



Homeland Security

MEMORANDUM FOR: Heads of the Contracting Activities

FROM: Soraya Correa
Chief Procurement Officer (CPO)

SUBJECT: Class Deviation (Number 16-01), Revision 1 from
Federal Acquisition Regulation 42.708, Quick Closeout Procedures

Purpose: Extension of Class Deviation 16-01 in accordance with Federal Acquisition Regulation (FAR) 1.404 to authorize contracting activities to deviate from the requirements at FAR 42.708(a)(2)(i) and (ii). Additionally, the requirement for Components to provide a list of contracts, task orders, and delivery orders that could potentially be closed prior to using these procedures is deleted and replaced with requiring Component closeout status semi-annually. Finally, the basis for the decision to waive the incurred cost audit was restated for clarification purposes. Upon signature, this class deviation extension is retroactively effective following the expiration date of the initial deviation (January 31, 2017).

Background: FAR 42.708 allows the contracting officer (CO) to negotiate the settlement of direct and indirect costs for a specific contract, task order, or delivery order to be closed in advance of the determination of final direct costs and indirect cost rates. However, the FAR limits this negotiation to instances where the total unsettled direct costs and indirect costs to be allocated to any one contract, task order, or delivery order is no more than the lesser of \$1,000,000 or ten percent of the total contract, task order, or delivery order amount. This class deviation will allow CO's to negotiate settlements and closeout of certain contracts using the procedures in FAR 42.708 regardless of dollar value or percent of unsettled direct and indirect costs allocable to the specific contract, delivery or task order. This class deviation is expected to:

1. Reduce the Department's backlog of completed contracts that remain open.

In general, the Government has six years to challenge costs claimed in a contractor's final indirect cost rate proposal. Due to various reasons, there are many DHS contracts, task orders, and delivery orders with unaudited final indirect cost rate proposals that are near the end of the six-year limit. In such instances, this deviation will allow closeout of completed contracts and orders prior to the final determination of direct and indirect costs, based on audits, for all years involved.

2. Protect the Department's ability to timely use funds.

a. In those instances in which funds obligated under a contract, task order, or delivery order are still available for new obligations, timely closeout may free the funds for current, proper obligations.

- b. In those instances in which expired funds are available for antecedent liability obligations but are approaching the five years allowed for such obligations, a timely closeout will allow the Department to properly use the funds before the appropriations account is closed.

Deviation: This class deviation authorizes DHS COs to use quick closeout procedures regardless of dollar value or percent of unsettled direct and indirect costs allocable to a contract, task order, or delivery order. This deviation is subject to the following restrictions:

- The contractor has submitted a final indirect cost rate proposal(s) for the contract, task order, or delivery order considered for expedited closeout.
- COs must use either the Defense Contract Audit Agency (DCAA) recommended rates, if available, or rates mutually agreed to by the CO and the contractor, in determining the final indirect expenses.
- COs may waive the incurred cost audit requirement if compelling reasons exist. The decision to waive the audit must be made by the responsible CO in consultation with his or her legal advisor, the Office of the Chief Procurement Officer (OCPO)/Oversight and Pricing Branch (OPB), and DCAA. The basis for the decision and unaudited contract, task order, or delivery order direct and/or indirect costs by contractor fiscal year must be documented in the contract file.
- COs must conduct a risk assessment that considers the contractor's accounting, estimating, and purchasing systems, open cost issues, and other pertinent information as required by FAR 42.708(a)(3)(iii). This assessment must be documented in the contract file.
- COs must ensure the contract, task order, and delivery order closed out under this deviation does not impact the Government's negotiation flexibility on any remaining unsettled contracts and orders. Indirect cost rates used under this deviation must not be considered as setting binding precedent when establishing the final indirect cost rates for other contracts, task orders, or delivery orders.

OCPO/OPB is available to assist contracting officers in determining whether a contract meets the restrictions above. Furthermore, in an effort to assess the Department's use of the deviation, OCPO/OPB will send out a data request for all contracts closed out using the Quick Closeout Deviation on a semiannual basis. OPB will send the first data request in July 2017.

Expiration Date: This class deviation will remain in effect until rescinded by the CPO.

Questions or comments about this class deviation may be directed to Kenneth Hill at (202) 447-0039 or Kenneth.Hill@hq.dhs.gov or to Eileen Klase at (202) 384-5697 or Eileen.Klase@hq.dhs.gov.

**Class deviation from Federal Acquisition Regulation 42.708,
Quick closeout procedures for the Department of Homeland Security**

Findings

The Department of Homeland Security (DHS) has a large number of open, physically complete contracts, task orders, and delivery orders that are subject to the following circumstances:

1. Contractors have submitted final indirect cost rate proposal(s); however, for various reasons, those proposals are approaching the six-year limit available to the Government to challenge costs claimed in a contractor's final indirect cost rate proposal(s).
2. Use of funds.
 - a. Funds still available for new obligations and for which a timely contract closeout may release funds for current, proper obligations.
 - b. Expired funds available for antecedent liability obligations are approaching the five years allowed for such obligations. A timely contract closeout will allow the agency to properly use the funds before the appropriations account is closed.
3. Total unsettled direct and indirect costs are more than \$1 million or ten percent of the contract, task order, or delivery order value.

This class deviation will allow DHS contracting officers (COs) to use quick closeout procedures regardless of dollar value or the percent of unsettled direct and indirect costs allocable to specific contracts, task orders, and delivery orders. Use of this deviation is subject to the following restrictions:

- The contractor has submitted a final indirect cost rate proposal(s) for the contract, task order, or delivery order considered for expedited closeout.
- COs must use either the Defense Contract Audit Agency (DCAA) recommended rates, if available, or rates mutually agreed to by the CO and the contractor, in determining the final indirect expenses.
- COs may waive the incurred cost audit requirement if compelling reasons exist. The decision to waive the audit must be made by the responsible CO in consultation with his or her legal advisor, the Office of the Chief Procurement Officer (OCPO)/Oversight and Pricing Branch (OPB), and DCAA. The basis for the decision must be documented in the contract file.
- COs must conduct a risk assessment that considers the contractor's accounting, estimating, and purchasing systems, open cost issues, and other pertinent information as required by FAR 42.708(a)(3)(iii). This assessment must also be documented in the contract file.
- COs must ensure the contract, task order, and delivery order closed out under this deviation does not impact the Government's negotiation flexibility on any remaining unsettled contracts and orders. Indirect cost rates used under this deviation must not be

considered as setting binding precedent when establishing the final indirect cost rates for other contracts, task orders, or delivery orders.

Determination

As authorized by FAR 1.404, I hereby issue a waiver to the requirements at FAR 42.708(a)(2)(i) and (ii) that allows DHS contracting activities to utilize quick closeout procedures before establishing final direct costs and indirect rates, regardless of dollar value or percent of unsettled direct and indirect costs allocable to the contract, task order, or delivery order meeting the restrictions provided herein. As required by FAR 1.404, OCPO has consulted with the Chair of the Civilian Agency Acquisition Council. This class deviation shall remain in effect until rescinded by CPO authority.



Soraya Correa
Chief Procurement Officer
Department of Homeland Security

April 5, 2017
Date