



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204 and 252

[Docket DARS-2019-0049]

RIN 0750-AK14

Defense Federal Acquisition Regulation Supplement: Modification of DFARS Clause, "Payment for Subline Items Not Separately Priced" (DFARS Case 2018-D050)

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 clarify its intent and conform its language to current DFARS terminology, pursuant to action taken by the 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-D050, using any of the following methods:

- o *Regulations.gov:* <http://www.regulations.gov>. Submit

comments via the Federal eRulemaking portal by entering "DFARS Case 2018-D050" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2018-D050." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2018-D050" on your attached document.

- o *Email:* *osd.dfars@mail.mil.* Include DFARS Case 2018-D050 in the subject line of the message.

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

- o *Mail:* Defense Acquisition Regulations System, Attn: Carrie Moore, 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, 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 clause at DFARS 252.204-7002, Payment for Subline Items Not Separately Priced, to simplify the clause text and conform terminology used in the text to current Government contract line item structure terminology. This update will clarify the intent of the clause, as it pertains to payment on contracts that contain not separately priced (NSP) items, when applicable. The rule also adds a prescription for DFARS 252.204-7002 in the applicable DFARS subpart 204.7109, Contract Clauses.

II. Discussion and Analysis

DFARS clause 252.204-7002 is included in solicitations and contracts when the value of a NSP contract line or subline item is included in the price of another contract line or subline item, and it is necessary to withhold payment on the priced contract line or subline item until the related NSP item has been delivered. The clause prohibits contractors from billing the Government for a priced item that contains the value of a NSP item until the related NSP items have also been delivered to and accepted by the Government. While use of the clause is discretionary, it is beneficial to DoD in situations when NSP items are individual deliverables on a contract, even though the NSP items are a part or component of a priced item on another contract line or subline item.

Currently, the clause text can be read as prohibiting the contractor from billing for any portion of a contract line or subline item that is associated with an NSP item until all of the NSP items have also been delivered to and accepted by the Government. It is not the intent of the Government to prohibit any and all payment on such contract line or subline items until all deliveries have been made and accepted for both the priced and NSP items. This rule simplifies the clause text to clarify that a contractor can bill the Government for the individual unit price of a delivered item, once the NSP item associated with the individually priced item has also been delivered and accepted by the Government.

The rule also conforms the text of the clause to the current contract line item structure terminology by replacing "contract line item" with "contract line or subline item" and adds a prescription for the DFARS clause in the applicable section of DFARS 204.71.

The modification of this DFARS text implements 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 252.204-7002 and determined that the clause should be revised.

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 updates language used in the clause text to clarify its intent and conform with current contract line item structure terminology. This rule does not change the applicability of the affected clause.

IV. Executive Orders 12866 and 13563

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 subject to 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 for contractors or changing any existing policies and practices. 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 252.204-7002, Payment for Subline Items Not Separately Priced, to simplify and conform the clause text to current Government contract line item structure terminology, pursuant to action taken by the Regulatory Reform Task Force.

The objective of this proposed rule is to clarify the intent of the clause for contractors, when submitting invoices under contracts that contain items that are not separately priced (NSP). The modification of these DFARS clauses implements a recommendation from the DoD Regulatory Reform Task Force.

Based on an average of data for fiscal year 2016 through 2018 from the Federal Procurement Data System and Electronic Document Access, DoD awards annually approximately 12,435 contracts that include DFARS clause 252.204-7002 to 2,544 unique entities. Of the 12,435 awards, approximately 4,924 contracts (40 percent) are awarded to approximately 1,564 unique small business entities (60 percent). However, based on the available data and the objective of the rule, DoD does not anticipate that this proposed rule will significantly impact small business entities.

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-D050) 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 204 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 204 and 252 are proposed to be amended as follows:

1. The authority citation for 48 CFR parts 204 and 252 continues to read as follows:

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

PART 204-ADMINISTRATIVE MATTERS

2. Amend section 204.7104-1 by-

a. In paragraph (b) (3) (iii), removing "subsection" and adding "section" in its place;

b. Revising paragraph (b) (3) (iv).

The revision reads as follows:

204.7104-1 Criteria for establishing.

* * * * *

(b) * * *

(3) * * *

(iv) When the price for items not separately priced is included in the price of another contract line or subline item, it may be necessary to withhold payment on the priced contract line or subline item until the included line or subline items that are not separately priced have been delivered. See the clause at 252.204-7002, Payment for Contract Line or Subline Items Not Separately Priced.

3. Revise section 204.7109 to read as follows:

204.7109 Contract clauses.

(a) Use the clause at 252.204-7002, Payment for Contract Line or Subline Items Not Separately Priced, in solicitations and contracts when the price for items not separately priced is included in the price of another contract line or subline item.

(b) Use the clause at 252.204-7006, Billing Instructions, in solicitations and contracts if Section G includes—

(1) Any of the standard payment instructions at PGI 204.7108 (b) (2); or

(2) Other payment instructions, in accordance with PGI 204.7108(d)(12), that require contractor identification of the contract line item(s) on the payment request.

PART 252-SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Revise section 252.204-7002 to read as follows:

252.204-7002 Payment for Contract Line or Subline Items Not Separately Priced.

As prescribed in 204.7109(a), use the following clause:

PAYMENT FOR CONTRACT LINE OR SUBLINE ITEMS NOT SEPARATELY PRICED

(DATE)

(a) If the schedule in this contract contains any contract line or subline items identified as not separately priced (NSP), it means that the unit price for the NSP line or subline item is included in the unit price of another, related line or subline item.

(b) The Contractor shall not invoice the Government for an item that includes in its price an NSP item until—

(1) The Contractor has also delivered the NSP item included in the price of the item being invoiced; and

(2) The Government has accepted the NSP item.

(c) This clause does not apply to technical data.

(End of clause)

252.204-7006 [Amended]

5. Amend section 252.204-7006 introductory text by removing "204.7109" and adding "204.7109(b)" in its place.

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