

requirement. For example, payment could be based on:

(1) A payment distribution profile developed by the contracting officer from a contract funds status report, or other form of cost reporting, that identifies actual funds usage by contract line item (or subline item) (CLIN/SLIN); or

(2) Information contractually required to be included on the contractor's payment request, identifying the amount of payment to be made for each CLIN/SLIN against which payment is requested.

(B) *Contract financing payments based on a unique payment distribution profile.* Payments will be based on a payment distribution profile established by the contracting officer at contract award or as revised during contract performance. The profile must indicate, for each anticipated payment, a percentage apportionment by CLIN/SLIN, based on anticipated contract performance. Payment distribution profiles may be derived from information supplied by the contractor, contract administration office, program office, or elsewhere. Payment profiles may reflect a combination of the other alternative described herein; however, each CLIN/SLIN may use only one method (see 204.7103-1 and 204.7104-1).

(c) *Contract financing payments distributed on a proportionate percentage basis.* Payments will be distributed on a proportionate percentage basis against all CLIN/SLINs when a best estimate of contractor work performance supports an assumption that work will be performed for all CLIN/SLINs in a relatively proportionate manner.

(D) *Contract financing payments using oldest funds first.* This payment method should be used only when other payment instruction options are not practicable. When used, payments will be made from the appropriate accounting classification citations in a sequence that enables exhaustion of the oldest fiscal year financing appropriation, before payments are made from more recent fiscal year appropriations. This form of payment instruction most typically applies to requirements that are funded by research, development, test and evaluation appropriations for successive fiscal years.

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DEPARTMENT OF DEFENSE

48 CFR Parts 225 and 252

[Docket No. 96-D021]

Defense Federal Acquisition Regulation Supplement; Contingent Fees-Foreign Military Sales

AGENCY: Department of Defense (DoD).

ACTION: Proposed rule with request for comments.

SUMMARY: The Director of Defense Procurement is proposing to amend the Defense Federal Acquisition Regulation supplement (DFARS) to permit payment of contingent fees in excess of \$50,000 per foreign military sale case under a government contract, if the foreign customer approves the payment in writing before contract award.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before August 4, 1997, to be considered in the formulation of the final rule.

ADDRESSES: Interested parties should submit written comments to: Defense Acquisition Regulations Council, Attn: Ms. Amy Williams, PDUSD(A&T)DP(DAR), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062. Telefax number (703) 602-0350. Please cite DFARS Case 96-D021 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, (703) 602-0131.

SUPPLEMENTARY INFORMATION:

A. Background

This rule proposes amendments to the interim rule published in the **Federal Register** on January 17, 1997 (62 FR 2616). The interim rule amended DFARS Subpart 225.73 and the clauses at 252.212-7001 and 252.225-7027 for conformance with revisions made to the Federal Acquisition Regulation pertaining to contingent fee arrangements. As a result of public comments received on the interim rule, this proposed rule removes the prohibition on payment of contingent fees exceeding \$50,000 for foreign military sales, and instead permits payment of contingent fees exceeding \$50,000 per foreign military sale case if the foreign customer agrees to such fees in writing before contract award.

B. Regulatory Flexibility Act

The proposed rule is not expected 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 most firms that pay or receive contingent fees on foreign military sales are not small business concerns. An initial regulatory flexibility analysis has therefore not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected DFARS subparts also will be considered in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 96-D021 in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because this proposed rule does not impose any information collection requirements that require Office of Management and Budget approval under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 225 and 252

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

Therefore, it is proposed that 48 CFR Parts 225 and 252 be amended as follows:

1. The authority citation for 48 CFR Parts 225 and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 225—FOREIGN ACQUISITION

2. Section 225.7303-4 is revised to read as follows:

225.7303-4 Contingent fees.

(a) Except as provided in paragraph (b) of this subsection, contingent fees are generally allowable under defense contracts provided that the fees are paid to a bona fide employee or a bona fide established commercial or selling agency maintained by the prospective contractor for the purpose of securing business (see FAR Part 31 and FAR Subpart 3.4).

(b) (1) Under DoD 5105.38-M, Security Assistance Management Manual, Letters of Offer and Acceptance for requirements for the governments of Australia, Taiwan, Egypt, Greece, Israel, Japan, Jordan, Republic of Korea, Kuwait, Pakistan, Philippines, Saudi Arabia, Turkey, Thailand, or Venezuela (Air Force) must provide that all U.S. Government contracts resulting from the Letters of Offer shall prohibit the payment of contingent fees unless the payments have been identified and approved in writing by the foreign

customer before contract award (see 225.7308(a)).

(2) For FMS to countries not listed in paragraph (b)(1) of this subsection, no payment of contingent fees in excess of \$50,000 per FMS case shall be made under a U.S. Government contract, unless payment has been identified and approved in writing by the foreign customer before contract award.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Section 252.225–7027 is revised to read as follows:

252.225–7027 Restriction on Contingent Fees for Foreign Military Sales.

As prescribed in 225.7308(a), use the following clause. Insert in paragraph (b)(1) of the clause the name(s) of any foreign country customer(s) listed in 225.7303–4(b).

RESTRICTION ON CONTINGENT FEES FOR FOREIGN MILITARY SALES

(a) Except as provided in paragraph (b) of this clause, contingent fees, as defined in the Covenant Against Contingent Fees clause of this contract, are generally an allowable cost, provided that the fees are paid to a bona fide employee or to established commercial selling agencies maintained by the Contractor for the purpose of securing business.

(b) For Foreign military sales, unless the contingent fees have been identified and payment approved in writing by the foreign customer before contract award, the following contingent fees are unallowable costs under the contract:

- (1) For sales to the Government(s) of _____, contingent fees in any amount.
- (2) For sales to Governments not listed in paragraph(b)(1) of this clause, contingent fees in excess of \$50,000 per foreign military sale case.

(End of clause)

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DEPARTMENT OF DEFENSE

48 CFR Parts 245 and 252

[DFARS Case 92–D024]

Defense Federal Acquisition Regulation Supplement; Demilitarization

AGENCY: Department of Defense (DoD).

ACTION: Proposed rule with request for comments.

SUMMARY: The Director of Defense Procurement is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to address control of Munitions List items and Strategic List items and demilitarization of excess property under Government contracts.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before August 4, 1997 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: Defense Acquisition Regulations Council, Attn: Mr. Rick Layser, PDUSD(A&T)DP(DAR), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telefax number (703) 602–0350. Please cite DFARS Case 92–D024 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Rick Layser, (703) 602–0131.

SUPPLEMENTARY INFORMATION:

A. Background

A proposed rule was published in the **Federal Register** on March 16, 1994 (59 FR 12223). The rule proposed amendments to the DFARS to improve control of Munitions List and Strategic List items and demilitarization of excess contractor inventory. After evaluation of public comments, a second proposed rule was published in the **Federal Register** on March 23, 1995 (60 FR 15276). As a result of public comments received on the second proposed rule, additional changes have been made, including amendment of the clause at 252.245–7XXX to—

(1) State that any adjustment in contract price incident to the contracting officer's direction to demilitarize excess Government property shall be made in accordance with the Changes clause of the contract;

(2) Specify the terms and conditions that the contractor must include in any agreement for sale of items requiring demilitarization or trade security controls; and

(3) Eliminate the requirement for inclusion of demilitarization codes on transfer documents when contractor-acquired property is transferred to a follow-on contract.

B. Regulatory Flexibility Act

The proposed rule is not expected 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 the vast majority of property requiring demilitarization or trade security controls is in the custody of contractors that are large business concerns. Additionally, contractor expenses incident to demilitarization are reimbursable contract costs. An initial regulatory flexibility analysis has therefore not been performed. Comments are invited from small businesses and other interested parties.

Comments from small entities concerning the affected DFARS subparts also will be considered in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 92–D024 in correspondence.

C. Paperwork Reduction Act

The information collection requirements in this proposed rule have been approved by the Office of Management and Budget under Clearance Number 0704–0363 through June 30, 1998.

List of Subjects in 48 CFR Parts 245 and 252

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

Therefore it is proposed that 48 CFR Parts 245 and 252 be amended as following:

1. The authority citation for 48 CFR Parts 245 and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 245—GOVERNMENT PROPERTY

245.601 [Amended]

2. Section 245.601 is amended by removing paragraph (2), and by redesignating paragraphs (3) and (4) as paragraphs (2) and (3), respectively.

3. Section 245.604 is revised to read as follows:

245.604 Restrictions on purchase or retention of contractor inventory.

(1) Contractors authorized to sell contractor inventory (see FAR 45.601) may not knowingly sell the inventory to any person or that person's agent, employee, or household member if that person—

(i) Is a civilian employee of the DoD or the U.S. Coast Guard; or

(ii) Is a member of the armed forces of the United States, including the U.S. Coast Guard; and

(iii) Has any functional or supervisory responsibilities for or within the Defense Reutilization and Marketing Program, or for the disposal of contractor inventory.

(2) (i) A contractor's authority to approve a subcontractor's sale, purchase, or retention at less than cost, and the subcontractor's authority to sell, purchase, or retain at less than cost if approved by a higher-tier contractor, does not include authority to approve—

(A) a sale by a subcontractor to the next higher-tier contractor or to an affiliate of such contractor or of the subcontractor; or