This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD certifies that this final rule will not 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 rule primarily relates to DoD planning and budget considerations with regard to the leasing of vessels, aircraft, and combat vehicles.

C. Paperwork Reduction Act

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

List of Subjects in 48 CFR Part 207

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR Part 207 is amended as follows:

PART 207—ACQUISITION PLANNING

■ 1. The authority citation for 48 CFR Part 207 continues to read as follows:

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

■ 2. Section 207.470 is amended as follows:
■ a. By redesignating paragraphs (a) and (b) as paragraphs (b) and (c) respectively;
■ b. By adding a new paragraph (a); and
■ c. In newly designated paragraph (c), by removing ''Except as provided in paragraph (a) of this section'' and adding in its place ''Except as provided in paragraphs (a) and (b) of this section''.

The new paragraph (a) reads as follows:

207.470 Statutory requirements.

(a) *Requirement for authorization of certain contracts relating to vessels, aircraft, and combat vehicles.* The contracting officer shall not enter into any contract for the lease or charter of any vessel, aircraft, or combat vehicle, or any contract for services that would require the use of the contractor's vessel, aircraft, or combat vehicle, unless the Secretary of the military department concerned has satisfied the requirements of 10 U.S.C. 2401, when—

(1) The contract will be a long-term lease or charter as defined in 10 U.S.C. 2401(d)(1); or

(2) The terms of the contract provide for a substantial termination liability as defined in 10 U.S.C. 2401(d)(2). Also see PGI 207.470.

* * * * *

[FR Doc. E9–16650 Filed 7–14–09; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 209, 237, and 252

RIN 0750–AF80

Defense Federal Acquisition Regulation Supplement; Lead System Integrators (DFARS Case 2006–D051)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Interim rule with request for comments.

SUMMARY: DoD has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 802 of the National Defense Authorization Act for Fiscal Year 2008. Section 802 places limitations on the award of new contracts for lead system integrator functions in the acquisition of major DoD systems.

DATES: *Effective date*: July 15, 2009.

Comment date: Comments on the interim rule should be submitted in writing to the address shown below on or before September 14, 2009, to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2006–D051, using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: dfars@osd.mil.* Include DFARS Case 2006–D051 in the subject line of the message.
- *Fax:* 703–602–7887.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Cassandra Freeman, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062.
- *Hand Delivery/Courier:* Defense Acquisition Regulations System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202–3402.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Cassandra Freeman, 703–602–8383.

SUPPLEMENTARY INFORMATION:

A. Background

DoD published an interim rule at 73 FR 1823 on January 10, 2008, to implement Section 807 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364) with regard to limitations on the performance of lead system integrator functions by DoD contractors. On January 28, 2008, Section 802 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181) placed additional limitations on DoD use of lead system integrators. This second interim rule amends the interim rule published on January 10, 2008, to implement Section 802 of Public Law 110–181.

One source submitted comments on the interim rule published on January 10, 2008. A discussion of the comments is provided below.

1. *Comment:* Section 802 of the Fiscal Year 2008 National Defense Authorization Act (Pub. L. 110–181), which was enacted after publication of the interim rule, contains a definition of ''lead system integrator'' that renders the interim rule definition obsolete.

DoD Response: The definition of ''lead system integrator'' in this second interim rule has been amended for consistency with the definition in Section 802 of Public Law 110–181.

2. *Comment:* The limitations on the award of new contracts for lead system integrator functions, in Section 802 of Public Law 110–181, will make any implementing regulations applicable to only a handful of contractors. Given the limited duration of ongoing contracts for programs that have been identified as lead system integrators, the newly created contract clauses in the interim rule are unlikely to be incorporated into a contract, because the fiscal year 2008 statutory prohibition effectively precludes their use. Therefore, DoD should withdraw or suspend the interim rule.

DoD Response: DoD agrees that the rule will apply only to a limited number of contractors and only for a limited duration. However, the law must be implemented for those situations where it is applicable.

3. *Comment:* It is inappropriate to require contractors to represent whether or not they propose to perform lead system integrator functions under vague definitions, given that the contract may be terminated for default or other remedies may be imposed at the sole discretion of the contracting officer if the contractor misrepresented its ''financial interests'' when that term is

not defined. Since a ''lead system integrator with system responsibility'' is essentially ''as determined by the Contracting Officer'' at the time of award, this presents an unacceptable situation where a contractor may be subject to penalty effectively for an errant determination by the Government. Moreover, successful offerors risk termination for default for misrepresenting their status at some later time if their lead system integrator status is found to be wrong, even if that representation was mistakenly, rather than knowingly or falsely, executed.

DoD Response: The definitions in the clause at DFARS 252.209–7007, as amended by this interim rule, sufficiently address the compliance requirements of a contractor certifying as a lead system integrator. It is incumbent upon the contractor to ensure that certifications represent the most current, accurate, and complete information to avoid the misinterpretation of information by the contracting officer. Likewise, it is the responsibility of the contracting officer to ensure due diligence in the evaluation of contractor certifications.

4. *Comment:* Existing regulations, such as those governing conflicts of interest, that are adequate to protect the public interest in situations where a prime contractor is responsible for integrating subsystems into a weapon system, are also adequate to protect the correlating situation in which a prime contractor is integrating systems into a ''system of systems.'' Additional policy guidance may be warranted to advise contracting officers to take appropriate steps in evaluating proposals to ensure mechanisms are in place to avoid conflicts of interest. In that case, the policy additions to Part 209 of the DFARS are sufficient to implement Section 807 of the Fiscal Year 2007 National Defense Authorization Act without the imposition of requirements for contractor representations and additional clauses in solicitations and contracts.

DoD Response: DoD considers the rule's provision and clause to be the appropriate means of conveying this specific statutory requirement to offerors and contractors.

5. *Comment:* Section 209.570–1 of the rule merely references the reader to the clause at 252.209–7007 for a definition of lead system integrator. The definition should be included in section 209.570–1 instead of referring the reader to the clause section of the DFARS.

DoD Response: The reference to the definition in the contract clause is consistent with the DFARS convention of minimizing repetition of text.

6. *Comment:* The rule would benefit in the Definitions section by the addition of a cross-reference to the existing statutory or regulatory definition of a major system, so that it is clear exactly what type of standards (dollar threshold, *etc.*) apply to the rule.

DoD Response: FAR 2.101 provides a definition of ''major system.'' It is not necessary to include a cross-reference in this DFARS rule, since the definitions in FAR 2.101 apply throughout the FAR system unless otherwise specified.

7. *Comment:* Clarification is needed on the term ''substantial portion'' used in paragraph (a)(2) of the clause at 252.209–7007.

DoD Response: Contracting officers have the discretion to determine whether an activity constitutes a ''substantial portion'' of the work on the system and the major subsystems. Factors to be considered in making this determination are the relative dollar value of the effort and the criticality of the effort to be performed.

8. *Comment:* Section 209.570–2(b)(1) states that the statutory prohibition does not apply if the Secretary of Defense certifies to both the House and Senate Armed Services Committees that the lead system integrator contractor was selected through a competitive process, and any potential organizational conflict of interest was neutralized in the selection process. The certification requirement itself would benefit from some clarity, and both the certification level and the body to whom the certification is made would benefit from the flexibility to delegate the exception authority to another approval level, such as the head of the contracting activity.

DoD Response: The certification requirement is consistent with Section 807 of the National Defense Authorization Act for Fiscal Year 2007. In view of the limited number of contracts to which this requirement applies, DoD considers it unnecessary to delegate this exception authority.

9. *Comment:* Section 209.570–2(b)(2), which cites another exception to the prohibition, is confusing. If the goal of this section is to allow for a lead system integrator to act as a subcontractor in the major system development/construction contract after completing lead system integrator functions, the standard for the exception is unclear. What exactly is a ''process over which the entity exercised no control''? The tiering of subcontractors as an ingredient to the selection process for an exception requires clarification.

DoD Response: Section 209.570–2(b)(2) of the rule is consistent with the language in Section 807 of National Defense Authorization Act for Fiscal Year 2007. The record does not document the legislative intent; however, DoD believes that a ''process over which the entity exercised no control'' means that the entity was selected to perform as a lower-tier subcontractor as a result of an independent selection process in which the entity did not participate as a decision-maker.

10. *Comment:* Section 235.008 contains language that is unclear. In particular, the statement ''*See* 209.570 for limitations on the award of contracts to contractors acting as lead system integrators,'' appears to prohibit the award of contracts for research and development efforts to lead system integrators.

DoD Response: The cross-reference in DFARS 235.008 does not prohibit the award of contracts for research and development efforts to lead system integrators; it advises the reader to consider the limitations on contractors acting as lead system integrators when evaluating research and development proposals for contract award.

11. *Comment:* Both the provision at 252.209–7006 and the clause at 252.209–7007 present problematic interpretation issues. Both include references to two different types of lead system integrators: a lead system integrator with system responsibility and a lead system integrator without system responsibility. The distinction between these two types of lead system integrators is somewhat difficult to comprehend, but the offeror is asked to make written representations as to its lead system integrator status based presumably on the type of work statement contained in the solicitation (which may or may not state that the work is for integration or systems engineering, *etc.*).

DoD Response: Consistent with the statutory provisions, the definitions recognize two categories of contracts for major systems: development/production contracts and service contracts. The offeror's representation will be based upon the contract work statement and any special provisions in the solicitation in light of the limitations and prohibitions in the provision at 252.209–7006 and the clause at 252.209–7007.

12. *Comment:* The definition of ''lead system integrator without system responsibility'' in the clause at 252.209–7007 anticipates that the lead system integrator understands and can make judgments about what is meant by inherently governmental functions. The definition references a section of the Federal Acquisition Regulation

completely unaddressed elsewhere in the rule. At no time prior to this juncture was the prohibition against lead system integrators receiving development/construction contracts tied to a determination that certain types of lead system integrator work were inherently governmental, a term evolving out of the FAIR Act and Competitive Sourcing/A–76 world of contracting. The clause states that contractors performing lead system integrator functions throughout the acquisition timeframe for a major system will refrain from acquiring a financial interest in any company anywhere that might be eligible to develop or manufacture the major system. Without addressing the impact on commerce by prohibiting business enterprises doing defense-related work for the Government from making strategic acquisitions, the timeframes for the complete acquisition cycle for major systems could last for years, effectively bringing legitimate and otherwise legal forms of economic activity (mergers and acquisitions) to a halt and extending the lead system integrator limitation period well beyond that envisioned by Congress when crafting the law.

DoD Response: The definitions and the requirements in the contract clause are consistent with the statutory provisions.

13. *Comment:* Paragraph (c) of the clause at 252.209–7007 imposes an unclear standard and undefined timeline for notice from a lead system integrator contractor to the contracting officer if the lead system integrator contractor acquires a financial interest in a relevant major system contractor. Additionally, the clause provides the contracting officer the unilateral right to impose a default termination in the event that a conflict cannot be mitigated or avoided after the contract has been awarded and/or in force for some time. Termination should not be made a specific requirement of this clause; rather, if a lead system integrator contractor is acting in good faith and otherwise complying with the requirements of the contract, but termination is still necessary to comport with the principle of any final lead system integrator limitation clause, termination should be one of convenience that allows the lead system integrator contractor to recoup all costs incurred prior to termination. Both paragraphs (c) and (d) of the clause should be rewritten to establish a reasonable standard for both timely notice and to clarify the extent of the Government's remedies in termination.

DoD Response: A failure to comply with statutory prohibitions speaks to the lack of responsibility of a contractor, and could be reasonable justification to terminate a contract for default. However, the clause does not direct a default termination; it only provides for it and also allows other remedial action as may be appropriate.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD does not expect this 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 application of the rule is limited to contractors performing lead system integrator functions for major DoD systems. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2006–D051.

C. Paperwork Reduction Act

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

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements Section 802 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181). Section 802 places additional limitations on the performance of lead system integrator functions by DoD contractors. DoD may award a new contract for lead system integrator functions in the acquisition of a major system only if the major system has not yet proceeded beyond low-rate initial production; or if the Secretary of Defense determines that it would not be practicable to carry out the acquisition without continuing to use a contractor to perform lead system integrator functions, and that doing so is in the best interest of DoD. Comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Parts 209, 237, and 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 209, 237, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 209, 237, and 252 continues to read as follows:

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

PART 209—CONTRACTOR QUALIFICATIONS

■ 2. Section 209.570–2 is amended by adding paragraphs (c) and (d) to read as follows:

209.570–2 Policy.

* * * * *

(c) In accordance with Section 802 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181), DoD may award a new contract for lead system integrator functions in the acquisition of a major system only if—

(1) The major system has not yet proceeded beyond low-rate initial production; or

(2) The Secretary of Defense determines in writing that it would not be practicable to carry out the acquisition without continuing to use a contractor to perform lead system integrator functions and that doing so is in the best interest of DoD. The authority to make this determination may not be delegated below the level of the Under Secretary of Defense for Acquisition, Technology, and Logistics. (*Also see* 209.570–3(b).)

(d) Effective October 1, 2010, DoD is prohibited from awarding a new contract for lead system integrator functions in the acquisition of a major system to any entity that was not performing lead system integrator functions in the acquisition of the major system prior to January 28, 2008.

■ 3. Section 209.570–3 is revised to read as follows:

209.570–3 Procedures.

(a) In making a responsibility determination before awarding a contract for the acquisition of a major system, the contracting officer shall—

(1) Determine whether the prospective contractor meets the definition of ''lead system integrator'';

(2) Consider all information regarding the prospective contractor's direct financial interests in view of the prohibition at 209.570–2(a); and

(3) Follow the procedures at PGI 209.570–3.

(b) A determination to use a contractor to perform lead system integrator functions in accordance with 209.570–2(c)(2)—

(1) Shall specify the reasons why it would not be practicable to carry out the acquisition without continuing to use a contractor to perform lead system integrator functions, including a discussion of alternatives, such as use of the DoD workforce or a system engineering and technical assistance contractor;

(2) Shall include a plan for phasing out the use of contracted lead system integrator functions over the shortest period of time consistent with the interest of the national defense; and

(3) Shall be provided to the Committees on Armed Services of the Senate and the House of Representatives at least 45 days before the award of a contract pursuant to the determination.

PART 237—SERVICE CONTRACTING

■ 4. Section 237.102–72 is added to read as follows:

237.102–72 Contracts for management services.

In accordance with Section 802 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181), DoD may award a contract for the acquisition of services the primary purpose of which is to perform acquisition support functions with respect to the development or production of a major system, only if—

(a) The contract prohibits the contractor from performing inherently governmental functions;

(b) The DoD organization responsible for the development or production of the major system ensures that Federal employees are responsible for determining—

(1) Courses of action to be taken in the best interest of the Government; and

(2) Best technical performance for the warfighter; and

(c) The contract requires that the prime contractor for the contract may not advise or recommend the award of a contract or subcontract for the development or production of the major system to an entity owned in whole or in part by the prime contractor.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Section 252.209–7007 is amended by revising the clause date and paragraphs (a)(2), (a)(3), and (e) to read as follows:

252.209–7007 Prohibited Financial Interests for Lead System Integrators.

* * * * *

PROHIBITED FINANCIAL INTERESTS FOR LEAD SYSTEM INTEGRATORS (JUL 2009)

(a) * * *

(2) *Lead system integrator with system responsibility* means a prime contractor for the development or production of a major system, if the prime contractor is not expected at the time of award to perform a substantial portion of the work on the system and the major subsystems.

(3) *Lead system integrator without system responsibility* means a prime contractor under a contract for the procurement of services, the primary purpose of which is to perform acquisition functions closely associated with inherently governmental functions (see section 7.503(d) of the Federal Acquisition Regulation) with respect to the development or production of a major system.

* * * * *

(e) This clause implements the requirements of 10 U.S.C. 2410p, as added by Section 807 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364), and Section 802 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181).

[FR Doc. E9–16676 Filed 7–14–09; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212 and 239

RIN 0750–AG32

Defense Federal Acquisition Regulation Supplement; Use of Commercial Software (DFARS Case 2008–D044)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 803 of the National Defense Authorization Act for Fiscal Year 2009. Section 803 requires DoD to identify and evaluate, at all stages of the acquisition process, opportunities for the use of commercial computer software and other non-developmental software.

DATES: *Effective Date:* July 15, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Julian Thrash, Defense Acquisition Regulations System, OUSD(AT&L)DPAP(DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone 703–602–0310; facsimile 703–602–7887. Please cite DFARS Case 2008–D044.

SUPPLEMENTARY INFORMATION:

A. Background

Section 803 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417) requires DoD to ensure that contracting officials identify and evaluate, at all stages of the acquisition process (including concept refinement, concept decision, and technology development), opportunities for the use of commercial computer software and other non-developmental software. This final rule adds text at DFARS 212.212 to address the requirements of Section 803 of Public Law 110–117. In addition, the rule adds cross-references to existing DFARS policy regarding the acquisition of commercial software, software maintenance, and software documentation.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

This rule will not have a significant cost or administrative impact on contractors or offerors, or a significant effect beyond the internal operating procedures of DoD. Therefore, publication for public comment under 41 U.S.C. 418b is not required. However, DoD will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should cite DFARS Case 2008–D044.

C. Paperwork Reduction Act

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

List of Subjects in 48 CFR Parts 212 and 239

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 212 and 239 are amended as follows:

■ 1. The authority citation for 48 CFR parts 212 and 239 continues to read as follows:

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