List of Subjects in 48 CFR Part 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 252 is proposed to be amended as follows:

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1. The authority citation for 48 CFR part 252 continues to read as follows:

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

2. Amend section 252.212–7001 by revising the clause date, and paragraphs (b)(5)(i), (b)(11)(i), (b)(14)(i), (b)(20), and (b)(21) to read as as follows:

252.212–7001 Contract terms and conditions required to implement statutes or executive orders applicable to defense acquisitions of commercial items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS APPLICABLE TO DEFENSE ACQUISITIONS OF COMMERCIAL ITEMS (DATE)

* * * * *

(b) * * *

(5)(i)____252.225–7001, Buy American Act and Balance of Payments Program (DATE) (41 U.S.C. chapter 83, E.O. 10582).

* * * * *

(11)(i)____252.225–7021, Trade Agreements (DATE) (19 U.S.C. 2501–2518 and 19 U.S.C. 3301 note)

* * * * *

(14)(i)____ 252.225–7036, Buy American Act—Free Trade Agreements—Balance of Payments Program (DATE) (41 U.S.C. chapter 83 and 19 U.S.C. 3301 note)

* * * * *

(20)____252.237–7010, Prohibition on Interrogation of Detainees by Contractor Personnel (NOV 2010) (Section 1038 of Pub. L. 111–84).

(21)____252.237–7019, Training for Contractor Personnel Interacting with Detainees (SEP 2006) (Section 1092 of Public Law 108–375).

* * * * *

3. Amend section 252.225–7001 by revising the clause date, paragraph (a)(8), and paragraph (b) to read as follows:

252.225–7001 Buy American Act and Balance of Payments Program.

* * * * *

BUY AMERICAN ACT AND BALANCE OF PAYMENTS PROGRAM (DATE)

(a) * * *

(8) *Qualifying country end product* means—

(i) An unmanufactured end product mined or produced in a qualifying country; or

(ii) An end product manufactured in a qualifying country if—

(A) The cost of the following types of components exceeds 50 percent of the cost of all its components:

(*1*) Components mined, produced, or manufactured in a qualifying country.

(*2*) Components mined, produced, or manufactured in the United States.

(*3*) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(B) The end product is a COTS item.

* * * * *

(b) This clause implements the Buy American Act (41 U.S.C. chapter 83). In accordance with 41 U.S.C. 1907, the component test of the Buy American Act is waived for an end product that is a COTS item (see section 12.505(a)(1) of the Federal Acquisition Regulation). Unless otherwise specified, this clause applies to all line items in the contract.

* * * * *

4. Amend section 252.225–7021 by revising the clause date and paragraph (a)(10) to read as follows:

252.225–7021 Trade agreements.

* * * * *

TRADE AGREEMENTS (DATE)

(a) * * *

(10) *Qualifying country end product* means—

(i) An unmanufactured end product mined or produced in a qualifying country; or

(ii) An end product manufactured in a qualifying country if—

(A) The cost of the following types of components exceeds 50 percent of the cost of all its components:

(*1*) Components mined, produced, or manufactured in a qualifying country.

(*2*) Components mined, produced, or manufactured in the United States.

(*3*) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(B) The end product is a COTS item.

* * * * *

5. Amend section 252.225–7036 by revising the clause date and paragraph (a)(13) to read as follows:

252.225–7036 Buy American Act—Free Trade Agreements—Balance of Payments Program.

* * * * *

BUY AMERICAN ACT—FREE TRADE AGREEMENTS—BALANCE OF PAYMENTS PROGRAM (DATE)

(a) * * *

(13) *Qualifying country end product* means—

(i) An unmanufactured end product mined or produced in a qualifying country; or

(ii) An end product manufactured in a qualifying country if—

(A) The cost of the following types of components exceeds 50 percent of the cost of all its components:

(*1*) Components mined, produced, or manufactured in a qualifying country.

(*2*) Components mined, produced, or manufactured in the United States.

(*3*) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(B) The end product is a COTS item.

* * * * *

[FR Doc. 2011–13367 Filed 6–3–11; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203, 204, and 252

RIN 0750–AG99

Defense Federal Acquisition Regulation Supplement; Representation Relating to Compensation of Former DoD Officials (DFARS Case 2010–D020)

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 require that offerors represent whether former DoD officials employed by the offeror are in compliance with post-employment restrictions.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before August 5, 2011, to be considered in the formation of the final rule.

ADDRESSES: Submit comments identified by DFARS Case 2010–D020, using any of the following methods:

○ *Regulations.gov: http://www.regulations.gov.*

Submit comments via the Federal eRulemaking portal by inputting "DFARS Case 2010–D020" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2010–D020." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and

"DFARS Case 2010–D020" on your attached document.

○ *E-mail: dfars@osd.mil.* Include DFARS Case 2010–D020 in the subject line of the message.

○ *Fax:* 703–602–0350.

○ *Mail:* Defense Acquisition Regulations System, Attn: Ms. Meredith Murphy, OUSD (AT&L) DPAP/DARS, Room 3B855, 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 *http://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. Meredith Murphy, Defense Acquisition Regulations System, OUSD (AT&L) DPAP/DARS, 3060 Defense Pentagon, Room 3B855, Washington, DC 20301–3060. Telephone 703–602–1302; facsimile 703–602–0350. Please cite DFARS Case 2010–D020.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Requirements

The principal statutory restrictions concerning post-government employment for DoD and other Federal employees after leaving Government employment are found in 18 U.S.C. 207 and 41 U.S.C. 2104 (formerly, 41 U.S.C. 423), and 5 CFR parts 2637 and 2641.

1. 18 U.S.C. 207

18 U.S.C. 207 prohibits an individual from representing a contractor to their former agency on particular matters involving specific parties that they handled while working for the Federal Government for defined cooling-off periods that vary according to the former official's involvement and position:

a. Former personnel are permanently barred from representing their new employer to their former agencies for matters on which they were personally and substantially involved.

b. Even if the former officials were not directly involved in the matter, former personnel may not represent their new employer to their former agency on matters that were pending under their official responsibility in their last year of service for two years after leaving Federal service.

c. Former senior-level officers and employees may not contact their former agency on particular government matters that are pending or are of substantial interest to the former agency for one year after leaving Federal service.

2. 41 U.S.C. 2104 (Formerly, 41 U.S.C. 423)

DoD and other Government acquisition officials may not accept compensation from a defense contractor during a one year cooling-off period if the official performed certain duties at DoD involving the contractor and a contract valued in excess of $10 million. However, the individual may accept employment from a division or affiliate that does not produce the same or similar items.

3. Section 847 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008

Section 847 requires that senior DoD officials who have been personally and substantially involved in contracts over $10 million request a written post-employment ethics opinion before receiving compensation from a contractor. It also applies to the employees who are affected by the one-year compensation ban of 41 U.S.C. 2104.

B. Current Acquisition Regulations

1. FAR 3.104 implements 41 U.S.C 2104 and 18 U.S.C. 207.

2. DFARS 203.104 implements procurement integrity for DoD.

3. DFARS 203.171–3 is an implementation of section 847 of the NDAA for FY 2008. Pursuant to DFARS 203.171–3, defense contractors may not knowingly provide compensation to "covered DoD officials" (as defined by a January 2009 DFARS Clause 252.203–7000, Requirements Relating to Compensation of Former DoD Officials) who left Government employment on or after January 28, 2008, unless the contractor first determines that the former employee has received, or has requested at least 30 days prior to receiving compensation from the contractor, the post-employment ethics opinion regarding post-employment restrictions. DFARS 252.203–7000 incorporates this prohibition of knowingly compensating former DoD "covered officials," into DoD contracts. The DFARS does not require additional action from the DoD contractor or covered employee in the event that the covered employee has not received an opinion on post-employment restrictions. In addition, the clause does not cover DoD employees who left the Government prior to January 28, 2008.

C. General Accountability Office (GAO) Study GAO–08–485

Congress included a provision in the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364, section 851) requiring GAO to report on recent employment of former DoD Officials by major defense contractors. In May 2008, the GAO issued a report, "Defense Contracting: Post-Government Employment of Former DoD Officials Needs Greater Transparency" (GAO–08–485). GAO auditors focused on 52 major defense contractors.

The GAO found that contractors under-reported the employment of former DoD officials to the extent that they employed almost twice as many they reported.

GAO estimated that approximately 422 former DoD officials (post-Government employment) were working on defense contracts under the responsibility of their former agency. At least nine of those individuals could have been performing services under the same contract for which they had prior program responsibility. GAO concluded that the results of the study indicated that defense contractors may employ a substantial number of former DoD officials on assignments related to their former positions.

According to GAO, DoD does not have a mechanism for monitoring former senior officials and acquisition officials when they begin their new jobs with defense contractors. DoD's practice of providing written ethics opinions to senior and acquisition officials who request them provides only limited transparency, although DoD is in the process of implementing a single database for collecting and retaining this information.

The GAO report showed that major defense contractors are not currently ensuring that former DoD senior officials and acquisition executives working on contracts are in compliance with post-employment restrictions. GAO concluded that greater transparency is needed by DoD with respect to former senior and acquisition executives (i.e., DoD "covered officials") to ensure compliance with applicable post-employment restrictions.

D. Proposed Rule

The proposed provision will remedy this deficiency by requiring offerors to submit representations at the time of contract award that all former DoD officials that are covered by the Procurement Integrity Act are in compliance with post-employment restrictions set forth in DFARS 203.171–3 and DFARS 252.203–7000. The

representation goes further in also requiring a representation that former DoD employees employed by the contractor are also in compliance with additional post-employment restrictions of 18 U.S.C. 207 and 5 CFR parts 2637 and 2631, including FAR 3.104–2.

This representation will be required in contracts for commercial items. This representation is an enforcement mechanism for DFARS clause 252.203–7000, which is required in contracts for commercial items (see 252.212–7001(b)(1)). Therefore, the representation has been added to 252.212–7000.

II. 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.

III. 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.* Nevertheless, an initial regulatory flexibility analysis has been prepared, and is summarized as follows:

This proposed rule is in response to a study by the General Accountability Office, "Defense Contracting: Post-Government Employment of Former DoD Officials Needs Greater Transparency" (GAO–08–485), issued in May 2008. The GAO found that contractors under-reported the employment of former DoD officials to the extent that they employed almost twice as many as they reported. The GAO report showed that major defense contractors are not currently ensuring that former DoD senior officials and acquisition executives working on contracts are in compliance with post-employment restrictions.

The objective of the proposed rule is to remedy this deficiency reported by the GAO by requiring offerors to submit representations at the time of contract award that all former DoD officials that are covered by the Procurement Integrity Act are in compliance with post-employment restrictions set forth in DFARS 203.171–3 and DFARS 252.203–7000, as required by section 847 of the National Defense Authorization Act for Fiscal Year 2008. The representation goes further in also requiring a representation that former DoD employees employed by the contractor are also in compliance with additional post-employment restrictions of 18 U.S.C. 207 and 5 CFR parts 2637 and 2631, including FAR 3.104–2.

The rule requires a representation from all offerors that respond to a DoD solicitation. However, the representation will only require preparatory effort if the offeror employs or otherwise provides compensation to former DoD officials covered by the Procurement Integrity Act. There is no impact on the offeror unless the former DoD officials covered by the Procurement Integrity Act are not in compliance with the post-employment restrictions. A covered DoD official is already defined in the clause at DFARS 252.203–7000, Requirements Relating to Compensation of Former DoD Employees. In the period of 2001–2006, 1.85 million former military and civilian personnel left DoD service. A "covered DoD official" only includes former DoD officials holding certain positions and who left within the past two years. The GAO found that the 1.85 million personnel who had left DoD service over a six-year period included only 35,192 who had served in the type of senior or acquisition official positions that made them subject to post-government employment restrictions, if they were subsequently hired by defense contractors. Dividing by 35,192 (to reduce the six-year period to a two-year period), we estimate that 11,730 of those officials would have left within the last two years. We estimate that 7,635 of these former officials may accept employment with a defense contractor (about 65 percent). The GAO study found 2,435 of these covered officials employed by 52 major defense contractors. Of the remaining 5,200 former officials covered by the Procurement Integrity Act, we estimate that 3,900 (75 percent) of them may work for small business concerns.

There is no information collection requirement associated with this proposed rule. Offerors make the representation by submission of an offer. They are not allowed to submit an offer if they can not make the representation. In order to submit an offer, small entities that hire a former DoD official covered by the Procurement Integrity Act will have to check the compliance of such employees with various applicable post-employment restrictions. DFARS 252.203–7000, Requirements Relating to Compensation of Former DoD Officials, already requires contractors to determine that a covered DoD official has sought and received, or has not received after 30 days of seeking, a written opinion from the appropriate DoD ethics counselor, regarding the applicability of post-employment restrictions to the activities that the official is expected to undertake on behalf of the contractor. Therefore, this representation of compliance does not impose an additional burden on the offeror.

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

There are no known significant alternatives to the rule that would achieve the objectives of the rule.

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 the 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 2010–D020) in correspondence.

IV. Paperwork Reduction Act

The rule does not impose any new 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 203 and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 203, 204, and 252 are proposed to be amended as follows:

1. The authority citation for 48 CFR parts 203, 204, and 252 continues to read as follows:

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

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

2. Revise section 203.171–4 to read as follows:

203.171–4 Solicitation provisions and contract clause.

(a) Use the clause at 252.203–7000, Requirements Relating to Compensation of Former DoD Officials, in all solicitations and contracts.

(b) Use the provision at 252.203–70XX, Representation Relating to Compensation of Former DoD Officials, in all solicitations.

PART 204—ADMINISTRATIVE MATTERS

3. Amend section 204.1202 by redesignating paragraphs (2)(i) through (xii) as paragraphs (2)(ii) through (xiii) and adding new paragraph (2)(i) to read as follows,

204.1202 Solicitation provision and contract clause.

* * * * *

(2) * * *

(i) 252.203–70XX, Representation Relating to Compensation of Former DoD Officials.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Add section 252.203–70XX to read as follows:

252.203–70XX Representation Relating to Compensation of Former DoD Officials.

As prescribed in 203.171–4(b), insert the following provision:

REPRESENTATION RELATING TO COMPENSATION OF FORMER DOD OFFICIALS (DATE)

(a) *Definition. Covered DoD official* is defined in the clause at 252.203–7000, Requirements Relating to Compensation of Former DoD Officials.

(b) By submission of this offer, the offeror represents, to the best of its knowledge and belief, that all covered DoD officials employed by or otherwise receiving compensation from the offeror are presently in compliance with—

(1) Defense Federal Acquisition Regulation Supplement (DFARS) 203.171–3 and DFARS 252.203–7000; and

(2) Other post-employment restrictions covered by 18 U.S.C. 207 and 5 CFR parts 2637 and 2631, including Federal Acquisition Regulation 3.104–2.

(End of provision)

5. Amend section 252.212–7000 by revising the clause date, revising paragraph (a), and adding paragraph (d) to read as follows:

252.212–7000 Offeror Representations and Certifications—Commercial Items.

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS (JUN 2011)

(a) *Definitions.* As used in this clause—

Covered DoD official is defined in the clause at 252.203–7000, Requirements Relating to Compensation of Former DoD Officials. *Foreign person* means any person other than a United States person as defined in Section 16(2) of the Export Administration Act of 1979 (50 U.S.C. App. Sec. 2415).

United States means the 50 States, the District of Columbia, outlying areas, and the outer Continental Shelf as defined in 43 U.S.C. 1331.

United States person is defined in section 16(2) of the Export Administration Act of 1979 and means any United States resident or national (other than an individual resident outside the United States and employed by other than a United States person), any domestic concern (including any permanent domestic establishment of any foreign concern), and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern, as determined under regulations of the President.

* * * * *

(d) *Representation Relating to Compensation of Former DoD Officials.* By submission of this offer, the offeror represents, to the best of its knowledge and belief, that all covered DoD officials employed by or otherwise receiving compensation from the offeror, are presently in compliance with—

(1) Defense Federal Acquisition Regulation Supplement (DFARS) 203.171–3 and DFARS 252.203–7000, Requirements Relating to Compensation of Former DoD Officials; and

(2) Other post-employment restrictions covered by 18 U.S.C. 207 and 5 CFR parts 2637 and 2631, including Federal Acquisition Regulation 3.104–2.

(End of provision)

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