

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 207 and 234**

[Docket DARS–2023–0030]

RIN 0750–AL82

Defense Federal Acquisition Regulation Supplement: Use of Fixed-Price Contracts for Certain Major Defense Acquisition Programs (DFARS Case 2023–D009)

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 2023 that limits the number of low-rate initial production lots associated with a major defense acquisition program under certain circumstances.

DATES: Effective April 25, 2024.

FOR FURTHER INFORMATION CONTACT: Mr. Jon Snyder, telephone 703–945–5341.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD published a proposed rule in the *Federal Register* at 88 FR 67611 on September 29, 2023, to implement section 808 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2023 (Pub. L. 117–263). Section 808 amends section 818 of Public Law 109–364 to limit the number of low-rate initial production lots associated with a major defense acquisition program to be procured to no more than one when the milestone decision authority authorizes the use of a fixed-price type contract at Milestone B and the scope of the work includes both development and low-rate initial production. This limitation may be waived. Two 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 is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule

There are no significant changes from the proposed rule.

B. Analysis of Public Comments

1. Support for the Rule

Comment: One respondent indicted support for the rule.

Response: The support for the rule is noted.

2. Clarifications

Comment: One respondent suggested that the rule should define or provide a reference to the definition of a fixed-price contract. The rule does not specify whether fixed-price contracts include firm-fixed-price, fixed-price-incentive, or fixed-price-with-economic-price-adjustment, which could create ambiguity or inconsistency in the application of the rule and affect the level of risk and incentive for the Government and contractors. The respondent recommended providing a reference to the relevant section of the Federal Acquisition Regulation (FAR) that defines these types of contracts or specify the types of fixed-price contracts that can be used.

Response: This rule does not stand alone; contracting officers will implement the rule in the context provided by the FAR and DFARS. FAR subpart 16.2 describes the types of fixed-price contracts that a contracting officer may use. The DFARS, as a supplement to the FAR, does not duplicate the content of the FAR.

Comment: One respondent suggested that the rule should explain the rationale or purpose of the limitation on procuring more than one lot for low-rate initial production (LRIP) using a fixed-price type contract for a major defense acquisition program. The rule currently does not state why this limitation is necessary or beneficial, or how it relates to the objective of reducing cost risk and improving performance. This could make it difficult to evaluate the effectiveness or impact of the rule, or to justify its use in specific cases.

Response: Section 808 of the NDAA for FY 2023 limits the number of LRIP lots to no more than one on fixed-price contracts that also include development. Neither section 808 nor the Joint Explanatory Statement provides the rationale or purpose of the limitation. However, the limitation may result in a reduction in risk to the contractor associated with proposing prices for multiple production lots of an item prior to the completion of development and initial production of the item.

Comment: One respondent suggested that the rule should establish some criteria or guidelines for exercising the waiver authority for the limitation on LRIP procurement. The rule currently does not indicate how the service

acquisition executive should decide whether to grant or deny a waiver, or what factors should be considered in making this decision. This could lead to arbitrary or inconsistent decisions or undermine the accountability or transparency of the waiver process. Providing examples of factors that could justify a waiver and indicate that the waiver authority should be used sparingly and only in exceptional circumstances.

Response: Section 808 provides the service acquisition executive the authority to waive this limitation. It does not specify the criteria to be considered in making such a waiver decision. Providing examples of factors to consider in determining whether or not to waive the limitation may preclude the consideration of factors that are relevant to the instant acquisition and may have a negative impact on meeting mission needs.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT), for Commercial Products (Including Commercially Available Off-the-Shelf (COTS) Items), and for Commercial Services

This final rule does not create any new solicitation provisions or contract clauses. It does not impact any existing solicitation provisions or contract clauses or their applicability to contracts valued at or below the simplified acquisition threshold, for commercial products including COTS items, or for commercial services.

IV. Expected Impact of the Rule

As a result of this final rule, unless waived, the Government may not procure more than one low-rate initial production lot associated with a major defense acquisition program if, at the time of Milestone B approval, the milestone decision authority authorizes the use of a fixed-price type contract and the scope of work of the fixed-price contract includes both development and low-rate initial production of items associated with such major defense acquisition program. This rule does not impact contractor operations; however, it may limit contractor risk assumed under such contracts. Development and initial production of an item likely involve the discovery and resolution of problems that are unknown beforehand. Risk to a contractor is higher when the contractor must propose prices for multiple production lots of an item before the development and initial production of that item are complete. By limiting the number of low-rate initial production lots on a fixed-price contract

that also includes development, this risk to the contractor may be reduced.

V. 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, as amended.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VII. 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:

This final rule is necessary to implement section 808 of the National Defense Authorization Act for Fiscal Year (FY) 2023 (Pub. L. 117–263). Section 808 modifies section 818 of Public Law 109–364 to limit the number of low-rate initial production lots associated with a major defense acquisition program to be procured to no more than one when the milestone decision authority authorizes the use of a fixed-price type contract at the time of Milestone B approval and the scope of the fixed-price contract includes both development and low-rate initial production.

No comments were received in response to the initial regulatory flexibility analysis.

Data is not available on the number of fixed-price type contracts for major defense acquisition programs that contain both development and low-rate

initial production; therefore, data was obtained for contracts that include DFARS clause 252.234–7004, Cost and Software Data Reporting System, or its alternate I clause. This DFARS clause is required to be included in solicitations and contracts for major defense acquisition programs that exceed \$50 million, and its alternate I clause is required to be included in solicitations and contracts for major defense acquisition programs that are greater than \$20 million but less than or equal to \$50 million under certain circumstances. According to the Procurement Business Intelligence Service, DoD awarded contracts for major defense acquisition programs to 130 unique small entities in FY 2021, 99 in FY 2022, and 109 in FY 2023. The average over the three-year period is 112 per fiscal year. Therefore, the number of small entities to which this rule may apply is 112.

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

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

VIII. Paperwork Reduction Act

This 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 207 and 234

Government procurement.

Jennifer D. Johnson,
Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 207 and 234 are amended as follows:

- 1. The authority citation for parts 207 and 234 continues to read as follows:

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

PART 207—ACQUISITION PLANNING

- 2. In section 207.106, revise paragraph (S–74) to read as follows:

207.106 Additional requirements for major systems.

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(S–74) When selecting contract type for a major defense acquisition program, see 234.004.

PART 234—MAJOR SYSTEM ACQUISITION

- 3. Amend section 234.004 by adding paragraph (2)(v) to read as follows:

234.004 Acquisition strategy.

* * * * *
(2) * * *

(v) In accordance with section 808 of the National Defense Authorization Act for Fiscal Year 2023 (Pub. L. 117–263)—

(A) The contracting officer shall not procure more than one lot for low-rate initial production, as defined at 10 U.S.C. 4231, associated with a major defense acquisition program if—

(1) The milestone decision authority authorizes the use of a fixed-price type contract at the time of Milestone B approval; and

(2) The scope of work of the fixed-price type contract includes both the development and low-rate initial production of items for such major defense acquisition program; and

(B) This limitation may be waived by the service acquisition executive for the department concerned, delegable to no lower than one level above the contracting officer, if—

(1) A written notification of the waiver, including associated rationale, is provided to the congressional defense committees no later than 30 days after issuance of the waiver in accordance with agency procedures; and

(2) A copy of the waiver and such congressional notification are included in the contract file.

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AGENCY FOR INTERNATIONAL DEVELOPMENT

48 CFR Parts 701 and 705

RIN 0412–AA88

U.S. Agency for International Development Acquisition Regulation; Administrative Updates: Correction

AGENCY: U.S. Agency for International Development.

ACTION: Direct final rule, Correction.

SUMMARY: The U.S. Agency for International Development (USAID) is issuing this final rule revising the Agency for International Development Acquisition Regulation (AIDAR) to maintain consistency with Federal and agency regulations, remove obsolete material and internal agency procedures, and make editorial amendments to clarify the regulation.