Subpart 217.74 - UNDEFINITIZED CONTRACT ACTIONS

Parent topic: Part 217 - SPECIAL CONTRACTING METHODS

217.7400 Scope.

This subpart prescribes policies and procedures implementing 10 U.S.C. 3371, et seq.

217.7401 Definitions.

As used in this subpart—

“Contract action” means an action which results in a contract.

(1) It includes contract modifications for additional supplies or services.

(2) It includes task orders and delivery orders.

(3) It does not include change orders, administrative changes, funding modifications, or any other contract modifications that are within the scope and under the terms of the contract, e.g., engineering change proposals, value engineering change proposals, and over and above work requests as described in subpart 217.77. For policy relating to definitization of change orders, see 243.204-70 .

“Definitization” means the agreement on, or determination of, contract terms, specifications, and price, which converts the undefinitized contract action to a definitive contract.

“Qualifying proposal” means a proposal that contains sufficient information to enable DoD to conduct meaningful analyses and audits of the information contained in the proposal.

“Undefinitized contract action” means any contract action for which the contract terms, specifications, or price are not agreed upon before performance is begun under the action. Examples are letter contracts, orders under basic ordering agreements, and provisioned item orders, for which the price has not been agreed upon before performance has begun. For policy relating to definitization of change orders, see 243.204-70 .

217.7402 Exceptions.

(a) The following undefinitized contract actions (UCAs) are not subject to this subpart. However, the contracting officer shall apply the policy and procedures to them to the maximum extent practicable (also see paragraph (b) of this section):

(1) Purchases at or below the simplified acquisition threshold.

(2) Special access programs.

(3) Congressionally mandated long-lead procurement contracts.

(b) If the contracting officer determines that it is impracticable to adhere to the procedures of this subpart for a particular contract action that falls within one of the categories in paragraph (a) of this section, the contracting officer shall provide prior notice, through agency channels, electronically via email to the Principal Director, Defense Pricing, Contracting, and Acquisition Policy (Contract Policy), at osd.pentagon.ousd-a-s.mbx.dpc-cp@mail.mil.

217.7403 Policy.

DoD policy is that undefinitized contract actions shall—

(a) Be used only when—

(1) The negotiation of a definitive contract action is not possible in sufficient time to meet the Government's requirements; and

(2) The Government's interest demands that the contractor be given a binding commitment so that contract performance can begin immediately.

(b) Be as complete and definite as practicable under the particular circumstances.

217.7404 Limitations.

See PGI 217.7404 for additional guidance on obtaining approval to authorize use of an undefinitized contact action, documentation requirements, and other limitations on their use.

(a) *Foreign military sales contracts.*

(1) A contracting officer may not enter into a UCA for a foreign military sale unless—

(i) The UCA provides for agreement upon contractual terms, specifications, and price by the end of the 180-day period beginning on the date on which the contractor submits a qualifying proposal; and

(ii) The contracting officer obtains approval from the head of the contracting activity to enter into a UCA in accordance with 217.7404-1 .

(2) The head of the contracting activity may waive the requirements of paragraph (a)(1) of this section, if a waiver is necessary in order to support any of the following operations:

(i) A contingency operation.

(ii) A humanitarian or peacekeeping operation.

(b) *Unilateral definitization by a contracting officer.* Any UCA with a value greater than $50 million may not be unilaterally definitized until—

(1) The earlier of—

(i) The end of the 180-day period, beginning on the date on which the contractor submits a qualifying proposal to definitize the contractual terms, specifications, and price; or

(ii) The date on which the amount of funds expended under the contractual action is equal to more than 50 percent of the negotiated overall not-to-exceed price for the contractual action;

(2) The head of the contracting activity, without power of redelegation, approves the definitization in writing;

(3) The contracting officer provides a copy of the written approval to the contractor; and

(4) A period of 30 calendar days has elapsed after the written approval is provided to the contractor.

217.7404-1 Authorization.

The contracting officer shall obtain approval from the head of the contracting activity before—

(a) Entering into a UCA. The request for approval must fully explain the need to begin performance before definitization, including the adverse impact on agency requirements resulting from delays in beginning performance.

(b) Including requirements for non-urgent spare parts and support equipment in a UCA. The request should show that inclusion of the non-urgent items is consistent with good business practices and in the best interest of the United States.

(c) Modifying the scope of a UCA when performance has already begun. The request should show that the modification is consistent with good business practices and in the best interests of the United States.

217.7404-2 Price ceiling.

UCAs shall include a not-to-exceed price.

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 qualifying proposal in

accordance with the contract definitization schedule, notwithstanding FAR 52.216-26, Payments of Allowable Costs Before Definitization, the contracting officer may withhold an amount necessary to protect the interests of the Government, not to exceed 5 percent of all subsequent financing requests, or take other appropriate actions (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.

217.7404-4 Limitations on obligations.

(a) The Government shall not obligate more than 50 percent of the not-to-exceed price before definitization. However, if a contractor submits a qualifying proposal before 50 percent of the not-to-exceed price has been obligated by the Government, then the limitation on obligations before definitization may be increased to no more than 75 percent (see 232.102-70 for coverage on provisional delivery payments).

(b) In determining the appropriate amount to obligate, the contracting officer shall assess the contractor's proposal for the undefinitized period and shall obligate funds only in an amount consistent with the contractor's requirements for the undefinitized period.

217.7404-5 Exceptions.

(a) The limitations in 217.7404-2, 217.7404-3, and 217.7404-4 do not apply to UCAs for the purchase of initial spares.

(b) The head of an agency may waive the limitations in 217.7404(a), 217.7404-2, 217.7404-3, and 217.7404-4 for UCAs if the head of the agency determines that the waiver is necessary to support -

(1) A contingency operation; or

(2) A humanitarian or peacekeeping operation.

217.7404-6 Allowable profit.

When the final price of a UCA is negotiated after a substantial portion of the required performance has been completed, the head of the contracting activity shall ensure the profit allowed reflects—

(a) Any reduced cost risk to the contractor for costs incurred during contract performance before negotiation of the final price. However, if a contractor submits a qualifying proposal to definitize a UCA, 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, 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;

(b) Any reduced cost risk to the contractor for costs expected to be incurred during performance of the remainder of the contract after negotiation of the final price; and

(c) The requirements at 215.404-71 -3(d)(2). The risk assessment shall be documented in the price negotiation memorandum.

217.7405 Plans and reports.

(a) To provide for enhanced management and oversight of UCAs, departments and agencies shall—

(1) Prepare and maintain a Consolidated UCA Management Plan; and

(2) Prepare semi-annual Consolidated UCA Management Reports addressing each UCA with an estimated value exceeding $5 million.

(b) Consolidated UCA Management Reports and Consolidated UCA Management Plan updates shall be submitted to the Office of the Principal Director, Defense Pricing, Contracting, and Acquisition Policy (Contract Policy) at osd.pentagon.ousd-a-s.mbx.asda-dp-c-contractpolicy@mail.mil, by October 31 and April 30 of each year in accordance with the procedures at PGI 217.7405 .

(c) Consolidated UCA Management Reports shall include information about all change orders that are not forward priced (i.e., unpriced) and have an estimated value exceeding $5 million.

217.7406 Contract clauses.

(a) Use the clause at FAR 52.216-24, Limitation of Government Liability, in—

(1) All UCAs;

(2) Solicitations associated with UCAs;

(3) Basic ordering agreements;

(4) Indefinite delivery contracts;

(5) Any other type of contract providing for the use of UCAs; and

(6) Unpriced change orders with an estimated value exceeding $5 million.

(b)(1) Use the clause at 252.217-7027 , Contract Definitization, in—

(i) All UCAs;

(ii) Solicitations associated with UCAs;

(iii) Basic ordering agreements;

(iv) Indefinite delivery contracts;

(v) Any other type of contract providing for the use of UCAs; and

(vi) Unpriced change orders with an estimated value exceeding $5 million.

(2) Insert the applicable information in paragraphs (a), (b), and (d) of the clause.

(3) If, at the time of entering into the UCA or unpriced change order, the contracting officer knows that the definitive contract action will meet the criteria of FAR 15.403-1, 15.403-2, or 15.403-3 for not requiring submission of certified cost or pricing data, the words “and certified cost or pricing data” may be deleted from paragraph (a) of the clause.