List of Subjects in 48 CFR Parts 204, 235, and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

■ Accordingly, the interim rule amending 48 CFR parts 204, 235, and 252, which was published at 74 FR 42274, July 21, 2008, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 204, 235, and 252 continues to read as follows:

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

PART 204—ADMINISTRATIVE MATTERS

■ 2. Subpart 204.73 is revised to read as follows:

Subpart 204.73—Export-Controlled Items

Sec.

204.7300 Scope of subpart.
204.7301 Definitions.
204.7302 General.
204.7303 Policy.
204.7304 Contract clauses.

Subpart 204.73—Export-Controlled Items

204.7300 Scope of subpart.

This subpart implements section 890(a) of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181).

204.7301 Definitions.

Export-controlled items, as used in this subpart, is defined in the clause at 252.204–7008.

204.7302 General.

Certain types of items are subject to export controls in accordance with the Arms Export Control Act (22 U.S.C. 2751, *et seq.*), the International Traffic in Arms Regulations (22 CFR parts 120–130), the Export Administration Act of 1979, as amended (50 U.S.C. App. 2401, *et seq.*), and the Export Administration Regulations (15 CFR parts 730–774). *See PGI 204.7302* for additional information.

204.7303 Policy.

(a) It is in the interest of both the Government and the contractor to be aware of export controls as they apply to the performance of DoD contracts.

(b) It is the contractor's responsibility to comply with all applicable laws and regulations regarding export-controlled items. This responsibility exists independent of, and is not established or limited by, this subpart.

204.7304 Contract clauses.

Use the clause at 252.204–7008, Export-Controlled Items, in all solicitations and contracts.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Section 252.204–7008 is revised to read as follows:

252.204–7008 Export-Controlled Items.

As prescribed in 204.7304, use the following clause:

Export-Controlled Items (Apr 2010)

(a) *Definition.* Export-controlled items, as used in this clause, means items subject to the Export Administration Regulations (EAR) (15 CFR parts 730–774) or the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120–130). The term includes:

(1) *Defense items,* defined in the Arms Export Control Act, 22 U.S.C. 2778(j)(4)(A), as defense articles, defense services, and related technical data, and further defined in the ITAR, 22 CFR part 120.

(2) Items, defined in the EAR as "commodities, software, and technology," terms that are also defined in the EAR, 15 CFR 772.1.

(b) The Contractor shall comply with all applicable laws and regulations regarding export-controlled items, including, but not limited to, the requirement for Contractors to register with the Department of State in accordance with the ITAR. The Contractor shall consult with the Department of State regarding any questions relating to compliance with the ITAR and shall consult with the Department of Commerce regarding any questions relating to compliance with the EAR.

(c) The Contractor's responsibility to comply with all applicable laws and regulations regarding export-controlled items exists independent of, and is not established or limited by, the information provided by this clause.

(d) Nothing in the terms of this contract adds to, changes, supersedes, or waives any of the requirements of applicable Federal laws, Executive orders, and regulations, including but not limited to—

(1) The Export Administration Act of 1979, as amended (50 U.S.C. App. 2401, *et seq.*);

(2) The Arms Export Control Act (22 U.S.C. 2751, *et seq.*);

(3) The International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.*);

(4) The Export Administration Regulations (15 CFR parts 730–774);

(5) The International Traffic in Arms Regulations (22 CFR parts 120–130); and

(6) Executive Order 13222, as extended.

(e) The Contractor shall include the substance of this clause, including this paragraph (e), in all subcontracts.

(End of clause)

Section 252.204–7009 [Removed and Reserved]

■ 4. Section 252.204–7009 is removed and reserved.

[FR Doc. 2010–7258 Filed 4–7–10; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 234 and 235

RIN 0750–AF79

Defense Federal Acquisition Regulation Supplement; Research and Development Contract Type Determination (DFARS Case 2006–D053)

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

ACTION: Final rule.

SUMMARY: DoD is adopting as final, without change, an interim rule that requires the Milestone Decision Authority (MDA) for a major defense acquisition program (MDAP) to select the contract type for a development program that is consistent with the level of program risk in accordance with section 818 of the National Defense Authorization Act (NDAA) for Fiscal Year 2007.

DATES: *Effective Date:* April 8, 2010.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Gomersall, 703–602–0302. Please cite DFARS case 2006–D053.

SUPPLEMENTARY INFORMATION:

A. Background

DoD published an interim rule at 73 FR 4117 on January 24, 2008, to implement section 818 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364). Section 818 requires DoD to modify regulations regarding the determination of contract type for development programs. Such regulations require the Milestone Decision Authority (MDA) for a major defense acquisition program (MDAP) to select the contract type for a development program that is consistent with the level of program risk. The MDA may select a fixed-price type contract, including a fixed-price incentive contract; or a cost-type contract, provided certain written determination requirements are satisfied.

The interim rule added a new section at DFARS 234.004 to implement the requirements of section 818 of Public Law 109–364, applicable to MDAPs, and

updated the policy at 235.006 to address requirements for other than MDAPs.

Two sources submitted comments on the interim rule. DoD's single response to both comments is provided following the comments.

1. *Comment:* One respondent suggested that the interim rule appears to be requiring written determinations on MDAPs and non-MDAPs that are exactly the opposite of one another. For MDAPS, 234.004(iii) requires a written determination by the MDA at the time of Milestone B approval if a fixed-price contract is not selected, and for non-MDAPs, 235.006(b)(i)(A)(3) requires a written determination if a fixed-price contract is selected for a developmental program. The respondent indicated that it is hard for him to understand the logic that would discourage the use of fixed-price development contracts for non-major programs, but would encourage their use for major programs. Moreover, he suggested that fixed-price development contracts are likely to be a source of numerous requests for equitable adjustments or claims, and concluded that instituting such a policy would be challenging and ill-timed even for a robust, experienced, and disciplined workforce.

2. *Comment:* The respondent stated that the interim rule appears to introduce additional burdens on DoD program managers and contracting personnel to justify the decision to issue a shipbuilding contract on a cost-type basis. The respondent believes that, when selecting a contract type for any program, DoD's focus should be on "whether a product, system, or item is still developing or has reached maturity." Further, although they are MDAPs, the respondent believes that the first several ships of a new class should be viewed as developmental products that are procured most efficiently through cost-type contracts because of the inherently high level of risk and uncertainty associated with them. Therefore, for the first several ships of a class, the burden placed upon the MDA should most often be to explain why a fixed-price contract type is selected rather than why a cost-type contract is selected. For this reason, the respondent believes that the interim rule is flawed since the requirements should be in reverse order when applied to shipbuilding contracts.

DoD Response: For MDAPs, the procedures in DFARS 234.004 are mandated by section 818 of the FY07 NDAA. For other than MDAPs, DoD determined that it would be in the best interest of the Government to retain the policy in DFARS 235.006 for a written determination if a fixed-price contract is selected for a development program. Therefore, DoD has made no change to the language set forth in the interim rule, and is adopting the interim rule as a final rule without change.

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 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 relates to internal DoD considerations and documentation requirements relating to the selection of contract type for development programs. No comments were received in response to publication of the interim rule with respect to any impact on small entities.

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 234 and 235

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR parts 234 and 235, which was published at 73 FR 4117 on January 24, 2008, is adopted as a final rule without change.

[FR Doc. 2010–7259 Filed 4–7–10; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 206, 225, and 252

RIN 0750–AG02

Defense Federal Acquisition Regulation Supplement; Acquisitions in Support of Operations in Iraq or Afghanistan (DFARS Case 2008–D002)

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

ACTION: Final rule.

SUMMARY: DoD is adopting as final, with minor changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections 886 and 892 of the National Defense Authorization Act for Fiscal Year 2008. Section 886 provides authority for DoD to limit competition when acquiring products or services in support of operations in Iraq or Afghanistan. Section 892 addresses competition requirements for the procurement of small arms for assistance to Iraq or Afghanistan.

DATES: *Effective Date:* April 8, 2010.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, 703–602–0328.

SUPPLEMENTARY INFORMATION:

A. Background

DoD published an interim rule at 73 FR 53151 on September 15, 2008, to implement sections 886 and 892 of the National Defense Authorization Act for Fiscal Year 2008. The comment period closed on November 14, 2008. Four respondents provided comments. In consideration of the public comments received, several changes were made in developing the final rule.

The final rule:

• Clarifies applicability of the trade agreements (*see* response to comment 3.a.)

• Includes a modified definition of "service from Iraq or Afghanistan" in the prescribed clauses, so that it reads "a service (including construction) that is performed in Iraq or Afghanistan. * * *". (*See* the DoD response to comment 4.c.)

• Adds the Commander of the Joint Contracting Command—Iraq/Afghanistan as an official authorized to make a determination that applies to an individual acquisition with a value of $78.5 million or more, or to a class of acquisitions.

DoD received comments from four persons or organizations in response to the interim rule (available on the Web at regulations.gov). The comments are grouped into the following categories:

1. Concern for U.S. industrial base.

2. Concern for industrial base of Iraq and Afghanistan.

3. Applicability of trade agreements.

4. Definitions relating to sources, products, and services from Iraq or Afghanistan.

5. Clarification of contracting officer flexibility with regard to the evaluation factor.

6. Decision authority no higher than head of the contracting activity.

7. Justification for issuing an interim rule.