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Penny Lassiter,

Director, Sector Policy and Programs Division.
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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 215, 234, and 252

[Docket DARS-2023-0047]

RIN 0750-AL83

Defense Federal Acquisition Regulation Supplement: Data Requirements for Commercial Products for Major Weapon Systems (DFARS Case 2023-D010)

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 James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 that clarifies the data to be provided for certain procurements related to major weapon systems.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before February 20, 2024, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2023-D010, using either of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Search for DFARS Case 2023-D010. Select "Comment" and follow the instructions to submit a comment. Please include "DFARS Case 2023-D010" on any attached documents.

- *Email:* osd.dfars@mail.mil. Include DFARS Case 2023-D010 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 803 of the James M. Inhofe National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2023 (Pub. L. 117-263). Section 803 modifies 10 U.S.C. 3455 to

provide additional guidance regarding data requirements to support a determination of commerciality and price reasonableness for certain procurements associated with major weapon systems.

II. Discussion and Analysis

This rule proposes to modify DFARS 234.7002 to implement section 803 of the James M. Inhofe NDAA for FY 2023. Section 803 clarifies the data an offeror is required to provide when a subsystem of major weapon system or a component or spare part for a major weapon system or subsystem is proposed as a commercial product. This proposed rule also clarifies the data to be provided to the contracting officer to determine price reasonableness for such actions. This proposed rule affords the offeror the flexibility to either submit the data or provide the contracting officer access to the data and to redact certain customer information.

This proposed rule modifies the solicitation provision at DFARS 252.215–7010, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, to align with the revisions made to DFARS 234.7002. This proposed rule also makes conforming changes to DFARS parts 212 and 215 to add cross-references to DFARS 234.7002.

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

This proposed rule amends the provision at DFARS 252.215–7010, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data. However, this proposed rule does not impose any new requirements on contracts at or below the SAT, for commercial products including COTS items, or for commercial services. The provision will continue to apply to acquisitions at or below the SAT, to acquisitions of commercial products, excluding COTS items, and to acquisitions of commercial services.

IV. Expected Impact of the Rule

DoD does not expect this proposed rule, when finalized, to have a significant impact on offerors because it merely clarifies the data an offeror is required to provide to the contracting officer when a subsystem of a major weapon system or a component or spare part of a major weapon system or subsystem is proposed as a commercial product. Specifically, this proposed rule

clarifies the data an offeror is required to provide to support the contracting officer's determination of price reasonableness and commerciality. This proposed rule will also allow an offeror to give the contracting officer access to the data, in lieu of submitting it, and to redact certain customer information from such data.

This proposed rule is expected to result in the timely submission of data, which may decrease the time it takes for a contracting officer to determine a product to be commercial, to determine price reasonableness, and to award the contract.

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 merely clarifies the data to be provided for certain procurements related to major weapon systems. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This proposed rule is necessary to implement section 803 of the James M. Inhofe National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2023. Section 803 clarifies the data an offeror is required to provide when a subsystem of a major weapon system or a component or spare part for a major weapon system or subsystem is proposed as a commercial product. Section 803 also clarifies the data to be provided to the contracting officer to determine price reasonableness for such actions. In addition, section 803 affords the offeror the flexibility to either submit the data or provide the contracting officer access to the data and to redact certain customer information.

The objective of this proposed rule is to implement section 803 of the James M. Inhofe NDAA for FY 2023, which modifies 10 U.S.C. 3455. The legal basis of the rule is section 803 of the James M. Inhofe NDAA for FY 2023.

Based on data from the Federal Procurement Data System for fiscal years 2021 through 2023, DoD awarded an average of approximately 50,260 commercial contracts related to major weapon systems to an average of 2,685 unique small entities per year. Therefore, this proposed rule is expected to apply to approximately 2,685 small entities per fiscal year.

This proposed rule does not impose any new reporting, recordkeeping, or other compliance requirements for small entities. The information being collected falls under the currently approved information collection recordkeeping requirements under OMB control number 0704–0574, Defense Federal Acquisition Regulation Supplement (DFARS) Part 215; Only One Offer and Related Clauses in DFARS 252.

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 proposed 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–D010), in correspondence.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies to this proposed rule. However, these changes to the DFARS do not impose additional information collection requirements to the paperwork burden previously approved by the Office of Management and Budget (OMB) under OMB Control Number 0704–0574, entitled Defense Federal Acquisition Regulation Supplement (DFARS) Part 215; Only One Offer and Related Clauses in DFARS 252.

List of Subjects in 48 CFR Parts 212, 215, 234, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 215, 234, and 252 are proposed to be amended as follows:

- 1. The authority citation for parts 212, 215, 234, and 252 continues to read as follows:

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

PART 212—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

- 2. Amend section 212.102 by revising paragraph (a)(iii)(A) to read as follows:

212.102 Applicability.

- (a) * * *
- (iii) * * *

(A) Determine in writing that the acquisition meets the “commercial product” or “commercial service” definition in FAR 2.101. See 234.7002(b) and (c) for subsystems of major weapon systems and components and spare parts of major weapon systems and subsystems;

* * * * *

- 3. Amend section 212.209 by revising paragraph (a)(1) to read as follows:

212.209 Determination of price reasonableness.

- (a) * * *

(1) In the case of major weapon systems, for subsystems of major weapon systems and components and spare parts of major weapon systems and subsystems acquired as commercial products in accordance with subpart 234.70, shall use information submitted under 234.7002(e); and

* * * * *

PART 215—CONTRACTING BY NEGOTIATION

- 4. Amend section 215.403–1 by revising paragraph (c)(3)(A) to read as follows:

215.403–1 Prohibition on obtaining certified cost or pricing data (10 U.S.C. chapter 271 and 41 U.S.C. chapter 35).

* * * * *

- (c) * * *
- (3) * * *

(A) Follow the procedures at PGI 215.403–1(c)(3) for pricing commercial products or commercial services, except see 234.7002(e) for pricing commercial subsystems of major weapon systems

and components and spare parts of major weapon systems and subsystems.

* * * * *

215.403–3 [Amended]

- 5. Amend section 215.403–3 in paragraph (c) by removing “234.7002(d)” and adding “234.7002(e)” in its place.

PART 234—MAJOR SYSTEM ACQUISITION

- 6. Amend section 234.7002—
 - a. By revising paragraph (b)(2);
 - b. By adding paragraph (b)(3);
 - c. By revising paragraphs (c)(1)(ii) and (c)(2);
 - d. By redesignating paragraph (d) as paragraph (e);
 - e. By adding a new paragraph (d); and
 - f. By revising newly redesignated paragraphs (e) introductory text, and (e)(1) through (3);
 - g. In newly redesignated paragraph (e)(4), by removing “paragraph (d)(3)” and “paragraphs (d)(1) and (2)” and adding “paragraph (e)(1)” in their places; and
 - h. In newly redesignated paragraph (e)(5), by removing “paragraphs (d)(1) and (2)” and “PGI 234.7002(d)(5)” and adding “paragraph (e)(1)” and “PGI 234.7002(e)(5)” in their places, respectively.

The revisions and additions read as follows:

234.7002 Policy.

* * * * *

- (b) * * *

(2) The contracting officer determines in writing that the subsystem is a commercial product in accordance with 212.102(a)(iii). For a subsystem of a major weapon system proposed as a commercial product that has not previously been determined to be a commercial product (see 212.102(a)(ii)), follow the procedures in paragraph (d) of this section.

(3) This paragraph (b) shall apply only to subsystems of major weapon systems that are acquired by DoD through a—

- (i) Prime contract;
- (ii) Modification to a prime contract;

or

- (iii) Subcontract under a prime contract for the acquisition of a subsystem proposed as a commercial product that has not previously been determined to be a commercial product (see 212.102(a)(ii)).

- (c) * * *

- (1) * * *

(ii) The contracting officer determines in writing that the component or spare part is a commercial product in accordance with 212.102(a)(iii). For a

component or spare part proposed as a commercial product that has not previously been determined to be a commercial product (see 212.102(a)(ii)), follow the procedures in paragraph (d) of this section.

(2) This paragraph (c) shall apply only to components and spare parts that are acquired by DoD through a—

- (i) Prime contract;
- (ii) Modification to a prime contract;

or

- (iii) Subcontract under a prime contract for the acquisition of a component or spare part proposed as a commercial product that has not previously been determined to be a commercial product (see 212.102(a)(ii)).

(d) *Commerciality determination.* To the extent necessary to make a commercial product determination in accordance with 212.102(a)(iii) that relies on paragraph (1), (2), (3), (4), or (5) of the “commercial product” definition at FAR 2.101 for a subsystem, component, or spare part as described in paragraphs (b) and (c) of this section, the contracting officer shall require the offeror to—

(1) Identify the comparable commercial product the offeror sells to the general public or nongovernmental entities for other than governmental purposes;

(2) Provide a comparison between the physical characteristics and functionality of the comparable commercial product and the subsystem, component, or spare part, including—

(i) For products under paragraph (3)(i) of the “commercial product” definition at FAR 2.101, a description of the modification and documentation to support that the modification is customarily available in the marketplace; or

(ii) For products under paragraph (3)(ii) of the “commercial product” definition at FAR 2.101, a detailed description of the modification and detailed technical data to demonstrate that the modification is minor (e.g., information on production processes and material differences); and

(3) Provide the national stock number (NSN) for the comparable commercial product, if one is assigned, and the NSN for the subsystem, component, or spare part, if one is assigned; or

(4) If the offeror does not sell a comparable commercial product to the general public or nongovernmental entities for other than governmental purposes—

(i) Notify the contracting officer in writing that it does not sell such a comparable product; and

(ii) Provide the contracting officer a comparison of the physical

characteristics and functionality of the comparable commercial product and the subsystem, component, or spare part, if available.

(e) *Relevant information to determine price reasonableness.* For products relying on paragraph (3)(ii) of the commercial product definition at FAR 2.101, see FAR 15.403–1(c)(3)(iii)(C). See 212.209(a) for requirements of 10 U.S.C. 3453 with regard to market research.

(1) Unless an exception at FAR 15.403–1(b)(1) or (2) applies—

(i) To the extent necessary to make a determination of price reasonableness, the contracting officer shall require the offeror to submit or provide to the contracting officer access to a representative sample, as determined by the contracting officer, of prices paid for the same or similar commercial products under comparable terms and conditions by both Government and commercial customers and the terms and conditions of such sales.

(ii) If the contracting officer determines that the offeror cannot provide or give access to sufficient information described in this paragraph (e)(1) to determine the reasonableness of price, the contracting officer shall require the offeror to submit or provide the contracting officer access to a representative sample, as determined by the contracting officer, of the prices paid for the same or similar commercial products sold under different terms and conditions and the terms and conditions of such sales.

(2) The contracting officer shall allow the offeror to redact only information provided pursuant to paragraph (e)(1) of this section that identifies the customer, if the offeror certifies in writing for each sale that the customer is a—

(i) Government customer (e.g., Federal, State, local, or foreign government);

(ii) Commercial customer purchasing the product for governmental purposes; or

(iii) Commercial customer purchasing the product for a commercial, mixed, or unknown purpose.

(3) If the contracting officer determines—

(i) That the information submitted pursuant to paragraph (e)(1) of this section is not sufficient to determine the reasonableness of price because the comparable commercial product(s) provided by the offeror are not a valid basis for a price analysis; or

(ii) That the proposed price is not reasonable after evaluating sales data, then the contracting officer shall obtain approval from an official one level above the contracting officer, without

power of delegation, to require the offeror to submit other relevant information regarding the basis for price or cost, including information on labor costs, material costs, and overhead rates.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Amend section 252.215–7010—

■ a. By removing the provision date “JAN 2023” and adding “DATE” in its place;

■ b. In paragraph (a) in the definition of “Sufficient non-Government sales” by removing “by FAR” and adding “by Federal Acquisition Regulation (FAR)” in its place;

■ c. By redesignating paragraphs (b)(1)(ii)(B) through (E) as (b)(1)(ii)(C) through (F);

■ d. By adding a new paragraph (b)(1)(ii)(B);

■ e. In paragraph (d)(1) by removing “DFARS 215.402(a)(i) and 215.404–1(b)” and adding “Defense Federal Acquisition Regulation Supplement (DFARS) 215.402(a)(i), 215.404–1(b), and 234.7002(e)” in its place;

■ f. By redesignating paragraphs (d)(3) and (4) as (d)(4) and (5);

■ g. By adding a new paragraph (d)(3);

■ h. In newly redesignated paragraph (d)(4) by removing “FAR 15.403–3” and adding “FAR 15.403–3 or DFARS 234.7002(e)” in its place;

■ i. In Alternate I—

■ i. By revising the provision title and date;

■ ii. In paragraph (a) in the definition of “Sufficient non-Government sales” by removing “by FAR” and adding “by Federal Acquisition Regulation (FAR)”;

■ iii. By redesignating paragraphs (b)(1)(ii)(B) through (E) as (b)(1)(ii)(C) through (F);

■ iv. By adding a new paragraph (b)(1)(ii)(B);

■ v. In paragraph (d)(1) by removing “DFARS 215.402(a)(i) and 215.404–1(b)” and adding “Defense Federal Acquisition Regulation Supplement (DFARS) 215.402(a)(i), 215.404–1(b), and 234.7002(e)” in its place;

■ vi. By redesignating paragraphs (d)(3) and (4) as (d)(4) and (5);

■ vii. By adding a new paragraph (d)(3); and

■ viii. In newly redesignated paragraph (d)(4) by removing “FAR 15.403–3” and adding “FAR 15.403–3 or DFARS 234.7002(e)” in its place.

The additions and revision read as follows:

252.215–7010 Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(B) For subsystems of a major weapon system and components and spare parts of a major weapon system or subsystem of a major weapon system that have not previously been determined to be commercial—

(1) The comparable commercial product the Offeror sells to the general public or nongovernmental entities;

(2) A comparison between the physical characteristics and functionality of the comparable commercial product and the subsystem, component, or spare part, including—

(i) For products under paragraph 3(i) of the “commercial product” definition at FAR 2.101, a description of the modification and documentation to support that the modification is customarily available in the marketplace; or

(ii) For products under paragraph (3)(ii) of the “commercial product” definition at FAR 2.101, a detailed description of the modification and detailed technical data to demonstrate that the modification is minor (e.g., information on production processes and material differences); and

(3) The national stock number (NSN) for the comparable commercial product, if one is assigned, and the NSN for the subsystem, component, or spare part, if one is assigned; or

(4) If the Offeror does not sell a comparable commercial product to the general public or nongovernmental entities for purposes other than government purposes, the Offeror shall—

(i) Notify the Contracting Officer in writing that it does not sell such a comparable product; and

(ii) Provide the Contracting Officer with a comparison of the physical characteristics and functionality of the most comparable commercial product in the commercial market.

* * * * *

(d) * * *

(3) If the Offeror redacts data that identifies the customer, then the Offeror shall include, for each sale, the following signed statement with the data submitted:

“By submission of this data, the Offeror [Offeror insert company name] certifies that the customer was [Offeror insert one or more of the following as applicable: a government customer; a commercial customer purchasing the same or similar product for governmental purposes (e.g., Federal, state, local, or foreign government); or a commercial customer purchasing the same or similar product for a commercial, mixed, or unknown purpose].”

* * * * *

Alternate I. * * *

Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Alternate I (Date)

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(B) For subsystems of a major weapon system and components and spare parts of a major weapon system or subsystem of a major weapon system that have not previously been determined to be commercial—

(1) The comparable commercial product the Offeror sells to the general public or nongovernmental entities;

(2) A comparison between the physical characteristics and functionality of the comparable commercial product and the subsystem, component, or spare part, including—

(i) For products under paragraph 3(i) of the “commercial product” definition

at FAR 2.101, a description of the modification and documentation to support that the modification is customarily available in the marketplace; or

(ii) For products under paragraph (3)(ii) of the “commercial product” definition at FAR 2.101, a detailed description of the modification and detailed technical data to demonstrate that the modification is minor (e.g., information on production processes and material differences); and

(3) The national stock number (NSN) for the comparable commercial product, if one is assigned, and the NSN for the subsystem, component, or spare part; or

(4) If the Offeror does not sell a comparable commercial product to the general public or nongovernmental entities for purposes other than government purposes, the Offeror shall—

(i) Notify the Contracting Officer in writing that it does not sell such a comparable product; and

(ii) Provide the Contracting Officer with a comparison of the physical characteristics and functionality of the most comparable commercial product in the commercial market.

* * * * *

(d) * * *

(3) If the Offeror redacts data that identifies the customer, then the Offeror shall include, for each sale, the following signed statement with the data submitted:

“By submission of this data, the Offeror [Offeror insert company name] certifies that the customer was [Offeror insert one or more of the following as applicable: a government customer (e.g., Federal, state, local, or foreign government); a commercial customer purchasing the same or similar product for governmental purposes; or a commercial customer purchasing the same or similar product for a commercial, mixed, or unknown purpose].”

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[FR Doc. 2023–27941 Filed 12–21–23; 8:45 am]

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