List of Subjects in 48 CFR Parts 212, 247, and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 247, and 252 are proposed to be amended as follows:

■ 1. The authority citation for 48 CFR parts 212, 247, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

212.301 [Amended]

■ 2. Amend section 212.301 by:
■ a. Removing paragraph (f)(xix)(D);
■ b. Redesignating paragraphs (f)(xix)(E) through (H) as paragraphs (f)(xix)(D) through (G), respectively;
■ c. In the newly redesignated paragraph (f)(xix)(D), removing ''247.574(d)'' and adding ''247.574(c)'' in its place;
■ d. In the newly redesignated paragraph (f)(xix)(E), removing ''247.574(e)'' and adding ''247.574(d)'' in its place;
■ e. In the newly redesignated paragraph (f)(xix)(F), removing ''247.574(f)'' and adding ''247.574(e)'' in its place; and
■ f. In the newly redesignated paragraph (f)(xix)(G), removing ''U.S'' and adding ''U.S.'' in its place.

PART 247—TRANSPORTATION

247.574 [Amended]

■ 3. Amend section 247.574 by:
■ a. Removing paragraph (c); and
■ b. Redesignating paragraphs (d) through (f) as paragraphs (c) through (e), respectively.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 252.247–7023 by:
■ a. In the clause heading, removing the date ''(APR 2014)'' and adding ''(DATE)'' in its place;
■ b. Redesignating paragraph (h) as paragraph (i);
■ c. Adding a new paragraph (h); and
■ d. In the newly redesignated paragraphs (i)(1) and (2), removing ''paragraph (h)'' and adding ''paragraph (i)'' in both places;
■ e. In Alternate I:
■ i. In the clause heading, removing the date of ''(APR 2014)'' and adding ''(DATE)'' in its place;
■ ii. Redesignating paragraph (h) as paragraph (i);
■ iii. Adding a new paragraph (h); and
■ iv. In the newly redesignated paragraphs (i)(1) and (2), removing ''paragraph (h)'' and adding ''paragraph (i)'' in both places;
■ f. In Alternate II—
■ i. In the clause heading, removing the date of ''(APR 2014)'' and adding ''(DATE)'' in its place;
■ ii. Redesignating paragraph (h) as paragraph (i);
■ iii. Adding a new paragraph (h); and
■ iv. In the newly redesignated paragraphs (i)(1) and (2), removing ''paragraph (h)'' and adding ''paragraph (i)'' in both places.

The additions read as follows:

252.247–7023 Transportation of Supplies by Sea.

* * * * *

(h) If the Contractor has indicated by the response to the solicitation provision, Representation of Extent of Transportation by Sea, that it did not anticipate transporting by sea any supplies; however, after the award of this contract, the Contractor learns that supplies will be transported by sea, the Contractor—

(1) Shall notify the Contracting Officer of that fact; and

(2) Hereby agrees to comply with all the terms and conditions of this clause.

* * * * *

Alternate I. * * *

* * * * *

(h) If the Contractor has indicated by the response to the solicitation provision, Representation of Extent of Transportation by Sea, that it did not anticipate transporting by sea any supplies; however, after the award of this contract, the Contractor learns that supplies will be transported by sea, the Contractor—

(1) Shall notify the Contracting Officer of that fact; and

(2) Hereby agrees to comply with all the terms and conditions of this clause.

* * * * *

Alternate II. * * *

* * * * *

(h) If the Contractor has indicated by the response to the solicitation provision, Representation of Extent of Transportation by Sea, that it did not anticipate transporting by sea any supplies, but the contractor learns after the award of the contract that supplies will be transported by sea, the Contractor shall notify the Contracting Officer of that fact.

* * * * *

252.247–7024 [Removed and Reserved]

■ 4. Remove and reserve section 252.247–7024.

252.247–7025 [Amended]

■ 5. Amend section 252.247–7025, in the introductory text, by removing ''247.574(d)'' and adding ''247.574(c)'' in its place.

252.247–7026 [Amended]

■ 6. Amend section 252.247–7026, in the introductory text, by removing ''247.574(e)'' and adding ''247.574(d)'' in its place.

252.247–7027 [Amended]

■ 7. Amend section 252.247–7027, in the introductory text, by removing ''247.574(f)'' and adding ''247.574(e)'' in its place.

[FR Doc. 2018–18246 Filed 8–23–18; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 225 and 252

[Docket DARS–2018–0004]

RIN 0750–AJ22

Defense Federal Acquisition Regulation Supplement: Restrictions on Acquisitions From Foreign Sources (DFARS Case 2017–D011)

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

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Act for Fiscal Year 2017 to apply domestic source requirements to acquisitions at or below the simplified acquisition threshold when acquiring athletic footwear to be furnished to enlisted members of the Armed Forces upon their initial entry into the Armed Forces, and add Australia and the United Kingdom to the definition of the ''National Technology and Industrial Base.''

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before October 23, 2018, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2017–D011, using any of the following methods:

○ *Federal eRulemaking Portal: http://www.regulations.gov.* Search for

''DFARS Case 2017–D011.'' Select ''Comment Now'' and follow the instructions provided to submit a comment. Please include ''DFARS Case 2017–D011'' on any attached documents.

○ *Email: osd.dfars@mail.mil.* Include DFARS Case 2017–D011 in the subject line of the message.

○ *Fax:* 571–372–6094.

○ *Mail:* Defense Acquisition Regulations System, Attn: Ms. Amy G. Williams, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571–372–6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement the following two sections of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328):

A. Section 817 of the NDAA for FY 2017

Section 817 extends the domestic source requirements of 10 U.S.C. 2533a (the Berry Amendment) below the simplified acquisition threshold, when acquiring athletic footwear to be furnished to the members of the Army, Navy, Air Force, or Marine Corps upon their initial entry into the Armed Forces.

B. Section 881(b) of the NDAA for FY 2017

Section 881(b) amends 10 U.S.C. 2500(1) by adding Australia and the United Kingdom of Great Britain and Northern Ireland to the United States and Canada as the countries within which the activities of the national technology and industrial base are conducted. 10 U.S.C. 2534, Miscellaneous Limitations on the Procurement of Goods Other Than United States Goods, requires that DoD only procure certain items if the manufacturer of the items is part of the national technology and industrial base.

II. Discussion and Analysis

This rule proposes to amend the DFARS as follows—

A. Section 817 of the NDAA for FY 2017

Amends DFARS 225.7002(a) to ensure that purchases of athletic footwear valued at or below the SAT are not exempt from the Berry Amendment (*i.e.* shall be procured from domestic sources). A conforming change is made at DFARS 225.7002–3(a) to remove the phrase ''that exceed the simplified acquisition threshold'' in order to rely on the introductory text of the section, which qualifies all of the prescription in the section as inapplicable if an exception at DFARS 225.7002–2 applies.

B. Section 881(b) of the NDAA for FY 2017

Modifies the following DFARS sections, which implement the restrictions of 10 U.S.C. 2534, to allow acquisition of certain items from Australia and the United Kingdom:

- DFARS 225.7004, Restriction on acquisition of foreign buses.
- DFARS 225.7005, Restriction on certain chemical weapons antidote.
- DFARS 225.7006, Restriction on air circuit breakers for naval vessels.
- DFARS 252.225–7037, Evaluation of Offers for Air Circuit Breakers.
- DFARS 252.225–7038, Restriction on Acquisition of Air Circuit Breakers.

Purchases from the United Kingdom were already authorized in the provision and clause through annual waivers, which cover air circuit breakers and certain other naval vessel components.

In addition, this rule proposes to remove coverage at DFARS 225.7006–3(b) and 225.7006–4(a)(2) of the annual waiver for air circuit breakers for naval vessels from the United Kingdom, because waiver is no longer required.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule proposes to amend the applicability of existing DFARS solicitation provisions and contract clauses as follows:

- To implement section 817 of the NDAA for FY 2017, this rule proposes to extend use of DFARS clause 252.225–7012, Preference for Certain Domestic Commodities, to acquisitions at or below the simplified acquisition threshold (SAT) when buying athletic footwear to be furnished to enlisted members of the Armed Forces upon their initial entry into the Armed Forces. This clause is already prescribed for use in solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items.
- To implement section 881(b) of the NDAA for FY 2017, this rule proposes to modify the provision at DFARS 252.225–7037, Evaluation of Offers for Air Circuit Breakers, and the clause at DFARS 252.225–7038, Restriction on Acquisition of Air Circuit Breakers, to add Australia as a country from which items restricted by 10 U.S.C. 2534 may be purchased. This rule does not change the prescriptions for the use of this provision or clause, which are already required for use in solicitations and contracts for commercial items, including COTS items. The clause does not apply below the SAT.

- *A. Applicability to Contracts at or Below the SAT*

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the SAT. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulation (FAR) Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial items, and is intended to limit the applicability of laws to contracts for the acquisition of commercial items. 41 U.S.C. 1906 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Likewise, 41 U.S.C. 1907 governs the applicability of laws to COTS items, with the Administrator for Federal Procurement Policy the decision authority to determine that it is in the best interest of the Government to apply a provision of law to acquisitions of COTS items in the FAR. The Director,

DPC, is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

C. Determinations

A determination under 41 U.S.C. 1905 is not required to prescribe DFARS 252.225–7012 for use in solicitations and contracts valued at or below the SAT, because section 817 of the NDAA for FY 2017 specifically states that DoD shall acquire athletic footwear that complies with the requirements of 10 U.S.C. 2533a ''without regard to the applicability of any simplified acquisition threshold under chapter 137 of title 10 (or any other provision of law).''

A determination under 41 U.S.C. 1906 and 1907 is not required to apply the requirements of DFARS 252.225–7037 and 252.225–7038 to acquisitions for commercial items, including COTS items, because the statute that this provision and clause implements is not a covered statute subject to 41 U.S.C. 1905–1907. At the time of the Federal Acquisition Streamlining Act of 1994 (FASA) (Pub. L. 103–355), now codified in part at 41 U.S.C. 1905–1907, this provision and clause were a single clause, DFARS 252.225–7029, Restriction on Acquisition of Air Circuit Breakers, which implemented 10 U.S.C. 2534. Because 10 U.S.C. 2534 predated FASA, it was not subject to 41 U.S.C. 1905–1907. The DFARS clause 252.225–7029 was included on the initial list of statutes applicable to the acquisition of commercial items at DFARS 252.212–7001, incorporated in the DFARS by DFARS Case 95–D712 on November 30, 1995 (Defense Acquisition Circular 91–9).

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This proposed rule is not expected to be an E.O. 13771, Reducing Regulation and Controlling Regulatory Costs, regulatory action, because this proposed rule is not significant under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this proposed 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.* However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The reason for this rule is to implement sections 817 and 881(b) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328).

The objectives of the rule are as follows:

- To remove the exception to domestic source restriction of the Berry Amendment (10 U.S.C. 2533a) for acquisitions at or below the simplified acquisition threshold when buying athletic footwear to be furnished to enlisted members of the Armed Forces upon their initial entry into the Armed Forces, as required by section 817 of the NDAA for FY 2017.
- To allow acquisition of certain items from Australia and the United Kingdom, for which purchase is currently restricted to items from the United States or Canada, in accordance with 10 U.S.C. 2534, as amended by section 881(b) of the NDAA for FY 2017.

A. Section 817 of the NDAA for FY 2017

This rule may apply to only a few small entities, because there are few sources that meet the domestic source requirements of the Berry Amendment with regard to athletic footwear. The Defense Logistics Agency (DLA) estimates a potential annual demand for approximately 200,000 to 250,000 pairs of athletic shoes to be delivered at the rate of approximately 27,500 pairs per month. In response to a request for information issued by DLA in December 2016, there were 5 responses from athletic footwear manufacturers, one of which was a small business. Small entities who are athletic shoe manufacturers could likely support portions of DoD's total requirements for athletic footwear. In addition, there are likely a number of domestic component suppliers who are small entities who would benefit from this new requirement as well. On the other hand, small entities that cannot provide athletic shoes that meet the domestic source requirements of the Berry Amendment, will no longer be able to compete for acquisition of athletic footwear at or below the simplified acquisition threshold that are for the purpose of providing athletic footwear to enlisted members of the Armed Forces upon their initial entry into the Armed Forces.

B. Section 881(b) of the NDAA for FY 2017

This rule will not apply to any small entities at the prime contract level, as there are only a few prime contractors for the restricted items, which are all U.S. firms that are other than small businesses. For the definition of ''small business,'' the Regulatory Flexibility Act refers to the Small Business Act, which in turn allows the U.S. Small Business Administration (SBA) Administrator to specify detailed definitions or standards (5 U.S.C. 601(3) and 15 U.S.C. 632(a)). The SBA regulations at 13 CFR 121.105 discuss who is a small business: ''(a)(1) Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.'' Therefore, if an item currently purchased from a U.S. entity that is other than a small business were to be purchased from an entity in the Australia or the United Kingdom, there could be an impact on a few small entities that are currently subcontractors to a U.S. prime contractor.

There are no projected reporting or recordkeeping requirements of this rule. The only compliance requirements are to furnish athletic footwear that complies with the Berry Amendment.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

By extending the restriction of the Berry Amendment to acquisitions that do not exceed the simplified acquisition threshold, this rule may benefit small entities that can provide athletic footwear that is compliant with the Berry Amendment, because they may be more able to compete for smaller acquisitions.

DoD was unable to identify any alternatives that would meet the requirements of the statutes.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the

existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2017–D011), in correspondence.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 225 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 225 and 252 are proposed to 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. 1303 and 48 CFR chapter 1.

PART 225—FOREIGN ACQUISITION

■ 2. Amend section 225.7002–2 by revising paragraph (a) to read as follows:

225.7002–2 Exceptions.

* * * * *

(a) Acquisitions at or below the simplified acquisition threshold, except for athletic footwear purchased by DoD for use by members of the Army, Navy, Air Force, or Marine Corps upon their initial entry into the Armed Forces (section 817 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328)).

* * * * *

225.7002–3 [Amended]

■ 3. Amend section 225.7002–3, in paragraph (a) by removing ''commercial items, that exceed the simplified acquisition threshold'' and adding ''commercial items'' in its place.

225.7004–1 [Amended]

■ 4. Amend section 225.7004–1 by removing ''United States or Canada'' and adding ''United States, Australia, Canada, or the United Kingdom'' in its place.

225.7004–3 [Amended]

■ 5. Amend section 225.7004–3 by:

■ a. In paragraph (a) by removing ''United States or Canada'' and adding ''United States, Australia, Canada, or the United Kingdom'' in its place wherever it appears.

■ b. In paragraphs (a), (b), and (c) by removing ''United States and Canada'' and adding ''United States, Australia, Canada, or the United Kingdom'' in its place wherever it appears.

225.7005–1 [Amended]

■ 6. Amend section 225.7005–1, in the introductory text and paragraph (b), by removing ''United States or Canada'' and adding ''United States, Australia, Canada, or the United Kingdom'' in its place in both places.

225.7006–1 [Amended]

■ 7. Amend section 225.7006–1 by removing ''United States or Canada'' and adding ''United States, Australia, Canada, or the United Kingdom'' in its place.

■ 8. Revise section 225.7006–3 to read as follows:

225.7006–3 Waiver.

The waiver criteria at 225.7008(a) apply to this restriction.

225.7006–4 [Amended]

■ 9. Amend section 225.7006–4 by:

■ a. In paragraph (a)(2), removing ''A waiver has been granted, other than the waiver for the United Kingdom, which has been incorporated into the provision'' and adding ''A waiver has been granted'' in its place; and

■ b. In paragraph (b)(2), removing ''A waiver has been granted, other than the waiver for the United Kingdom, which has been incorporated into the clause'' and adding ''A waiver has been granted'' in its place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.225–7037 [Amended]

■ 10. Amend section 252.225–7037 by:

■ a. Removing the provision date of ''(JUN 2012)'' and adding ''(DATE)'' in its place; and

■ b. In paragraphs (a) and (b), removing ''outlying areas, Canada,'' and adding ''outlying areas, Australia, Canada,'' in its place in both places.

252.225–7038 [Amended]

■ 11. Amend section 252.225–7038 by:

■ a. Removing the provision date of ''(JUN 2005)'' and adding ''(DATE)'' in its place; and

■ b. Removing ''outlying areas, Canada,'' and adding ''outlying areas, Australia, Canada,'' in its place.

[FR Doc. 2018–18245 Filed 8–23–18; 8:45 am]

BILLING CODE 6820–ep–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 232, 242, and 252

[Docket DARS–2018–0042]

RIN 0750–AJ28

Performance-Based Payments and Progress Payments (DFARS Case 2017–D019)

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

ACTION: Proposed rule; notice of meeting.

SUMMARY: DoD is proposing to implement a section of the National Defense Authorization Act for Fiscal Year 2017, which addresses the preference for performance-based payments, and to streamline the performance-based payment process. DoD is also proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to revise progress payments and performance-based payments policies for DoD contracts in order to increase its business effectiveness and efficiency as well as to provide an opportunity for both small and other than small entities to qualify for increased customary progress payment rates and maximum performance-based payment rates based on whether the offeror/contractor has met certain performance criteria.

DOD believes the proposed rule will eliminate the unintended consequences of not updating its contract financing policies (which, in turn will save hundreds of millions of dollars for the taxpayers), will improve contractor performance, and will distinguish and meaningfully recognize high performing companies and divisions of companies, as the case may be.

This rule proposes to relieve the administrative burden on contractors by deleting the current regulations relating to performance-based payments at DFARS subpart 232.10 and the associated clauses at DFARS 252.232–7012, Performance-Based Payments—Whole Contract Basis, and 252.232–7013, Performance-Based Payments—Deliverable Item Basis. This rule also removes the requirement to negotiate consideration due the Government for providing the contractor with the improved cash flow when utilizing performance-based payments.

In addition to the request for written comments on this proposed rule, DoD will hold a public meeting to hear the views of interested parties.