

**DEPARTMENT OF DEFENSE****Defense Acquisition Regulations System****48 CFR Part 216**

RIN 0750-AH15

**Defense Federal Acquisition Regulation Supplement; Increase the Use of Fixed-Price Incentive (Firm Target) Contracts (DFARS Case 2011-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 increase the use of fixed-price incentive (firm target) contracts, with particular attention to share lines and ceiling prices.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before May 2, 2011, to be considered in the formation of the final rule.

**ADDRESSES:** You may submit comments, identified by DFARS Case 2011-D010, using any of the following methods:

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

Submit comments via the Federal eRulemaking portal by inputting "DFARS Case 2011-D010" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2011-D010." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2011-D010" on your attached document.

- *E-mail:* [dfars@osd.mil](mailto:dfars@osd.mil). Include DFARS Case 2011-D010 in the subject line of the message.

- *Fax:* 703-602-0350.

- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD (AT&L) DPAP/DARS, 3060 Defense Pentagon, Room 3B855, 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 <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. Amy Williams, OUSD (AT&L) DPAP/

DARS, 3060 Defense Pentagon, Room 3B855, Washington, DC 20301-3060. Telephone 703-602-0328; facsimile 703-602-0350. Please cite DFARS Case 2011-D010.

**SUPPLEMENTARY INFORMATION:****I. Background**

This DFARS case was initiated to incentivize productivity and innovation in industry, as set forth in a memorandum from the Under Secretary of Defense for Acquisition, Technology, and Logistics, dated November 3, 2010. The memorandum provided guidance to the secretaries of the military departments and directors of defense agencies on obtaining greater efficiency and productivity in defense spending. In support of this initiative, DoD is proposing to amend DFARS subpart 216.4 to require that contracting officers must—

(1) Give particular consideration to the use of fixed-price incentive (firm target) contracts, especially for acquisitions moving from development to production; and

(2) Pay particular attention to share lines and ceiling prices for fixed-price incentive (firm target) contracts, with a 120 percent ceiling and a 50/50 share ratio as the default arrangement.

**II. Executive Order 12866**

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

**III. Regulatory Flexibility Act**

DoD does not expect this 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 this rule does not impose economic burdens on contractors. The purpose and effect of this rule is to establish an approval threshold for contract type and to encourage the use of a particular contract type in order to incentivize productivity and innovation in industry. However, DoD has prepared an initial regulatory flexibility analysis that is summarized as follows:

This rule proposes to amend the Defense Federal Acquisition Regulation Supplement to implement the initiative on incentivizing productivity and innovation in industry, as presented by the Under Secretary of Defense for Acquisition, Technology, & Logistics in a memorandum dated November 3, 2010. The objective of the rule is to incentivize contractors. The legal basis is 41 U.S.C. 1303 and 48 CFR chapter 1.

The proposed rule will not have much impact on small entities because the focus of the rule is for development efforts that are moving into early production. Small entities are more likely to receive awards for commercial products, including commercially available off-the-shelf products, for which firm-fixed-price contracts are appropriate. In Fiscal Year 2010, 93 percent of awards to small businesses were firm-fixed-price contracts, and 99.99 percent of awards to small businesses were other than fixed-price incentive contracts.

The proposed rule imposes no reporting, recordkeeping, or other information collection requirements.

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

There are no known alternatives to the rule that would adequately implement the DoD policy. There is no significant economic impact on small entities.

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 2011-D010) in correspondence.

**IV. Paperwork Reduction Act**

The proposed rule contains no 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 Part 216**

Government procurement.

**Ynette R. Shelkin,**

*Editor, Defense Acquisition Regulations System.*

Therefore, 48 CFR part 216 is proposed to be amended as follows:

**PART 216—TYPES OF CONTRACTS**

1. The authority citation for 48 CFR part 216 continues to read as follows:

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

2. Add section 216.403-1 to read as follows:

**216.403-1 Fixed-price incentive (firm target) contracts.**

(b) *Application.*

(1) The contracting officer shall give particular consideration to the use of fixed-price incentive (firm target)

contracts, especially for acquisitions moving from development to production.

(2) The contracting officer shall pay particular attention to share lines and ceiling prices for fixed-price incentive (firm target) contracts, with a 120 percent ceiling and a 50/50 share ratio as the default arrangement.

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Part 217

RIN 0750-AG89

#### Defense Federal Acquisition Regulation Supplement; Multiyear Contracting (DFARS Case 2009-D026)

**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 update and clarify the requirements for multiyear contracting. No statutory changes are incorporated in this proposed rule.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before May 2, 2011, to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2009-D026, using any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *E-mail:* [dfars@osd.mil](mailto:dfars@osd.mil). Include DFARS Case 2009-D026 in the subject line of the message.
- *Fax:* (703) 602-0350.
- *Mail:* Defense Acquisition Regulations System, Attn: Manual Quinones, OUSD (AT&L) DPAP (DARS), Room 3B855, 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 <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:** Manual Quinones, Telephone (703) 602-1302.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

This DFARS case was initiated by DoD based on an internal DoD policy decision to perform a comprehensive review of DFARS subpart 217.1, Multiyear Contracting to update and clarify the requirements relating to multiyear contracting. This effort includes reorganizing existing coverage for multiyear acquisitions, such as the co-location of basic congressional notification requirements under 217.170, General. Additionally, the contents of 217.173, Multiyear contracts for weapons systems and 217.174, Multiyear contracts that employ economic order quantity procurement, are merged into 217.170, General, and 217.172, Multiyear contracts for supplies. The requirements governing multiyear contracts for military family housing, currently at 217.171(b), are separated out and highlighted as a new section 217.173, entitled "Multiyear contracting for military family housing." Citations to the United States Code, relevant DoD regulations, and the Federal Acquisition Regulation have been updated. No changes to existing DoD policy, including implementation of any statutorily mandated acquisition-related thresholds, are being made in this rule.

##### II. Executive Order 12866

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

##### III. Regulatory Flexibility Act

DoD does not expect this rule to have an economic impact on small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not change the existing requirements of subpart 217.1. Further, these requirements are primarily internal procedures for DoD. Therefore, DoD has not performed an initial regulatory flexibility analysis.

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 2009-D026) in correspondence.

#### IV. Paperwork Reduction Act

This rule does not impose 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 Part 217

Government procurement.

**Mary Overstreet,**

*Editor, Defense Acquisition Regulations System.*

Therefore, 48 CFR part 217 is proposed to be amended as follows:

#### PART 217—SPECIAL CONTRACTING METHODS

1. The authority citation for 48 CFR part 217 continues to read as follows:

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

2. Section 217.170 is amended by—
  - a. Redesignating paragraphs (a), (b), (c), (d), and (e) as paragraphs (b), (c), (d), (e), and (f), respectively;
  - b. Adding a new paragraph (a);
  - c. Amending redesignated paragraph (b) by removing "Public Law 105-56" and adding in its place "Pub. L. 105-56," and removing "Section" and adding in its place "section";
  - d. Amending redesignated paragraph (c) by removing "217.172(f)(2)" and adding in its place "217.172(g)(2)";
  - e. Revising redesignated paragraph (d); and
  - f. Revising redesignated paragraph (f).

The additions and revisions read as follows:

##### 217.170 General.

(a) This section explains the general rules that are common to all multiyear contracts.

\* \* \* \* \*

(d) The head of the agency must provide written notice to the congressional defense committees at least 10 days before termination of any multiyear contract (10 U.S.C. 2306b(1)(6), 10 U.S.C. 2306c(d)(3), section 8008(a) of Pub. L. 105-56, and similar sections in subsequent DoD appropriations acts).

\* \* \* \* \*

(f)(1) DoD must provide notification to the congressional defense committees at least 30 days before entering into a multiyear contract for certain procurements, including those expected to—

(i) Employ an unfunded contingent liability in excess of \$20 million (*see* 10 U.S.C. 2306b(1)(1)(B)(i)(II), 10 U.S.C. 2306(d)(1), and section 8008(a) of Pub.