



5000-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 211

[Docket DARS-2018-0021]

RIN 0750-AJ23

Defense Federal Acquisition Regulation Supplement: Use of Commercial or Non-Government Standards (DFARS Case 2017-D014)

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) implement a section of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328), which requires DoD to revise the DFARS to encourage contractors to propose commercial or non-Government standards and industry-wide practices that meet the intent of military specifications and standards.

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 2017-D014, using any of the following methods:

- o Federal eRulemaking Portal: <http://www.regulations.gov>. Search for "DFARS Case 2017-D014." Select "Comment Now" and follow the instructions provided to submit a comment. Please include "DFARS Case 2017-D014" on any attached documents.
- o Email: osd.dfars@mail.mil. Include DFARS Case 2017-D014 in the subject line of the message.
- o Fax: 571-372-6094.
- o Mail: Defense Acquisition Regulations System, Attn: Mr. Mark Gomersall, OUSD(A&S)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, approximately 2 to 3 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

DoD is proposing to amend the DFARS to implement section 875(c) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328). Section 875(c) requires DoD to revise the DFARS to encourage contractors to

propose commercial or non-Government standards and industry-wide practices that meet the intent of military specifications and standards.

II. Discussion and Analysis

DoD is proposing to amend DFARS 211.107(b) to require the use of Federal Acquisition Regulation (FAR) provision 52.211-7, *Alternatives to Government-Unique Standards*, in DoD solicitations and contracts that include military or Government-unique specifications and standards; and, in so doing, encourage and permit offerors to propose alternatives to Government-unique standards using an existing FAR provision.

The use of FAR provision 52.211-7 is optional for agencies that report their use of voluntary consensus standards to the National Institute of Standards and Technology using the categorical reporting method. However, Office of Management and Budget (OMB) Circular A-119, *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*, requires, at paragraph 12.a.(4), that agencies using the categorical method of reporting method must "Enable potential offerors to suggest voluntary consensus standards that can replace Government-unique standards." Use of this existing FAR provision will enable DoD to meet the intent of section 875(c).

In response to OMB Circular A-119, the National Institute of Standards and Technology collects reports from Federal Agencies on their use of Government-unique standards, which is reported annually to Congress. DoD statistics used for that report do not differentiate among the many different types of Government-unique Standards. The overriding conceptual approach is to reduce Government reliance on standards produced by Government entities for their own use.

As a matter of existing policy, DoD discourages the use of military specifications and standards in solicitations. As stated in DoD Directive 5000.01: "When using performance-based strategies, contract requirements shall be stated in performance terms, limiting the use of military specifications and standards to Government-unique requirements only." However, to meet the intent of section 875(c) of the NDAA for FY 2017, DoD is proposing to amend DFARS 211.107(b) to require the use of FAR provision 52.211-7, Alternatives to Government-Unique Standards, in DoD solicitations and contracts that include military or Government-unique specifications and standards to encourage and permit offerors to propose alternatives to Government-unique standards.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and Contracts for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

The purpose of this rule is to implement section 875(c) of the NDAA for FY 2017, which requires DoD to revise the DFARS to encourage contractors to propose commercial or non-Government standards and industry-wide practices that meet the intent of military specifications and standards. DoD does not intend to apply the requirements of section 875(c) to solicitations for contracts valued at or below the SAT or to contracts for commercial items, including COTS items, because such contracts do not generally include or require use of military or Government-unique standards or specifications.

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. Executive Order 13771

This rule is not an E.O. 13771, Reducing Regulation and Controlling Regulatory Costs, regulatory action, because this rule is not significant under E.O. 12866.

VI. 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, at 5 U.S.C. 601 et. seq. However, an initial regulatory flexibility analysis has been prepared and is summarized as follows:

This proposed rule implements section 875(c) of the National Defense Authorization Act (NDAA) for FY 2017 (Public Law 114-328).

The objective of this rule is to clarify the use of FAR 52.211-7, Alternatives to Government-Unique Standards, in DoD solicitations and contracts that include military or Government-unique specifications and standards. This will encourage and permit Offerors to propose alternatives to Government-unique standards by using an existing FAR provision. The legal basis for this rule is section 875(c) of the NDAA for FY 2017 (Public Law 114-328).

The rule will apply to both large and small entities to the extent that such entities receive Government solicitations containing Government-unique standards and FAR provision

52.211-7, Alternatives to Government-unique Standards. Such entities may already be familiar with this provision as it has been in place since its publication in 1998 (63 FR 68344, December 10, 1998).

As a matter of policy, DoD discourages the use of military specifications and standards in solicitations. As stated in DoD Directive 5000.01: "When using performance-based strategies, contract requirements shall be stated in performance terms, limiting the use of military specifications and standards to Government-unique requirements only."

In addition, between 1994 and 2000, over 29,000 military specifications and standards were cancelled. Of those, 6,100 were canceled without replacement, and 3,500 were superseded by nongovernment standards. Moreover, DoD participates in over 120 private sector standards-developing organizations such as ASTM, ANSI, ISO and IEEE. Voluntary consensus standards adopted by DoD are also listed in the Defense Logistics Agency ASSIST database to identify the source for obtaining the adopted standards.

Based on Federal Procurement Data System data for product service code (PSC) 5342 (hardware, weapon systems), this rule could potentially apply to approximately 757 unique entities, of which 585 are small businesses. This is based on the number of DoD contract awards in fiscal year 2016 for PSC 5342. It cannot

be discerned how many of the contract awards required the use of a military specification or standard. Further, given the DoD policy of discouraging the use of military specifications and standards in solicitations, this rule would likely impact no more than 40 offerors or potential contractors (the approximate number of DoD contractors involved in major weapons systems, which are more likely to require Government specifications).

Accordingly, DoD estimates that this rule will have limited application. However, given the fact that some small number of DoD solicitations may include a military specification or standard—generally limited to those involving a major weapons system, this rule would provide a permissive means for offerors to propose reducing regulatory burden on a given solicitation.

This rule does not contain reporting and recordkeeping requirements, since it merely revises guidance to contracting officers for use of FAR clause 52.211-7, Alternatives to Government-unique Standards.

As an alternative to this proposed rule, DoD could create a stand-alone DoD provision. Such a provision, however, would largely duplicate, overlap, and potentially conflict with the requirements of the existing provision at FAR 52.211-7.

DoD does not expect this proposed rule to have a significant economic impact on small entities. The rule will have a positive impact on both large and small contractors, in that

they will now be permitted to propose alternatives to Government standards using an existing FAR provision, the same provision used for other, i.e., non-DoD Government solicitations.

The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no significant alternatives that meet the requirement of the statute.

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 2017-D014), in correspondence.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies. The rule contains information collection requirements. OMB has cleared this information collection requirement under OMB control number 9000-0153, titled, OMB Circular A-119; FAR Sections Affected: 52.211-7 and 53.105.

List of Subjects in 48 CFR Part 211

Government procurement.

Amy G. Williams,

Deputy, Defense Acquisition Regulations System.

Therefore, 48 CFR part 211 is proposed to be amended as follows:

PART 211-DESCRIBING AGENCY NEEDS

1. The authority citation for part 211 continues to read as follows:

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

2. Revise section 211.107 to read as follows:

211.107 Solicitation provision.

(b) Use the provision at FAR 52.211-7, Alternatives to Government-Unique Standards, in DoD solicitations that include military or Government-unique specifications and standards.

3. Revise section 211.201 to read as follows:

211.201 Identification and availability of specifications.

Follow the procedures at PGI 211.201 for obtaining specifications, standards, and data item descriptions from the DLA ASSIST database, including DoD adoption notices on voluntary consensus standards.

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