



(Billing Code 5001-06)

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 215 and 252**

**[Docket DARS-2016-0004]**

**RIN 0750-AI84**

**Defense Federal Acquisition Regulation Supplement: Independent Research and Development Expenses (DFARS Case 2016-D017)**

**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 ensure that substantial future independent research and development expenses, as a means to reduce evaluated bid prices in competitive source selections, are evaluated in a uniform way during competitive source selections.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below 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 2016-D017, using any of the following methods:

- o Federal eRulemaking Portal: <http://www.regulations.gov>.

Search for "DFARS Case 2016-D017." Select "Comment Now" and follow the instructions provided to submit a comment. Please include "DFARS Case 2016-D017" on any attached documents.

- o Email: osd.dfars@mail.mil. Include DFARS Case 2016-D017 in the subject line of the message.

- o Fax: 571-372-6094.

- o Mail: Defense Acquisition Regulations System, Attn: Mr. Mark Gomersall, 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. Mark Gomersall, telephone 571-372-6099.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

As expressed in the "Implementation Directive for Better Buying Power 3.0 - Achieving Dominant Capabilities through Technical Excellence and Innovation," dated April 9, 2015, the Under Secretary of Defense for Acquisition, Technology, and Logistics noted a concern when "promised future IRAD

[independent research and development] expenditures are used to substantially reduce the bid price on competitive procurements. In these cases, development price proposals are reduced by using a separate source of government funding (allowable IRAD overhead expenses spread across the total business) to gain a price advantage in a specific competitive bid. This is not the intended purpose of making IRAD an allowable cost.”

DoD published an advanced notice of proposed rulemaking (ANPR) in the Federal Register at 81 FR 6488 on February 8, 2016, to seek information to assist in the development of a revision to the DFARS to ensure that substantial future independent research and development (IR&D) expenses, used as a means to reduce evaluated bid prices, are evaluated in a uniform way during competitive source selections. A public meeting was held on March 3, 2016, to hear the views of interested parties.

## **II. Discussion and Analysis**

DoD is proposing to amend the DFARS to require contracting officers to adjust the total evaluated price of major defense acquisition programs and major automated information systems proposals, for evaluation purposes only, to include the amount by which the offerors propose that future independent research and development investments reduce the price of the proposals.

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

This rule proposes to create a new clause: DFARS 252.215-70XX, Notification of Inclusion of Evaluation Criteria for Reliance Upon Future Government-Reimbursed Independent Research and Development Investments. DoD plans not to apply this clause to contracts at or below the simplified acquisition threshold or to commercial items, including commercially available off-the-shelf items.

### **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 proposed 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 prepared and is summarized as follows:

DoD is proposing to amend the DFARS to require contracting officers to adjust the total evaluated price of major defense acquisition programs and major automated information systems proposals, for evaluation purposes only, to include the amount by which the offerors propose that future independent research and development investments reduce the price of the proposals.

The objective of this rule is to ensure that substantial future independent research and development expenses, as a means to reduce evaluated bid prices in competitive source selections, are evaluated in a uniform way during competitive source selections.

The rule has limited application and will apply only to major defense acquisition programs (as defined in 10 U.S.C. 2430) and major automated information systems acquisitions (as defined in 10 U.S.C. 2445a). This rule should not impact small entities, since major defense acquisition programs and major automated information systems acquisition policies normally apply to large contractors, because the cost, magnitude, and production

requirements of such programs are generally beyond the capability or capacity of small entities as prime contractors.

There is no change to reporting and recordkeeping as a result of this rule. The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known significant alternative approaches to the rule that would meet the requirements.

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 2016-D017), 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 215 and 252**

Government procurement.

**Jennifer L. Hawes,**

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 215 and 252 are proposed to be amended as follows:

1. The authority citation for 48 CFR parts 215 and 252 continues to read as follows:

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

**PART 215—CONTRACTING BY NEGOTIATION**

2. In section 215.305, add paragraph (a) (1) to read as follows:

**215.305 Proposal evaluation.**

(a) (1) Cost or price evaluation. For major defense acquisition programs and major automated information systems in a development phase, when an offeror proposes a cost or price that is reduced due to reliance upon future Government-reimbursed independent research and development projects, the contracting officer shall, for evaluation purposes only, adjust the total evaluated cost or price of the proposal to include the amount by which such investments reduce the price of the proposal.

\* \* \* \* \*

3. Amend section 215.408 by—

a. Redesignating paragraphs (2) through (5) as paragraphs (3) through (6), respectively; and

b. Adding a new paragraph (2) to read as follows:

**215.408 Solicitation provisions and contract clauses.**

\* \* \* \* \*

(2) Use the provision at 252.215-70XX, Notification of Inclusion of Evaluation Criteria for Reliance Upon Future Government-Reimbursed Independent Research and Development Investments, in all competitive solicitations for major defense acquisition programs (as defined in 10 U.S.C. 2430) and major automated information systems acquisitions (as defined in 10 U.S.C. 2445a) in a development phase.

\* \* \* \* \*

**PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

4. Add section 252.215-70XX to read as follows:

**252.215-70XX Notification of Inclusion of Evaluation Criteria for Reliance Upon Future Government-Reimbursed Independent Research and Development Investments.**

As prescribed in 215.408(2), use the following provision:

**NOTIFICATION OF INCLUSION OF EVALUATION CRITERIA FOR RELIANCE UPON FUTURE GOVERNMENT-REIMBURSED INDEPENDENT RESEARCH AND DEVELOPMENT INVESTMENTS (DATE)**

(a) This solicitation includes price evaluation criteria that consider the Offeror's intended use of future Government-reimbursed independent research and development (IR&D) projects if the Offeror proposes a cost or price that is reduced due to reliance upon expected future Government-reimbursed IR&D projects.

(b) If the Offeror, in the performance of any contract resulting from this solicitation, intends to use IR&D to meet the contract requirements, the Offeror's proposal shall include documentation in its price proposal to support this proposed approach.

(c) For evaluation purposes only, the Contracting Officer will adjust the Offeror's total evaluated cost or price to include the amount that such future IR&D investments reduce the price of the proposal.

(End of provision)

[FR Doc. 2016-26369 Filed: 11/3/2016 8:45 am; Publication Date: 11/4/2016]