

**DEPARTMENT OF DEFENSE**

**48 CFR Parts 212, 215, 217, 225, 227, 230, 237, 242, 247, 252, and 253**

[DFARS Case 97-D018]

**Defense Federal Acquisition Regulation Supplement; Contracting by Negotiation; Part 215 Rewrite**

**AGENCY:** Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** The Director of Defense Procurement has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to revise procedures pertaining to contracting by negotiation. These amendments conform with amendments made to the Federal Acquisition Regulation (FAR) in Federal Acquisition Circular 97-02, which was published in the **Federal Register** on September 30, 1997.

**EFFECTIVE DATE:** October 14, 1998.

**FOR FURTHER INFORMATION CONTACT:** Defense Acquisition Regulations Council, Attn: Ms. Melissa Rider, PDUSD(A&T)DP(DAR), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0131; telefax (703) 602-0350.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This final rule revises DFARS Part 215 to align it with the reorganized format of FAR Part 15 that was published as a final rule in the **Federal Register** on September 30, 1997 (62 FR 51224). In addition to changes related to format, this rule makes the following changes to DFARS Part 215:

- Guidance on the four-step source selection process and the alternate source selection process have been removed, as the new guidance at FAR 15.101, Best value continuum, clearly allows such source selection processes.
- Requirements for obtaining approvals before requesting second or subsequent best and final offers have been removed in view of the new guidance on proposal revisions at FAR 15.307.
- Guidance on cost realism analysis has been revised to reflect the new guidance on cost realism analysis at FAR 15.404-1(d).
- Thresholds for requesting field pricing assistance have been added at 215.404-2. Similar guidance was removed from the FAR, but is still considered to be appropriate for DoD activities.
- Guidance on field pricing support has been revised to conform with the

FAR revisions that eliminated standard content requirements for field pricing reports.

A proposed rule with request for comments was published in the **Federal Register** on November 26, 1997 (62 FR 63050). Thirty-six comments were received from five sources. All comments were considered in the development of the final rule.

**B. 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 the rule primarily consists of conforming DFARS amendments, and implementing guidance for contracting officers, to reflect existing FAR policy on contracting by negotiation.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the final rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

**List of Subjects in 48 CFR Parts 212, 215, 217, 225, 227, 230, 237, 242, 247, 252, and 253**

Government procurement.

**Michele P. Peterson,**

*Executive Editor, Defense Acquisition Regulations Council.*

Therefore, 48 CFR Parts 212, 215, 217, 225, 227, 230, 237, 242, 247, 252, and 253 are amended as follows:

1. The authority citation for 48 CFR Parts 212, 215, 217, 225, 227, 230, 237, 242, 247, 252, and 253 continues to read as follows:

**Authority:** 41 U.S.C. 421 and 48 CFR Chapter 1.

**PART 212—ACQUISITION OF COMMERCIAL ITEMS**

**212.503 [Amended]**

2. Section 212.503 is amended in paragraph (c)(ii) by revising the parenthetical to read “(see FAR 15.403-4)”.

3. Part 215 is revised to read as follows:

**PART 215—CONTRACTING BY NEGOTIATION**

Sec.

215.000 Scope of part.

**Subpart 215.2—Solicitation and Receipt of Proposals and Information**

215.204-2 Part I—The Schedule.

**Subpart 215.3—Source Selection**

215.303 Responsibilities.

215.304 Evaluation factors and significant subfactors.

215.305 Proposal evaluation.

**Subpart 215.4—Contract Pricing**

215.403 Obtaining cost or pricing data.

215.403-1 Prohibition on obtaining cost or pricing data.

215.403-5 Instructions for submission of cost or pricing data or information other than cost or pricing data.

215.404 Proposal analysis.

215.404-1 Proposal analysis techniques.

215.404-2 Information to support proposal analysis.

215.404-3 Subcontract pricing considerations.

215.404-4 Profit.

215.404-70 DD Form 1547, Record of Weighted Guidelines Method Application.

215.404-71 Weighted guidelines method.

215.404-71-1 General.

215.404-71-2 Performance risk.

215.404-71-3 Contract type risk and working capital adjustment.

215.404-71-4 Facilities capital employed.

215.404-72 Modified weighted guidelines method for nonprofit organizations.

215.404-73 Alternate structure approaches.

215.404-74 Fee requirements for cost-plus-award-fee contracts.

215.404-75 Reporting profit and fee statistics.

215.406-1 Prenegotiation objectives.

215.406-3 Documenting the negotiation.

215.407-2 Make-or-buy programs.

215.407-3 Forward pricing rate agreements.

215.407-4 Should-cost review.

215.407-5 Estimating systems.

215.407-5-70 Disclosure, maintenance, and review requirements.

215.408 Solicitation provisions and contract clauses.

215.470 Estimated data prices.

**215.000 Scope of part.**

See 225.872 for additional guidance on procedures for purchasing form qualifying countries.

**SUBPART 215.2—SOLICITATION AND RECEIPT OF PROPOSALS AND INFORMATION**

**215.204-2 Part I—The Schedule.**

(g) When a contract contains both fixed-priced and cost-reimbursement line items or subline items, the contracting officer shall provide, in Section B, Supplies or Services and Prices/Costs, an identification of contract type specified for each contract line item or subline item to facilitate appropriate payment.

**Subpart 215.3—Source Selection**

**215.303 Responsibilities.**

(b)(2) For high-dollar value and other acquisitions, as prescribed by agency procedures, the source selection authority (SSA) shall approve a source

selection plan (SSP) before the solicitation is issued. The SSP—

(A) Shall be prepared and maintained by a person designated by the SSA or as prescribed by agency procedures;

(B) Shall be coordinated with the contracting officer and senior advisory group, if any, within the source selection organization; and

(C) Shall include, as a minimum—

(1) The organization, membership, and responsibilities of the source selection team;

(2) A statement of the proposed evaluation factors and any significant subfactors and their relative importance;

(3) A description of the evaluation process, including specific procedures and techniques to be used in evaluating proposals; and

(4) A schedule of significant events in the source selection process, including documentation of the source selection decision and announcement of the source selection decision.

#### **215.304 Evaluation factors and significant subfactors.**

(c)(i) In acquisitions that require use of the clause at FAR 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, the extent of participation of small and small disadvantaged businesses in performance of the contract shall be addressed in source selection.

(A) For acquisitions other than those based only on cost or price competition, the contracting officer shall evaluate the extent to which offerors identify and commit to small business and to small disadvantaged business, historically black college and university, or minority institution performance of the contract, whether as a joint venture, teaming arrangement, or subcontractor.

(B) Evaluation factors may include—

(1) The extent to which such firms are specifically identified in proposals;

(2) The extent of commitment to use such firms (for example, enforceable commitments are to be weighted more heavily than non-enforceable ones);

(3) The complexity and variety of the work small firms are to perform;

(4) The realism of the proposal;

(5) When not otherwise required by 215.305(a)(2), past performance of the offerors in complying with requirements of the clauses at FAR 52.219-8, Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns, and 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan; and

(6) The extent of participation of such firms in terms of the value of the total acquisition.

(C) Proposals addressing the extent of small and small disadvantaged business performance may be separate from subcontracting plans submitted pursuant to the clause at FAR 52.219-9 and should be structured to allow for consideration of offers from small businesses.

(D) When an evaluation includes the factor in paragraph (c)(i)(B)(1) of this section, the small, small disadvantaged, or women-owned small businesses considered in the evaluation shall be listed in any subcontracting plan submitted pursuant to FAR 52.219-9 to facilitate compliance with 252.219-7003(g).

(ii) The costs or savings related to contract administration and audit may be considered when the offeror's past performance or performance risk indicates the likelihood of significant costs or savings.

#### **§ 215.305 Proposal evaluation.**

(a)(1) *Cost or price evaluation.*

Contracting officers shall ensure that the use of uncompensated overtime in contracts to acquire services on the basis of the number of hours provided (see FAR 37.115) will not degrade the level of technical expertise required to fulfill the Government's requirements. When acquiring such services, contracting officers shall conduct a risk assessment, and evaluate for award on that basis, any proposals received that reflect factors such as—

(A) Unrealistically low labor rates or other costs that may result in quality or service shortfalls; and

(B) Unbalanced distribution of uncompensated overtime among skill levels and its use in key technical positions.

(2) *Past performance evaluation.*

When a past performance evaluation is required by FAR 15.304, and the solicitation includes the clause at FAR 52.219-8, Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns, the evaluation factors shall include the past performance of offerors in complying with requirements of that clause. When a past performance evaluation is required by FAR 15.304, and the solicitation includes the clause at FAR 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, the evaluation factors shall include the past performance of offerors in complying with requirements of that clause.

(b) Any determination to reject a proposal based on a violation or possible violation of Section 27 of the OFPP Act shall be made as specified in FAR 3.104.

### **Subpart 215.4—Contract Pricing**

#### **215.403 Obtaining cost or pricing data.**

##### **§ 215.403-1 Prohibition on obtaining cost or pricing data.**

(c) *Standards for exceptions from cost or pricing data requirements—(1) Adequate price competition.* For acquisitions under dual or multiple source programs:

(A) The determination of adequate price competition must be made on a case-by-case basis. Even when adequate price competition exists, in certain cases it may be appropriate to obtain additional information to assist in price analysis.

(B) Adequate price competition normally exists when—

(i) Prices are solicited across a full range of step quantities, normally including a 0-100 percent split, from at least two offerors that are individually capable of producing the full quantity; and

(ii) The reasonableness of all prices awarded is clearly established on the basis of price analysis (see FAR 15.404-1(b)).

(4) *Waivers.* (A) DoD has waived the requirement for submission of cost or pricing data for the Canadian Commercial Corporation and its subcontractors.

(B) DoD has waived cost or pricing data requirements for nonprofit organizations (including education institutions) on cost-reimbursement-no-fee contracts. The contracting officer shall require—

(1) Submission of information other than cost or pricing data to the extent necessary to determine reasonableness and cost realism; and

(2) Cost or pricing data from subcontractors that are not nonprofit organizations when the subcontractor's proposal exceeds the cost or pricing data threshold at FAR 15.403-4(a)(1).

##### **215.403-5 Instructions for submission of cost or pricing data or information other than cost or pricing data.**

(b) When the solicitation requires contractor compliance with the Contractors Cost Data Reporting (CCDR) System (Army—AMCP 715-8, Navy—NAV PUB P-5241, and Air Force—AFMCP 800-15), require the contractor to submit DD Form 1921 or 1921-1 with its pricing proposal.

#### **215.404 Proposal analysis.**

##### **215.404-1 Proposal analysis techniques.**

(a) *General.* For spare parts or support equipment, perform an analysis of—

(i) Those line items where the proposed price exceeds by 25 percent or

more the lowest price the Government has paid within the most recent 12-month period based on reasonably available information;

(ii) Those line items where a comparison of the item description and the proposal price indicates a potential for overpricing;

(iii) Significant high-dollar-value items. If there are no obvious high-dollar-value items, include an analysis of a random sample of items; and

(iv) A random sample of the remaining low-dollar value items. Sample size may be determined by subjective judgment, e.g., experience with the offeror and the reliability of its estimating and accounting systems.

(d) *Cost realism analysis.* The contracting officer should determine what information other than cost or pricing data is necessary for the cost realism analysis during acquisition planning and development of the solicitation. Unless such information is available from sources other than the offerors (see FAR 15.402(a)(2)), the contracting officer will need to request data from the offerors. The contracting officer—

(i) Shall request only necessary data; and

(ii) May not request submission of cost or pricing data.

#### **215.404-2 Information to support proposal analysis.**

(a) *Field pricing assistance.* (i) The contracting officer should consider requesting field pricing assistance for—

(A) Fixed-price proposals exceeding the cost or pricing data threshold;

(B) Cost-type proposals exceeding the cost or pricing data threshold from offerors with significant estimating system deficiencies (see 215.407-5-70(a)(4) and (c)(2)(i)); or

(C) Cost-type proposals exceeding \$10 million from offerors without significant estimating system deficiencies.

(ii) The contracting officer should not request field pricing support for proposed contracts or modifications in an amount less than that specified in paragraph (a)(i) of this subsection. An exception may be made when a reasonable pricing result cannot be established because of—

(A) A lack of knowledge of the particular offeror; or

(B) Sensitive conditions (e.g., a change in, or unusual problems with, an offeror's internal systems).

(c) *Audit assistance for prime contracts or subcontracts.* (i) If, in the opinion of the contracting officer or auditor, the review of a prime contractor's proposal requires further review of subcontractors' cost estimates

at the subcontractors' plants (after due consideration of reviews performed by the prime contractor), the contracting officer should inform the administrative contracting officer (ACO) having cognizance of the prime contractor before the review is initiated.

(ii) Notify the appropriate contract administration activities when extensive, special, or expedited field pricing assistance will be needed to review and evaluate subcontractors' proposals under a major weapon system acquisition. If audit reports are received on contracting actions that are subsequently cancelled, notify the cognizant auditor in writing.

#### **§ 215.404-3 Subcontract pricing considerations.**

(a)(i) When obtaining field pricing assistance on a prime contractor's proposal, the contracting officer should request audit or field pricing assistance to analyze and evaluate the proposal of a subcontractor at any tier (notwithstanding availability of data or analyses performed by the prime contractor) if the contracting officer believes that such assistance is necessary to ensure the reasonableness of the total proposed price. Such assistance may be appropriate when, for example—

(A) There is a business relationship between the contractor and the subcontractor not conducive to independence and objectivity;

(B) The contractor is a sole source supplier and the subcontract costs represent a substantial part of the contract cost;

(C) The contractor has been denied access to the subcontractor's records;

(D) The contracting officer determines that, because of factors such as the size of the proposed subcontract price, audit or field pricing assistance for a subcontract at any tier is critical to a fully detailed analysis of the prime contractor's proposal;

(E) The contractor or higher-tier subcontractor has been cited for having significant estimating system deficiencies in the area of subcontract pricing, especially the failure to perform adequate cost analyses of proposed subcontract costs or to perform subcontract analyses prior to negotiation of the prime contract with the Government; or

(F) A lower-tier subcontractor has been cited as having significant estimating system deficiencies.

(ii) It may be appropriate for the contracting officer or the ACO to provide assistance to a contractor or subcontractor at any tier, when the contractor or higher-tier subcontractor

has been denied access to a subcontractor's records in carrying out the responsibilities at FAR 15.404-3 to conduct price or cost analysis to determine the reasonableness of proposed subcontract prices. Under these circumstances, the contracting officer or the ACO should consider whether providing audit or field pricing assistance will serve a valid Government interest.

(iii) When DoD performs the subcontract analysis, DoD shall furnish to the prime contractor or higher-tier subcontractor, with the consent of the subcontractor reviewed, a summary of the analysis performed in determining any unacceptable costs included in the subcontract proposal. If the subcontractor withholds consent, DoD shall furnish a range of unacceptable costs for each element in such a way as to prevent disclosure of subcontractor proprietary data.

(iv) Price redeterminable or fixed-price incentive contracts may include subcontracts placed on the same basis. When the contracting officer wants to reprice the prime contract even though the contractor has not yet established final prices for the subcontracts, the contracting officer may negotiate a firm contract price—

(A) If cost or pricing data on the subcontracts show the amounts to be reasonable and realistic; or

(B) If cost or pricing data on the subcontracts are too indefinite to determine whether the amounts are reasonable and realistic, but—

(1) Circumstances require prompt negotiation; and

(2) A statement substantially as follows is included in the repricing modification of the prime contract:

As soon as the Contractor establishes firm prices for each subcontract listed below, the Contractor shall submit (in the format and with the level of detail specified by the Contracting Officer) to the Contracting Officer the subcontractor's cost incurred in performing the subcontract and the final subcontract price. The Contractor and Contracting Officer shall negotiate an equitable adjustment in the total amount paid or to be paid under this contract to reflect the final subcontract price.

(v) If the selection of the subcontractor is based on a trade-off among cost or price and other non-cost factors rather than lowest price, the analysis supporting subcontractor selection should include a discussion of the factors considered in the selection (also see FAR 15.101 and 15.304 and 215.304). If the contractor's analysis is not adequate, return it for correction of deficiencies.

(vi) The contracting officer shall make every effort to ensure that fees negotiated by contractors for cost-plus-fixed-fee subcontracts do not exceed the fee limitations in FAR 15.404-4(c)(4).

#### 215.404-4 Profit.

(b) *Policy.* (1) Departments and agencies shall use a structured approach for developing a prenegotiation profit or fee objective on any negotiated contract action that requires cost analysis, except on cost-plus-award-fee contracts (see 215.404-74). There are three approaches—

(A) The weighted guidelines method;  
(B) The modified weighted guidelines method; and

(C) An alternate structured approach.

(c) *Contracting officer responsibilities.* (1) Also, do not perform a profit analysis when assessing cost realism in competitive acquisitions.

(2) The contracting officer—

(A) Shall use the weighted guidelines method (see 215.404-71), unless—

(1) The modified weighted guidelines method applies; or

(2) An alternate approach is justified.

(B) Shall use the modified weighted guidelines method (see 215.404-72) on contract actions with nonprofit organizations.

(C) May use an alternate structured approach (see 215.404-73) when—

(1) The contract action is—

(i) Under \$500,000;

(ii) For architect-engineer or construction work;

(iii) Primarily for delivery of material from subcontractors; or

(iv) A termination settlement; or

(2) The weighted guidelines method does not produce a reasonable overall profit objective and the head of the contracting activity approves use of the alternate approach in writing.

(D) Shall use the weighted guidelines method to establish a basic profit rate under a formula-type pricing agreement, and may then use the basic rate on all

actions under the agreement, provided that conditions affecting profit do not change.

(E) Shall document the profit analysis in the contract file.

(5) Although specific agreement on the applied weights or values for individual profit factors shall not be attempted, the contracting officer may encourage the contractor to—

(A) Present the details of its proposed profit amounts in the weighted guidelines format or similar structured approach; and

(B) Use the weighted guidelines method in developing profit objectives for negotiated subcontracts.

(6) The contracting officer must also verify that relevant variables have not materially changed (e.g., performance risk, interest rates, progress payment rates, distribution of facilities capital).

(d) *Profit-analysis factors.*—(1) *Common factors.* The common factors are embodied in the DoD structured approaches and need not be further considered by the contracting officer.

#### § 215.404-70 DD Form 1547, Record of Weighted Guidelines Method Application.

(a) The DD Form 1547—

(1) Provides a vehicle for performing the analysis necessary to develop of profit objectives;

(2) Provides a format for summarizing profit amounts subsequently negotiated as part of the contract price; and

(3) Serves as the principal source documents for reporting profit statistics to DoD's management information system.

(b) The military departments are responsible for establishing policies and procedures for feeding the DoD-wide management information system on profit and fee statistics (see 215.404-75).

(c) The contracting officer shall—

(1) Use and prepare a DD Form 1547 whenever a structured approach to profit analysis is required by 215.404-4(b) (see 215.404-71, 215.404-72, and 215.404-73 for guidance on using the

structured approaches). Administrative instructions for completing the form are in 253.215.-70.

(2) Ensure that the DD Form 1547 is accurately completed. The contracting officer is responsible for the correction any errors detected by the management system auditing process.

#### § 215.404-71 Weighted guidelines method.

##### § 215.404-71-1 General.

(a) The weighted guidelines method focuses on three profit factors—

(1) Performance risk;

(2) Contract type risk; and

(3) Facilities capital employed.

(b) The contracting officer assigns values to each profit factor; the value multiplied by the base results in the profit objective for that factor. Each profit factor has a normal value and a designated range of values. The normal value is representative of average conditions on the prospective contract when compared to all goods and services acquired by DoD. The designated range provides values based on above normal or below normal conditions. In the negotiation documentation, the contracting officer need not explain assignment of the normal value, but should address conditions that justify assignment of other than the normal value.

##### § 215.404-71-2 Performance risk.

(a) *Description.* this profit factor addresses the contractor's degree of risk in fulfilling the contract requirements. The factor consists of three parts:

(1) Technical—the technical uncertainties of performance.

(2) Management—the degree of management effort necessary to ensure that contract requirements are met.

(3) Cost control—the contractor's efforts to reduce and control costs.

(b) *Determination.* The following extract from the DD Form 1547 is annotated to describe the process.

Item	Contractor risk factors	Assigned weighting	Assigned value	Base (item 18)	Profit objective
21. ....	Technical .....	(1)	(2)	N/A	N/A
22. ....	Management .....	(1)	(2)	N/A	N/A
23. ....	Cost control .....	(1)	(2)	N/A	N/A
24. ....	Performance risk (composite) .....	N/A	(3)	(4)	(5)

(1) Assign a weight (percentage) to each element according to its input to the total performance risk. The total of the three weights equals 100 percent.

(2) Select a value for each element from the list in paragraph (c) of this subsection using the evaluation criteria in paragraphs (d), (e), and (f) of this subsection.

(3) Compute the composite as shown in the following example:

	Assigned weighting	Assigned value	Weighted value
Technical .....	30%	5.0%	1.5%
Management .....	30	4.0	1.2
Cost control .....	40	4.5	1.8
Composite value .....	100%	.....	4.5%

(4) Insert the amount from Block 18 of the DD Form 1547. Block 18 is total contract costs, excluding general and administrative expenses, contractor independent research and development and bid and proposal expenses, and facilities capital cost of money.

(5) Multiply (3) by (4).

(c) *Values: Normal and designated ranges.*

	Normal value (per-cent)	Designated range (per-cent)
Standard .....	4	2 to 6
Alternate .....	6	4 to 8

(1) *Standard.* The standard designated range should apply to most contracts.

(2) *Alternate.* Contracting officers may use the alternate designated range for research and development and service contractors when these contractors require relatively low capital investment in buildings and equipment when compared to the defense industry overall. If the alternate designated range is used, do not give any profit for facilities capital employed (see 215.404-71-4(c)(3)).

(d) *Evaluation criteria for technical.*

(1) Review the contract requirements and focus on the critical performance elements in the statement of work or specifications. Factors to consider include—

- (i) Technology being applied or developed by the contractor;
- (ii) Technical complexity;
- (iii) Program maturity;
- (iv) Performance specifications and tolerances;
- (v) Delivery schedule; and
- (vi) Extent of a warranty or guarantee.

(2) *Above normal conditions.* (i) The contracting officer may assign a higher than normal value in those cases where there is a substantial technical risk. Indicators are—

- (A) The contractor is either developing or applying advanced technologies;
- (B) Items are being manufactured using specifications with stringent tolerance limits;
- (C) The efforts require highly skilled personnel or require the use of state-of-the-art machinery;
- (D) The services and analytical efforts are extremely important to the

Government and must be performed to exacting standards;

(E) The contractor's independent development and investment has reduced the Government's risk or cost;

(F) The contractor has accepted an accelerated delivery schedule to meet DoD requirements; or

(G) The contractor has assumed additional risk through warranty provisions.

(ii) Extremely complex, vital efforts to overcome difficult technical obstacles that require personnel with exceptional abilities, experience, and professional credentials may justify a value significantly above normal.

(iii) The following may justify a maximum value—

(A) Development or initial production of a new item, particularly if performance or quality specifications are tight; or

(B) A high degree of development or production concurrency.

(3) *Below normal conditions.*

(i) The contracting officer may assign a lower than normal value in those cases where the technical risk is low. Indicators are—

(A) Acquisition is for off-the-shelf items;

(B) Requirements are relatively simple;

(C) Technology is not complex;

(D) Efforts do not require highly skilled personnel;

(E) Efforts are routine;

(F) Programs are mature; or

(G) Acquisition is a follow-on effort or a repetitive type acquisition.

(ii) The contracting officer may assign a value significantly below normal for—

(A) Routine services;

(B) Production of simple items;

(C) Rote entry or routine integration of Government-furnished information; or

(D) Simple operations with Government-furnished property.

(e) *Evaluation criteria for management.* (1) The contracting officer should—

(i) Assess the contractor's management and internal control systems using contracting office information and reviews made by field contract administration offices or other DoD field offices;

(ii) Assess the management involvement expected on the prospective contract action;

(iii) Consider the degree of cost mix as an indication of the types of resources applied and value added by the contractor; and

(iv) Consider the contractor's support of Federal socioeconomic programs.

(2) *Above normal conditions.* (i) The contracting officer may assign a higher than normal value when the management effort is intense. Indicators of this are—

(A) The contractor's value added is both considerable and reasonably difficult;

(B) The effort involves a high degree of integration or coordination; or

(C) The contractor has a substantial record of active participation in Federal socioeconomic programs.

(ii) The contracting officer may justify a maximum value when the effort—

(A) Requires large scale integration of the most complex nature;

(B) Involves major international activities with significant management coordination (e.g., offsets with foreign vendors); or

(C) Has critically important milestones.

(3) *Below normal conditions.* (i) The contracting officer may assign a lower than normal value when the management effort is minimal Indicators of this are—

(A) The program is mature and many end item deliveries have been made;

(B) The contractor adds minimum value to an item;

(C) The efforts are routine and require minimal supervision;

(D) The contractor provides poor quality, untimely proposals;

(E) The contractor fails to provide an adequate analysis of subcontractor costs; or

(F) The contractor does not cooperate in the evaluation and negotiation of the proposal.

(ii) The following may justify a value significantly below normal—

(A) Reviews performed by the field contract administration offices disclose unsatisfactory management and internal control systems (e.g., quality assurance, property control, safety, security); or

(B) The effort requires an unusually low degree of management involvement.

(f) *Evaluation criteria for cost control.*

(1) The contracting officer should evaluate—

(i) The expected reliability of the contractor's cost estimates (including the contractor's cost estimating system);

(ii) The contractor's cost reduction initiatives (e.g., competition advocacy programs, dual sourcing, spare parts pricing reform, value engineering);

(iii) The adequacy of the contractor's management approach to controlling cost and schedule; and

(IV) Any other factors that affect the contractor's ability to meet the cost targets (e.g., foreign currency exchange rates and inflation rates).

(2) *Above normal conditions.* The contracting officer may assign a higher than normal value if the contractor can demonstrate a highly effective cost control program. Indicator of this are—

(i) The contractor provides fully documented and reliable cost estimates;

(ii) The contractor has an aggressive cost reduction program that has demonstrable benefits;

(iii) The contractor uses a high degree of subcontract competition (e.g., aggressive dual sourcing); or

(iv) The contractor has a proven record of cost tracking and control.

(3) *Below normal conditions.* The contracting officer may assign a lower normal value if the contractor demonstrates minimal concern for cost control. Indicators are—

(i) The contractor's cost estimating system is marginal;

(ii) The contractor has made minimal effort to initiate cost reduction programs;

(iii) The contractor's cost proposal is inadequate; or

(iv) The contractor has a record of cost overruns or other indication of unreliable cost estimates and lack of cost control.

#### § 215.404–71–3 Contract type risk and working capital adjustment.

(a) *Description.* The contract type risk factor focuses on the degree of cost risk accepted by the contractor under varying contract types. The working capital adjustment is an adjustment added to the profit objective for contract type risk. It only applies to fixed-price contracts that provide for progress payments. Though it uses a formula approach, it is not intended to be an exact calculation of the cost of working capital. Its purpose is to give general recognition to the contractor's cost of working capital under varying contract circumstances, financing policies, and the economic environment.

(b) *Determination.* The following extract from the DD 1547 is annotated to explain the process.

Item	Contractor risk factors		Assigned value	Base (item 18)	Profit objective
25. ....	CONTRACT type risk .....		(1)	(2)	(3)
26. ....	WORKING capital (4) .....	Cost financed (5)	Length factor (6)	Interest rate (7)	(8)

(1) Select a value from the list of contract types in paragraph (c) of this subsection using the evaluation criteria in paragraph (d) of this subsection.

(2) Insert the amount from Block 18, i.e., the total allowable costs excluding general and administrative expenses, independent research and development and bid and proposal expenses, and facilities capital cost of money.

(3) Multiply (1) by (2).

(4) Only complete this block when the prospective contract is a fixed-price contract containing provisions for progress payments.

(5) Insert the amount computed per paragraph (e) of this subsection.

(6) Insert the appropriate figure from paragraph (f) of this subsection.

(7) Use the interest rate established by the Secretary of the Treasury (see 230.7101–1(a)). Do not use any other interest rate.

(8) Multiply (5) by (6) by (7). This is the working capital adjustment. It shall not exceed 4 percent of the contract costs in Block 20.

(c) *Values: Normal and designated ranges.*

Contract type	Notes	Normal value (percent)	Designated range (percent)
Firm-fixed-price, no financing .....	(1)	5	4 to 6
Firm-fixed-price, with financing .....	(2)	3	2 to 4
Fixed-priced-incentive, no financing .....	(1)	3	2 to 4
Fixed-priced with predeterminable provision .....	(3)		
Fixed-price-incentive, with financing .....	(2)	1	0 to 2
Cost-plus-incentive-fee .....	(4)	1	0 to 2
Cost-plus-fixed-fee .....	(4)	.5	0 to 1
Time-and-materials contracts (including overhaul contracts priced on time-and-materials basis) .....	(5)	.5	0 to 1
Labor-hour contracts .....	(5)	.5	0 to 1
Firm-fixed-price-level-of-effort-term .....	(5)	.5	0 to 1

(1) "No financing" means that the contractor either does not provide progress payments, or provides them only on a limited basis, such as financing of first articles. Do not compute a working capital adjustment.

(2) "With financing" means progress payments. When progress payments are present, compute a working capital adjustment (Block 26).

(3) For the purposes of assigning profit values, treat a fixed-price contract with redeterminable provisions as if it were a fixed-price-incentive contract with below normal conditions.

(4) Cost-plus contracts shall not receive the working capital adjustment.

(5) These types of contracts are considered cost-plus-fixed-fee contracts for the purposes of assigning profit values. They shall not receive the

working capital adjustment in Block 26. However, they may receive higher than normal values within the designated range to the extent that portions of cost are fixed.

(d) *Evaluation criteria—(1) General.* The contracting officer should consider elements that affect contract type risk such as—

(i) Length of contract;

(ii) Adequacy of cost data for projections;  
 (iii) Economic environment;  
 (iv) Nature and extent of subcontracted activity;  
 (v) Protection provided to the contractor under contract provisions (e.g., economic price adjustment clauses);  
 (vi) The ceilings and share lines contained in incentive provisions; and  
 (vii) Risk associated with contracts for foreign military sales (FMS) that are not funded by U.S. appropriations.

(2) **Mandatory.** The contracting officer shall assess the extent to which costs have been incurred prior to definitization of the contract action (also see 217.7404-6(a)). The assessment shall include any reduced contractor risk on both the contract before definitization and the remaining portion of the contract. When costs have been incurred prior to definitization, generally regard the contract type risk to be in the low end of the designated range. If a substantial portion of the costs have been incurred prior to definitization, the contracting officer may assign a value as low as 0 percent, regardless of contract type.

(3) **Above normal conditions.** The contracting officer may assign a higher than normal value when there is substantial contract type risk. Indicators of this are—

(i) Efforts where there is minimal cost history;

(ii) Long-term contracts without provisions protecting the contractor, particularly when there is considerable economic uncertainty;

(iii) Incentive provisions (e.g., cost and performance incentives) that place a high degree of risk on the contractor; or

(iv) FMS sales (other than those under DoD cooperative logistics support arrangements or those made from U.S. Government inventories or stocks) where the contractor can demonstrate that there are substantial risk above those normally present in DoD contracts for similar items.

(4) **Below normal conditions.** The contracting officer may assign a lower

than normal value when the contract type risk is low. Indicators of this are—

(i) Very mature product line with extensive cost history;

(ii) Relatively short-term contracts;

(iii) Contractual provisions that substantially reduce the contractor's risk; or

(iv) Incentive provisions that place a low degree of risk on the contractor.

(e) **Costs financed.** (1) Costs financial equal total costs multiplied by the portion (percent) of costs financed by the contractor.

(2) Total costs equal Block 20 (i.e., all allowable costs, including general and administrative and independent research and development/bid and proposal, but excluding facilities capital cost of money), reduced as appropriate when—

(i) The contractor has little cash investment (e.g., subcontractor progress payments liquidated late in period of performance);

(ii) some costs are covered by special financing provisions, such as advance payments; or

(iii) The contract is multiyear and there are special funding arrangements.

(3) The portion financed by the contractor is generally the portion not covered by progress payments, i.e., 100 percent minus the customary progress payment rate (see FAR 32.501). For example, if a contractor receives progress payments at 75 percent, the portion financed by the contractor is 25 percent. On contracts that provide flexible progress payments (see 252.232-7003) or progress payments to small businesses, use the customary progress payment rate for large businesses.

(f) **Contract length factor.** (1) This is the period of time that the contractor has a working capital investment in the contract. It—

(i) Is based on the time necessary for the contractor to complete the substantive portion of the work;

(ii) Is not necessarily the period of time between contract award and final delivery (or final payment), as periods of minimal effort should be excluded;

(iii) Should not include periods of performance contained in option provisions; and

(iv) Should not, for multiyear contracts, include periods of performance beyond that required to complete the initial program year's requirements.

(2) The contracting officer—

(i) Should use the following table to select the contract length factor;

(ii) Should develop a weighted average contract length when the contract has multiple deliveries; and

(iii) May use sampling techniques provided they produce a representative result.

TABLE

Period to perform substantive portion (in months)	Contract length factor
21 or less .....	.40
22 to 27 .....	.65
28 to 33 .....	.90
34 to 39 .....	1.15
40 to 45 .....	1.40
46 to 51 .....	1.65
52 to 57 .....	1.90
58 to 63 .....	2.15
64 to 69 .....	2.40
70 to 75 .....	2.65
76 or more .....	2.90

(3) Example: A prospective contract has a performance period of 40 months with end items being delivered in the 34th, 36th, 38th, and 40th months of the contract. The average period is 37 months and the contract length factor is 1.15.

#### 215.404-71-4 Facilities capital employed.

(a) **Description.** This factor focuses on encouraging and rewarding aggressive capital investment in facilities that benefit DoD. It recognizes both the facilities capital that the contractor will employ in contract performance and the contractor's commitment to improving productivity.

(b) **Determination.** The following extract from the DD Form 1547 has been annotated to explain the process.

Item	Contractor facilities capital employed	Assigned value	Amount employed	Profit objective
27. ....	LAND .....	N/A	(2)	N/A
28. ....	BUILDINGS .....	(1)	(2)	(3)
29. ....	EQUIPMENT .....	(1)	(2)	(3)

(1) Select a value from the list in paragraph (c) of this subsection using

the evaluation criteria in paragraph (d) of this subsection.

(2) Use the allocated facilities capital attributable to land, buildings, and equipment, as derived in DD Form 1861,

Contract Facilities Capital Cost of Money (see 230,7001).

(i) In addition to the net book value of facilities capital employed, consider facilities capital that is part of a formal investment plan if the contractor submits reasonable evidence that—

(A) Achievable benefits to DoD will result from the investment; and

(B) The benefits of the investment are included in the forward pricing structure.

(ii) If the value of intracompany transfers has been included in Block 18 at cost (i.e., excluding general and administrative (G&A) expenses and profit), add to the contractor's allocated facilities capital, the allocated facilities capital attributable to the buildings and

equipment of those corporate divisions supplying the intracompany transfers. Do not make this addition if the value of intracompany transfers has been included in Block 18 at price (i.e., including G&A expenses and profit).

(3) Multiply (1) by (2).

(c) Values: Normal and designated ranges.

Notes	Asset type	Normal value (percent)	Designated range (percent)
(1) .....	Land .....	0	N/A
(1) .....	Buildings .....	15	10 to 20
(1) .....	Equipment ....	35	20 to 50
(2) .....	Land .....	0	N/A
(2) .....	Buildings .....	5	0 to 10
(2) .....	Equipment ....	20	15 to 25
(3) .....	Land .....	0	N/A
(3) .....	Buildings .....	0	0
(3) .....	Equipment ....	0	0

(1) These are the normal values and ranges. They apply to all situations except those noted in (2) and (3).

(2) These alternate values and ranges apply to situations where a highly facilitized manufacturing firm will be performing a research and development or services contract. They balance the method used to allocate facilities capital cost of money, which may produce disproportionate allocation of assets to these types of efforts.

(3) When using a value from the alternate designated range for the performance risk factor (see 215.404-71-2(c)(2)), do not allow profit on facilities capital employed.

(d) *Evaluation criteria.* (1) In evaluating facilities capital employed, the contracting officer—

(i) Should relate the usefulness of the facilities capital to the goods or services being acquired under the prospective contract;

(ii) Should analyze the productivity improvements and other anticipated industrial base enhancing benefits resulting from the facilities capital investment, including—

(A) The economic value of the facilities capital, such as physical age, undepreciated value, idleness, and expected contribution to future defense needs; and

(B) The contractor's level of investment in defense related facilities as compared with the portion of the contractor's total business that is derived from DoD;

(iii) Should consider any contractual provisions that reduce the contractor's risk of investment recovery, such as termination protection clauses and capital investment indemnification; and

(iv) Shall ensure that increases in facilities capital investments are not merely asset revaluations attributable to mergers, stock transfers, take-overs, sales of corporate entities, or similar actions.

(2) *Above normal conditions.* (i) The contracting officer may assign a higher than normal value if the facilities capital investment has direct, identifiable, and exceptional benefits. Indicators are—

(A) New investments in state-of-the-art technology that reduce acquisition cost of yield other tangible benefits such as improved product quality or accelerated deliveries;

(B) Investments in new equipment for research and development applications; or

(C) Contractor demonstration that the investments are over and above the normal capital investments necessary to support anticipated requirements of DoD programs.

(ii) The contracting officer may assign a value significantly above normal when there are direct and measurable benefits in efficiency and significantly reduced acquisition cost on the effort being priced. Maximum values apply only to those cases where the benefits of the facilities capital investment are substantially above normal.

(3) *Below normal conditions.* (i) The contracting officer may assign a lower than normal value if the facilities capital investment has little benefit to DoD. Indicators are—

(A) Allocations of capital apply predominantly to commercial item lines;

(B) Investments are for such things as furniture and fixtures, home or group

level administrative offices, corporate aircraft and hangars, gymnasiums; or

(C) Facilities are old or extensively idle.

(ii) The contracting officer may assign a value significantly below normal when a significant portion of defense manufacturing is done in an environment characterized by outdated, inefficient, and labor-intensive capital equipment.

#### 215.404-72 Modified weighted guidelines method for nonprofit organizations.

(a) *Definitions* As used in this subpart, a nonprofit organization is a business entity—

(1) That operates exclusively for charitable, scientific, or educational purposes;

(2) Whose earnings do not benefit any private shareholder or individual;

(3) Whose activities do not involve influencing legislation or political campaigning for any candidate for public office; and

(4) That is exempted from Federal income taxation under section 501 of the Internal Revenue Code.

(b) For nonprofit organizations that are Federally Funded Research and Development Centers (FFRDCs), the contracting officer—

(1) Should consider whether any fee is appropriate. Considerations shall include the FFRDC's—

(i) Proportion of retained earnings (as established under generally accepted accounting methods) that relates to DoD contracted effort;

(ii) Facilities capital acquisition plans;

(iii) Working capital funding as assessed on operating cycle cash needs;

(iv) Contingency funding; and

(v) Provision for funding unreimbursed costs deemed ordinary and necessary to the FFRDC.

(2) Shall, when a fee is considered appropriate, compute the fee objective using the weighted guidelines method in 215.404-71, with the following modifications:

(i) *Modifications to performance risk (Blocks 21-243 of the DD Form 1547).*

(A) If the contracting officer assigns a value from the standard designated range (see 215.404-71-2(c)), reduce the fee objective by an amount equal to 1 percent of the costs in Block 18 of the DD Form 1547. Show the net (reduced) amount on the DD Form 1547.

(B) If the contracting officer assigns a value from the alternate designated range, reduce the fee objective by an amount equal to 2 percent of the costs in Block 18 of the DD Form 1547. Show the net (reduced) amount of the DD Form 1547.

(ii) *Modifications to contract type risk (Block 25 of the DD Form 1547).* Use a designated range of -1 percent to 0 percent in lieu of the values in 215.404-71-3. There is no normal value.

(c) For nonprofit organizations that are entities that have been identified by the Secretary of Defense or a Secretary of a Department as receiving sustaining support on a cost-plus-fixed-fee basis from a particular DoD department or agency, compute a fee objective for covered actions using the weighted guidelines method in 215.404-71, modified as described in paragraph (b)(2) of this subsection.

(d) For all other nonprofit organizations, compute a fee objective for covered actions using the weighted guidelines method in 215.404-71, modified as described in paragraph (b)(2)(i) of this subsection.

**215.404-73 Alternate structured approaches.**

(a) The contracting officer may use an alternate structured approach under 215.404-4(c).

(b) The contracting officer may design the structure of the alternate, but it shall include—

(1) Consideration of the three basic components of profit—performance risk, contract type risk (including working capital), and facilities capital employed. However, the contracting officer is not required to complete Blocks 21 through 30 of the DD Form 1547.

(2) Offset for facilities capital cost of money.

(i) The contracting officer shall reduce the overall prenegotiation profit objective by the lesser of 1 percent of total cost or the amount of facilities capital cost of money. The profit amount in the negotiation summary of the DD Form 1547 must be net of the offset.

(ii) This adjustment is needed for the following reason: The values of the profit factors used in the weighted guidelines method were adjusted to recognize the shift in facilities capital cost of money from an element of profit to an element of contract cost (see FAR 31.205-10) and reductions were made directly to the profit factors for

performance risk. In order to ensure that this policy is applied to all DoD contracts that allow facilities capital cost of money, similar adjustments shall be made to contracts that use alternate structured approaches.

**215.404-74 Fee requirements for cost-plus-award-fee contracts.**

In developing a fee objective for cost-plus-award-fee contracts, the contracting officer shall—

(a) Follow the guidance in FAR 16.405-2 and 216.405-2;

(b) Not use the weighted guidelines method or alternate structured approach;

(c) Apply the offset policy in 215.404-73(b)(2) for facilities capital cost of money, i.e., reduce the base fee by the lesser of 1 percent of total costs or the amount of facilities capital cost of money; and

(d) Not complete a DD Form 1547.

**215.404-75 Reporting profit and fee statistics.**

(a) Contracting officers in contracting offices that participate in the management information system for profit and fee statistics send completed DD Forms 1547 on actions of \$500,000 or more, where the contracting officer used either the weighted guidelines method, an alternate structured approach, or the modified weighted guidelines method, to their designated office within 30 days after contract award.

(b) Participating contracting offices and their designated offices are—

Contracting office	Designated officer
<b>ARMY</b>	
All .....	U.S. Army, Contracting Support Agency, ATTN: SARD—RS, 5109 Leesburg Pike, Suite 916, Falls Church, VA 22041-3201
<b>NAVY</b>	
*Naval Air Systems Command .....	Commander, Fleet and Industrial Supply Center, Norfolk Washington Detachment, Code 402, Washington Navy Yard, Washington, DC 20374-5000
*Naval Sea Systems Command	
*Space and Naval Warfare Systems Command	
*Naval Facilities Engineering Command	
*Naval Supply Systems Command	
*Office of Naval Research	
*Headquarters, United States Marine Corps	
*Strategic Systems Programs Office	
*Military Sealift Command	
*Automatic Data Processing Selection Office	
*Navy Regional Data Automation Center	
*Naval Research Laboratory	
*Navy Commercial Communications Center	
*Naval Aviation Depot Operations Center	

Contracting office	Designated officer
<b>AIR FORCE</b>	
Air Force Materiel Command (all field offices) .....	Air Force Materiel Command, 645 CCSG/SCOS, ATTN: J010 Clerk, 2721 Sacramento Street, Wright-Patterson Air Force Base, OH 45433-5006

\*Includes all subordinate field offices

(c) When negotiation of a contract action over \$500,000 has been delegated to another contracting agency (e.g., to an ACO), that agency shall ensure that a copy of the DD Form 1547 is provided to the delegating office for reporting purposes within 30 days from negotiation of the contract action.

(d) Contracting offices outside the United States, its possessions, and Puerto Rico are exempt from reporting.

(e) Designated offices send a quarterly (non-cumulative) report of DD Form 1547 data to—

Washington Headquarters Services, Directorate for Information Operations and Reports, (WHS/DIOR), 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302

(f) In preparing and sending the quarterly report, designated offices—

(1) Perform the necessary audits to ensure information accuracy;

(2) Do not enter classified information;

(3) Transmit the report via computer magnetic tape using the procedures, format, and editing process issued by the Director of Defense Procurement; and

(4) Send the reports not later than the 30th day after the close of the quarterly reporting periods.

(g) These reporting requirements have been assigned report control symbol: A&T (Q) 1751.

#### **215.406-1 Prenegotiation objectives.**

(a) Also consider—

(i) Data resulting from application of work measurement systems in developing prenegotiation objectives; and

(ii) Field pricing assistance personnel participation in planned prenegotiation and negotiation activities.

(b) Prenegotiation objectives, including objectives related to disposition of findings and recommendations contained in preaward and postaward contract audit and other advisory reports, shall be documented and reviewed in accordance with Departmental procedures.

#### **215.406-3 Documenting the negotiation.**

(a)(7) Include the principal factors related to the disposition of findings and recommendation contained in

preaward and postaward contract audit and other advisory reports.

(10) The documentation—

(A) Must address significant deviations from the prenegotiation profit objective;

(B) Should include the DD Form 1547, Record of Weighted Guidelines Application (see 215.404-70), if used, with supporting rationale; and

(C) Must address the rationale for not using the weighted guidelines method when its use would otherwise be required by 215.404-70.

#### **215.407-2 Make-or-buy programs.**

(e) *Program requirements*—(1) *Items and work included*. The minimum dollar amount is \$1 million.

#### **215.407-3 Forward pricing rate agreements.**

(b)(i) Use forward pricing rate agreement (FPRA) rates when such rates are available, unless waived on a case-by-case basis by the head of the contracting activity.

(ii) Advise the ACO of each case waived.

(iii) Contact the ACO for questions on FPRAs or recommended rates.

#### **215.407-4 Should-cost review.**

(b) *Program should-cost review*. (2) DoD contracting activities should consider performing a program should-cost review before award of a definitive contract for a major system as defined by DoDI 5000.2R. See DoDI 5000.2R regarding industry participation.

(c) *Overhead should-cost review*. (1) Contact the DCMC/DLA Overhead Center, Fort Belvoir, VA 22060-6621, at (703) 767-3387, for questions on overhead should-cost analysis.

(2)(A) The Defense Contract Management Command/Defense Logistics Agency (DCMC/DLA), or the military department responsible for performing contract administration functions (e.g., Navy SUPSHIP), should consider, based on risk assessment, performing an overhead should-cost review of a contractor business unit (as defined in FAR 31.001) when all of the following conditions exist—

(1) Projected annual sales to DoD exceed \$1 billion;

(2) Projected DoD versus total business exceeds 30 percent;

(3) Level of sole source DoD contracts is high;

(4) Significant volume of proposal activity is anticipated;

(5) Production or development of a major weapon system or program is anticipated; and

(6) Contractor cost control/reduction initiatives appear inadequate.

(B) The head of the contracting activity may request an overhead should-cost review for a business unit that does not meet the criteria in paragraph (c)(2)(A) of this subsection.

(C) Overhead should-cost reviews are labor intensive. These reviews generally involve participation by the contracting, contract administration, and contract audit elements. The extent of availability of military department, contract administration, and contract audit resources to support DCMC/DLA led teams should be considered when determining whether a review will be conducted. Overhead should-cost reviews generally shall not be conducted at a contractor business segment more frequently than every 3 years.

#### **215.407-5 Estimating systems.**

#### **215.407-5-70 Disclosure, maintenance, and review requirements.**

(a) *Definitions*.

(1) *Acceptable estimating system* means an estimating system that—

(i) Is established, maintained, reliable, and consistently applied; and

(ii) Produces verifiable, supportable, and documented cost estimates.

(2) *Contractor* means a business unit as defined in FAR 31.001.

(3) *Estimating system* is as defined in the clause at 252.215-7002, Cost Estimating System Requirements.

(4) *Significant estimating system deficiency* means a shortcoming in the estimating system that is likely to consistently result in proposal estimates for total cost or a major cost element(s) that do not provide an acceptable basis for negotiation of fair and reasonable prices.

(b) *Applicability*. (1) DoD policy is that all contractors have estimating systems that—

(i) Are acceptable;

(ii) Consistently produce well-supported proposals that are acceptable

as a basis for negotiation of fair and reasonable prices;

(iii) Are consistent with and integrated with the contractor's related management systems; and

(iv) Are subject to applicable financial control systems.

(2) A large business contractor is subject to estimating system disclosure, maintenance, and review requirements if—

(i) In its preceding fiscal year, the contractor received DoD prime contracts or subcontracts totaling \$50 million or more for which cost or pricing data were required; or

(ii) In its preceding fiscal year, the contractor received DoD prime contracts or subcontracts totaling \$10 million or more (but less than \$50 million) for which cost or pricing data were required and the contracting officer, with concurrence or at the request of the ACO, determines it to be in the best interest of the Government (e.g., significant estimating problems are believed to exist or the contractor's sales are predominantly Government).

(c) *Responsibilities.* (1) The contracting officer shall—

(i) Through use of the clause at 252.215-7002, Cost Estimating System Requirements, apply the disclosure, maintenance, and review requirements to large business contractors meeting the criteria in paragraph (b)(2)(i) of this subsection;

(ii) Consider whether to apply the disclosure, maintenance, and review requirements to large business contractors under paragraph (b)(2)(ii) of this subsection; and

(iii) Not apply the disclosure, maintenance, and review requirements to other than large business contractors.

(2) The cognizant ACO, for contractors subject to paragraph (b)(2) of this subsection, shall—

(i) Determine the acceptability of the disclosure and system; and

(ii) Pursue correction of any deficiencies.

(3) The cognizant auditor, on behalf of the ACO, serves as team leader in conducting estimating system reviews.

(4) A contractor subject to estimating system disclosure, maintenance, and review requirements shall—

(i) Maintain an acceptable system;

(ii) Describe its system to the ACO;

(iii) Provide timely notice of changes in the system; and

(iv) Correct system deficiencies identified by the ACO.

(d) *Characteristics of an acceptable estimating system—(1) General.* An acceptable system should provide for the use of appropriate source data, utilize sound estimating techniques and

good judgment, maintain a consistent approach, and adhere to established policies and procedures.

(2) *Evaluation.* In evaluating the acceptability of a contractor's estimating system, the ACO should consider whether the contractor's estimating system, for example—

(i) Establishes clear responsibility for preparation, review, and approval of cost estimates;

(ii) Provides a written description of the organization and duties of the personnel responsible for preparing, reviewing, and approving cost estimates;

(iii) Assures that relevant personnel have sufficient training, experience, and guidance to perform estimating tasks in accordance with the contractor's established procedures;

(iv) Identifies the sources of data and the estimating methods and rationale used in developing cost estimates;

(v) Provides for appropriate supervision throughout the estimating process;

(vi) Provides for consistent application of estimating techniques;

(vii) Provides for detection and timely correction of errors;

(viii) Protects against cost duplication and omissions;

(ix) Provides for the use of historical experience, including historical vendor pricing information, where appropriate;

(x) Requires use of appropriate analytical methods;

(xi) Integrates information available from other management systems, where appropriate;

(xii) Requires management review including verification that the company's estimating policies, procedures, and practices comply with this regulation;

(xiii) Provides for internal review of and accountability for the acceptability of the estimating system, including the comparison of projected results to actual results and an analysis of any differences;

(xiv) Provides procedures to update cost estimates in a timely manner throughout the negotiation process; and

(xv) Addresses responsibility for review and analysis of the reasonableness of subcontract prices.

(3) *Indicators of potentially significant estimating deficiencies.* The following examples indicate conditions that may produce or lead to significant estimating deficiencies—

(i) Failure to ensure that historical experience is available to and utilized by cost estimators, where appropriate;

(ii) Continuing failure to analyze material costs or failure to perform subcontractor cost reviews as required;

(iii) Consistent absence of analytical support for significant proposed cost amounts;

(iv) Excessive reliance on individual personal judgments where historical experience or commonly utilized standards are available;

(v) Recurring significant defective pricing findings within the same cost element(s);

(vi) Failure to integrate relevant parts of other management systems (e.g., production control or cost accounting) with the estimating system so that the ability to generate reliable cost estimates is impaired; and

(vii) Failure to provide established policies, procedures, and practices to persons responsible for preparing and supporting estimates.

(e) *Review procedures.* Cognizant audit and contract administration activities shall—

(1) Establish and manage regular programs for reviewing selected contractors' estimating systems.

(2) Conduct reviews as a team effort.

(i) The contract auditor will be the team leader.

(ii) The team leader will—

(A) Coordinate with the ACO to ensure that team membership includes qualified contract administration technical specialists.

(B) Advise the ACO and the contractor of significant findings during the conduct of the review and during the exit conference.

(C) Prepare a team report.

(1) The ACO or a representative should—

(i) Coordinate the contract administration activity's review;

(ii) Consolidate findings and recommendations; and

(iii) When appropriate, prepare a comprehensive written report for submission to the auditor.

(2) The contract auditor will attach the ACO's report to the team report.

(3) Tailor reviews to take full advantage of the day-to-day work done by both organizations.

(4) Conduct a review, every 3 years, of contractors subject to the disclosure requirements. The ACO and the auditor may lengthen or shorten the 3-year period based on their joint risk assessment of the contractor's past experience and current vulnerability.

(f) *Disposition of survey team findings—(1) Reporting of survey team findings.* The auditor will document the findings and recommendations of the survey team in a report to the ACO. If there are significant estimating deficiencies, the auditor will recommend disapproval of all or portions of the estimating system.

(2) *Initial notification to the contractor.* The ACO will provide a copy of the team report to the contractor and, unless there are no deficiencies mentioned in the report, will ask the contractor to submit a written response in 30 days, or a reasonable extension.

(i) If the contractor agrees with the report, the contractor has 60 days from the date of initial notification to correct any identified deficiencies or submit a corrective action plan showing milestones and actions to eliminate the deficiencies.

(ii) If the contractor disagrees, the contractor should provide rationale in its written response.

(3) *Evaluation of contractor's response.* The ACO, in consultation with the auditor, will evaluate the contractor's response to determine whether—

(i) The estimating system contains deficiencies that need correction;

(ii) The deficiencies are significant estimating deficiencies that would result in disapproval of all or a portion of the contractor's estimating system; or

(iii) The contractor's proposed corrective actions are adequate to eliminate the deficiency.

(4) *Notification of ACO determination.* The ACO will notify the contractor and the auditor of the determination and, if appropriate, of the Government's intent to disapprove all or selected portions of the system. The notice shall—

(i) List the cost elements covered;

(ii) Identify any deficiencies requiring correction; and

(iii) Require the contractor to correct the deficiencies within 45 days or submit an action plan showing milestones and actions to eliminate the deficiencies.

(5) *Notice of disapproval.* If the contractor has neither submitted an acceptable corrective action plan nor corrected significant deficiencies within 45 days, the ACO shall disapprove all or selected portions of the contractor's estimating system. The notice of disapproval must—

(i) Identify the cost elements covered;

(ii) List the deficiencies that prompted the disapproval; and

(iii) Be sent to the cognizant auditor, and each contracting and contract administration officer having substantial business with the contractor.

(6) *Monitoring contractor's corrective action.* The auditor and the ACO will monitor the contractor's progress in correcting deficiencies. If the contractor fails to make adequate progress, the ACO shall take whatever action is necessary to ensure that the contractor corrects the deficiencies. Examples of

actions the ACO can take are: bringing the issue to the attention of higher level management, reducing or suspending progress payments (see FAR 32.503-6), and recommending nonaward of potential contracts.

(7) *Withdrawal of estimating system disapproval.* The ACO will withdraw the disapproval when the ACO determines that the contractor has corrected the significant system deficiencies. The ACO will notify the contractor, the auditor, and affected contracting and contract administration activities of the withdrawal.

(g) *Impact of estimating system deficiencies on specific proposals.* (1) Field pricing teams will discuss identified estimating system deficiencies and their impact in all reports on contractor proposals until the deficiencies are resolved.

(2) The contracting officer responsible for negotiation of a proposal generated by an estimating system with an identified deficiency shall evaluate whether the deficiency impacts the negotiations. If it does not, the contracting officer should proceed with negotiations. If it does, the contracting officer should consider other alternatives, e.g.—

(i) Allowing the contractor additional time to correct the estimating system deficiency and submit a corrected proposal;

(ii) Considering another type of contract, e.g., FPIF instead of FFP;

(iii) Using additional cost analysis techniques to determine the reasonableness of the cost elements affected by the system's deficiency;

(iv) Segregating the questionable areas as a cost reimbursable line item;

(v) Reducing the negotiation objective for profit or fee; or

(vi) Including a contract (reopener) clause that provides for adjustment of the contract amount after award.

(3) The contracting officer who incorporates a reopener clause into the contract is responsible for negotiating price adjustments required by the clause. Any reopener clause necessitated by an estimating deficiency should—

(i) Clearly identify the amounts and items that are in question at the time of negotiation;

(ii) Indicate a specific time or subsequent event by which the contractor will submit a supplemental proposal, including cost or pricing data, identifying the cost impact adjustment necessitated by the deficient estimating system;

(iii) Provide for the contracting officer to unilaterally adjust the contract price

if the contractor fails to submit the supplemental proposal; and

(iv) Provide that failure of the Government and the contractor to agree to the price adjustment shall be a dispute under the Disputes clause.

#### **215.408 Solicitation provisions and contract clauses.**

(1) Use the clause at 252.215-7000, Pricing Adjustments, in solicitations and contracts that contain the clause at—

(i) FAR 52.215-11, Price Reduction for Defective Cost or Pricing Data—Modifications;

(ii) FAR 52.215-12, Subcontractor Cost or Pricing Data; or

(iii) FAR 52.215-13, Subcontractor Cost or Pricing Data—Modifications.

(2) Use the clause at 252.215-7002, Cost Estimating System requirements, in all solicitations and contracts to be award on the basis of cost or pricing data.

#### **215.470 Estimated data prices.**

(a) DoD requires estimates of the prices of data in order to evaluate the cost to the Government of data items in terms of their management, product, or engineering value.

(b) When data are required to be delivered under a contract, the solicitation will include DD Form 1423, Contract Data Requirements List. The form and the provision included in the solicitation request the offeror to state what portion of the total price is estimated to be attributable to the production or development of the listed data for the Government (not to the sale of rights in the data). However, offerors' estimated prices may not reflect all such costs; and different offerors may reflect these costs in a different manner, for the following reasons—

(1) Differences in business practices in competitive situations;

(2) Differences in accounting systems among offerors;

(3) Use of factors or rates on some portions of the data;

(4) Application of common effort to two or more data items; and

(5) differences in data preparation methods among offerors.

(c) Data price estimates should not be used for contract pricing purposes without further analysis.

(d) The contracting officer shall ensure that the contract does not include a requirement for data that the contractor has delivered or is obligated to deliver to the government under another contract or subcontract, and that the successful offeror identifies any such data required by the solicitation. However, where duplicate data are

desired, the contract price shall include the costs of duplication, but not of preparation, of such data.

#### **PART 217—SPECIAL CONTRACTING METHODS**

4. Section 217.7103-3 is amended by revising paragraph (b) to read as follows:

##### **217.7103-3 Solicitation for job orders.**

\* \* \* \* \*

5. Section 217.7103-4 is revised to read as follows:

##### **217.7103-4 Award of a job order.**

Award job orders in accordance with FAR Subpart 14.4 or 15.5.

##### **217.7406 [Amended]**

6. Section 217.7406 is amended in paragraph (b) in the last sentence by removing “15.804-1” and inserting in its place “15.403-1, 15.403-2, or 15.403-3”.

#### **PART 225—FOREIGN ACQUISITION**

##### **225.872-3 [Amended]**

7. Section 225.872-3 is amended in paragraph (g) in the first sentence by revising the parenthetical to read “(see FAR 14.207 and 15.201(c))”

##### **225.872-6 [Amended]**

8. Section 225.872-6 is amended in paragraph (c) introductory text by removing “215.805-5(c)(1)” and inserting in its place “215.404-2(c)”.

#### **PART 227—PATENTS, DATA, AND COPYRIGHTS**

##### **227.7203-10 [Amended]**

9. Section 227.7203-10 is amended in paragraph (a)(1) at the end of the first sentence by revising the phrase “release or disclosure” to read “release, or disclosure”; and at the end of the fifth sentence by removing “15.607” and inserting in its place “15.306(a)”.

#### **PART 230—COST ACCOUNTING STANDARDS**

##### **230.7002 [Amended]**

10. Section 230.7002 is amended in paragraph (b) by removing “215.970-1(c)” and inserting in its place “215.404-71-4”.

##### **§ 230.7004-1 [Amended]**

11. Section 230.7004-1 is amended by inserting a period after the section heading; and in paragraph (a) by revising the parenthetical to read “(see FAR Subpart 42.17)”.

##### **§ 230.7103 [Amended]**

12. Section 230.7103 is amended by removing “Subpart 15.9” and inserting in its place “15.404-4”.

#### **PART 237—SERVICE CONTRACTING**

13. Section 237.7204 is amended under the heading “GENERAL PROVISIONS” by revising paragraph 7. to read as follows:

##### **§ 237.7204 Format and clauses for educational service agreements.**

\* \* \* \* \*

##### **GENERAL PROVISIONS**

\* \* \* \* \*

7. FAR 52.215-8, Order of Precedence—Uniform Contract Format.

\* \* \* \* \*

#### **PART 242—CONTRACT ADMINISTRATION**

##### **§ 242.7205 [Amended]**

14. Section 242.7205 is amended in paragraph (b)(4)(iv) by revising the parenthetical to read “(see 215.407-5)”.

#### **PART 247—TRANSPORTATION**

15. Section 247.572-2 is amended by revising the first sentence of paragraph (f)(3)(i) and by revising paragraph (f)(3)(ii) to read as follows:

##### **§ 247.572-2 Direct purchase of ocean transportation services.**

\* \* \* \* \*

(f) \* \* \*

(3) \* \* \*

(i) An analysis of the carrier's cost in accordance with FAR Subpart 15.4, or profit in accordance with 215.404-4.

(ii) A description of efforts taken pursuant to FAR 15.405, to negotiate a reasonable price. For the purpose of FAR 15.405(d), this report is the referral to a level above the contracting officer; and

\* \* \* \* \*

#### **PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

##### **§ 252.215-7000 [Amended]**

16. Section 252.215-7000 is amended in the introductory text by removing “215.804-8” and inserting in its place “215.408(1)”.

17. Section 252.215-7002 is amended by revising the introductory text, the clause date, paragraph (c) introductory text, paragraph (d)(2) introductory text, paragraph (d)(2)(ii), and paragraph (e)(1) introductory text to read as follows:

##### **252.215-7002 Cost estimating system requirements.**

As prescribed in 215.408(2), use the following clause:

Cost Estimating System Requirements (Oct 1998)

\* \* \* \* \*

(c) *Applicability.*

Paragraphs (d) and (e) of this clause apply if the Contractor is a large business and either—

\* \* \* \* \*

(d) \* \* \*

(2) An estimating system disclosure is acceptable when the Contractor has provided the ACO with documentation that—

\* \* \* \* \*

(ii) Provides sufficient detail for the Government to reasonably make an informed judgment regarding the acceptability of the Contractor's estimating practices.

\* \* \* \* \*

(e) \* \* \*

(1) The Contractor shall respond to a written report from the Government that identifies deficiencies in the Contractor's estimating system as follows:

\* \* \* \* \*

##### **252.217-7027 [Amended]**

18. Section 252.217-7027 is amended by revising the clause date to read “OCT 1998”; and in paragraph (c) in the first sentence by removing “15.8” and inserting in its place “15.4”.

##### **252.219-7005 [Amended]**

19. Section 252.219-7005 is amended by revising the clause date to read “(OCT 1998)”; and in paragraph (c) by removing “Subpart 15.9” and inserting in its place “15.404-4”.

20. Section 252.243-7000 is amended by revising the clause date and paragraph (c)(1) to read as follows:

##### **252.243-7000 Engineering change proposals.**

\* \* \* \* \*

Engineering Change Proposals (Oct 1998)

\* \* \* \* \*

(c) \* \* \*

(1) A contract pricing proposal using the format in Table 15-2, Section 15.408, of the Federal Acquisition Regulation; and

\* \* \* \* \*

#### **PART 253—FORMS**

##### **253.204-70 [Amended]**

21. Section 253.204-70 is amended in paragraph (b)(6)(1) introductory text in the first sentence by removing “52.215-20” and inserting in its place “52.215-6”.

22. Section 253.215-70 is amended by revising paragraphs (a) and (b)(4); by removing paragraph (b)(7) and redesignating paragraphs (b)(8) and (b)(9) as paragraphs (b)(7) and (b)(8), respectively; by revising paragraphs (c)(12) and (c)(14); and by revising the last sentence of paragraph (c)(15) and the last sentence of paragraph (c)(16) to read as follows:

**253.215-70 DD Form 1547, Record of Weighted Guidelines Application.**

(a) Use the DD Form 1547 as prescribed in 215.404-70.

(b) \* \* \*

(4) If the contracting office is exempt from reporting to the DoD management information system on profit and fee statistics (see 215.404-75), do not complete Block 1, 4, 5, 6, 7, 8, 9, 10, 11, or 12.

\* \* \* \* \*

(c) \* \* \*

(12) *Block 12—use code.* Enter the appropriate code for use of the weighted guidelines method—

Description	Code
Standard weighted guidelines method (215.404-71) .....	2
Alternate performance risk, no facilities employed (215.404-71-2(c)(2)) .....	1
Alternate facilities capital employed (215.404-71-4(c)(2)) .....	3
Alternate structure approach (215.404-73) .....	4
Modified weighted guidelines approach, (215.404-72) .....	5

\* \* \* \* \*

(14) *Blocks 21 through 29—weighted guidelines profit factors.* Enter the amounts determined in 215.404-71 or 215.404-72. This section is not required to be completed when using an alternate structured approach (215.404-73).

(15) \* \* \* This section is not required to be completed when using an alternate structured approach (215.404-73).

(16) \* \* \* When using an alternate structured approach, see 215.404-73(b)(2) for offsets.

\* \* \* \* \*

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**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Parts 217 and 227**

[I.D.100598B]

RIN 0648-AH97

**Sea Turtle Conservation; Shrimp Trawling Requirements**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notification of an exemption and request for comments.

**SUMMARY:** NMFS issues this rule to allow the use of limited tow times by shrimp trawlers in inshore waters in Alabama as an alternative to the requirement to use Turtle Excluder Devices (TEDs). This area was affected by Hurricane Georges on and about September 27 to 29, 1998. NMFS has been notified by the Director of the Marine Resources Division of the Alabama Department of Conservation and Natural Resources that large amounts of debris in Alabama's bays in the aftermath of the hurricane are causing extraordinary difficulty with the performance of TEDs. NMFS will monitor the situation to ensure there is adequate protection for sea turtles in this area and to determine whether impacts from the hurricane continue to make TED use impracticable.

**DATES:** This rule is effective from October 7, 1998 through October 31, 1998, when tow times must be limited to no more than 55 minutes measured from the time trawl doors enter the water until they are retrieved from the water, and from November 1, 1998 until November 6, 1998, when tow times must be limited to no more than 75 minutes. Comments on this rule are requested, and must be received by November 6, 1998.

**ADDRESSES:** Comments on this action should be addressed to the Chief, Endangered Species Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Charles A. Oravetz, 813-570-5312, or Barbara A. Schroeder, 301-713-1401.

**SUPPLEMENTARY INFORMATION:****Background**

All sea turtles that occur in U.S. waters are listed as either endangered or threatened under the Endangered Species Act of 1973 (ESA). The Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), and hawksbill (*Eretmochelys imbricata*) are listed as endangered. Loggerhead (*Caretta caretta*) and green (*Chelonia mydas*) turtles are listed as threatened, except for populations of green turtles in Florida and on the Pacific coast of Mexico, which are listed as endangered.

The incidental take of these species, as a result of shrimp trawling activities, have been documented in the Gulf of Mexico and along the Atlantic. Under the ESA and its implementing regulations, taking sea turtles is prohibited, with exceptions identified in 50 CFR 227.72. Existing sea turtle conservation regulations (50 CFR part 227, subpart D) require most shrimp

trawlers operating in the Gulf and Atlantic areas to have a NMFS-approved TED installed in each net rigged for fishing, year round.

The regulations provide for the use of limited tow times as an alternative to the use of TEDs for vessels with certain specified characteristics or under certain special circumstances. The provisions of 50 CFR 227.72 (e)(3)(ii) specify that the Assistant Administrator for Fisheries, NOAA (Assistant Administrator), may authorize "compliance with tow time restrictions as an alternative to the TED requirement, if [he] determines that the presence of algae, seaweed, debris or other special environmental conditions in a particular area makes trawling with TED-equipped nets impracticable." The provisions of 50 CFR 227.72(e)(3)(i) specify the maximum tow times that may be used when authorized as an alternative to the use of TEDs. The tow times may be no more than 55 minutes from April 1 through October 31 and no more than 75 minutes from November 1 through March 31. NMFS has selected these tow time limits to minimize the level of mortality of sea turtles that are captured by trawl nets that are not equipped with TEDs.

**Recent Events**

On September 27, Hurricane Georges hit the Mississippi and Alabama coasts. The hurricane remained nearly stationary over the coastal area and South Alabama for about two days and deposited as much as 36 inches of rain on some areas. The combination of heavy rains and hurricane storm surge produced severe flooding in south Mississippi and South Alabama rivers. The Director of the Marine Resources Division of the Alabama Department of Conservation and Natural Resources (Alabama Director) stated in a September 30 letter to the NMFS Southeast Regional Administrator that the flooding "has deposited a tremendous amount of debris in Alabama's bays." He further stated that the "inordinate amount of debris is causing extraordinary difficulty with the performance of TEDs in these areas" and that "the debris clogs the TEDs making them inoperable for the exclusion of turtles and reduces the catch of shrimp." His letter requested that NMFS use its authority to allow the use of 55-minute tow times as an alternative to TEDs for a 30-day period in Alabama's inshore waters that are open to shrimping.

Coastal areas in Louisiana and Mississippi were also affected by Hurricane Georges. NMFS has been consulting with the Louisiana