

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 252

Defense Federal Acquisition Regulation Supplement; Technical Amendments

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

ACTION: Final rule.

SUMMARY: DoD is making technical amendments to the Defense Federal Acquisition Regulation Supplement (DFARS) to provide needed editorial changes.

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

FOR FURTHER INFORMATION CONTACT: Ms. Ynette Shelkin, Defense Acquisition Regulations System, OUSD(AT&L)DPAP(DARS), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6089; facsimile 571-372-6094.

SUPPLEMENTARY INFORMATION: This final rule amends the DFARS as follows:

1. Adds paragraph (d)(1)(vii) to clause 252.204-7007, Alternate A, Annual Representations and Certifications, which was inadvertently removed from the Code of Federal Regulations with the publication of DFARS Case 2011-D048 (77 FR 19128), and makes a conforming change to the clause date.

2. Conforms statutory titles to the new Positive Law Codification of Title 41, United States Code, "Public Contracts," in Alternates IV and V of clause 252.225-7036, Buy American—Free Trade Agreements—Balance of Payments Program and makes conforming changes to the dates of the Alternates, which were inadvertently omitted from publication of the final rule under DFARS Case 2012-D003 (77 FR 35879).

List of Subjects in 48 CFR Part 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 252 is amended as follows:

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 1. The authority citation for 48 CFR part 252 continues to read as follows:

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

■ 2. Section 252.204-7007 is amended—

■ a. By removing the clause date "(JUN 2012)" and adding "(JUL 2012)" in its place; and

■ b. By adding paragraph (d)(1)(vii) to read as follows:

252.204-7007 Alternate A, Annual Representations and Certifications.

* * * * *

(d) * * *

(1) * * *

(vii) 252.247-7022, Representation of Extent of Transportation by Sea. Applies to all solicitations except those for direct purchase of ocean transportation services or those with an anticipated value at or below the simplified acquisition threshold.

* * * * *

252.225-7036 [Amended]

■ 3. Section 252.225-7036 is amended in Alternates IV and V by removing the clause date "(MAY 2012)" and adding "(JUN 2012)" in its place and in paragraph (c), by removing "Act".

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215, 225, and 252

RIN 0750-AH42

Defense Federal Acquisition Regulation Supplement: Contracting With the Canadian Commercial Corporation (DFARS Case 2011-D049)

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to clarify the requirements for the Canadian Commercial Corporation to submit data other than certified cost or pricing data.

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

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 76 FR 61296 on October 4, 2011. DoD also issued a correction to a sentence in the

Background Summary of the **Federal Register** notice on October 18, 2011, at 76 FR 64297. One respondent submitted public comments in response to the proposed rule.

With some exceptions, as provided at DFARS 225.870-1(c), the Canadian Commercial Corporation awards and administers DoD contracts with contractors located in Canada. DoD has waived the requirement for the Canadian Commercial Corporation and its subcontractors to submit certified cost or pricing data (see DFARS 215.403-1(c)(4)(C)). However, the purpose of this rule is to clarify that the requirement to submit data other than certified cost or pricing data has not been waived.

II. Discussion and Analysis

A. Summary of Significant Changes in the Final Rule as a Result of Public Comments

1. DFARS 215.408(5) has been revised to raise the threshold for cost-reimbursement contracts from the simplified acquisition threshold to \$700,000.

2. DFARS 215.408(5) has also raised the level to which the head of the contracting activity can delegate approval authority for using the provision at 252.215-7003 and the clause at 252.215-7004 in accordance with 215.408(5)(i)(B) and (ii)(B), respectively, from one level above the contracting officer to two levels above the contracting officer.

3. DFARS 225.870-4(c)(5) and 252.215-7003 now include the text at FAR 15.403-3(a)(4) to notify the contracting officer and the offerors that in order to be eligible for award, offerors must provide data necessary to determine that the price is fair and reasonable.

4. The clause at 252.215-7004 has been revised to require data other than certified cost or pricing data for modifications only when they exceed the simplified acquisition threshold. The contracting officer may modify the clause to specify a higher threshold.

B. Analysis of Public Comments

1. Use of Domestic Policies, Procedures, and Practices

Comment: The respondent cited the Defence Production Sharing Agreement of 1956 and the need to apply Canadian domestic policies, practices, and procedures when conducting price analysis on a Canadian supplier.

Response: Data other than certified cost or pricing data can be released in line with Canadian laws and

government contracting practices, policies, and procedures.

2. Information Necessary To Make a Determination of Fair and Reasonable Prices

Comment: According to the respondent, under current defense procurement arrangements, Canada assumes the cost of investigating and verifying whether the prices on a procurement contract and its subsequent management are fair and reasonable. The respondent expressed concern over significant costs associated with investigation and verification of price reasonableness for companies and Government, so that duplication should be avoided. Nevertheless, the respondent acknowledged that DoD is ultimately responsible for making a final decision regarding the reasonableness of the prices it pays and that there may be some cases (such as sole source fixed-price contracts over \$500 million and sole source cost-reimbursement contracts that exceed the simplified acquisition threshold) in which additional information may be needed. The respondent suggested modification to the DFARS rule to emphasize that the DoD contracting officer should not request more information than is necessary to determine that the price is fair and reasonable.

Response: The principle that the contracting officer should not request more data than is necessary to determine that the price is fair and reasonable is stated in FAR 15.402(a)(3) and applies to all DoD requests for cost or pricing data. This DFARS rule reiterates at 225.870–4(c)(2), and in paragraph (b)(iii) of both the new provision at 252.215–7003 and the new clause at 252.215–7004, that the contracting officer shall only require submission of data other than certified cost or pricing data to the extent necessary to determine a fair and reasonable price.

To avoid unnecessary duplication of effort, the provision and clause both provide that the Canadian Commercial Corporation shall provide to the contracting officer the analysis provided to the Canadian Commercial Corporation by Public Works and Government Services Canada (comparable to the analysis required at FAR 15.404–1) as well as profit rate or fee.

3. Requests for Information Other Than Certified Cost or Pricing Data

Comment: The respondent recommended that approval should be required for any request of information other than certified cost or pricing data.

Response: The DFARS rule does not require authorization when requesting data for sole source acquisitions that are—

- Cost-reimbursement, if the contract value is expected to exceed a dollar threshold of \$700,000; or
- Fixed-price, if the contract value is expected to exceed \$500 million.

The respondent acknowledged that for such contracts additional requests for data other than certified cost or pricing data may be warranted. To require higher level approval of each such request would impose an unnecessary administrative burden. Higher level approval is required for any request for data other than certified cost or pricing data in solicitations and contracts other than those sole source acquisitions specified in the rule.

4. Level of Authorization for Requests for Additional Information

Comment: The respondent recommended requiring the approval by the head of the contracting activity, or a delegate no lower than the Senior Executive Service level, before a contracting officer proceeds with any request for data other than certified cost or pricing data to the Canadian Commercial Corporation.

Response: In response to this comment, DoD revised the final rule to restrict delegation of approval authority by the head of the contracting activity to a level no lower than two levels above the DoD contracting officer.

5. Application to Competitive Acquisitions in Which Two or More Offers Are Received

Comment: The respondent stated that substantive investigation and cost verification of cost reasonableness is normally not required if a solicitation for goods or services is considered competitive. Therefore, the respondent recommended that requests for data other than certified cost or pricing data not be allowed on competitive acquisitions in which more than one offer is received. The respondent acknowledged that if only one offer is received, the acquisition may be treated the same as a sole source procurement, rather than a competitive procurement.

Response: FAR 15.403–3 states that when adequate price competition exists, generally no additional data are necessary to determine the reasonableness of price. FAR 15.404–1 provides that comparison of proposed prices received in response to the solicitation normally establishes a fair and reasonable price. However, the FAR does not preclude the unusual circumstance in which additional data

might be required (although preferably from a source other than the offeror). In such circumstances, the contracting officer may request the data with the higher level approval as specified in the final rule.

6. Modifications

Comment: The respondent recommended a minimum threshold to limit the requests for data other than certified cost or pricing data to significant contract modifications.

Response: DoD has modified the final rule to provide a threshold at least equal to the simplified acquisition threshold. The prescription advises that the request for data other than certified cost or pricing data should be used (1) for modifications that equal or exceed the simplified acquisition threshold; or (2) when questions of cost or price realism arise. The contracting officer can modify the clause to specify a higher threshold, based on the value and type of acquisition.

7. Compliance With Canadian law

Comment: According to the respondent, any release of data by the Canadian Commercial Corporation must comply with Canadian law, regulations, and obligations, especially the Access to Information Act and the Privacy Act, as well as non-disclosure agreements with parties in a contractual relationship with the Government.

Response: Award of a contract to a Canadian contractor via the Canadian Commercial Corporation is subject to the terms and conditions of the DFARS clause and to FAR 15.403–3(a)(4), which specifies that an offeror who does not comply with a requirement to submit data that the contracting officer has deemed necessary to determine price reasonableness or cost realism is ineligible for award unless the head of the contracting activity determines that it is in the best interest of the Government to make the award to that offeror.

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 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.

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 it only impacts Canadian business concerns. No domestic small business entities will be impacted by this rule. 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."

V. Paperwork Reduction Act

The rule contains 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); however, these changes to the DFARS do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000-0013, Cost or Pricing Data Requirements and Information Other Than Cost or Pricing Data.

List of Subjects in 48 CFR Parts 215, 225, and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 215, 225, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 215, 225, and 252 continues to read as follows:

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

PART 215—CONTRACTING BY NEGOTIATION

■ 2. Amend section 215.403-1 by revising the heading and paragraph (c)(4)(C) to read as follows:

215.403-1 Prohibition on obtaining certified cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. chapter 35).

* * * * *

(c) * * *

(4) * * *

(C) DoD has waived the requirement for submission of certified cost or pricing data for the Canadian Commercial Corporation and its subcontractors (but see 215.408(5) and 225.870-4(c)).

* * * * *

■ 3. Amend section 215.408 by adding paragraph (5) to read as follows:

215.408 Solicitation provisions and contract clauses.

* * * * *

(5) When contracting with the Canadian Commercial Corporation—

(i) Use the provision at 252.215-7003, Requirement for Data Other Than Certified Cost or Pricing Data—

(A) In solicitations for sole source acquisitions that are—

(1) Cost-reimbursement, if the contract value is expected to exceed \$700,000; or

(2) Fixed-price, if the contract value is expected to exceed \$500 million; or

(B) In other solicitations, if the head of the contracting activity, or designee no lower than two levels above the contracting officer, determines that data other than certified cost or pricing data is needed in order to determine that the price is fair and reasonable (see FAR 15.403-3(a)); and

(ii)(A) Use the clause at 252.215-7004, Requirement for Data Other Than Certified Cost or Pricing Data—Modifications—Canadian Commercial Corporation—

(1) In solicitations and contracts for sole source acquisitions that are—

(i) Cost-reimbursement, if the contract value is expected to exceed \$700,000; or

(ii) Fixed-price, if the contract value is expected to exceed \$500 million; or

(2) In other solicitations and contracts, if the head of the contracting activity, or designee no lower than two levels above the contracting officer, determines that it is reasonably certain that data other than certified cost or pricing data will be needed in order to determine that the price of modifications is fair and reasonable (see FAR 15.403-3(a)).

(B) The contracting officer may specify a higher threshold in paragraph (b) of the clause.

PART 225—FOREIGN ACQUISITION

225.802-70 [Amended]

■ 4. Amend section 225.802-70 in the second sentence by removing "Subpart" and adding "subpart" in its place.

225.870-1 [Amended]

■ 5. Amend section 225.870-1, paragraph (a), by removing "Canadian Government" each time it appears and adding "Canadian government" in its place.

■ 6. Amend section 225.870-4 by redesignating paragraph (c) as paragraph (d) and adding new paragraph (c) to read as follows:

225.870-4 Contracting procedures.

* * * * *

(c) *Requirement for data other than certified cost or pricing data.* (1) DoD has waived the requirement for submission of certified cost or pricing data for the Canadian Commercial Corporation and its subcontractors (see 215.403-1(c)(4)(C)).

(2) The Canadian Commercial Corporation is not exempt from the requirement to submit data other than certified cost or pricing data, as defined in FAR 2.101. In accordance with FAR 15.403-3(a)(1)(ii), the contracting officer shall require submission of data other than certified cost or pricing data from the offeror, to the extent necessary to determine a fair and reasonable price.

(3) The contracting officer shall use the provision at 252.215-7003, Requirement for Data Other Than Certified Cost or Pricing Data—Canadian Commercial Corporation, and the clause at 252.215-7004, Requirement for Data Other Than Certified Cost or Pricing Data—Modifications—Canadian Commercial Corporation, as prescribed at 215.408(5)(i) and (ii), respectively.

(4) Except for contracts described in 225.870-1(c)(1) through (4), Canadian suppliers will provide required data other than certified cost or pricing data exclusively through the Canadian Commercial Corporation.

(5) As specified in FAR 15.403-3(a)(4), an offeror who does not comply with a requirement to submit data that the contracting officer has deemed necessary to determine price reasonableness or cost realism is ineligible for award, unless the head of the contracting activity determines that it is in the best interest of the Government to make the award to that offeror, based on consideration of the following:

- (i) The effort made to obtain the data.
- (ii) The need for the item or service.

(iii) Increased cost or significant harm to the Government if award is not made.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Add sections 252.215–7003 and 252.215–7004 to read as follows:

252.215–7003 Requirement for Submission of Data Other Than Certified Cost or Pricing Data—Canadian Commercial Corporation.

As prescribed at 215.408(5)(i), use the following provision:

REQUIREMENT FOR SUBMISSION OF DATA OTHER THAN CERTIFIED COST OR PRICING DATA—CANADIAN COMMERCIAL CORPORATION (JUL 2012)

(a) Submission of certified cost or pricing data is not required.

(b) Canadian Commercial Corporation shall obtain and provide the following:

(i) Profit rate or fee (as applicable).

(ii) Analysis provided by Public Works and Government Services Canada to the Canadian Commercial Corporation to determine a fair

and reasonable price (comparable to the analysis required at FAR 15.404–1).

(iii) Data other than certified cost or pricing data necessary to permit a determination by the U.S. Contracting Officer that the proposed price is fair and reasonable [*U.S. Contracting Officer to insert description of the data required in accordance with FAR 15.403–3(a)(1)*].

(c) As specified in FAR 15.403–3(a)(4), an offeror who does not comply with a requirement to submit data that the U.S. Contracting Officer has deemed necessary to determine price reasonableness or cost realism is ineligible for award unless the head of the contracting activity determines that it is in the best interest of the Government to make the award to that offeror.

(End of provision)

252.215–7004 Requirement for Submission of Data Other Than Certified Cost or Pricing Data—Modifications—Canadian Commercial Corporation.

As prescribed at 215.408(5)(ii), use the following clause:

REQUIREMENT FOR SUBMISSION OF DATA OTHER THAN CERTIFIED COST OR PRICING DATA—MODIFICATIONS—CANADIAN COMMERCIAL CORPORATION (JUL 2012)

(a) Submission of certified cost or pricing data is not required.

(b) Canadian Commercial Corporation shall obtain and provide the following for modifications that exceed the simplified acquisition threshold [*or higher dollar value specified by the U.S. Contracting Officer in the solicitation*].

(i) Profit rate or fee (as applicable).

(ii) Analysis provided by Public Works and Government Services Canada to the Canadian Commercial Corporation to determine a fair and reasonable price (comparable to the analysis required at FAR 15.404–1).

(iii) Data other than certified cost or pricing data necessary to permit a determination by the U.S. Contracting Officer that the proposed price is fair and reasonable [*U.S. Contracting Officer to insert description of the data required in accordance with FAR 15.403–3(a)(1)*].

(End of clause)

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