

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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CODSIA Case 2019-001

April 16, 2019

Defense Acquisition Regulations System
ATTN: Ms. Amy Williams
DPC/OUUSD(A&S)
3060 Defense Pentagon, Room 3B941
Washington, DC 20301-3060

SUBJ: Defense Federal Acquisition Regulation Supplement (DFARS) Case 2018-D008, “Undefinitized Contract Actions”

Dear Ms. Williams,

On behalf of the undersigned members of the Council of Defense and Space Industry Associations (CODSIA),¹ we offer the following comments on the subject proposed rule published in the *Federal Register* on February 15, 2019. Section 811 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 and Section 815 of the NDAA FY18 make important and positive changes to polices governing the Department of Defense’s (DoD) use of UCAs. CODSIA believes that the proposed rule is generally accurate in its implementation of these provisions of law, except for changes (or lack thereof) to the definition of a ‘qualifying proposal’ discussed below.

Comment: CODSIA’s central contention with the proposed rule is the incomplete revision of the definition of qualifying proposal. The chart below contrasts the changes in the definition of ‘qualifying proposal’ at Title 10, United States Code 2326(g)(2) with the revisions made at DFARS 217.7401(c):

Text of 10 USC 2326(j)(2) (as revised by Section 811 of the FY17 NDAA)	Text at DFARS 217.7401(c) (proposed revision under DFARS Case 2018-D008)
(2) The term “qualifying proposal” means a proposal that contains sufficient information to enable the Department of Defense to conduct complete and a	(c) Qualifying proposal means a proposal containing sufficient data for the DoD to do complete and meaningful analyses and audits of the –

¹ CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues at the suggestion of the Department of Defense. CODSIA consists of seven associations – Aerospace Industries Association (AIA), American Council of Engineering Companies (ACEC), Associated General Contractors (AGC), Information Technology Alliance for Public Sector (ITAPS), National Defense Industrial Association (NDIA), Professional Services Council (PSC), and U.S. Chamber of Commerce. CODSIA’s member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members’ positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

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meaningful audits of the information contained in the proposal and of any other information that the Department is entitled to review in connection with the contract as determined by the contracting officer.	(1) Data in the proposal; and (2) Any other data that the contracting officer has determined DoD needs to review in connection with the contract.
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Aside from the codified changes made by Section 811, Congress reiterated its intent to amend the definition of ‘qualifying proposal’ in accompanying report language:

The House recedes with an amendment that would eliminate the requirement that undefinitized contractual actions be awarded on a fixed-price basis, ensure that allowable profit reflects the cost risk at the time that a contractor submits a qualifying proposal to definitize a contract, and ***specify that such a proposal contain the information necessary to conduct a meaningful audit of the proposal. (emphasis added)***

Recommendation: DoD must revise the definition of ‘qualifying proposal’ as follows to ensure consistency with the letter of 10 USC 2326(j)(2) and intent of Section 811 of the FY17 NDAA:

* * * * *

PART 217—SPECIAL CONTRACTING METHODS

217.7401

[Amended]

3. In section 217.7401, by striking subparagraphs (c)(1) and (c)(2) and revising paragraph (c) to read as follows:

“(c) Qualifying proposal means a proposal that contains sufficient information to enable the Department of Defense to conduct a meaningful audit of the information contained in the proposal. A proposal submitted in compliance with the Proposal Adequacy Checklist (see DFARS 252.215-7009) shall be deemed to provide sufficient information to meet the definition of a qualifying proposal.”

* * * * *

Overall, Section 811 intends to reverse increasing use of UCAs and lagging definitization of UCAs. The change in definition of ‘qualifying proposal’ is a central component of the latter effort. Under the existing definition of ‘qualifying proposal’ disagreements between the

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contracting officer and the contractor over how much supporting information is enough constitutes a source of delay. The change in the definition that we propose will facilitate earlier discussions, while ensuring that the contracting officer has 'sufficient information' to enable a 'meaningful audit of the proposal.'

Although not explicitly referenced at 10 U.S.C. 2326, CODSIA recommends DoD establish that a proposal submitted in compliance with the Proposal Adequacy Checklist shall be deemed a 'qualifying proposal.' This would provide objective criteria for contracting officers, while not constraining their judgement of what information is needed to conduct a meaningful audit of a proposal. We also encourage DoD to rely upon relevant approved contractor business systems (i.e. Accounting, Estimating, Purchasing) to the maximum extent practicable in determining qualifying proposals.

Thank you for your attention to these comments. The CODSIA POC for these comments is Ryan Ouimette of the Aerospace Industries Association (AIA) who may be reached at (703) 358-1086 or at ryan.ouimette@aia-aerospace.org.

Sincerely,

	
John Luddy Vice President National Security Aerospace Industries Association	Steve Hall Vice President, Government Affairs American Council of Engineering Companies
	
Jimmy Christianson Regulatory Counsel Associated General Contractors of America	Eminence N. Griffin Senior Director, Government Affairs and Counsel Information Technology Industry Council
	
Wesley P. Hallman Senior Vice President for Policy National Defense Industrial Association	Alan Chvotkin Executive Vice President and Counsel Professional Services Council