

determination as specified in paragraph (a)(ii)(B)(2)(i) of this section.

(2) Pursuant to 10 U.S.C.

2306a(b)(4)(A), the contracting officer may presume that a prior commercial item determination made by a military department, a defense agency, or another component of DoD shall serve as a determination for subsequent procurements of such item. In accordance with 10 U.S.C. 2306a(b)(4) and 10 U.S.C. 2380(c), if the contracting officer questions a prior determination to use FAR part 12 procedures and instead chooses to proceed with a procurement of an item previously determined to be a commercial item using procedures other than FAR part 12 procedures, the contracting officer shall request a review by the head of the contracting activity that will conduct the procurement. Not later than 30 days after receiving a request for review, the head of the contracting activity shall—

(i) Confirm that the prior use of FAR part 12 procedures was appropriate and still applicable; or

(ii) Issue a determination that the prior use of FAR part 12 procedures was improper or that it is no longer appropriate to acquire the item using FAR part 12 procedures, with a written explanation of the basis for the determination.

(iii) *Commercial item determination.* Unless the procedures in paragraph (a)(ii) of this section are applicable, when using FAR part 12 procedures for acquisitions of commercial items pursuant to 212.102(a)(i)(A) that exceed the simplified acquisition threshold, the contracting officer shall—

(A) Determine in writing that the acquisition meets the commercial product or commercial service definition in FAR 2.101;

(B) Include the written determination in the contract file;

(C) Obtain approval at one level above the contracting officer when a commercial item determination relies on paragraph (1)(ii), (3), or (4) of the “commercial product” definition at FAR 2.101 or paragraph (2) of the “commercial service” definition at FAR 2.101; and

(D) Follow the procedures and guidance at PGI 212.102(a)(iii) regarding file documentation and commercial item determinations.

(iv) *Nontraditional defense contractors.* In accordance with 10 U.S.C. 2380a, contracting officers—

(A) Except as provided in paragraph (a)(iv)(B) of this section, may treat supplies and services provided by nontraditional defense contractors as commercial items. This permissive authority is intended to enhance

defense innovation and investment, enable DoD to acquire items that otherwise might not have been available, and create incentives for nontraditional defense contractors to do business with DoD. It is not intended to recategorize current noncommercial items; however, when appropriate, contracting officers may consider applying commercial item procedures to the procurement of supplies and services from business segments that meet the definition of “nontraditional defense contractor” even though they have been established under traditional defense contractors. The decision to apply commercial item procedures to the procurement of supplies and services from nontraditional defense contractors does not require a commercial item determination and does not mean the item is commercial;

(B) Shall treat services provided by a business unit that is a nontraditional defense contractor as commercial items, to the extent that such services use the same pool of employees as used for commercial customers and are priced using methodology similar to methodology used for commercial pricing; and

(C) Shall document the file when treating supplies or services from a nontraditional defense contractor as commercial items in accordance with paragraph (a)(iv)(A) or (B) of this section.

(v) *Commercial item guidebook.* For a link to the commercial item guidebook, see PGI 212.102(a)(v).

#### **Subpart 212.70 [Removed and Reserved]**

■ 3. Remove and reserve subpart 212.70, consisting of sections 212.7000 and 212.7001.

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## **DEPARTMENT OF DEFENSE**

### **Defense Acquisition Regulations System**

#### **48 CFR Parts 217, 234, and 235**

[Docket DARS–2021–0020]

RIN 0750–AL49

### **Defense Federal Acquisition Regulation Supplement: Contract Authority for Development and Demonstration of Prototypes (DFARS Case 2021–D025)**

**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 2021 that amends the types of line items and contract options that may be included, subject to limitations, in certain contracts initially awarded pursuant to competitive solicitations.

**DATES:** Effective April 28, 2022.

**FOR FURTHER INFORMATION CONTACT:** Ms. Barbara J. Salcido, telephone 571–372–6102.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

DoD published a proposed rule in the *Federal Register* at 86 FR 59951 on October 29, 2021, to revise the DFARS to implement paragraph (a)(2) of section 831 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116–283). Section 831(a)(2) amends 10 U.S.C. 2302e(a) to revise the type of contract line items or options that may be included, without additional competition, in contracts initially awarded from the competitive selection of a proposal resulting from a broad agency announcement.

One respondent submitted a public comment in response to the proposed rule.

##### **II. Discussion and Analysis**

DoD reviewed the public comment in the development of the final rule. The public comment is outside the scope of this rule; therefore, there are no changes made to the final rule.

##### **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 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 at or below the simplified acquisition threshold, for commercial products including COTS items, or for commercial services.

##### **IV. Expected Impact of the Rule**

The final rule impacts DoD acquisition planning decisions for contract awards that will result from the competitive selection of a proposal in response to a broad agency announcement for which DoD intends to include a contract line item or option

for the development and demonstration of technology developed under the contract. The final rule broadens the scope of effort for which these contract line items and contract options can be awarded and the type of funding that may be used to fund these line items or options. This final rule also helps streamline the process for moving technologies developed under such contracts from science and technology into production.

#### 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, dated September 30, 1993.

#### 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 under 5 U.S.C. 804.

#### VII. Regulatory Flexibility Act

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

This final rule implements paragraph (a)(2) of section 831 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116–283). The objective of this rule is to revise the type of contract line items or options that may be included, without additional competition, in contracts initially awarded from the competitive selection of a proposal resulting from a broad agency announcement.

When awarding such a contract, contracting officers may now include a contract line item or contract option for the “development and demonstration” of technology developed under the contract. This revision provides a broader scope of effort and funding for which these contract line items and contract options can be awarded, which in turn helps streamline the process for moving technologies developed under such contracts from science and technology into production.

There were no significant issues raised by public comments in response to the initial regulatory flexibility analysis.

Based on data from the Federal Procurement Data System for FY 2018 through FY 2020, on average, DoD annually awards 300 contracts to 200 unique small entities using the competitive selection of proposals resulting from a broad agency announcement.

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

There are no significant alternatives to this rule that would accomplish the objective of the statute.

#### VIII. 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 Parts 217, 234, and 235

Government procurement.

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

Therefore, 48 CFR parts 217, 234, and 235 are amended as follows:

■ 1. The authority citation for 48 CFR parts 217, 234, and 235 continues to read as follows:

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

#### PART 217—SPECIAL CONTRACTING METHODS

■ 2. Amend section 217.202 by revising paragraph (2) to read as follows:

##### 217.202 Use of options.

\* \* \* \* \*

(2) For a contract that is initially awarded from the competitive selection of a proposal resulting from a broad agency announcement, see 234.005–1 for the use of contract options for the development and demonstration or

initial production of technology developed under the contract or the delivery of initial or additional items.

#### PART 234—MAJOR SYSTEM ACQUISITION

■ 3. Amend section 234.005–1 by revising the introductory text and paragraph (1) to read as follows:

##### 234.005–1 Competition.

A contract that is initially awarded from the competitive selection of a proposal resulting from a broad agency announcement (see 235.016) may contain a contract line item or contract option using funds not limited to those identified in 235.016 for the development and demonstration or initial production of technology developed under the contract, or the delivery of initial or additional items if the item or a prototype thereof is created as the result of work performed under the contract, only when it adheres to the following limitations:

(1) The contract line item or contract option shall be limited to the delivery of the minimal amount of initial or additional items or prototypes that will allow for timely competitive solicitation and award of a follow-on development or production contract for those items.

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#### PART 235—RESEARCH AND DEVELOPMENT CONTRACTING

■ 4. Amend section 235.006–71 by revising paragraph (b) to read as follows:

##### 235.006–71 Competition.

\* \* \* \* \*

(b) For a contract that is initially awarded from the competitive selection of a proposal resulting from a broad agency announcement, see 234.005–1 for the use of contract line items or contract options for the development and demonstration or initial production of technology developed under the contract or the delivery of initial or additional items.

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