

**DEPARTMENT OF DEFENSE****Defense Acquisition Regulations System****48 CFR Parts 203, 204, 206, 212, 215, and 235**

[Docket DARS–2023–0002]

RIN 0750–AL57

**Defense Federal Acquisition Regulation Supplement: Defense Commercial Solutions Opening (DFARS Case 2022–D006)****AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).**ACTION:** Proposed rule.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2022 that authorizes DoD to acquire innovative commercial products and commercial services using general solicitation competitive procedures, as well as a section of the National Defense Authorization Act for Fiscal Year 2023 that makes an amendment to that authority.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before April 3, 2023, to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2022–D006, using either of the following methods:

○ *Federal eRulemaking Portal:* <https://www.regulations.gov>. Search for “DFARS Case 2022–D006.” Select “Comment” and follow the instructions to submit a comment. Please include “DFARS Case 2022–D006” on any attached documents.

○ *Email:* [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil). Include DFARS Case 2022–D006 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jeanette Snyder, 703–508–7524.

**SUPPLEMENTARY INFORMATION:****I. Background**

DoD is proposing to revise the DFARS to implement section 803 of the

National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2022 (Pub. L. 117–81) and section 814 of the NDAA for FY 2023 (Pub. L. 117–263). Section 803 modifies 10 U.S.C. 2380c (redesignated as 10 U.S.C. 3458) to give DoD the authority to acquire innovative commercial products and commercial services through a competitive selection of proposals resulting from a general solicitation and the peer review of such proposals. Section 803 of the NDAA for FY 2022 also repealed section 879 of the NDAA for FY 2017, which authorized a pilot program providing the same authority for a limited period of time. Section 814 amends 10 U.S.C. 3458 to replace “fixed-price incentive fee contracts” with “fixed-price incentive contracts”.

**II. Discussion and Analysis**

This rule proposes to modify DFARS part 212 to add a new subpart 212.7X, Defense Commercial Solutions Opening, to implement section 803 of the NDAA for FY 2022, which permanently authorizes DoD to acquire innovative commercial products and commercial services through the use of general solicitation competitive procedures and the peer review of such proposals in conjunction with a FAR part 12 contract. The proposed new subpart 212.7X provides the scope, definitions, policy and procedures, and limitations associated with the commercial solutions opening. This proposed rule, at DFARS 212.7X02, Policy, authorizes contracting officers to use a general solicitation (known as a commercial solutions opening (CSO))—

- To obtain innovative solutions or potential capabilities that fulfill requirements;
- To close capability gaps, or provide potential innovative technological advancements; and
- When meaningful proposals with varying technical or scientific approaches can be reasonably anticipated.

DFARS 212.7X02 instructs contracting officers to—

- Award any resulting CSO contracts on a fixed-price basis, including fixed-price incentive contracts;
- Treat products and services acquired as commercial products or commercial services; and
- Use the subpart 212.7X procedures in conjunction with FAR part 35 and DFARS part 235 when acquiring research and development.

A CSO seeks innovative solutions, and DFARS 212.7X01 adds a definition of “innovative” as follows: (1) any technology, process, or method, including research and development,

that is new as of the date of submission of a proposal; or (2) any application that is new as of the date of submission of a proposal of a technology, process, or method existing as of such date.

This proposed rule also modifies DFARS 203, 204, 206, 215, 217, and 235 to add cross-references to CSOs.

**III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items**

This rule does not create any new solicitation provisions or contract clauses. It does not impact any existing solicitation provisions or contract clauses, or their applicability to contracts valued at or below the simplified acquisition threshold, for commercial products including commercially available off-the-shelf items, or for commercial services.

**IV. Expected Impact of the Rule**

This proposed rule implements the permanent statutory authorization for DoD to acquire innovative commercial products and commercial services through a competitive selection of proposals resulting from a general solicitation known as a CSO and the peer review of such proposals in conjunction with a FAR part 12 contract. This rule is expected to impact the Government and large and small entities by simplifying solicitation, evaluation, and award procedures, which should decrease acquisition cost and, thus, be less burdensome for all parties. The use of a CSO in conjunction with a FAR part 12 contract is also expected to benefit contractors and offerors as it will allow for the use of existing commercial contracting procedures and operating systems, which decreases burden on both large and small entities. As a result, large and small entities may be more willing to enter into contracts with DoD. Therefore, DoD expects to benefit by having greater access to technologies not previously accessible.

**V. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting

flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

#### VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not anticipated to be a major rule under 5 U.S.C. 804.

#### VII. Regulatory Flexibility Act

DoD does not expect this proposed rule to 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 only 11 contracts were awarded annually to small entities as a result of a commercial solutions opening during the five-year period of the pilot program from fiscal years 2018 to 2022. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This proposed rule is necessary to implement section 803 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2022 (Pub. L. 117–81) and section 814 of the NDAA for FY 2023 (Pub. L. 117–263). Section 803 modifies 10 U.S.C. 2380c (redesignated as 10 U.S.C. 3458) to permanently authorize DoD to acquire innovative commercial products and commercial services through a competitive selection of proposals resulting from a general solicitation, known as a commercial solutions opening (CSO), and the peer review of such proposals in conjunction with a FAR part 12 contract. Section 814 amends 10 U.S.C. 3458 to replace “fixed-price incentive fee contracts” with “fixed-price incentive contracts”.

The objective of this proposed rule is to implement section 803 to permanently authorize DoD to acquire innovative commercial products and commercial services through a competitive selection of proposals resulting from a CSO and the peer review of such proposals. This proposed rule authorizes DoD to obtain innovative solutions or potential capabilities to fulfill requirements, close capability gaps, or provide potential technological advancements that are new as of the

date of submission of a proposal or that is a new application as of the date of submission of a proposal of a technology, process, or method existing as of such date. The use of a CSO with a FAR part 12 commercial contract is intended to bring new entrants into the DoD marketplace. The legal basis for the rule is section 803 of the NDAA for FY 2022.

Section 879 of the NDAA for FY 2017 (Pub. L. 114–328) authorized a pilot program for the Defense CSO (the pilot), which was repealed by section 803 of the NDAA for FY 2022. During the pilot, from FY 2018 to FY 2022, DoD awarded a total of 89 contracts as a result of CSOs, with 56, or 63 percent, being awarded to small entities over the five-year period. Approximately 11 contracts were awarded to small entities each year. Data from the System for Award Management revealed there were 420,000 small entities registered as of January 2022. However, since the use of a CSO with a FAR part 12 contract is intended to attract new entrants into the market, this number may not fully capture the number of small entities to which this rule may apply. Therefore, DoD cannot provide a more precise estimate of the number of small entities to which this rule may apply.

This proposed rule does not impose any new reporting, recordkeeping, or other compliance requirements for small entities.

The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives that would accomplish the stated objectives of the applicable statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2022–D006), in correspondence.

#### VIII. Paperwork Reduction Act

This proposed rule does not contain any new information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### List of Subjects in 48 CFR Parts 203, 204, 206, 212, 215, and 235.

Government procurement.

**Jennifer D. Johnson,**

*Editor/Publisher, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 203, 204, 206, 212, 215, and 235 are proposed to be amended as follows:

■ 1. The authority citation for 48 CFR parts 203, 204, 206, 212, 215, and 235 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

#### PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 2. Add section 203.104–1 to subpart 203.1 to read as follows:

##### 203.104–1 Definitions.

The definition of *Federal agency procurement* at FAR 3.104–1 also includes commercial solutions openings.

#### PART 204—ADMINISTRATIVE AND INFORMATION MATTERS

■ 3. Amend section 204.1603 by revising paragraph (a)(3)(A)(2) and adding a sentence at the end of paragraph (a)(4) to read as follows:

##### 204.1603 Procedures.

(a) \* \* \*

(3) \* \* \*

(A) \* \* \*

(2) Use S to identify broad agency announcements and commercial solutions openings.

\* \* \* \* \*

(4) \* \* \* Use C in position 10 to identify the solicitation as a commercial solutions opening.

\* \* \* \* \*

#### PART 206—COMPETITION REQUIREMENTS

■ 4. Amend section 206.102 by adding paragraph (d)(4) to read as follows:

##### 206.102 Use of competitive procedures.

(d) \* \* \*

(4) Competitive selection of proposals based on a review by scientific, technological, or other subject-matter expert peers resulting from a commercial solutions opening as described in subpart 212.7X (10 U.S.C. 3458) is a competitive procedure.

## PART 212—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

■ 5. Amend section 212.102 by adding paragraph (a)(i)(B)(3) to read as follows:

### 212.102 Applicability.

(a) \* \* \*

(i) \* \* \*

(B) \* \* \*

(3) 10 U.S.C. 3458—Supplies or services resulting from a commercial solutions opening pursuant to subpart 212.7X.

\* \* \* \* \*

■ 6. Amend section 212.203 by adding paragraph (3) to read as follows:

### 212.203 Procedures for solicitation, evaluation, and award.

\* \* \* \* \*

(3) See subpart 212.7X for acquisitions resulting from a commercial solutions opening.

■ 7. Add subpart 212.7X, consisting of sections 212.7X00 through 212.7X05, to read as follows:

## SUBPART 212.7X—DEFENSE COMMERCIAL SOLUTIONS OPENING

Sec.

212.7X00 Scope of subpart.

212.7X01 Definition.

212.7X02 Policy.

212.7X03 Limitations.

212.7X04 Procedures.

212.7X05 Congressional notification.

## SUBPART 212.7X—DEFENSE COMMERCIAL SOLUTIONS OPENING

### 212.7X00 Scope of subpart.

This subpart implements section 803 of the National Defense Authorization Act for Fiscal Year 2022 (Pub. L. 117–81) (10 U.S.C. 3458) for the acquisition of innovative commercial products or commercial services through the use of a general solicitation known as a commercial solutions opening (CSO).

### 212.7X01 Definition.

As used in this subpart—

*Innovative* means—

(1) Any technology, process, or method, including research and development, that is new as of the date of submission of a proposal; or

(2) Any application that is new as of the date of submission of a proposal of a technology, process, or method existing as of such date.

### 212.7X02 Policy.

(a) Contracting officers may only use a CSO—

(1) To obtain innovative solutions or potential capabilities that fulfill requirements;

(2) To close capability gaps, or provide potential innovative technological advancements; and

(3) When meaningful proposals with varying technical or scientific approaches can be reasonably anticipated.

(b) Notwithstanding the limitations at FAR 12.207(a) and (e), contracts awarded pursuant to a CSO shall be fixed-price, including fixed-price incentive contracts. When using a fixed-price incentive type contract, see FAR 12.214 and 16.204 for additional requirements.

(c) Contracting officers shall treat products and services acquired using a CSO as commercial products or commercial services.

(d) When using a CSO to acquire research and development, contracting officers shall use the procedures of this subpart in conjunction with FAR part 35 and part 235. A CSO is not subject to the limitations at 235.016 and may be used to fulfill requirements for research and development, ranging from advanced component development through operational systems development.

### 212.7X03 Limitations.

Contracting officers shall follow the procedures at PGI 212.7X03 to obtain senior procurement executive approval to award a contract in excess of \$100 million resulting from a CSO.

### 212.7X04 Procedures.

This section prescribes procedures for the use of a CSO.

(a) The CSO shall—

(1) Describe the agency's interest for an individual program requirement or for broadly defined areas of interest covering the full range of the agency's requirements;

(2) Specify the technical data required that may be necessary to meet DoD's minimum requirements (see 227.7102 and 227.7202);

(3) Describe the evaluation factors for selecting proposals to include—

(i) Technical and importance to agency programs as the primary evaluation factors;

(ii) Price to the extent appropriate, but at a minimum to determine that the price is fair and reasonable; and

(iii) Relative importance of the factors, and the method of evaluation;

(4) Specify the period of time during which proposals submitted in response to the CSO will be accepted; and

(5) Contain instructions for the preparation and submission of proposals.

(b) The contracting officer shall publicize the CSO through the Governmentwide point of entry and, if

authorized pursuant to FAR subpart 5.5, may also publish a notice regarding the CSO in noted scientific, technical, or engineering periodicals. The contracting officer shall publish the notice at least annually.

(c) Proposals received in response to the CSO shall be evaluated in accordance with evaluation factors specified therein through a scientific, technological, or other subject-matter expert peer review process. Written evaluation reports on individual proposals are required, but proposals need not be evaluated against each other since they are not submitted in response to a common performance work statement or statement of work.

(d) Synopsis of proposed contract actions under FAR subpart 5.2 of individual contract actions based upon proposals received in response to the CSO is not required. The notice published pursuant to paragraph (b) of this section fulfills the synopsis requirement.

(e) When a small business concern would otherwise be selected for award but is considered not responsible, follow the SBA Certificate of Competency procedure (see FAR subpart 19.6).

(f) The contracting officer shall document the decision that the requirements of this subpart have been met and include the documentation in the contract file.

### 212.7X05 Congressional notification.

See PGI 212.7X05 for congressional notification requirements for contracts valued at more than \$100 million that are awarded pursuant to a CSO.

## PART 215—CONTRACTING BY NEGOTIATION

■ 8. Amend section 215.371–4 by adding paragraph (a)(6) to read as follows:

### 215.371–4 Exceptions.

(a) \* \* \*

(6) Acquisitions under a commercial solutions opening pursuant to subpart 212.7X.

\* \* \* \* \*

■ 9. Add subpart 215.6, consisting of sections 215.602 and 215.604, to read as follows:

## SUBPART 215.6—UNSOLICITED PROPOSALS

### 215.602 Policy.

The policy at FAR 15.602 applies to commercial solutions openings.

**215.604 Agency points of contact.**

(a)(3) The guidance at FAR 15.604(a)(3) applies to commercial solutions openings.

**PART 235—RESEARCH AND DEVELOPMENT CONTRACTING**

■ 10. Amend section 235.006–71 by revising paragraph (a) to read as follows:

**235.006–71 Competition.**

(a)(1) Use of a broad agency announcement with peer or scientific review for the award of science and technology proposals in accordance with 235.016(a) fulfills the requirement for full and open competition (see 206.102(d)(2)).

(2) Use of a commercial solutions opening with scientific, technological,

or other subject-matter expert peer review for the award of innovative solutions or potential capabilities in accordance with subpart 212.7X fulfills the requirement for full and open competition (see 206.102(d)(4)).

\* \* \* \* \*

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