

SUBJECT: Timely Definitizations of Undefined Contractual Actions (UCAs)

1. As a result of audits to determine whether UCAs have been definitized in a timely manner, questions have arisen regarding definitization requirements and qualifying proposals.

2. The statute which establishes "restrictions" on "Undefined contractual actions" (UCAs) is 10 USC § 2326. This statute requires that an undefined contractual action provide for "agreement upon contractual terms, specifications, and price by the earlier of--(A) 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 (B) the date on which the amount of funds obligated under the contractual action is equal to more than 50 percent of the negotiated overall ceiling price for the contractual action." The term "qualifying proposal" is defined as "a proposal that contains sufficient information to enable the Department of Defense to conduct complete and 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."

3. The policies and procedures implementing 10 USC § 2326 are prescribed in Defense Federal Acquisition Regulation Supplement (DFARS) subpart 217.74. The definition of the term "qualifying proposal" in DFARS § 217.7401(c) is almost identical to that in the statute. In DFARS § 217.7404-3(a), the requirement for definitization schedules in UCAs provides for definitization by the earlier of "(1) [t]he date which is 180 days after issuance of the action...; or (2) [t]he 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." In addition DFARS § 217.7404-3(a) provides that the first date ("180 days after issuance of the action") "may be extended but may not exceed the date which is 180 days after the contractor submits a qualifying proposal." Thus, DFARS is more restrictive than the statutory requirement which addresses the "180-day period beginning on the date on which the contractor submits a qualifying proposal" but not the "180 days after issuance of the action."

4. It must be noted that 10 USC § 2326 does not present a timeliness question as long as definitization occurs by "the end of the 180-day period beginning on the date on which the contractor submits a qualifying proposal...." However, timeliness questions do arise under the DFARS requirements. If a qualifying proposal is not submitted before "the date which is 180 days after issuance of the action," timeliness during

the period after the 180th day and before submission of a qualifying proposal is not addressed in DFARS ä 217.7404-3. Unfortunately, despite the Government's best efforts, the contractor's delay in submitting a qualifying proposal or causing a new qualifying proposal to be required could result in untimely definitizations, unless the contracting officer unilaterally determines "a reasonable price or fee" as provided in DFARS clause 252.217-7027.

5. No further extensions of the time for definitization of a UCA beyond the "180 days after the contractor submits a qualifying proposal" are provided by the statute or the DFARS. However, the requirements may change between the time that a UCA is issued and definitization. Both the statute and DFARS ä 217.7404-1(c) provide for approvals for modification of the scope of a UCA under which performance has begun, but neither addresses definitization of the modified UCA. If the government's requirements or the contractor's proposed methods of complying with the requirements have changed to such an extent that any proposal previously submitted no longer would meet the definition of a "qualifying proposal," submission of a new qualifying proposal would be necessary. If the changes for which a new qualifying proposal is necessary require approval by the head of the contracting activity (in accordance with DFARS ä 216.7404-1(c)) and are so extensive that they would be considered to be issuance of a new UCA, then in order to be timely, definitization would have to be completed within 180 days after the contractor submits a qualifying proposal" (DFARS ä 217.7404-3(a)). The determination of whether the changes to a UCA are sufficient to be considered a new UCA must be made on a case-by-case basis.

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