

**252.215-701X Program Should-Cost Review.**

As prescribed in 215.408(8), use the following clause:

**Program Should-Cost Review (Date)**

(a) The Government has the right to perform a program should-cost review, as described in Federal Acquisition Regulation (FAR) 15.407-4(b). The review may be conducted in support of a particular contract proposal or during contract performance to find opportunities to reduce program costs. The Government will communicate the elements of the proposed should-cost review to the prime contractor (Pub. L. 115-91).

(b) If the Government performs a program should-cost review, upon the Government's request, the Contractor shall provide access to accurate and complete cost data and Contractor facilities and personnel necessary to permit the Government to perform the program should-cost review.

(c) The Government has the right to use third-party experts to supplement the program should-cost review team. The Contractor shall provide access to the Contractor's facilities and information necessary to support the program should-cost review to any third-party experts who have signed non-disclosure agreements in accordance with the FAR 52.203-16.

(End of Clause)

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**DEPARTMENT OF DEFENSE****Defense Acquisition Regulations System****48 CFR Part 219**

[Docket DARS-2019-0034]

RIN 0750-AK43

**Defense Federal Acquisition Regulation Supplement: Review of Defense Solicitations by Procurement Center Representatives (DFARS Case 2019-D008)**

**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 implement a section of the National Defense Authorization Act for Fiscal Year 2017 that provides limits on the scope of review by the Small Business Administration's procurement center representatives for certain solicitations awarded by or for DoD.

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

address shown below on or before October 8, 2019, to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2019-D008, using any of the following methods:

○ *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for "DFARS Case 2019-D008." Select "Comment Now" and follow the instructions provided to submit a comment. Please include "DFARS Case 2019-D008" on any attached documents.

○ *Email:* [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil). Include DFARS Case 2019-D008 in the subject line of the message.

○ *Fax:* 571-372-6094.

○ *Mail:* Defense Acquisition Regulations System, Attn: Ms. Jennifer D. Johnson, 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](http://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. Jennifer D. Johnson, telephone 571-372-6100.

**SUPPLEMENTARY INFORMATION:****I. Background**

This rule proposes to revise the DFARS to implement section 1811 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328) and the Small Business Administration (SBA) proposed rule published in the **Federal Register** on December 4, 2018, at 83 FR 62516. Section 1811 provides limits on the scope of review by SBA's procurement center representatives for certain solicitations awarded by or for DoD.

Specifically, section 1811 limits the scope of review by procurement center representatives, unless DoD requests a review, if the solicitation is awarded by or for DoD and—

- Is conducted pursuant to section 22 of the Arms Export Control Act (22 U.S.C. 2762);
- Is a humanitarian operation as defined in 10 U.S.C. 401(e);
- Is a contingency operation as defined in 10 U.S.C. 101(a)(13);
- Is to be awarded pursuant to an agreement with the government of a foreign country in which U.S. Armed Forces are deployed; or

- Both the place of award and place of performance outside the United States and its territories.

SBA's proposed rule states that, unless the contracting agency requests a review, procurement center representatives will not review such procurements. Additionally, section 1811 excludes these procurements from DoD's small business goals.

**II. Discussion and Analysis**

This rule proposes to amend DFARS part 219 to implement section 1811 of the NDAA for FY 2017 and SBA's proposed rule. Specifically, the rule proposes to add text at DFARS 219.402 to inform contracting officers that procurement center representatives will not review acquisitions conducted by or for DoD, unless the contracting activity requests a review, if the acquisition is—

- For foreign military sales (see DFARS 225.7300);
- In support of humanitarian and civic assistance;
- In support of a contingency operation;
- Awarded pursuant to a Status of Forces Agreement or other agreement with the government of a foreign country in which U.S. Armed Forces are deployed; or
- Both awarded and performed outside the United States and its outlying areas.

The proposed text includes a definition of "humanitarian and civic assistance" that applies only to the implementation of section 1811. Both section 1811 and SBA's proposed rule refer to "a humanitarian operation as defined in section 401(e) of title 10, United States Code." Although the term "humanitarian operation" is used, the type of activities it covers are quite different from the "humanitarian or peacekeeping operation" defined in Federal Acquisition Regulation 2.101 and currently used in the DFARS. In 10 U.S.C. 401(e), the term "humanitarian and civic assistance" is used to refer to specific activities carried out in conjunction with authorized military operations in a foreign country. Examples of such assistance include construction of rudimentary surface transportation systems, well drilling, and construction of basic sanitation facilities. Therefore, this proposed rule includes a definition to avoid confusion among the contracting workforce.

This rule also proposes to add a reference in DFARS subpart 219.5, Set-Asides for Small Business, to the exclusions in DFARS 219.402.

### 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 provisions or clauses or impact any existing provisions or 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 rule is not expected to be subject to E.O. 13771, because this 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 it is expected to impact primarily Government operations. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This rule proposes to revise the DFARS to implement section 1811 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328) and the SBA proposed rule published in the **Federal Register** on December 4, 2018, at 83 FR 62516. Specifically, the rule informs contracting officers that procurement center representatives will not review acquisitions conducted by or for DoD, unless the contracting activity requests a review, if the acquisition is—

- For foreign military sales (see DFARS 225.7300);
- In support of humanitarian and civic assistance;
- In support of a contingency operation;
- Awarded pursuant to a Status of Forces Agreement or other agreement

with the government of a foreign country in which U.S. Armed Forces are deployed; or

- Both awarded and performed outside the United States and its outlying areas.

Additionally, section 1811 of the NDAA for FY 2017 excludes these procurements from DoD's small business goals.

The objective of this rule is to implement, in the DFARS, the limits on the scope of review by procurement center representatives. The legal basis for the rule is section 1811 of the NDAA for FY 2017.

This rule may impact small entities that are interested in performing the types of DoD contracts listed in section 1811 of the NDAA for FY 2017.

According to the Federal Procurement Data System (FPDS), DoD awarded an average of 12,658 contracts and orders for performance outside the United States to approximately 1,292 unique small entities per year in FY 2016, 2017, and 2018. Approximately 4 percent of those small entities received awards for foreign military sales. About 8 percent received awards in support of a contingency operation. Approximately 81 percent received awards made pursuant to an agreement such as a Status of Forces Agreement.

FPDS does not currently collect data on the type of humanitarian operation identified in section 1811, which is very different from the “humanitarian or peacekeeping” operation defined in Federal Acquisition Regulation (FAR) 2.101 and used in the DFARS. FPDS does collect data on humanitarian or peacekeeping operations, as defined in FAR 2.101, showing that about 1% of the small entities, performing contracts or orders outside the United States, received awards for humanitarian or peacekeeping operations. The data collected may provide some indication of the number of small entities that could perform contracts or orders for the type of humanitarian operation identified in section 1811.

This rule does not impose any new reporting, recordkeeping or other compliance requirements for small entities.

This rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives which would accomplish the stated objectives of the applicable statute.

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 2019–D008), in correspondence.

### VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

### List of Subjects in 48 CFR Part 219

Government procurement.

#### Jennifer Lee Hawes,

*Regulatory Control Officer, Defense Acquisition Regulations System.*

Therefore, 48 CFR part 219 is proposed to be amended as follows:

### PART 219—SMALL BUSINESS PROGRAMS

- 1. The authority citation for 48 CFR part 219 continues to read as follows:

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

- 2. Add section 219.402 to subpart 219.4 to read as follows:

#### **219.402 Small Business Administration procurement center representatives.**

(c)(i) *Authority.* This section implements section 1811 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328).

(ii) *Definition.* As used in this section, “humanitarian and civic assistance” (10 U.S.C. 401(e)) means any of the following activities carried out in conjunction with authorized military operations in a foreign country:

(A) Medical, surgical, dental, and veterinary care provided in areas of a country that are rural or underserved by professionals in those fields, including education, training, and technical assistance related to the care provided.

(B) Construction of rudimentary surface transportation systems.

(C) Well drilling and construction of basic sanitation facilities.

(D) Rudimentary construction and repair of public facilities.

(iii) *Exclusions.* Unless the contracting activity requests a review, SBA procurement center representatives will not review acquisitions conducted by or for DoD if the acquisition is—

(A) For foreign military sales (see 225.7300);

(B) In support of humanitarian and civic assistance;

(C) In support of a contingency operation;

(D) Awarded pursuant to a Status of Forces Agreement or other agreement

with the government of a foreign country in which U.S. Armed Forces are deployed; or

(E) Both awarded and performed outside the United States and its outlying areas.

■ 3. Revise section 219.502-1 to read as follows:

**219.502-1 Requirements for setting aside acquisitions.**

Do not set aside acquisitions—  
(a) For supplies that were developed and financed, in whole or in part, by Canadian sources under the U.S.-Canadian Defense Development Sharing Program; or

(b) Excluded from procurement center representative review (see 219.402(c)(iii)).

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