



5001-06-P

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 207, 215, 216, and 234**

**[Docket DARS-2019-0026]**

**RIN 0750-AK38**

**Defense Federal Acquisition Regulation Supplement: Reliability and Maintainability in Weapon System Design (DFARS Case 2019-D003)**

**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 2018 that requires the use of reliability and maintainability sustainment factors in weapon system design.

**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 2019-D003, using any of the following methods:

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

Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2019-D003" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2019-D003." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2019-D003" on your attached document.

- o *Email:* *osd.dfars@mail.mil.* Include DFARS Case 2019-D003 in the subject line of the message.

- o *Fax:* 571-372-6094.

- o *Mail:* Defense Acquisition Regulations System, Attn: Ms. Kimberly Bass, OUSD(A&S)DPC/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:** Ms. Kimberly Bass, telephone 571-372-6174.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD is proposing to amend the DFARS to implement section 834 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91). Section 834 amends title 10, United States Code (U.S.C.), to add section 2443, sustainment factors in weapon system design, which requires program managers or comparable requiring activity officials exercising program management responsibilities to ensure that reliability and maintainability are included in the performance attributes of the key performance parameters on sustainment during the development of capabilities requirements for major weapon systems design and contracts for the—

- Engineering and manufacturing development of a weapon system, including embedded software; or
- Production of a weapon system, including embedded software.

As a matter of policy, the Under Secretary of Defense for Acquisition and Sustainment directed application of the requirements of 10 U.S.C. 2443 to the technical maturation and risk reduction phase.

## **II. Discussion and Analysis**

The following changes to the DFARS are proposed to implement 10 U.S.C. 2443:

DFARS 207.106(S-70)(2)(ii)(A) implements 10 U.S.C. 2443 as an additional requirement for major systems, and provides guidance to the acquisition team during acquisition planning to ensure

that reliability and maintainability are included in the performance attributes of the key performance parameters on sustainment during the development of capabilities requirements.

DFARS 207.106(S-72) (5) informs the contracting officer to ensure best practices are used during the development of performance measures for use in responding to the negative or positive contractor performance in meeting the contract requirements for sustainment for a weapon system as defined in 10 U.S.C.2302 and 2303d during acquisition planning. The contracting officer is to encourage the use of incentive fees and penalties as appropriate and allow the program manager or requiring activity official performing program management responsibilities to base determination of contractor performance on reliability and maintainability data collected during the program. The data collected must be described in detail and shared with appropriate contract and Government organizations to the maximum extent practicable.

DFARS 215.304(c) (vi) informs the contracting officer that, in coordination with the program manager or comparable requiring activity official performing program management responsibilities, source selections must emphasize sustainment factors and objective reliability and maintainability evaluation criteria in competitive contracts for the technical maturation and risk reduction phase, and engineering and manufacturing

development of a weapon system, including embedded software; or the production of a weapon system, including embedded software. Application of this requirement to competitive contracts for the technical maturation and risk reduction phase is a matter of policy, whereas application to the engineering and manufacturing development and production of a weapon system, including embedded software, is required by statute.

DFARS 216.402-2(2) requires contracting officers to ensure that information about incentive fees, or the imposition of penalties, are included in the solicitation for covered contracts if the program manager or requiring official includes provisions for the payment of incentive fees to the contractor for achievement of design specifications for reliability and maintainability or the imposition of penalties to be paid by the contractor to the Government for failure to achieve the design specifications.

DFARS 234.004 informs the contracting officer to: (1) include clearly defined measurable criteria for engineering activities and design specifications for reliability and maintainability provided by the program manager, or comparable requiring activity official performing program management responsibilities; or (2) ensure a copy of the justification for the decision not to include the criteria, is included in the

contract file as provided by the program manager or requiring activity official.

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

This rulemaking does not propose to create 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. Executive Order 13771**

This proposed rule is not expected to be an E.O. 13771 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, 5 U.S.C. 601, et seq., because the rule requires contracting officers and program managers or requiring office officials to give emphasis to sustainment factors in weapon system design. 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 834 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018. Section 834 amends Title 10, United States Code, to add section 2443, Sustainment factors in weapon system design, which requires program managers or comparable requiring activity officials exercising program management responsibilities to ensure that reliability and maintainability are included in the performance attributes of the key performance parameters on sustainment during the development of capabilities requirements for major weapon systems design and contracts for the technical maturation and risk reduction and engineering and manufacturing

development of a weapon system, including embedded software; or production of a weapon system.

The objective of this proposed rule is to require contracting officers, in coordination with program managers or requiring office officials, to ensure that reliability and maintainability are included in the performance attributes of the key performance parameter on sustainment during the development of capabilities requirements.

According to information available in the Federal Procurement Data System for fiscal years 2016 through 2018, DoD made a total of 200 contract awards under various product service codes for research and engineering development under the product service group AC, Research and Development-Defense Systems. The award data included task and delivery orders under single award indefinite delivery indefinite quantity contracts and basic ordering agreements. Of the total 200 awards for the three-year period cited, 79 awards (approximately 40 percent) were made to 71 unique small business entities.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. The proposed 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 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 2019-D003), in correspondence.

This action is necessary to implement section 834 of the NDAA for FY 2018.

#### **VII. 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 207, 215, 216, and 234**

Government procurement.

**Jennifer Lee Hawes,**

*Regulatory Control Officer, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 207, 215, 216, and 234 are proposed to be amended as follows:

1. The authority citation for 48 CFR parts 207, 215, 216, and 234 continues to read as follows:

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

#### **PART 207—ACQUISITION PLANNING**

2. Amend section 207.106 by-

a. In paragraph (S-70) (1), removing "Section 802(a)" and adding "section 802(a)" in its place;

b. Redesignating paragraphs (S-70) (2) (ii) through (iv) as paragraphs (iii) through (v), respectively;

c. Adding a new paragraph (S-70) (2) (ii); and

d. Adding paragraph (S-72) (5).

The additions read as follows:

**207.106 Additional requirements for major systems.**

\* \* \* \* \*

(S-70) \* \* \*

(2) \* \* \*

(ii) In accordance with 10 U.S.C. 2443, to emphasize reliability and maintainability in weapon system design, ensure that reliability and maintainability are included in the performance attributes of the key performance parameters on sustainment during the development of capabilities requirements.

For additional guidance see PGI 207.105(b) (14) (ii) (2);

\* \* \* \* \*

(S-72) \* \* \*

(5) In accordance with 10 U.S.C. 2443, acquisition plans for engineering manufacturing and development and production of major systems as defined in 10 U.S.C. 2302 and 2302d and for major defense acquisition programs as defined in 202.101, shall

include performance measures that are developed using best practices for responding to the positive or negative performance of a contractor for the engineering and manufacturing development or production of a weapon system, including embedded software. At a minimum the contracting officer shall-

(i) Encourage the use of incentive fees and penalties as appropriate; and

(ii) Allow the program manager or comparable requiring activity official exercising program management responsibilities, to base determinations of a contractor's performance on reliability and maintainability data collected during the program. Such data collection and associated evaluation metrics shall be described in detail in the contract; and to the maximum extent practicable, the data shall be shared with appropriate contractor and Government organizations.

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**PART 215-CONTRACTING BY NEGOTIATION**

3. Amend section 215.304 by adding paragraph (c)(vi) to read as follows:

**215.304 Evaluation factors and significant subfactors.**

(c) \* \* \*

(vi) Ensure source selections emphasize sustainment factors and objective reliability and maintainability evaluation criteria in competitive contracts for the-

(A) Technical maturation and risk reduction phase of weapon system design (see guidance at PGI 207.105(b)(14)(ii)(2));

(B) Engineering and manufacturing development phase of a weapon system, including embedded software (10 U.S.C. 2443); or

(C) Production and deployment phase of a weapon system, including embedded software (10 U.S.C. 2443).

**PART 216--TYPES OF CONTRACTS**

4. Amend section 216.402-2 by--

a. Designating the text as paragraph (1); and

b. Adding paragraph (2).

The addition reads as follows:

**216.402-2 Technical performance incentives.**

\* \* \* \* \*

(2) Contracting officers shall ensure requirements about the payment of incentive fees or the imposition of penalties are included in the solicitation for a contract for the engineering and manufacturing development or production of a weapon system, including embedded software, if the program manager or comparable requiring activity official exercising program manager responsibilities includes--

(i) Provisions for the payment of incentive fees to the contractor, based on achievement of design specification

requirements for reliability and maintainability of weapons systems under the contract; or

(ii) The imposition of penalties to be paid by the contractor to the Government for failure to achieve such design specification requirements (10 U.S.C. 2443).

**PART 234—MAJOR SYSTEM ACQUISITION**

5. Amend section 234.004 by adding paragraph (3) to read as follows:

**234.004 Acquisition strategy.**

\* \* \* \* \*

(3) The contracting officer shall include in solicitations for contracts for the technical maturation and risk reduction phase, engineering and manufacturing development phase or production phase of a weapon system, including embedded software—

(i) Clearly defined measurable criteria for engineering activities and design specifications for reliability and maintainability provided by the program manager, or the comparable requiring activity official performing program management responsibilities; or

(ii) Ensure a copy of the justification, executed by the program manager or the comparable requiring activity official performing program management responsibilities for the decision that engineering activities and design specifications for

reliability and maintainability should not be a requirement, is included in the contract file (10 U.S.C. 2443).

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