

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 207 and 234****[Docket DARS–2023–0030]****RIN 0750–AL82****Defense Federal Acquisition Regulation Supplement: Use of Fixed-Price Contracts for Certain Major Defense Acquisition Programs (DFARS Case 2023–D009)****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 2023 that limits the number of low-rate initial production lots associated with a major defense acquisition program under certain circumstances.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before November 28, 2023, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2023–D009 using any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Search for “DFARS Case 2023–D009.” Select “Comment” and follow the instructions to submit a comment. Please include “DFARS Case 2023–D009” on any attached documents.

- *Email:* osd.dfars@mail.mil. Include DFARS Case 2023–D009 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Ms. Jeanette Snyder, 703–508–7524.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD is proposing to revise the DFARS to implement section 808 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2023 (Pub. L. 117–263). Section 808 amends section 818 of Public Law 109–364 to limit the number of low-rate initial

production lots associated with a major defense acquisition program to be procured to no more than one when the milestone decision authority authorizes the use of a fixed-price type contract at Milestone B and the scope of the work includes both development and low-rate initial production. This limitation may be waived.

II. Discussion and Analysis

This proposed rule adds new guidance to contracting officers at DFARS 234.004, paragraph (2)(v), to specify that the contracting officer shall not procure more than one low-rate initial production lot associated with a major defense acquisition program if—

- The milestone decision authority authorizes the use of a fixed-price type contract at the time of Milestone B approval; and
- The scope of work of the fixed-price type contract includes both development and low-rate initial production of items for such major defense acquisition program.

This limitation may be waived by the service acquisition executive for the department concerned, delegable to no lower than one level above the contracting officer, if—

- A written notification of the waiver, including rationale, is provided to the congressional defense committees no later than 30 days after issuance of the waiver; and
- A copy of the waiver and such congressional notification are included in the contract file.

This rule also proposes to modify DFARS 207.106 to reference DFARS 234.004 when selecting the contract type for a major defense acquisition program and to remove the reference to section 811 of the NDAA for FY 2013 (Pub. L. 112–239), since more than one NDAA applies requirements or restrictions to contract types for procurements associated with major defense acquisition programs.

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

This rule does not create any new solicitation provisions or contract clauses. It does not impact any existing solicitation provisions or contract clauses or their applicability to contracts valued at or below the simplified acquisition threshold, for commercial products including COTS items, or for commercial services.

IV. Expected Impact of the Rule

As a result of this proposed rule, unless waived, the Government may not procure more than one low-rate initial production lot associated with a major defense acquisition program if, at the time of Milestone B approval, the milestone decision authority authorizes the use of a fixed-price type contract and the scope of work of the fixed-price contract includes both development and low-rate initial production of items associated with such major defense acquisition program. This rule does not impact contractor operations; however, it may limit contractor risk assumed under such contracts. Development and initial production of an item likely involve the discovery and resolution of problems that are unknown beforehand. Risk to a contractor is higher when the contractor must propose prices for multiple production lots of an item before the development and initial production of that item are complete. By limiting the number of low-rate initial production lots on a fixed-price contract that also includes development, this risk to the contractor may be reduced.

V. 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, as amended.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule, when finalized, 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 this rule only applies to certain fixed-price type contracts for major defense acquisition programs. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This proposed rule is necessary to implement section 808 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2023 (Pub. L. 117–263). Section 808 modifies section 818 of

Public Law 109–364 to limit the number of low-rate initial production lots associated with a major defense acquisition program to be procured to no more than one when the milestone decision authority authorizes the use of a fixed-price type contract at the time of Milestone B approval and the scope of the fixed-price contract includes both development and low-rate initial production.

The objective of this proposed rule is to limit the number of low-rate initial production lots associated with a major defense acquisition program to no more than one when the milestone decision authority authorizes the use of a fixed-price type contract at the time of Milestone B approval and the scope of the fixed-price contract includes both development and low-rate initial production. The legal basis for the rule is section 808 of the NDAA for FY 2023.

Data is not available on the number of fixed-price type contracts for major defense acquisition programs that contain both development and low-rate initial production; therefore, data was pulled on contracts that include DFARS clause 252.234–7004, Cost and Software Data Reporting System, or its alternate I clause. This DFARS clause is required to be included in solicitations and contracts for major defense acquisition programs that exceed \$50 million and its alternate I clause is required to be included in solicitations and contracts for major defense acquisition programs that are greater than \$20 million, but less than or equal to \$50 million under certain circumstances. According to the Procurement Business Intelligence Service, DoD awarded contracts for major defense acquisition programs to 162 unique small entities in FY 2020, 133 in FY 2021, and 116 in FY 2022. The average over the three-year period is 137 per fiscal year. Therefore, the number of small entities to which this rule may apply is 137.

This proposed rule does not impose any new reporting, recordkeeping or other compliance requirements for small entities.

This proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives that would accomplish the stated objectives of the applicable statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this proposed 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 2023–D009), in correspondence.

VIII. Paperwork Reduction Act

This proposed rule does not contain any new 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 and 234

Government procurement.

Jennifer D. Johnson,
Editor/Publisher, Defense Acquisition
Regulations System.

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

- 1. The authority citation for parts 207 and 234 continues to read as follows:

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

PART 207—ACQUISITION PLANNING

- 2. In section 207.106, revise paragraph (S–74) to read as follows:

207.106 Additional requirements for major systems.

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(S–74) When selecting contract type for a major defense acquisition program, see 234.004.

PART 234—MAJOR SYSTEM ACQUISITION

- 3. Amend section 234.004 by adding new paragraph (2)(v) to read as follows:

234.004 Acquisition strategy.

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(2) * * *

(v) In accordance with section 808 of the National Defense Authorization Act for Fiscal Year 2023 (Pub. L. 117–263)—

(A) The contracting officer shall not procure more than one lot for low-rate initial production, as defined at 10 U.S.C. 4231, associated with a major defense acquisition program if—

(1) The milestone decision authority authorizes the use of a fixed-price type contract at the time of Milestone B approval; and

(2) The scope of work of the fixed-price type contract includes both the development and low-rate initial production of items for such major defense acquisition program.

(B) This limitation may be waived by the service acquisition executive for the department concerned, delegable to no lower than one level above the contracting officer, if—

(1) A written notification of the waiver, including associated rationale, is provided to the congressional defense committees no later than 30 days after issuance of the waiver in accordance with agency procedures; and

(2) A copy of the waiver and such congressional notification are included in the contract file.

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