

**DEPARTMENT OF DEFENSE****Defense Acquisition Regulations System****48 CFR Parts 209, 216, and 252**

RIN 0750-AH37

**Defense Federal Acquisition Regulation Supplement: Award Fee Reduction or Denial for Health or Safety Issues (DFARS Case 2011-D033)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is adopting as final, without change, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement those sections of the National Defense Authorization Acts for Fiscal Years 2010 and 2011, providing increased authorities to reduce or deny award fees to companies found to jeopardize the health or safety of Government personnel. In addition, this rule modifies the requirement that information on the final determination of award fee be entered into the Federal Awardee Performance and Integrity Information System (FAPIS).

**DATES:** *Effective Date:* February 24, 2012.

**FOR FURTHER INFORMATION CONTACT:** Ms. Meredith Murphy, telephone 703-602-1302.

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

DoD published an interim rule in the **Federal Register** at 76 FR 57674 on September 16, 2011, to implement sections 823 and 834 of the National Defense Authorization Acts (NDAA) for Fiscal Years (FY) 2010 and 2011, providing increased statutory authorities to reduce or deny award fees to companies found to jeopardize the health or safety of Government personnel and adding a mechanism to decrease or eliminate a contractor's award fee for a specific performance period. In addition, the interim rule implemented the modification by section 834 of section 872 of the NDAA for FY 2009, which required that information on the final determination of award fee be entered into the Federal Awardee Performance and Integrity Information System (FAPIS). One respondent submitted a public comment in response to the interim rule.

**II. Discussion and Analysis of the Public Comment**

The Defense Acquisition Regulations Council (the Council) reviewed the public comment in the development of the final rule. A discussion of the comment is provided as follows:

**A. Summary of Significant Changes**

The interim rule is adopted, without change, as a final rule.

**B. Analysis of Public Comment**

*Comment:* The respondent noted that DFARS 209.105-2-70 uses the term "DoD appointing official," while the clause, at DFARS 252.216-7007(a)(ii)(E), states that the determination is made by the Secretary of Defense. The respondent suggested that the same term be used in both locations.

*Response:* The terminology used was carefully considered by DoD. Section 834 of the statute requires the Secretary of Defense to provide for an "expeditious, independent investigation" and "make a final determination, pursuant to procedures established by the Secretary for purposes of this section. Defense Criminal Investigative Organizations (DCIOs) currently have procedures in place to conduct criminal investigations of contractor misconduct. These procedures are outside the acquisition regulatory process, and, further, there are differences in the procedural processes followed within different parts of DoD. After consideration of the comment, DoD determined that the DFARS text at 209.105-2-70 should be as specific as possible for the guidance of the contracting officer, i.e., "the DoD appointing official that requested a DoD investigation makes a final determination \* \* \*" However, DoD used the "Secretary of Defense" in the DFARS clause because it is not necessary to specify to the contractor the delegation of authority within DoD.

**III. 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 a significant regulatory action and, therefore, was 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.

**IV. Regulatory Flexibility Act**

DoD certifies that this final rule will not 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 section 834 of the NDAA for FY 2011 does not apply to firms that are subject to the jurisdiction of U.S. courts. By definition, small businesses are U.S. businesses and, therefore, are subject to the jurisdiction of the U.S. courts. Accordingly, this rule will not affect small businesses. For the definition of "small business," the Regulatory Flexibility Act refers to the Small Business Act, which in turn allows the U.S. Small Business Administration (SBA) Administrator to specify detailed definitions or standards (5 U.S.C. 601(3) and 15 U.S.C. 632(a)). The SBA regulations at 13 CFR 121.105 discuss who is a small business: "(a)(1) Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor."

This rule also implements section 823 of the NDAA for FY 2010. Section 823 required contracting officers to consider reduction or denial of award fee if the actions of the contractor or a subcontractor at any tier jeopardized the health or safety of Government personnel. DoD did not prepare an initial regulatory flexibility analysis upon publication of the interim rule implementing section 823 (75 FR 69360, effective November 12, 2010) because, generally, contracts awarded to small businesses are not likely to utilize incentive- and award-fee contract structures. No comments were received from small entities on the interim rule.

**V. 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 209, 216, and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

### Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR parts 209, 216, and 252, which was published at 76 FR 57674 on September 16, 2011, is adopted as a final rule without change.

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

48 CFR Parts 215, 232, 234, 242, 244, 245, and 252

RIN 0750-AG58

#### Defense Federal Acquisition Regulation Supplement; Business Systems—Definition and Administration (DFARS Case 2009-D038)

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is adopting as final, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to improve the effectiveness of DoD oversight of contractor business systems.

**DATES:** *Effective date:* February 24, 2012.

**FOR FURTHER INFORMATION CONTACT:** Mr. Mark Gomersall, 703-602-0302.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

DoD published an initial proposed rule for Business Systems—Definition and Administration (DFARS Case 2009-D038) in the **Federal Register** on January 15, 2010 (75 FR 2457). Based on the comments received, DoD published a second proposed rule on December 3, 2010 (75 FR 75550). The public comment period closed January 10, 2011. On January 7, 2011, the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2011 was signed into law (Pub. L. 111-383). Section 893 of the NDAA for FY 2011, Contractor Business Systems, set forth statutory requirements for the improvement of contractor business systems to ensure

that such systems provide timely, reliable information for the management of DoD programs. Based on the comments received in response to the second proposed rule and the requirements of the NDAA for FY 2011, DoD published an interim rule with request for comments on May 18, 2011 (76 FR 28856). The public comment period ended on July 18, 2011. Comments were received from 14 respondents in response to the interim rule.

Contractor business systems and internal controls are the first line of defense against waste, fraud, and abuse. Weak control systems increase the risk of unallowable and unreasonable costs on Government contracts. To improve the effectiveness of Defense Contract Management Agency (DCMA) and Defense Contract Audit Agency (DCAA) oversight of contractor business systems, DoD has clarified the definition and administration of contractor business systems as follows:

A. Contractor business systems have been defined as accounting systems, estimating systems, purchasing systems, earned value management systems (EVMS), material management and accounting systems (MMAS), and property management systems.

B. Compliance enforcement mechanisms have been implemented in the form of a business systems clause which includes payment withholding that allows contracting officers to withhold a percentage of payments, under certain conditions, when a contractor's business system contains significant deficiencies. Payments could be withheld on—

- Interim payments under—
  - Cost-reimbursement contracts;
  - Incentive type contracts;
  - Time-and-materials contracts;
  - Labor-hour contracts;
- Progress payments; and
- Performance-based payments.

##### II. Discussion and Analysis

###### A. Analysis of Public Comments

###### 1. Accounting System Monitoring

*Comment:* A respondent stated that DFARS 252.242-7006(c)(8) is vague. Periodic monitoring of the system can take many forms and be performed by numerous personnel. The respondent suggested that wording more in line with DFARS 252.244-7001(c)(18), DFARS 252.215-7002(d)(4)(xii), or DFARS 252.215-7002(d)(4)(xiii) would better state who is expected to perform the monitoring, why the monitoring is being performed, and would give a clearer expectation of level of monitoring to be performed.

*Response:* The size and complexity of companies and their processes, operations, and accounting systems capabilities vary. Therefore, it is not feasible to establish specific requirements regarding the extent or frequency of monitoring by the contractor. However, the term “periodic” has been removed and additional language has been added, similar to the language at 252.244-7001 and 252.215-7002, to clarify that the contractor's accounting system shall provide for management reviews or internal audits of the contractor's system to ensure compliance with the contractor's policies, procedures, and established accounting practices.

###### 2. Business Systems Clause Prescription

*Comment:* A “covered contract” is defined at DFARS 242.7000(a) as one that is subject to Cost Accounting Standards (CAS). A respondent stated that the problem with this prescription is that a contracting officer will not typically know if the resulting contract will be subject to CAS when drafting the solicitation. A determination as to whether CAS applies to a particular contract is made after the offeror submits an offer containing the information required by the provision at FAR 52.230-1, Cost Accounting Notices and Certification. The contracting officer then inserts the appropriate CAS clauses in the contract, if necessary. The respondent suggested that one way to correct this is to add a paragraph to the clause making it self-deleting if CAS does not apply to the contract.

*Response:* The clause has been amended to make it self-deleting if CAS does not apply.

###### 3. Definition of Covered Contract

*Comment:* A respondent suggested that the definition of “covered contract” be modified to match the definition in section 893 of the NDAA for FY 2011.

*Response:* Section 816 of the NDAA for 2012 redefined “covered contract” as “a contract that is subject to the cost accounting standards promulgated pursuant to section 1502 of title 41, United States Code, that could be affected if the data produced by a contractor business system has a significant deficiency.” The section 816 definition matches the definition used in this rule, therefore, no revisions are necessary.

###### 4. Cost vs. Cost-Reimbursement

*Comment:* A respondent stated that the word “cost” is used throughout the rule when “cost-reimbursement” is what is meant. Unless this rule only applies to cost contracts, a specific type