

only in that it removes this FAR exemption.

There is no reporting or recordkeeping requirement established by this rule. The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no alternatives that would achieve the objectives of the final rule. No comments were received on the small business impact in response to the initial regulatory flexibility analysis.

Interested parties may obtain a copy of the final regulatory flexibility analysis (FRFA) from the point of contact named herein. A copy of the FRFA has been submitted to the Chief Counsel for Advocacy of the Small Business Administration.

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 203 and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 203 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 203 and 252 continues to read as follows:

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

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 2. Amend section 203.1004 by revising paragraph (b)(2)(ii) to read as follows:

203.1004 Contract clauses.

(a) * * *

(b)(2)(ii) Unless the contract is for the acquisition of a commercial item or will be performed entirely outside the United States, if the contract exceeds \$5 million, use the clause at 252.203-7004, Display of Fraud Hotline Poster(s), in lieu of the clause at FAR 52.203-14, Display of Hotline Poster(s). If the Department of Homeland Security (DHS) provides disaster relief funds for the contract, DHS will provide information on how to obtain and display the DHS fraud hotline poster.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Add section 252.203-7004 to read as follows:

252.203-7004 Display of fraud hotline poster(s).

As prescribed in 203.1004(b)(2)(ii), use the following clause:

Display of Fraud Hotline Poster(s) (Sep 2011)

(a) *Definition.* *United States*, as used in this clause, means the 50 States, the District of Columbia, and outlying areas.

(b) *Display of fraud hotline poster(s).*

(1) The Contractor shall display prominently in common work areas within business segments performing work in the United States under Department of Defense (DoD) contracts DoD fraud hotline posters prepared by the DoD Office of the Inspector General. DoD fraud hotline posters may be obtained from the DoD Inspector General, Attn: Defense Hotline, 400 Army Navy Drive, Washington, DC 22202-2884.

(2) If the contract is funded, in whole or in part, by Department of Homeland Security (DHS) disaster relief funds, the DHS fraud hotline poster shall be displayed in addition to the DoD fraud hotline poster. If a display of a DHS fraud hotline poster is required, the Contractor may obtain such poster from:

[Contracting Officer shall insert the appropriate DHS contact information or website.]

(3) Additionally, if the Contractor maintains a company website as a method of providing information to employees, the Contractor shall display an electronic version of the poster(s) at the website.

(c) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (c), in all subcontracts that exceed \$5 million except when the subcontract—

(1) Is for the acquisition of a commercial item; or

(2) Is performed entirely outside the United States.

(End of clause)

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 209, 216, and 252

[DFARS Case 2011-D033]

RIN-0750-AH37

Defense Federal Acquisition Regulation Supplement; Award Fee Reduction or Denial for Health or Safety Issues

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

ACTION: Interim rule.

SUMMARY: DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement those sections of the National Defense Authorization Acts (NDAA) for Fiscal Years (FY) 2011 and 2010 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, this rule modifies the section of the NDAA for FY 2009 that requires that information on the final determination of award fee be entered into the Federal Awardee Performance and Integrity Information System (FAPIS).

DATES: *Effective Date:* September 16, 2011.

Applicability Date: This interim rule is applicable to any contract entered into on or after the effective date. This interim rule is applicable to any task order or delivery order issued on or after the effective date of this interim rule, under a contract entered into before, on, or after the effective date.

Comments Date: Comments on the interim rule should be submitted in writing to the address shown below on or before November 15, 2011 to be considered in the formation of the final rule.

ADDRESSES: Submit comments identified by DFARS Case 2011-D033, using any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2011-D033" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2011-D033." Follow the instructions provided at the "Submit a Comment" screen.

Please include your name, company name (if any), and “DFARS Case 2011–D033” on your attached document. Follow the instructions for submitting comments.

- *E-mail:* dfars@osd.mil. Include DFARS Case 2011–D033 in the subject line of the message.

- *Fax:* 703–602–0350.

- *Mail:* Defense Acquisition Regulations System, ATTN: Meredith Murphy, 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: Meredith Murphy, telephone 703–602–1302.

SUPPLEMENTARY INFORMATION:

I. Background

An interim rule was published in the **Federal Register** under DFARS Case 2009–D039, Award-Fee Reductions for Health and Safety Issues, on November 12, 2010, at 75 FR 69360 to implement section 823 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84). This interim rule includes the review of public comments received in response to the **Federal Register** notice for DFARS Case 2009–D039. DFARS Case 2009–D039 was merged into this case, DFARS Case 2011–D033, after the NDAA for FY 2011 (Pub. L. 111–383) was enacted on January 7, 2011, in order to combine related sections of the NDAs for FY 2010 and FY 2011 affecting identical sections of the DFARS.

A. Section 834 Interim Rule

- The NDAA for FY 2011 was enacted on January 7, 2011. Section 834 of the statute added to existing statutory authorities to decrease or eliminate a contractor’s award fee for a performance period based on a final determination resulting from a DoD investigation of a serious bodily injury or death of any civilian or military personnel alleged to have been caused by a contractor or subcontractor.

- Section 834 applies only to contractors and subcontractors at any tier that are not subject to the jurisdiction of U.S. courts.

A contractor’s award fee is affected if, after the investigation, a determination

is made that the serious bodily injury or death was caused by the contractor’s or subcontractor’s gross negligence or with reckless disregard for the safety of civilian or military personnel of the Government.

Senate Report 111–201, “to accompany S. 3454, the National Defense Authorization Act for Fiscal Year 2011,” associated with section 834, stated that investigations under the provision would be conducted pursuant to existing DoD procedures for administrative fact-finding investigations, such as those provided by Army Regulation 15–6 and the Manual of the Judge Advocate General of the Navy. Defense Criminal Investigative Organizations (DCIOs) have procedures in place currently for conducting criminal investigations of contractor misconduct. In addition, the Military Services have procedures for conducting administrative investigations involving actions related to civilian and military personnel. Findings of criminal misconduct are made at the conclusion of the DCIO investigations.

- The statute also modifies section 872 of the NDAA for FY 2009 (Pub. L. 110–417), and requires that information on the final determination be entered into the Federal Awardee Performance and Integrity Information System (FAPIIS) (see DFARS 209.105–2–70) and will be available to the public.

DoD has added a provision at DFARS 209.105–2–70 to provide for the inclusion of a final determination of contractor fault in the FAPIIS (see FAR 9.104–6 and <http://www.ppirs.gov>). In addition, the requirements of section 834 have been included at DFARS 216.405–2–70, Award fee reduction or denial for jeopardizing the health or safety of Government personnel, and added as a fifth cause for reducing or denying a contractor’s award fee in the clause at DFARS 252.216–7004.

B. Section 823 Interim Rule

The related statutory provision, section 823 of the NDAA for FY 2010, currently is addressed at DFARS 216.405–2–70, Award fee reduction for jeopardizing the health or safety of Government personnel, and the clause at DFARS 252.216–7004 (similarly titled), which require the contracting officer to include in the evaluation criteria of any award-fee plan a review of contractor actions that jeopardized the health and safety of Government personnel. As previously discussed, the section 823 requirement was implemented in the DFARS by DFARS Case 2009–D039, published in the **Federal Register** as an interim rule on

November 12, 2010, at 75 FR 69360, prior to its being merged into this case, 2011–D033, Award Fee Reduction or Denial for Health or Safety Issues.

II. Discussion and Analysis

The public comment period for the interim rule issued under DFARS Case 2009–D039 closed January 24, 2011. Two respondents submitted comments on the interim rule. The individual comments are discussed below.

A. Applicability

Comment: A respondent recommended that the rule be applied to harm caused to any person (not just Government employees).

Response: Section 823 addresses “serious bodily injury or death to any civilian or military personnel of the Government.” Extension of the application of this rule to any person is outside the scope of the statute.

Comment: The respondent commented that the definition of “covered incident” should be broadened, such that contractors are not encouraged to settle out of court and thus deny any liability or wrong-doing and protect their award fees.

Response: The rule implements the statutory definition of a “covered incident” in section 823 of the NDAA for FY 2010, which provides instructions to the contracting officer to reduce the award fee if the contractor is found at fault for a covered incident. It does not instruct the Government on how to proceed with any investigation or resolve covered incidents. No changes to the statutory definition are determined necessary in response to this comment.

Comment: A respondent called for the contracting officer to be allowed to consider any incident that calls into question a contractor’s integrity or responsibility when deciding whether to reduce or deny award fees.

Response: Extension of the application of this rule to any incident that calls into question a contractor’s integrity or responsibility is outside the scope of the statute; however, other parts of the FAR, such as FAR parts 3, Improper Business Practices and Personal Conflicts of Interest, and 9, Contractor Qualifications, and the related DFARS parts, provide information on dealing with contractor responsibility and improper business practices.

B. Documentation

Comment: A respondent stated that contracting officers should be required to make a written determination regarding decisions to reduce or deny

the award fee or decline to do so. The statements should also be made available to the public, according to this respondent.

Response: FAR 16.401(e)(2) states that “(t)he basis for all award-fee determinations shall be documented in the contract file, to include, at a minimum, a determination that overall cost, schedule, and technical performance in the aggregate is or is not at a satisfactory level.” The award-fee determination does not go into FAPIIS. It is the “final determination of contractor fault by the Secretary of Defense” (section 834(d)) that is required to be submitted into FAPIIS. While the latter determination impacts the former determination, they are not the same thing. A requirement for public posting of award-fee determinations is outside the scope of the statute.

C. Contractor Liability

Comment: The respondent noted that contractors performing on contracts within Government facilities have little control over the conditions of the facilities, the funding to provide for repairs to facilities, or the priorities of the repairs.

Response: The DFARS clause at 252.216–7004, Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel, applies only when a direct, causal connection is found between a contractor’s actions and a serious bodily injury to a Government employee.

Comment: The respondent expressed concern that, if a contractor is found partially liable under the Occupational Safety and Health Administration multi-employer worksite policy for a hazardous worksite condition that caused serious injury, then the contractor’s future/past award fee could be reduced or denied.

Response: The statute as implemented in DFARS clause 252.216–7004, requires that if a contractor is found liable in a covered incident for causing serious bodily injury to a Government employee, the contracting officer must consider reducing or denying the relevant award fee.

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 is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

On November 12, 2010, DoD published an interim rule at 75 FR 69360 implementing section 823 of the NDAA for FY 2010. The interim rule was immediately effective upon publication. 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 jeopardize the health or safety of Government personnel. DoD did not prepare an initial regulatory flexibility analysis at that time because generally, contracts awarded to small business are not likely to utilize incentive- and award-fee contract structures. No comments were received on the regulatory flexibility section of the notice for the interim rule implementing section 823.

DoD does not expect this interim rule implementing section 834 of the NDAA for FY 2011 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.* This rule 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. An initial regulatory flexibility analysis has not been performed because this rule will apply only to primes and subcontractors at any tier that are not subject to the jurisdiction of the U.S. courts. 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 the 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–D033) in correspondence.

V. Paperwork Reduction Act

The interim 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).

VI. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. Pursuant to section 823 of the NDAA for FY 2010, contracting officers shall include in the evaluation criteria of any award-fee plan, a review of contractor and subcontractor actions that jeopardize the health and safety of Government personnel, through gross negligence or reckless disregard for the safety of such personnel, as determined through conviction in a criminal proceeding or finding of fault and liability in a civil or administrative proceeding. Additionally, pursuant to section 834 of the NDAA for FY 2011, which became effective on enactment, January 7, 2011, contracting officers are authorized to make a determination of contractor or subcontractor fault where DoD has reason to believe that a contractor or subcontractor may have caused the serious bodily injury or death of civilian or military personnel and the contractor or any subcontractor is not subject to the jurisdiction of the U.S. courts. If DoD finds that a contractor or subcontractor caused the death or serious injury through gross negligence or with reckless disregard for the safety of such personnel, this final determination shall be included in award-fee determinations, thereby providing an important remedy for those situations where a DoD contractor or subcontractor is not otherwise subject to U.S. court jurisdiction. Issuing an interim rule will provide contracting officers with this important remedy immediately upon publication of the rule. However, pursuant to 41 U.S.C. 1707 (formerly 41 U.S.C. 418b) and FAR 1.501–3(b), DoD will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 209, 216, and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 209, 216, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 209, 216, and 252 continues to read as follows:

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

PART 209—CONTRACTOR QUALIFICATIONS

■ 2. Add section 209.105 to subpart 209.1 to read as follows:

209.105 Procedures

■ 3. Add section 209.105–2–70 to read as follows:

209.105–2–70 Inclusion of determination of contractor fault in Federal Awardee Performance and Integrity Information System (FAPIS)

If the contractor or a subcontractor at any tier is not subject to the jurisdiction of the U.S. courts and the DoD appointing official that requested a DoD investigation makes a final determination that a contractor's or subcontractor's gross negligence or reckless disregard for the safety of civilian or military personnel of the Government caused serious bodily injury or death of such personnel, the contracting officer shall enter in FAPIS the appropriate information regarding such determination within three days of receiving notice of the determination, pursuant to section 834 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111–383). Information posted in FAPIS regarding such determinations will be publicly available.

PART 216—TYPES OF CONTRACTS

■ 4. Amend section 216.405–2–70 by revising paragraphs (b) and (c) to read as follows:

216.405–2–70 Award fee reduction or denial for jeopardizing the health or safety of Government personnel.

* * * * *

(b) The contracting officer shall include in the evaluation criteria of any award-fee plan, a review of contractor and subcontractor actions that jeopardized the health or safety of Government personnel, through gross negligence or reckless disregard for the safety of such personnel, as determined through—

(1) Conviction in a criminal proceeding, or finding of fault and liability in a civil or administrative proceeding (in accordance with section 823 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84)); or

(2) If a contractor or a subcontractor at any tier is not subject to the jurisdiction of the U.S. courts, a final determination of contractor or subcontractor fault resulting from a DoD investigation (in accordance with section 834 of the National Defense

Authorization Act for Fiscal Year 2011 (Pub. L. 111–383)).

(c) In evaluating the contractor's performance under a contract that includes the clause at 252.216–7004, Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel, the contracting officer shall consider reducing or denying award fees for a period if contractor or subcontractor actions cause serious bodily injury or death of civilian or military Government personnel during such period. The contracting officer's evaluation also shall consider recovering all or part of award fees previously paid for such period.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Revise section 252.216–7004 to read as follows:

252.216–7004 Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel.

As prescribed in 216.406 use the following clause:

Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel (SEP 2011)

(a) *Definitions.* As used in this clause—
Covered incident—

(i) Means any incident in which the Contractor, through a criminal, civil, or administrative proceeding that results in a disposition listed in paragraph (a)(ii) of this definition—

(A) Has been determined in the performance of this contract to have caused serious bodily injury or death of any civilian or military personnel of the Government through gross negligence or with reckless disregard for the safety of such personnel; or
(B) Has been determined to be liable for actions of a subcontractor of the Contractor that caused serious bodily injury or death of any civilian or military personnel of the Government through gross negligence or with reckless disregard for the safety of such personnel.

(ii) Includes those incidents that have resulted in any of the following dispositions:

(A) In a criminal proceeding, a conviction.
(B) In a civil proceeding, a finding of fault or liability that results in the payment of a monetary fine, penalty, reimbursement, restitution, or damage of \$5,000 or more.
(C) In an administrative proceeding, a finding of fault and liability that results in—
(1) The payment of a monetary fine or penalty of \$5,000 or more; or
(2) The payment of a reimbursement, restitution, or damages in excess of \$100,000.

(D) In a criminal, civil, or administrative proceeding, a disposition of the matter by consent or compromise with an acknowledgment of fault by the Contractor if the proceeding could have led to any of the

outcomes specified in subparagraphs

(a)(ii)(A), (a)(ii)(B), or (a)(ii)(C).

(E) In a DoD investigation of the Contractor or its subcontractors at any tier not subject to the jurisdiction of the U.S. courts, a final determination by the Secretary of Defense of Contractor or subcontractor fault (see DFARS 216.405–2–70).

Serious bodily injury means a grievous physical harm that results in a permanent disability.

(b) If, in the performance of this contract, the Contractor's or its subcontractor's actions cause serious bodily injury or death of civilian or military Government personnel, the Government may reduce or deny the award fee for the period in which the covered incident occurred, including the recovery of all or part of any award fees paid for any previous period during which the covered incident occurred.

(End of clause)

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 216

[DFARS Case 2011–D010]

RIN 0750–AH15

Defense Federal Acquisition Regulation Supplement; Increase the Use of Fixed-Price Incentive (Firm Target) Contracts

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the DFARS to increase the use of fixed-price incentive (firm target) contracts, with particular attention to share lines and ceiling prices.

DATES: *Effective date:* September 16, 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, telephone 703–602–0328.

SUPPLEMENTARY INFORMATION:

I. Background

This DFARS case was initiated to implement an initiative to incentivize productivity and innovation in industry, as set forth in a memorandum from the Under Secretary of Defense for Acquisition, Technology, & Logistics (USD(AT&L)), dated November 3, 2010. The memorandum provided guidance to the secretaries of the military departments and directors of defense