



(Billing Code 5001-06)

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 216 and 236**

**[Docket DARS-2016-0006]**

**RIN 0750-AI87**

**Defense Federal Acquisition Regulation Supplement: Prohibition on Use of any Cost-Plus System of Contracting for Military Construction and Military Family Housing Projects (DFARS Case 2015-D040)**

**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 2012 that amended title 10 of the United States Code by prohibiting any form of cost-plus contracting for military construction projects or military family housing projects.

**DATES:** Comments on the proposed rule should be submitted in writing on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2015-D040, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2015-D040" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2015-D040." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2015-D040" on your attached document.

- o Email: [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil). Include DFARS Case 2015-D040 in the subject line of the message.

- o Fax: 571-372-6094.

- o Mail: Defense Acquisition Regulations System, Attn: Mr. Christopher Stiller, OUSD(AT&L)DPAP/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:** Mr. Christopher Stiller, telephone 571-372-6176.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

DoD is proposing to revise the DFARS to implement section 2801 of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112-81). Section 2801 entitled "Prohibition on Use of any Cost-Plus System of Contracting for Military Construction and Military Family Housing Projects" amends section 2306 of title 10, United States Code (U.S.C.), by prohibiting any form of cost-plus contracting for military construction projects or military family housing projects.

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

The rule proposes to amend DFARS 216.301-3, Limitations, to prohibit the use of any form of cost-plus contract type for contracts in connection with a military construction project or military family housing project. The placement of the text aligns with general limitations provided at FAR 16.301-3 on cost-reimbursement contracts. Because 10 U.S.C. 2306(c) prohibits several distinct kinds of cost-plus type contracts, the prohibition does not align with any specific cost-plus type as implemented at FAR 16.301-3.

The prohibition at 10 U.S.C. 2306(c) is broader in scope than the prohibition currently implemented at DFARS 216.306; therefore, the language at DFARS 216.306 is revised to add a

cross reference to the proposed revision at DFARS 216.301-3. The proposed rule adds a new section at DFARS 236.215 to align with FAR 36.215 and provide a cross reference to DFARS 216.301-3. Finally, a cross reference is also added at DFARS 236.271 to 216.301-3.

### **III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items**

This case does not add 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. Regulatory Flexibility Act**

DoD does not expect this 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. However, an initial regulatory flexibility analysis has been performed and is summarized as follows.

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 2801 of the National Defense Authorization Act for Fiscal Year 2012, which amends 10 U.S.C. 2306, to prohibit any form of cost-plus contracting for military construction projects or military family housing projects.

There is an existing prohibition at DFARS 216.306 on using certain cost-plus-fixed-fee contracts funded by a military construction appropriations acts. This proposed rule expands this prohibition to all cost-plus contract types in connection with a military construction project or military family housing project.

There is minimal impact anticipated on small entities as a result of the proposed rule. Based on data available in the Federal Procurement Data System, there were only 19 cost-reimbursement type construction acquisitions awarded in fiscal

year 2015, two of which were awarded to small businesses. There is already a general prohibition at DFARS 216.306 on certain cost-plus-fixed-fee contracts funded by a military construction appropriations act. The proposed rule expands this prohibition to all cost-plus contract types in connection with a military construction project or a military family housing project.

There are no new projected reporting, recordkeeping, and other compliance requirements of the rule.

The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known significant alternatives to this rule.

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 2015-D040), in correspondence.

## **VI. 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 216 and 236

Government procurement.

**Jennifer L. Hawes,**

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 216 and 236 are proposed to be amended as follows:

1. The authority citation for 48 CFR parts 216 and 236 continues to read as follows:

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

2. Add section 216.301-3 to read as follows:

### **PART 216—TYPES OF CONTRACTS**

#### **216.301-3 Limitations.**

Contracts in connection with a military construction project or a military family housing project shall not use any form of a cost-plus contract type (10 U.S.C. 2306(c)). This applies notwithstanding a declaration of war or the declaration by the President of a national emergency under section 201 of the National Emergencies Act (50 U.S.C. 1621) that includes the use of the armed forces.

3. Amend section 216.306 by adding introductory text to paragraph (c) to read as follows:

#### **216.306 Cost-plus-fixed-fee contracts.**

(c) Limitations. For contracts in connection with a military construction project or military family housing project, see the prohibition at 216.301-3.

\* \* \* \* \*

**PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS**

4. Add section 236.215 to read as follows:

**236.215 Special procedures for cost-reimbursement contracts for construction.**

See 216.301-3 for the prohibition on the use of any form of a cost-plus contract in connection with a military construction project or a military family housing project.

5. Revise section 236.271 to read as follows:

**236.271 Cost-plus-fixed-fee contracts.**

Annual military construction appropriations acts restrict the use of cost-plus-fixed-fee contracts (see 216.306(c)). See also 216.301-3 regarding the prohibition against the use of any form of a cost-plus contract in connection with a military construction project or military family housing project.

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