**DFARS Case 2021-D003**

**Undefinitized Contract Actions**

**Final Rule**

**PART 215—CONTRACTING BY NEGOTIATION**

**\* \* \* \* \***

**SUBPART 215.4—CONTRACT PRICING**

**\* \* \* \* \***

**215.404 Proposal analysis.**

**\* \* \* \* \***

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

**\* \* \* \* \***

(d) *Evaluation criteria—*

(1) \* \* \*

(2) *Mandatory.*

(i) 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) and 243.204-70-6). **[When considering the reduced cost risks associated with allowable incurred costs on an undefinitized contract action, it is appropriate to apply separate contract risk factors for allowable incurred costs and estimated costs to complete when completing the contract risk sections of DD Form 1547, Record of Weighted Guidelines.]** 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~~**[has]** been incurred prior to definitization, the contracting officer may assign a value as low as zero percent, regardless of contract type. However, if a contractor submits a qualifying proposal to definitize an undefinitized contract action and the contracting officer for such action definitizes the contract after the end of the 180-day period beginning on the date on which the contractor submitted the qualifying proposal ~~(~~as defined in 217.7401~~)~~, the profit allowed on the contract shall accurately reflect the cost risk of the contractor as such risk existed on the date the contractor submitted the qualifying proposal.

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**PART 217—SPECIAL CONTRACTING METHODS**

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**SUBPART 217.74—UNDEFINITIZED CONTRACT ACTIONS**

**\* \* \* \* \***

**217.7404-3 Definitization schedule**.

(a) UCAs shall contain definitization schedules that provide for definitization by the earlier of—

(1) The date that is 180 days after the contractor submits a qualifying proposal. This date may not be extended beyond an additional 90 days without a written determination by the head of the contracting activity without power of redelegation, the commander of the combatant command concerned, or the Under Secretary of Defense for Acquisition and Sustainment that it is in the best interests of the military department or the defense agency, the combatant command, or the Department of Defense, respectively, to continue the action; or

(2) The date on which the amount of funds obligated under the contract action is equal to more than 50 percent of the not-to-exceed price.

(b)**[(1)]** Submission of a qualifying proposal in accordance with the definitization schedule is a material element of the contract. If the contractor does not submit a ~~timely~~ qualifying proposal~~,~~ **[in accordance with the contract definitization schedule, notwithstanding FAR 52.216-26, Payments of Allowable Costs Before Definitization,]** the contracting officer may ~~suspend or reduce progress~~ **[withhold an amount necessary to protect the interests of the Government, not to exceed 5 percent of all subsequent financing requests]** ~~payments~~~~under FAR 32.503-6~~, or take other appropriate action**[s (e.g., documenting the noncompliance in the contractor’s past performance evaluation** **or terminating the contract for default).**

**(2) Contracting officers shall document in the contract file the justification for withholding or not withholding payments if the qualifying proposal was not submitted in accordance with the contract definitization schedule]**.

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

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**252.217-7027 Contract [D]~~d~~efinitization.**

As prescribed in 217.7406(b), use the following clause:

CONTRACT DEFINITIZATION (~~DEC 2012~~**[MAY 2023]**)

(a) A \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ *~~(~~***[*[*]***insert specific type of contract action~~)~~***[*]*]** is contemplated. The Contractor agrees to begin promptly negotiating with the Contracting Officer the terms of a definitive contract that will include**[—]**

(1) ~~a~~**[A]**ll clauses required by the Federal Acquisition Regulation (FAR) on the date of execution of the ~~underfinitized~~**[undefinitized]** contract action~~,~~**[;]**

(2) ~~a~~**[A]**ll clauses required by law on the date of execution of the definitive contract action~~,~~**[;]** and

(3) ~~a~~**[A]**ny other mutually agreeable clauses, terms, and conditions.

**[(b)]** The Contractor agrees to submit a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ *~~(~~***[*[*]***insert type of proposal; e.g., fixed-price or cost-and-fee~~)~~***[*]*]** proposal and certified cost or pricing data supporting its proposal. **[Notwithstanding FAR 52.216-26, Payments of Allowable Costs Before Definitization, failure to meet the qualifying proposal date in the contract definitization schedule could result in the Contracting Officer withholding an amount up to 5 percent of all subsequent requests for financing until the Contracting Officer determines that a proposal is qualifying.]**

(~~b~~**[c]**) The schedule for definitizing this contract **[action]** is as follows *~~(~~***[*[*]***insert target date for definitization of the contract action and dates for submission of proposal, beginning of negotiations, and, if appropriate, submission of the make-or-buy and subcontracting plans and certified cost or pricing data~~)~~***[*]*:]**~~.~~

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(~~c~~**[d]**) If agreement on a definitive contract action to supersede this undefinitized contract action is not reached by the target date in paragraph (~~b~~**[c]**) of this clause, or within any extension of it granted by the Contracting Officer, the Contracting Officer may, with the approval of the head of the contracting activity, determine a reasonable price or fee in accordance with **[FAR]** subpart 15.4 and part 31 ~~of the FAR~~, subject to Contractor appeal as provided in the Disputes clause. In any event, the Contractor shall proceed with completion of the contract, subject only to the Limitation of Government Liability clause.

(1) After the Contracting Officer’s determination of price or fee, the contract shall be governed by⎯

(i) All clauses required by the FAR on the date of execution of this ~~underfinitized~~**[undefinitized]** contract action for either fixed-price or cost-reimbursement contracts, as determined by the Contracting Officer under this paragraph (~~c~~**[d]**);

(ii) All clauses required by law as of the date of the Contracting Officer’s determination; and

(iii) Any other clauses, terms, and conditions mutually agreed upon.

(2) To the extent consistent with paragraph (~~c~~**[d]**)(1) of this clause, all clauses, terms, and conditions included in this undefinitized contract action shall continue in effect, except those that by their nature apply only to an undefinitized contract action.

(~~d~~**[e]**) The definitive contract resulting from this undefinitized contract action will include a negotiated \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ *~~(~~***[*[*]***insert “cost/price ceiling” or “firm-fixed price”~~)~~***[*]*]** in no event to exceed \_\_\_\_\_\_\_\_\_\_ *~~(~~***[*[*]***insert the not-to-exceed amount~~)~~***[*]*]***.*

(End of clause)