



September 28, 2009

Defense Acquisition Regulations System
Attn: Ms. Cassandra Freeman
OUSD (AT&L) DPAP (DARS)
IMD 3D139
3062 Defense Pentagon
Washington, D.C. 20301-3062

Submitted via: <http://www.regulations.gov> and email

Subject: DFARS Case 2008-D034, Management of Unpriced Change Orders

Dear Ms. Freeman:

The Aerospace Industries Association (AIA) is pleased to respond to the request for comments published in the July 29, 2009, Federal Register, regarding management of unpriced change orders. DFARS subpart 217.74 prescribes policies and procedures for the management of undefinitized contract actions (UCAs). Unpriced change orders, issued in accordance with FAR part 43 and DFARS part 243, are excluded from the scope of DFARS subpart 217.74. The proposed rule would apply those revised policies and procedures to unpriced change orders. AIA is opposed to this proposal and recommends withdrawal of the proposed rule.

AIA supports the selective use of UCAs and timely definitization when a UCA is required to support customer requirements. While we recognize the need for UCAs in some situations, we too prefer a definitized contract before we start work. UCAs benefit DoD by expediting contract actions to meet urgent needs of the Combatant Commanders, avoid costs associated with potential production line gaps, buy long lead time materials and parts, incorporate product upgrades prior to delivery to improve availability, and reduce product life cycle costs by accelerating incorporation of reliability or safety improvements. The initiation and timely definitization of UCAs is often beyond the control of the contractor (e.g., requirements definition and funding issues particularly with FMS contracts, and delays in DCAA supporting audits).

Because of the policies at DFARS 215.404-71-3(d)(2) and 217.7404-6, contractors often realize reduced profits on incurred costs though DoD initiates the UCA, DoD benefits from the UCA, and any delays in definitization may not be the fault of the contractor. The proposed rule

would expand these inequitable policies to unpriced change orders. Bilateral UCAs and unilateral change orders are fundamentally different. The proposed rule does not provide a compelling justification for applying UCA rules to unpriced change orders. Under the FAR changes clauses [except FAR 52.212-4(c)], a contracting officer has the authority unique to U.S. Federal Government contracting to issue unilateral change orders within the general scope of the contract and the contractor must continue performance of the contract as changed. (We note that this unilateral right to make changes does not exist for contracts awarded under FAR Part 12.) These unilateral change orders are priced after issuance in accordance with the procedure in the applicable clause. It would be grossly unfair for DoD to retain the uniquely Government right to issue unilateral change orders and then penalize contractors by decrementing allowable profit on incurred costs. It would also be unfair for a contracting officer to suspend or reduce progress payments or take other actions based on a contractor's failure to submit a qualifying proposal based on a unilaterally issued definitization schedule or not-to-exceed price.

DFARS Subpart 217.74 implements 10 U.S.C. 2326. In the statute, the term "UCA" does not include contractual actions with respect to foreign military sales (FMS), purchases not in excess of the simplified acquisition threshold, special access programs, and congressionally mandated long-lead procurement contracts (10 U.S.C. 2326(g)(1)). The DFARS directs contracting officers to apply the policies in 217.74 "to the maximum extent practicable" to the categories excluded by the statute. The proposed rule would amend DFARS 217.7402 to require contracting officers to provide prior notice, through agency channels, to the Deputy Director, DPAP (Contract Policy and International Contracting), if the contracting officer determines that it is impracticable to apply the policies in 217.74 to UCAs for FMS, special access programs, or congressionally mandated long-lead procurement contracts.


AIA believes the current "maximum extent practicable" requirement in 217.7402 is inconsistent with the intent of the statute that exempts application of these policies and procedures to the specified categories. The statute recognizes that it would be unfair or impractical to apply UCA policies and procedures to the exempted categories. Delays in definitization of FMS contracts, for example, are caused to a large extent by foreign customer driven requirement and funding perturbations. The proposed rule could exacerbate the existing inappropriate "maximum extent practicable" policy by mandating a high-level notification requirement.

We encourage DoD to withdraw the proposed rule and modify the policies at DFARS 215.404-71-3(d)(2) and 217.7404-6 to require contracting officers to consider the benefits the Government derived from the UCA and the cause of any definitization delays, as well as the risk from the date the UCA was issued, when calculating the appropriate amount of profit on incurred costs. We also encourage DoD to delete the "maximum extent practicable" requirement at DFARS 217.7402.

AIA member companies continue to partner with DoD to identify creative and flexible strategies to avoid UCAs, reduce definitization times, reduce proposal lead times, and improve proposal quality. AIA is confident our combined efforts will help to improve this process. Thank you for the opportunity to comment on this proposal.

If you have any questions on the above comments and recommendations, please contact me at 703 358-1042. My email address is dick.powers@aia-aerospace.org.

Sincerely,



Richard J. Powers
Director, Financial Administration