

FOR FURTHER INFORMATION CONTACT: Ms. Sandra G. Haberlin, (703) 602-0289.

SUPPLEMENTARY INFORMATION:

A. Background

On December 27, 1999, Item I of Federal Acquisition Circular 97-15 (64 FR 72415) removed Subpart 23.1, Pollution Control and Clean Air and Water, from the FAR. Subpart 23.1 contained policy pertaining to entities that are ineligible for contract award due to a violation of the Clean Air Act or the Clean Water Act. The FAR text was deemed unnecessary, because contracting officers can use the General Services Administration List of Parties Excluded from Federal Procurement and Nonprocurement Programs to ensure that they do not award contracts to ineligible entities. In accordance with Environmental Protection Agency regulations at 40 CFR 32.215(b), FAR Subpart 23.1 permitted an agency head to except a contract from the prohibition on award to a Clean Air Act or Clean Water Act violator if it was in the paramount interest of the United States to do so. DFARS Subpart 223.1 limited delegation of this exception authority to a level no lower than an official who is appointed by and with the advice of the Senate.

This DFARS rule proposes to—

1. Remove the text from DFARS Subpart 223.1, since FAR Subpart 23.1 no longer exists; and relocate the text to DFARS 209.405(b), since the corresponding text at FAR 9.405(b) addresses matters relating to entities on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs;

2. Retain a limitation on delegation of the exception authority, but lower the permitted level of delegation to a level no lower than a general or flag officer or a member of the Senior Executive Service; and

3. Designate the text already located at DFARS 209.405 as 209.405(a), and amend the text to clarify that the provisions of 10 U.S.C. 2393 regarding a “compelling reason” determination apply only to the conduct of business with entities that are debarred or suspended.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

The proposed rule is not expected 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 pertains only to the

exceptional situations where there is a need to conduct business with entities that are debarred or suspended or, because of a violation of the Clean Air Act or the Clean Water Act, are ineligible for award. Therefore, an initial regulatory flexibility analysis has not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected DFARS subparts also will be considered in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2000-D004.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 209 and 223

Government procurement.

Michele P. Peterson,
Executive Editor, Defense Acquisition Regulations Council.

Therefore, 48 CFR Parts 209 and 223 are proposed to be amended as follows:

1. The authority citation for 48 CFR Parts 209 and 223 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 209—CONTRACTOR QUALIFICATIONS

2. Section 209.405 is revised to read as follows:

209.405 Effect of listing.

(a) Under 10 U.S.C. 2393(b), when a department or agency determines that a compelling reason exists for it to conduct business with a contractor that is debarred or suspended from procurement programs, it must provide written notice of the determination to the General Services Administration, Office of Acquisition Policy. Examples of compelling reasons are—

(1) Only a debarred or suspended contractor can provide the supplies or services;

(2) Urgency requires contracting with a debarred or suspended contractor;

(3) The contractor and a department or agency have an agreement covering the same events that resulted in the debarment or suspension and the agreement includes the department of agency decision not to debar or suspend the contractor; or

(4) The national defense requires continued business dealings with the debarred or suspended contractor.

(b)(i) The Procurement Cause and Treatment Code “H” annotation in the GSA List of Parties Excluded from Federal Procurement and Nonprocurement Programs identifies contractors that are declared ineligible for award of a contract or subcontract because of a violation of the Clean Air Act (42 U.S.C. 7606) or the Clean Water Act (33 U.S.C. 1368).

(ii) Under the authority of 40 CFR 32.215(b), the agency head may grant an exception permitting award to a Code “H” ineligible contractor if it is in the paramount interest of the United States.

(A) The agency head may delegate this exception authority to a level no lower than a general or flag officer or a member of the Senior Executive Service.

(B) The official granting the exception must provide written notice to the Environmental Protection Agency debarring official.

PART 223—ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

Subpart 223.1 [Removed]

3. Subpart 223.1 is removed.

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DEPARTMENT OF DEFENSE

48 CFR Part 215

[DFARS Case 2000-D300]

Defense Federal Acquisition Regulation Supplement; Profit Incentives To Produce Innovative New Technologies

AGENCY: Department of Defense (DoD).

ACTION: Proposed rule with request for comments.

SUMMARY: The Acting Director of Defense Procurement is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 813 of the National Defense Authorization Act for Fiscal Year 2000. Section 813 requires DoD to review its profit guidelines to consider whether appropriate modifications, such as placing increased emphasis on technical risk as a factor for determining appropriate profit margins, would provide an increased profit incentive for contractors to develop and produce complex and innovative new technologies.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before July 21, 2000, to be considered in the formation of the final rule.

ADDRESSES: Interested parties should submit written comments on the proposed rule to: Defense Acquisition Regulations Council, Attn: Ms. Amy Williams, PDUSD(AT&L) DP(DAR), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062. Telefax (703) 602-0350.

E-mail comments submitted via the Internet should be addressed to: dfars@acq.osd.mil

Please cite DFARS Case 2000-D300 in all correspondence related to this proposed rule. E-mail correspondence should cite DFARS Case 2000-D300 in the subject line.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, (703) 602-0288.

SUPPLEMENTARY INFORMATION:

A. Background

This rule proposes amendments to the profit policy in DFARS Subpart 215.4 to implement Section 813 of the National Defense Authorization Act for Fiscal Year 2000 (Public Law 106-65). DoD published an advance notice of proposed rulemaking on February 10, 2000 (65 FR 6574), posted a preliminary draft on potential changes on the Defense Procurement Internet web site, and held a public meeting on February 23, 2000. Representatives from Government and industry participated in the public meeting.

The proposed rule amends the weighted guidelines method of profit computation at DFARS 215.404-71 to combine the management and cost control elements of the performance risk factor; to establish a new "technology incentive" range for technical risk; and, based on comments received at the public meeting, to slightly modify some

of the cost control standards. In addition, the rule amends DFARS 215.404-4(b) to clarify that DoD departments and agencies must use a structured approach for developing a prenegotiation profit or fee objective on any negotiated contract action when cost or pricing data is obtained.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

The proposed rule is not expected 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 most contracts awarded to small entities are below \$500,000, are based on adequate price competition, or are for commercial items, and do not require submission of cost or pricing data. Therefore, an initial regulatory flexibility analysis has not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected DFARS subpart also will be considered in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2000-D300.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 215

Government procurement.

Michele P. Peterson,
Executive Editor, Defense Acquisition Regulations Council.

Therefore, 48 CFR part 215 is proposed to be amended as follows:

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

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 215—CONTRACTING BY NEGOTIATION

2. Section 215.404-4 is amended by revising paragraph (b)(1) introductory text to read as follows:

215.404-4 Profit.

(b) * * * (1) Departments and agencies must use a structured approach for developing a prenegotiation profit or fee objective on any negotiated contract action when cost or pricing data is obtained, except for cost-plus-award-fee contracts (see 215.404-74) or contracts with Federally Funded Research and Development Centers (FFRDCs) (see 215.404-75). There are three structured approaches—

* * * * *

3. Section 215.404-71-2 is revised to read as follows:

215.404-71-2 Performance risk.

(a) *Description.* This profit factor addresses the contractor's degree of risk in fulfilling the contract requirements. The factor consists of two parts:

(1) Technical—the technical uncertainties of performance.

(2) Management/cost control—the degree of management effort necessary—

(i) To ensure that contract requirements are met; and

(ii) To reduce and control costs.

(b) *Determination.* The following extract from the DD Form 1547 is annotated to describe the process.

Item	Contractor risk factors	Assigned weighting	Assigned value	Base (item 18)	Profit objective
21.	Technical	(¹)	(²)	N/A	N/A
22.	Management/Cost Control	(¹)	(²)	N/A	N/A
23.	Reserved				
24.	Performance Risk (Composite)	N/A	(³)	(⁴)(⁵)

¹ Assign a weight (percentage) to each element according to its input to the total performance risk. The total of the two weights equals 100 percent.

² Select a value for each element from the list in paragraph (c) of this subsection using the evaluation criteria in paragraphs (d) and (e) of this subsection.

³ Compute the composite as shown in the following example:

	Assigned weighting (percent)	Assigned value (percent)	Weighted value (percent)
Technical	60	5.0	3.0
Management/Cost Control	40	4.0	1.6

	Assigned weighting (percent)	Assigned value (percent)	Weighted value (percent)
Composite Value	100	4.6

⁴Insert the amount from Block 18 of the DD Form 1547. Block 18 is total contract costs, excluding general and administrative expenses, contractor independent research and development and bid and proposal expenses, and facilities capital cost of money.

⁵Multiply (3) by (4).

(c) *Values: Normal and designated ranges.*

Normal value (percent)	Designated range (percent)
Standard	4 2 to 6
Alternate	6 4 to 8
Technology Incentive	8 6 to 10

(1) *Standard.* The standard designated range should apply to most contracts.

(2) *Alternate.* Contracting officers may use the alternate designated range for research and development and service contractors when these contractors require relatively low capital investment in buildings and equipment when compared to the defense industry overall. If the alternate designated range is used, do not give any profit for facilities capital employed (see 215.404-71-4(c)(3)).

(3) *Technology incentive.* For the technical factor only, contracting officers may use the technology incentive range for acquisitions that include development or production of innovative new technologies.

(d) *Evaluation criteria for technical.* (1) Review the contract requirements and focus on the critical performance elements in the statement of work or specifications. Factors to consider include—

- (i) Technology being applied or developed by the contractor;
- (ii) Technical complexity;
- (iii) Program maturity;
- (iv) Performance specifications and tolerances;
- (v) Delivery schedule; and
- (vi) Extent of a warranty or guarantee.

(2) *Above normal conditions.* (i) The contracting officer may assign a higher than normal value in those cases where there is a substantial technical risk. Indicators are—

- (A) Items are being manufactured using specifications with stringent tolerance limits;
- (B) The efforts require highly skilled personnel or require the use of state-of-the-art machinery;
- (C) The services and analytical efforts are extremely important to the Government and must be performed to exacting standards;
- (D) The contractor's independent development and investment has reduced the Government's risk or cost;

(E) The contractor has accepted an accelerated delivery schedule to meet DoD requirements; or

(F) The contractor has assumed additional risk through warranty provisions.

(ii) Extremely complex, vital efforts to overcome difficult technical obstacles that require personnel with exceptional abilities, experience, and professional credentials may justify a value significantly above normal.

(iii) The following may justify a maximum value—

(A) Development or initial production of a new item, particularly if performance or quality specifications are tight; or

(B) A high degree of development or production concurrency.

(3) *Below normal conditions.* (i) The contracting officer may assign a lower than normal value in those cases where the technical risk is low.

Indicators are—

(A) Acquisition is for off-the-shelf items;

(B) Requirements are relatively simple;

(C) Technology is not complex;

(D) Efforts do not require highly skilled personnel;

(E) Efforts are routine;

(F) Programs are mature; or

(G) Acquisition is a follow-on effort or a repetitive type acquisition.

(ii) The contracting officer may assign a value significantly below normal for—

(A) Routine services;

(B) Production of simple items;

(C) Rote entry or routine integration of Government-furnished information; or

(D) Simple operations with Government-furnished property.

(4) *Technology incentive range.*

(i) The contracting officer may assign values within the technology incentive range when contracting performance includes the introduction of new, significant technological innovation. Use the technology incentive range only for the most innovative contract efforts. Innovation may be in the form of—

(A) Development or application of new technology that fundamentally changes the characteristics of an existing product or system and that results in increased technical performance, improved reliability, or reduced costs; or

(B) New products or systems that contain significant technological advances over the products or systems they are replacing.

(ii) When selecting a value within the technology incentive range, the contracting officer should consider the relative value of the proposed innovation to the acquisition as a whole. When the innovation represents a minor benefit, the contracting officer should consider using values less than the norm. For innovative efforts that will have a major positive impact on the product or program, the contracting officer may use values above the norm.

(e) *Evaluation criteria for management/cost control.*

(1) The contracting officer should evaluate—

(i) The contractor's management and internal control systems using contracting office information and reviews made by field contract administration offices or other DoD field offices;

(ii) The management involvement expected on the prospective contract action;

(iii) The degree of cost mix as an indication of the types of resources applied and value added by the contractor;

(iv) The contractor's support of Federal socioeconomic programs;

(v) The expected reliability of the contractor's cost estimates (including the contractor's cost estimating system);

(vi) The contractor's cost reduction initiatives (e.g., competition advocacy programs, technical insertion programs, obsolete parts control programs, dual sourcing, square parts pricing reform, value engineering);

(vii) The adequacy of the contractor's management approach to controlling cost and schedule; and

(viii) Any other factors that affect the contractor's ability to meet the cost targets (e.g., foreign currency exchange rates and inflation rates).

(2) *Above normal conditions.* (i) The contracting officer may assign a higher than normal value when the management effort is intense. Indicators of this are—

(A) The contractor's value added is both considerable and reasonably difficult;

(B) The effort involves a high degree of integration or coordination;

(C) The contractor has a substantial record of active participation in Federal socioeconomic programs;

(D) The contractor provides fully documented and reliable cost estimates;

(E) The contractor has an aggressive cost reduction program that has demonstrable benefits;

(F) The contractor uses a high degree of subcontract competition (*e.g.*, aggressive dual sourcing);

(G) The contractor has a proven record of cost tracking and control; or

(H) The contractor aggressively seeks process improvements to reduce costs.

(ii) The contracting officer may justify a maximum value when the effort—

(A) Requires large scale integration of the most complex nature;

(B) Involves major international activities with significant management coordination (*e.g.*, offsets with foreign vendors); or

(C) Has critically important milestones.

(3) *Below normal conditions.* (i) The contracting officer may assign a lower than normal value when the management effort is minimal. Indicators of this are—

(A) The program is mature and many end item deliveries have been made;

(B) The contractor adds minimum value to an item;

(C) The efforts are routine and require minimal supervision;

(D) The contractor provides poor quality, untimely proposals;

(E) The contractor fails to provide an adequate analysis of subcontractor costs;

(F) The contractor does not cooperate in the evaluation and negotiation of the proposal;

(G) The contractor's cost estimating system is marginal;

(H) The contractor has made minimal effort to initiate cost reduction programs;

(I) The contractor's cost proposal is inadequate; or

(J) The contractor has a record of cost overruns or another indication of unreliable cost estimates and lack of cost control.

(ii) The following may justify a value significantly below normal—

(A) Reviews performed by the field contract administration offices disclose unsatisfactory management and internal control systems (*e.g.*, quality assurance, property control, safety, security); or

(B) The effort requires an unusually low degree of management involvement.

4. Section 215.404-702 is amended by adding paragraph (b)(1)(iii) to read as follows:

215.404-72 Modified weighted guidelines method for nonprofit organizations other than FFRDCs.

* * * * *

(b) * * *

(1) * * *

(iii) Do not assign a value from the technology incentive designated range.

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NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1803 and 1852

NASA Inspector General Hotline Posters

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: This is a proposed rule to amend the NASA FAR Supplement (NFS) to require NASA contractors to display "hotline posters" on contracts exceeding \$5,000,000 and performed at contractor facilities in the United States.

DATES: Comments should be submitted on or before July 21, 2000.

ADDRESSES: Interested parties should submit written comments to Paul Brundage, NASA Headquarters Office of Procurement, Contract Management Division (Code HK), Washington, DC 20456-0001. Comments may also be submitted by email to pbrundage@hq.nasa.gov.

FOR FURTHER INFORMATION CONTACT: Paul Brundage, (202) 358-0481.

SUPPLEMENTARY INFORMATION:

A. Background

NASA's Office of Inspector General (IG) has requested that NASA contractors be required to display "hotline posters" in contractor facilities performing work on some NASA contracts. Foreign contracts and contracts less than \$5,000,000 would be exempt. This proposed rule would require contractors to obtain from the NASA IG "hotline posters" and to post them in facilities where and when work is performed on an applicable NASA contract. By waiver from Part 12, NASA might also impose this requirement on a case-by-case basis in contracts for commercial items when unusual circumstances warrant. An example of such circumstances might include procurements involving extraordinary concerns about the safety of human life.

B. Regulatory Flexibility Act

This proposed rule is not expected to have a significant economic impact on a substantial number of small business entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) because it only affects small business entities with contracts exceeding \$5,000,000 and the NASA IG will provide the posters at no direct cost to contractors.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this proposed rule does not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

Lists of Subjects in 48 CFR Parts 1803 and 1852

Government procurement.

Tom Luedtke,

Associate Administrator for Procurement.

Accordingly, 48 CFR Parts 1803 and 1852 are proposed to be amended as follows:

1. The authority citation for 48 CFR Parts 1803 and 1852 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1).

PART 1803—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

2. Add Subpart 1803.70 to read as follows:

Subpart 1803.70—IG Hotline Posters

1803.7000 Policy.

1803.7001 Contract clause.

Subpart 1803.70—IG Hotline Posters

1803.7000 Policy.

NASA requires contractors to display NASA hotline posters prepared by the NASA Office of Inspector General on those contracts specified in 1803.7001, so that employees of the contractor having knowledge of waste, fraud, or abuse, can readily identify a means to contact NASA's IG.

1803.7001 Contract clause.

Contracting officers must insert the provision at 1852.203-70, Display of Inspector General Hotline Posters, in solicitations and contracts expected to exceed \$5,000,000 and performed at contractor facilities in the United States.