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5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 239 and 252

[Docket DARS-2019-0017]

RIN 0750-AK10

Defense Federal Acquisition Regulation Supplement: Modification of DFARS Clause "Orders for Facilities and Services" (DFARS Case 2018-D045)

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 modify the text of an existing DFARS clause to include the text of another DFARS clause on the same subject in an effort to streamline contract terms and conditions for contractors, pursuant to action taken by the DoD Regulatory Reform Task Force.

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 2018-D045, using any of the following methods:

- *Regulations.gov*: <http://www.regulations.gov>. Search for "DFARS Case 2018-D045." Select "Comment Now"" and follow the instructions provided to submit a comment. Please include "DFARS Case 2018-D045" on any attached documents.
- *Email*: *osd.dfars@mail.mil*. Include DFARS Case 2018-D045 in the subject line of the message.
- *Fax*: 571-372-6094.
- *Mail*: Defense Acquisition Regulations System, Attn: Carrie Moore, 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, 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: Ms. Carrie Moore, telephone 571-372-6093.

SUPPLEMENTARY INFORMATION:

I. Background

This rule proposes to modify the DFARS clause 252.239-7004, Orders for Facilities and Services, to incorporate the information currently included in DFARS clause 252.239-7005, Rates, Charges, and Services, and make minor changes to simplify

the clause text. Combining these clauses will result in 252.239-7005 being removed from the DFARS.

II. Discussion and Analysis

The clauses at DFARS 252.239-7004 and 252.239-7005 are both included in all solicitations, contracts, and basic agreements for telecommunications services. The clause at 252.239-7004 specifies how contractors shall acknowledge the receipt orders under the contract or agreement, while the clause at 252.239-7005 provides contractors with terms and conditions regarding charges for facilities and services being provided in accordance with the contract or agreement. Since both clauses are included in all of the same contracts as DFARS clause 252.239-7004 and both clauses provide terms and conditions pertaining to telecommunications services, the text of the two clauses can be combined, without changing the intent of either one of the clauses. This will help minimize the number of clauses in the contract and streamline contract terms and conditions for contractors.

The modification of this DFARS text supports a recommendation from the DoD Regulatory Reform Task Force. On February 24, 2017, the President signed Executive Order (E.O.) 13777, "Enforcing the Regulatory Reform Agenda," which established a Federal policy "to alleviate unnecessary regulatory burdens" on the American people. In accordance with E.O. 13777, DoD

established a Regulatory Reform Task Force to review and validate DoD regulations, including the DFARS. A public notice of the establishment of the DFARS Subgroup to the DoD Regulatory Reform Task Force, for the purpose of reviewing DFARS provisions and clauses, was published in the *Federal Register* at 82 FR 35741 on August 1, 2017, and requested public input. No public comments were received on these clauses. Subsequently, the DoD Task Force reviewed the requirements of DFARS clause 252.239-7004 and 252.239-7005 and determined that the clauses could be combined.

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

This proposed rule does not create any new provisions or clauses. The rule combines two clauses on the same topic into a single clause and makes minor modifications to simplify clause text. This rule does not change the applicability of the affected clauses, which are included in solicitations and contracts for telecommunications services, including those valued at or below the SAT or for commercial services.

IV. Executive Orders 12866 and 13563

Executive Order (E.O.) 12866, Regulatory Planning and Review; and E.O. 13563, Improving Regulation and Regulatory Review, 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. The Office of Management and Budget, Office of Information and Regulatory Affairs, has determined that this is not a significant regulatory action as defined under section 3(f) of E.O. 12866 and, therefore, was not subject to review under section 6(b). This rule is not a major rule as defined at 5 U.S.C. 804(2).

V. Executive Order 13771

This rule is not subject to Executive Order (E.O.) 13771, because this rule is not a significant regulatory action 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, 5 U.S.C. 601, et seq., because the rule is not creating any new requirements or changing any existing requirements for contractors. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The Department of Defense is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to modify the text of DFARS clause 252.239-7004, Orders for Facilities and Services, to include the text of DFARS clause 252.239-7005, Rates, Charges, and Services. Combining the requirements of these two clauses permits DFARS 252.239-7005 to be removed from the DFARS.

The objective of this proposed rule is to streamline contract terms and conditions pertaining to telecommunications services. The modification of these DFARS clauses supports a recommendation from the DoD Regulatory Reform Task Force.

This rule is not expected 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., because it is simply combining two existing clauses that address the same topic into a single comprehensive clause.

Based on fiscal year (FY) 2018 data from the Federal Procurement Data System, the Government awarded approximately 8,670 contracts and orders for services under the Product and Supply Code (PSC) D3 - Information Technology and Telecommunications. Of the 8,670 contracts and orders awarded, approximately 28% of the awards were made to 1,050 unique small businesses entities. The PSC D3 does not break down further into information technology services and telecommunications

services; therefore, the number of contracts and orders awarded in FY 2018 exclusively for telecommunications services is estimated to be fewer than the number awarded in FY 2018 under PSC D3 in its entirety.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. This rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known significant alternative approaches to the proposed rule that would meet the proposed objectives.

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 2018-D035) 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 239 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 239 and 252 are proposed to be amended as follows:

1. The authority citation for parts 239 and 252 continues to read as follows:

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

PART 239—ACQUISITION OF INFORMATION TECHNOLOGY

2. Amend section 239.7411 by—

a. In paragraph (a) introductory text, removing the em dash and replacing it with a period;

b. In paragraphs (a)(1) and (2), removing the semicolons and adding periods in their places;

c. Removing paragraph (a)(3);

d. Redesignating paragraphs (a)(4) through (6) as paragraphs (a)(3) through (5), respectively; and

e. In redesignated paragraphs (a)(3) and (4), removing the semicolons and adding periods in their places.

3. Revise section 252.239-7004 to read as follows:

252.239-7004 Orders for Facilities and Services.

As prescribed in 239.7411(a), use the following clause:

ORDERS FOR FACILITIES AND SERVICES (DATE)

(a) Definitions: As used in this clause—

Governmental regulatory body means the Federal Communications Commission, any statewide regulatory body, or any body with less than statewide jurisdiction when operating under the state authority. Regulatory bodies whose decisions are not subject to judicial appeal, and regulatory bodies that regulate a company owned by the same entity that creates the regulatory body are not governmental regulatory bodies.

(b) The Contractor shall acknowledge a communication service authorization or other type order for supplies and facilities by-

(1) Commencing performance after receipt of an order; or
(2) Written acceptance by a duly authorized representative.

(c) The Contractor shall furnish the services and facilities under this agreement/contract in accordance with all applicable tariffs, rates, charges, regulations, requirements, terms, and conditions of-

(1) Service and facilities furnished or offered by the Contractor to the general public or the Contractor's subscribers; or

(2) Service as lawfully established by a governmental regulatory body.

(d) The Government will not prepay for services.

(e) For nontariffed services, the Contractor shall charge the Government at the lowest rate and under the most favorable terms and conditions for similar service and facilities offered to any other customer.

(f) Recurring charges for services and facilities shall, in each case, start with the satisfactory beginning of service or provision of facilities or equipment and are payable monthly in arrears.

(g) Expediting charges are costs necessary to get services earlier than normal. Examples are overtime pay or special shipment. When authorized, expediting charges shall be the additional costs incurred by the Contractor and the subcontractor. The Government shall pay expediting charges only when—

(1) They are provided for in the tariff established by a governmental regulatory body; or

(2) They are authorized in a communication service authorization or other contractual document.

(h) When services normally provided are technically unacceptable and the development, fabrication, or manufacture of special equipment is required, the Government may—

(1) Provide the equipment; or

(2) Direct the Contractor to acquire the equipment or facilities. If the Contractor acquires the equipment or

facilities, the acquisition shall be competitive, if practicable.

(i) If at any time the Government defers or changes its orders for any of the services but does not cancel or terminate them, the amount paid or payable to the Contractor for the services deferred or modified shall be equitably adjusted under applicable tariffs filed by the Contractor with the regulatory commission in effect at the time of deferral or change. If no tariffs are in effect, the Government and the Contractor shall equitably adjust the rates by mutual agreement. Failure to agree on any adjustment shall be a dispute concerning a question of fact within the meaning of the Disputes clause of this contract.

252.239-7005 [Removed and Reserved]

4. Remove and reserve section 252.239-7005.

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