at DFARS 228.370 to require that DFARS clause 252.228–7005, Accident Reporting and Investigation Involving Aircraft, Missiles, and Space Launch Vehicles, be included in all solicitations and contracts involving the manufacture, modification, overhaul, or repair of these items; and, update the text of the clause to follow current DFARS convention regarding the use of the word “shall” to indicate a mandatory requirement or action. This rule is pursuant to action taken by the DoD Regulatory Reform Task Force.

The objective of this proposed rule is to ensure contractor cooperation in the early reporting of accidents that involve an aircraft, missile, or space launch vehicle being manufactured, modified,

repaired, or overhauled by the contractor in connection with the contract; and, with the Government investigation of such accidents. This proposed rule requires, instead of permits, the inclusion of the clause in all applicable contracts. The rulemaking also updates the clause to clarify its intent; however, it is assumed that the clause is already being included in all applicable contracts. The rulemaking simply clarifies the Government's expectation on the usage of the clause.

According to data available in the Federal Procurement Data System (FPDS) for fiscal years 2016 through 2018, DoD awarded a total of 2,288 noncommercial contracts and orders for services under the product services codes listed below that relate to manufacture, modification, overhaul, or repair of aircraft, missiles, and space launch vehicles. Of these 2,288 awards, 219, or approximately 10 percent, were made to 67 unique small business entities over this three-year period. On average, 73 awards were made to 22 unique small entities on an annual basis.

FPDS does not provide additional information on the types of support services provided under the contract, which can include manufacture, modification, overhaul, or repair work; therefore, the number of small business contractors impacted by this rule is expected to be less than the number of entities identified by the data. The FPDS data reflects awards under the following product service codes:

- AC16—R&D—Defense System: Aircraft (Management/Support);
- AC26—Defense System: Missile/Space Systems (Management/Support);
- AR96—R&D—Space: Other (Management/Support);
- J014—Repair, and Rebuilding of Equipment—Guided Missiles;
- J015—Maintenance, Repair, and Rebuilding of Equipment—Aircraft and Airframe Structural Components;
- J018—Maintenance, Repair, and Rebuilding of Equipment—Space Vehicles;
- K014—Modification of Equipment—Guided Missiles;
- K015—Modification of Equipment—Aircraft and Airframe Structural Components; and,
- K018—Modification of Equipment—Space Vehicles.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. This rulemaking does not duplicate, overlap, or conflict with any other Federal rules. There are no known significant alternative approaches to the

proposed rule that would meet the proposed objectives.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities. DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2018–D047) in correspondence.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies to this rule, as the information collection requirement in DFARS clause 252.228–7005, Accident Reporting and Investigation Involving Aircraft, Missiles, and Space Launch Vehicles, is currently approved under OMB Control Number 0704–0216, entitled “Defense Federal Acquisition Regulation Supplement (DFARS) Part 228, Bonds and Insurance, and related clauses at DFARS 252.228.” The proposed changes to the clause prescription and text do not impact the information collection, because prompt contractor reporting of such accidents is already required by the clause and remains unchanged.

List of Subjects in 48 CFR Parts 228 and 252

Government procurement.

Jennifer Lee Hawes,
Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 228 and 252 are proposed to be amended as follows:

- 1. The authority citation for 48 CFR parts 228 and 252 continues to read as follows:

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

PART 228—BONDS AND INSURANCE

- 2. Amend section 228.370 by revising paragraph (d) to read as follows:

228.370 Additional clauses.

* * * * *

(d) Use the clause at 252.228–7005, Accident Reporting and Investigation Involving Aircraft, Missiles, and Space Launch Vehicles, in solicitations and contracts that involve the manufacture, modification, overhaul, or repair of aircraft, missiles, and space launch vehicles.

* * * * *

PART 252—SOLICITATION REVISIONS AND CONTRACT CLAUSES

252.228–7005 [Amended]

- 3. Amend section 252.228–7005 by—
- a. Removing the clause date “(DEC 1991)” and adding “(DATE)” in its place; and
- b. In paragraphs (b) and (c) removing “will” and adding “shall” in both places.

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 239 and 252

[Docket DARS–2019–0029]

RIN 0750–AK11

Defense Federal Acquisition Regulation Supplement: Modification of DFARS Clause, “Obligation of the Government” (DFARS Case 2018–D046)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to modify the text of an existing DFARS clause to include the text of two other DFARS clauses on the same subject, in an effort to streamline contract terms and conditions for contractors, pursuant to action taken by the Regulatory Reform Task Force.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before August 27, 2019, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2018–D046, using any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering “DFARS Case 2018–D046” under the heading “Enter keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “DFARS Case 2018–D046.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “DFARS Case 2018–D046” on your attached document.
- *Email:* osd.dfars@mail.mil. Include DFARS Case 2018–D046 in the subject line of the message.