

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 212, 219, and 252**

RIN 0750-A142

Defense Federal Acquisition Regulation Supplement: Advancing Small Business Growth (DFARS Case 2014-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 clarify that entering into a contract award may cause a small business to eventually exceed the applicable small business size standard.

DATES: Effective May 26, 2015.

FOR FURTHER INFORMATION CONTACT: Ms. Lee Renna, telephone 571-372-6095.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD published a proposed rule in the *Federal Register* at 79 FR 65917 on November 6, 2014, to implement policy to ensure that a small business contractor is made aware that entering into a covered contract conveys its acknowledgement that doing so may cause it to eventually exceed the small business size standard of the North American Industry Classification System (NAICS) code identified in the solicitation and contract. This clarification is required by section 1611 of the National Defense Authorization Act for Fiscal Year 2014, Public Law 113-66, (10 U.S.C. 2419).

There were no public comments submitted in response to the proposed rule.

II. Discussion and Analysis

Minor editorial changes have been made from the proposed rule as follows: (1) In the heading at 219.303, the acronym “(NAICS)” was removed; (2) At DFARS 219.309, paragraph (a) was renumbered as paragraph (1), and a reference was changed from “\$70,000,000” to read “\$70 million”; and (3) DFARS 252.219-7000, paragraph (b), was revised slightly in the first sentence to reflect more standardized provision language and to spell out “NAICS” to reflect the North American Industry Classification System.

III. 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.

IV. Regulatory Flexibility Act

DoD has certified that this rule will not 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.* This conclusion is based on the following:

This rule does not create or alleviate any financial burden on small businesses. The purpose of the rule is only to advise small businesses that entering into a DoD contract may eventually cause such businesses to exceed the small business size standard associated with the applicable NAICS code, and to encourage these businesses to develop the competencies typically desired of other than small businesses.

V. 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 212, 219, and 252

Government procurement.

Amy G. Williams,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 219, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 212 and 252 continues to read as follows:

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

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Amend section 212.301 by adding a new paragraph (f)(vi)(C) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f) * * *

(vi) * * *

(C) Use the provision at 252.219-7000, Advancing Small Business Growth, as prescribed in 219.309(1), to comply with 10 U.S.C. 2419.

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PART 219—SMALL BUSINESS PROGRAMS

■ 3. The authority citation for 48 CFR part 219 is revised to read as follows:

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

■ 4. Amend section 219.303 by revising the section heading to read as follows:

219.303 Determining North American Industry Classification System codes and size standards.

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■ 5. Add section 219.309 to subpart 219.3 to read as follows:

219.309 Solicitation provisions and contract clauses.

(1) Use the provision at 252.219-7000, Advancing Small Business Growth, in solicitations, including solicitations using FAR part 12 procedures for acquisition of commercial items, when the estimated annual value of the contract is expected to exceed—

(i) The small business size standard, if expressed in dollars, for the North American Industry Classification System (NAICS) code assigned by the contracting officer; or

(ii) \$70 million, if the small business size standard is expressed as number of employees for the NAICS code assigned by the contracting officer.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. Add section 252.219-7000 to read as follows:

252.219-7000 Advancing Small Business Growth.

As prescribed in 219.309(1), use the following provision:

Advancing Small Business Growth (May 2015)

(a) This provision implements 10 U.S.C. 2419.

(b) The Offeror acknowledges by submission of its offer that by acceptance of the contract resulting from this solicitation, the Offeror may exceed the applicable small business size standard of the North American Industry Classification System (NAICS) code assigned to the contract and would no longer qualify as a small business concern for that NAICS code. (Small business size standards matched to industry NAICS codes are published by the Small Business Administration and are available at <http://www.sba.gov/content/table-small-business-size-standards>.) The Offeror is therefore encouraged to develop the capabilities and characteristics typically desired in contractors that are competitive as other-than-small contractors in this industry.

(c) For procurement technical assistance, the Offeror may contact the nearest Procurement Technical Assistance Center (PTAC). PTAC locations are available at www.dla.mil/SmallBusiness/Pages/ptac.aspx.

(End of provision)

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 213, and 252

RIN 0750-A140

Defense Federal Acquisition Regulation Supplement: Past Performance Information Retrieval System—Statistical Reporting (PIRS—SR) (DFARS Case 2014-D015)

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 require contracting officers to consider information in the Statistical Reporting module of the Past Performance Information Retrieval System when evaluating past performance of offerors under competitive solicitations for supplies using simplified acquisition procedures.

DATES: Effective May 26, 2015.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer Hawes, telephone 571-372-6115.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the *Federal Register* at 80 FR 4848 on January 29, 2015, to revise the DFARS to add a new provision at DFARS

252.213-7000, Notice to Prospective Suppliers on the Use of Past Performance Information Retrieval System—Statistical Reporting in Past Performance Evaluations, for use in competitive solicitations for supplies using FAR part 13 simplified acquisition procedures, including those for acquisitions valued at less than or equal to \$1 million under FAR 13.5. 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. A discussion of the comment and the changes made to the rule is provided below:

A. Analysis of Public Comment

Comment: A respondent commented that streamlining a formal and systematic process will improve the opportunities for small businesses and reduce bias in the award of Government contracts.

Response: No changes were made as a result of this comment.

B. Other Changes

The final rule includes a clarification in the prescription at DFARS 213.106-2-70 that the provision is applicable for use in competitive solicitations using FAR part 12 procedures for the acquisition of commercial items. A minor editorial change is also made at 212.301(f)(v) to address the reference to the DFARS provision 252.213-7000, Notice to Prospective Suppliers on Use of Past Performance Information Retrieval System—Statistical Reporting in Past Performance Evaluations, in the same manner as the other content of this section.

III. 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.

IV. 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 rule amends the Defense Federal Acquisition Regulation Supplement (DFARS) to require contracting officers to consider information available in Past Performance Information Retrieval System—Statistical Reporting (PIRS—SR) when evaluating the past performance of offerors under competitive solicitations for supplies using FAR part 13 simplified acquisition procedures (including acquisitions under the authority of FAR subpart 13.5 valued at less than or equal to \$1 million).

This rule will help fill the gap between the higher DoD threshold for the collection and evaluation of past performance information and the thresholds at FAR 15.304(c)(3)(i). PIRS—SR collects quantifiable delivery and quality data from existing systems and uses that data to classify each supplier's performance by Federal supply class and product service code. Contracting officers will use this objective data to help make better-informed best value award decisions for supply contracts valued at less than or equal to \$1 million.

No comments were received from the public regarding the initial regulatory flexibility analysis.

This rule will apply to small businesses submitting offers on competitive solicitations for supplies issued using simplified acquisition procedures valued at less than \$1 million. According to a report generated in the Federal Procurement Data System, in fiscal year 2013, DoD made 15,258 new competitive awards for commercial supplies valued at less than or equal to \$1 million to 4,018 unique small businesses.

The rule creates no new reporting, recordkeeping, or other compliance requirements. There are no known significant alternatives to the rule. The impact of this rule on small business is not expected to be significant.

V. 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).