U.S. Chamber of Commerce

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December 15, 2022

Ms. Linda Neilson
Director, Defense Acquisition Regulations Systems
U.S. Department of Defense
Alexandria, VA 22350

Re: Proposed Rule, Defense Acquisition Regulations System, Department of Defense; Defense Federal Acquisition Regulation Supplement: Undefinitized Contract Actions (87 Fed. Reg. 65,507-65,509, October 28, 2022)

Dear Ms. Neilson:

The U.S. Chamber of Commerce ("the Chamber") submits the following comments in response to the Department of Defense's ("Department") notice of proposed rulemaking to amend its Defense Federal Acquisition Regulation Supplement ("DFARS"), as recommended by the Department's Inspector General to refine the management of Undefinitized Contract Actions ("UCAs").

These comments reflect the input of a vast range of industries that make up the Chamber's industrial base members who participate in contracting and supplier relationships with the Department and across the Federal Government. They showcase, therefore, concerns of the Department's most valued partners.

Often deemed necessary by the contracting officer ("CO"), the execution of a UCA is a bilateral agreement between the Department and provider to begin work prior to the completion of negotiations. However, subsequent requirements, budget changes, and other events often delay proposal submission and/or definitization of the contract. This proposed rule injects further uncertainty into the definitization process by providing for subjective and unilateral determinations by a CO carrying the potential to penalize the contractor for both current work under the UCA and future work. While this rule may be well-intentioned, the proposed changes will have adverse effects on the industrial base and will likely hamper – not expedite – definitization.

Levying financial penalties on a contractor who is responsive and making a good faith effort to negotiate will undermine healthy discourse, unnecessarily feed distrust, escalate conflict around matters that tend to be traditional points of tension, and put contractors in an unfair bargaining position. A fair rule would create a shared responsibility to ensure there are firm requirements against which to submit a qualifying proposal, disincentivize a Contracting Officer from resorting to negative

rulings, and introduce language and concepts that would make the definitization process more equitable and advantageous for both parties. For these reasons, the Chamber opposes this proposed rule and urges the Department to withdraw the rulemaking.

I. Treatment of incurred cost

The proposed rule concludes that in all cases "the contract type risk to be in the low end of the designated range when costs have been incurred prior to definitization," and consequently requires COs to consider applying separate and differing contract risk factors to costs incurred and estimated costs to complete.

We strongly disagree with the assertion that in all cases contractor performance during the period of the UCA will diminish risk, thereby warranting a reduction in contractor fee based on lower risk. For example, external factors that impact all contractors (e.g., COVID-19, supply chain issues, labor shortages, excessive inflation etc.) could cause more uncertainty, which increases risk. This proposed rule would limit the discretion and flexibility of the CO to review and assign risk factors, which are both consistent with the requirements of the DFARS and consider the merits and risks of a particular UCA. Ironically, the approach taken by this proposed rule will actually provide an incentive for COs to delay definitization as it engenders a mindset that the government will get a better price for each day the contractor is held to perform under a UCA.

II. Subjectivity of "qualifying proposal submittal" risks punitive recourse to industry

The definition of "qualifying proposal"[1] has always been subjective and is left to the discretion of the CO, which is particularly concerning to industry when multiple UCAs with similar data and substantiation could be deemed qualified by one CO and not by another. COs are consistently reluctant to provide clarity on criteria for a qualifying proposal for concern of setting a precedent. While the government may define a qualifying proposal in practice as one which includes all cost and price analyses, DFARS does not state this as a requirement, and this ambiguity compels contractors to provide cost and price data to which the Department is not otherwise entitled. We suggest the Department clarify the definition of "qualifying proposal" at DFARS 217.7401. Elements of that definition should be considered in a revision to DFARS Clause 252.215-7009, Proposal Adequacy Checklist, to incorporate UCA-unique factors that shall be agreed upon as part of the definitization schedule.

[1] DFARS 217.7401

The UCA environment, by its nature, occurs in an environment of uncertainty with one or more factors of a stable acquisition (requirements, terms/conditions, pricing) lacking. Additionally, funding placed against the UCA is also constrained and may preclude industry from adopting and executing to an optimal program baseline. Despite the unknowns shared by both parties, this proposed rule places the full burden of providing a qualifying proposal on the contractor. The Chamber suggests modifying DFARS 217.7404-6, Allowable profit, to articulate suggested factors that affect cost risk, such as inflation, baseline fluidity, and reduced negotiating strength with suppliers and vendors in a UCA environment.

III. Profit margins are challenged

Profit margins are consistently challenged within a UCA environment. This proposed rule seeks to add a new sentence within DFARS 215.404–71–3(d)(2)(i) that will exacerbate the situation:

> "*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.*"

Stating "it is appropriate" appears to minimize the risks undertaken by contractors when entering the UCA environment. Industry is concerned that COs may interpret this language as a de facto mandate and would further reduce fees apportioned to actual costs incurred. Because of reduced and/or unpredictable cash flow driven by funding uncertainty and limits, industry participants often self-finance program performance using their own funding. Internal funds preserve program schedules(?) by ensuring availability of labor, material, and production capacity otherwise not available to the government. All of this is in the warfighters' best interests and occurs at industry's expense. Contract award activities not under industry control also delay definitization and preclude industry from working to a measurable, predictable baseline. Industry often experiences this turbulence and unpredictability as additional risk and disruption, which conceivably merits additional profit under UCA circumstances.

Contractors rely on the Federal Government for audit, support, and insight into subcontractor positions. Delays in determining qualified proposals and definitization schedules may be dependent on rates/factors audits on subcontractors by the government and should not be counted against contractor compliance. Definitization schedules are often dictated by COs with little to no input from the contractor as to what is possible. The Chamber urges the Department to require explicit agreement by

the contractor to the risk assessment negotiated in the price negotiation memorandum and the definitization schedule in the final rule.

IV. Proposed rule fails to address root causes and increases risk

UCAs are often awarded due to the Department's insufficient staffing or otherwise delayed acquisition planning. Similar concerns may also impact the ability of parties to timely complete fact-find and negotiation activities. The proposed rule discounts these resource limitations and usurps a CO's latitude to properly assess the facts and circumstances surrounding a particular UCA. When discussing concerns over use, consider highlighting the "proper" use of UCAs and fact that many UCAs are pursued by the Department due to other contracting delays – not strictly to the limited circumstances highlighted in the DFARS. The Chamber encourages the Department to address human resource concerns, improve workforce training and establish internal policies that limit UCAs for appropriate circumstances, and would be happy to work with the Department to provide suggestions in this regard.

Despite the perceived benefit of offering a 5% withholding cap, applying a withhold— of any amount— to a subjective term, unilaterally defined by the CO, will delay definitization. Authorizing a withhold of up to 5% on all contract financing, while also authorizing adverse Contractor Performance Assessment Reporting System (CPAR) language, is punitive and constrains the procuring contracting officer's (PCO) ability to exercise critical thinking and proportional judgment. The Chamber recommends eliminating mention of adverse CPAR language.

V. Subjectivity of past performance reviews and lack of appellate process is punitive for contractors

The proposed rule calls for COs to document a contractor's failure to meet submittal dates for qualified proposals in past performance evaluations.[2] Past Performance Reviews are subjective and do not contain objective data. Moreover, there is no appellate process to the data submitted. Though a contractor may submit a response to the reviewing authority, there is no way to appeal to a higher authority to have inaccurate or incomplete data redacted. This is particularly punitive for contractors. The Chamber urges the Department to consider implementing an appellate process for contractors to address inaccuracies present in their past performance reviews.

VI. Changes in Department requirements delays definitization

[2] DFARS 217.7404-3, Section (b)(1).

The audit conducted by the Department's Inspector General recognizes that changes in government requirements led to the delay in definitization and as a result, the contractor had to submit a new proposal. When the Department requests changes to the Statement of Work (SOW), CDRLs, and / or schedule, post UCA proposal receipt, it delays originally contemplated definitization. The proposed rule does not adequately account for Department-driven changes to contract definitization. The Chamber recommends amending the final rule to require the setting of the SOW/specifications in place at the time of UCA execution, as a firm baseline for contract negotiation and execution. Any desired changes should be handled as change orders once the contract is definitized.

VII. UCAs are not cost-reimbursable contracts

The Department's characterization of UCAs as "essentially cost-reimbursable contracts" is inaccurate.[3] UCAs, in and of themselves, are not a contract type. References to Payments of Allowable Cost Before Definitization are misleading as they are only applicable where a cost-reimbursement definitive contract is contemplated.[4] Further, UCAs specifically define the resultant contract type.[5] The contractor still bears cost risk associated with definitization through the establishment of a "Not to Exceed" (NTE), to include the Department's right to unilaterally establish a price at said contract type. It is fair, however, to look at the extent of costs incurred under the contract at the time of qualifying proposal submission.

Conclusion:

For the reasons noted above, the Chamber urges the Department to withdraw this rulemaking. Thank you for the opportunity to comment; our members recognize and support the warfighter's mission and appreciate the Department's effort to include the industrial base in the rulemaking process.

Sincerely,

Keith Webster
Vice President, Defense, Aerospace, and Acquisition Policy
U.S. Chamber of Commerce

[3] Repeatedly referenced. I.e.: PGI 217.74.
[4] DFARS 52.216-26.
[5] DFARS 252.217-7027(d).