

## PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 2. Section 203.570–1 is revised to read as follows:

### 203.570–1 Scope.

This subpart implements 10 U.S.C. 2408. For information on 10 U.S.C. 2408, see PGI 203.570–1.

## PART 207—ACQUISITION PLANNING

■ 3. Section 207.105 is amended by adding paragraph (b)(19)(F) to read as follows:

### 207.105 Contents of written acquisition plans.

\* \* \* \* \*

(b) \* \* \*

(19) \* \* \*

(F) *CONUS Antiterrorism Considerations.* Follow the procedures at PGI 207.105(b)(19)(F) for consideration of antiterrorism measures in acquisition planning.

## PART 209—CONTRACTOR QUALIFICATIONS

■ 4. Section 209.105–1 is added to read as follows:

### 209.105–1 Obtaining information.

For guidance on using the Excluded Parties List System, see PGI 209.105–1.

## PART 229—TAXES

■ 5. Section 229.101 is amended by revising paragraph (a) and adding paragraph (b) to read as follows:

### 229.101 Resolving tax problems.

(a) Within DoD, the agency-designated legal counsels are the defense agency General Counsels, the General Counsels of the Navy and Air Force, and for the Army, the Chief, Contract Law Division, Office of the Judge Advocate General. For additional information on the designated legal counsels, see PGI 229.101(a).

(b) For information on fuel excise taxes, see PGI 229.101(b).

## PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

### 252.225–7043 [Amended]

■ 6. Section 252.225–7043 is amended as follows:

■ a. By revising the clause date to read “(Mar 2006)”; and

■ b. In paragraph (d), by removing “225.7401” and adding in its place “PGI 225.7403–1”.

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Part 207

[DFARS Case 2004–D021]

### Defense Federal Acquisition Regulation Supplement; Contractor Performance of Acquisition Functions Closely Associated With Inherently Governmental Functions

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

**ACTION:** Final rule.

**SUMMARY:** DoD has adopted as final, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 804 of the National Defense Authorization Act for Fiscal Year 2005. Section 804 places limitations on the award of contracts for the performance of acquisition functions closely associated with inherently governmental functions.

**DATES:** Effective March 21, 2006.

**FOR FURTHER INFORMATION CONTACT:** Ms. Robin Schulze, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone (703) 602–0326, facsimile (703) 602–0350. Please cite DFARS Case 2004–D021.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

DoD published an interim rule at 70 FR 14572 on March 23, 2005, to implement Section 804 of the National Defense Authorization Act for Fiscal Year 2005. Section 804 places limitations on the award of contracts for the performance of acquisition functions closely associated with inherently governmental functions.

Three sources submitted comments on the interim rule. A discussion of the comments is provided below.

1. *Comment:* One respondent recommended revision of the text at 207.503(S–70)(1) to replace the phrase “functions closely associated with inherently governmental functions that are listed at FAR 7.503(d)” with the phrase “services and actions that are

listed at FAR 7.503(d).” Since 10 U.S.C. 2383(b)(3) states that the phrase “functions closely associated with inherently governmental functions” means those functions described in FAR 7.503(d), use of the FAR reference would meet the letter of the law and would avoid introducing a new phrase in the DFARS.

*DoD Response:* DoD believes that use of the phrase “functions closely associated with inherently governmental functions,” along with the reference to FAR 7.503(d), more clearly describes the requirements of the rule. Therefore, DoD has made no change to the rule as a result of this comment.

2. *Comment:* One respondent recommended amending the text at 207.503(S–70)(1)(i)(B) to remove the word “supervise” and replace it with the phrase “provide oversight to” to prevent a conflict with Office of Federal Procurement Policy (OFPP) Policy Letter 92–1, Inherently Governmental Functions. The respondent stated that OFPP Policy Letter 92–1 cautions against exercising “such control over contractor activities to convert the contract \* \* \* to a personal services contract,” and that use of the word “supervise,” could be understood by Federal officials that they are to interact with contractor employees in the same way they supervise Federal employees.

*DoD Response:* It should be noted that OMB Circular No. A–76 dated May 29, 2003, supersedes OFPP Policy Letter 92–1. However, DoD agrees that the term “supervise” could be subject to differing interpretations and could lead to an inappropriate contract relationship. Therefore, DoD has amended the rule to replace the term “supervise” with the term “oversee.”

3. *Comment:* One respondent stated that, given the importance of this issue, DoD should provide further guidance concerning the circumstances under which contracting officers may make a determination under 207.503(S–70)(1)(i)(A), that appropriate DoD personnel cannot reasonably be made available to perform the functions.

*DoD Response:* DoD does not believe that additional guidance is necessary. The availability decision must be made on a case-by-case basis, and DoD contracting officers should retain the flexibility to make informed decisions to meet mission needs.

4. *Comment:* One respondent expressed support for the rule, since the rule places some controls on the award of contracts for the performance of jobs closely associated with the Federal Government’s purchases of goods and services. The respondent believes that the Government should protect

inherently governmental functions, and recommended that DoD require contracting officers to provide written justifications of decisions made under this DFARS rule and that those justifications be made publicly available on the World Wide Web.

**DoD Response:** In accordance with FAR Subpart 4.8, the Government contract file should document the basis for an acquisition and the relevant decisions made by the contracting officer. DoD does not believe it is necessary to post the determinations made in accordance with this rule on the World Wide Web.

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 has prepared a final regulatory flexibility analysis consistent with 5 U.S.C. 604. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows:

The objective of the rule is to ensure proper management and oversight of contracts for functions that generally are not considered to be inherently governmental, but may approach being in that category because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contractor performance. The impact of the rule on small entities is unknown at this time. DoD agencies will implement the requirements of the rule in making decisions whether to enter into, and in the administration of, contracts for performance of the acquisition functions closely associated with inherently governmental functions that are listed in section 7.503(d) of the Federal Acquisition Regulation. DoD received no comments on the initial regulatory flexibility analysis. As a result of comments received on the interim rule, the final rule contains a minor change to clarify that Government personnel “oversee” but do not “supervise” contractor personnel.

## 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.*

■ Accordingly, the interim rule amending 48 CFR part 207, which was published at 70 FR 14572 on March 23, 2005, is adopted as a final rule with the following change:

### 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.

#### 207.503 [Amended]

■ 2. Section 207.503 is amended in paragraph (S-70)(1)(i)(B) by removing “supervise” and adding in its place “oversee”.

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Part 207 and Appendix D to Chapter 2

[DFARS Case 2003-D071]

### Defense Federal Acquisition Regulation Supplement; Component Breakout

**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 remove procedures for breaking out components of end items for future acquisitions. These procedures have been relocated to the new DFARS companion resource, Procedures, Guidance, and Information. This final rule is a result of a transformation initiative undertaken by DoD to dramatically change the purpose and content of the DFARS.

**DATES:** *Effective Date:* March 21, 2006.

**FOR FURTHER INFORMATION CONTACT:** Mr. Euclides Barrera, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0296; facsimile (703) 602-0350. Please cite DFARS Case 2003-D071.

## SUPPLEMENTARY INFORMATION:

### A. Background

DFARS Transformation is a major DoD initiative to dramatically change the purpose and content of the DFARS. The objective is to improve the efficiency and effectiveness of the acquisition process, while allowing the acquisition workforce the flexibility to innovate. The transformed DFARS will contain only requirements of law, DoD-wide policies, delegations of FAR authorities, deviations from FAR requirements, and policies/procedures that have a significant effect beyond the internal operating procedures of DoD or a significant cost or administrative impact on contractors or offerors. Additional information on the DFARS Transformation initiative is available at <http://www.acq.osd.mil/dpap/dars/dfars/transformation/index.htm>.

This final rule is a result of the DFARS Transformation initiative. The rule removes DFARS Appendix D, which contains DoD policy and procedures for breakout of components of end items for future acquisitions. The portions of Appendix D containing DoD policy on component breakout have been relocated to a new section at DFARS 207.171. The portions of Appendix D containing internal DoD procedures for component breakout have been relocated to the new DFARS companion resource, Procedures, Guidance, and Information (PGI), available at <http://www.acq.osd.mil/dpap/dars/pgi>.

DoD published a proposed rule at 70 FR 14623 on March 23, 2005. One industry association submitted comments on the proposed rule. A discussion of the comments is provided below.

1. *Comment:* Relocation of component breakout requirements to a guidance document is not appropriate, because it would provide DoD with the option to unilaterally eliminate the breakout requirement in its entirety, without affording the public an opportunity to object.

**DoD Response:** Although PGI is more than a guidance document, DoD agrees that portions of Appendix D are more appropriate for retention in the DFARS. Therefore, the portions of Appendix D containing DoD policy for component breakout have been relocated to a new section at DFARS 207.171. The portions of Appendix D that have been relocated to PGI are limited to internal DoD procedures for conducting breakout reviews, documenting breakout decisions, and maintaining breakout records. These procedures are still