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48 CFR Parts 204, 212, 225, *et al.*

Defense Federal Acquisition Regulation Supplements; Final Rules

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 225 and 252**

RIN 0750-AH69

Defense Federal Acquisition Regulation Supplement: United States-Korea Free Trade Agreement (DFARS Case 2012-D025)

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

ACTION: Interim rule.

SUMMARY: DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement the United States-Korea Free Trade Agreement. The Republic of Korea is already party to the World Trade Organization Government Procurement Agreement.

DATES: *Effective date:* May 22, 2012.

Comment Date: Comments on the interim rule should be submitted in writing to the address shown below on or before July 23, 2012, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2012-D025, using any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2012-D025" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2012-D025." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2012-D025" on your attached document.

- *Email:* dfars@osd.mil. Include DFARS Case 2012-D025 in the subject line of the message.

- *Fax:* 571-372-6094.

- *Mail:* Defense Acquisition Regulations System, Attn: (Ms. Amy Williams), 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 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 Williams, Defense Acquisition

Regulations System, OUSD (AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone: 571-372-6106.

SUPPLEMENTARY INFORMATION:**I. Background**

This interim rule amends DFARS part 225 and the corresponding provisions and clauses in DFARS part 252 to implement the United States-Korea Free Trade Agreement (see the United States-Korea Free Trade Agreement Implementation Act (Pub. L. 112-41) (19 U.S.C. 3805 note)).

The Republic of Korea is already party to the World Trade Organization Government Procurement Agreement (WTO GPA). This Free Trade Agreement (FTA) now covers acquisition of supplies and services between \$100,000 and the current WTO GPA threshold of \$202,000, lowering the threshold for—

- Waiver of the applicability of the Buy American statute (41 U.S.C. chapter 83) for some foreign supplies and construction materials from the Republic of Korea; and
- Applicability of specified

procurement procedures designed to ensure fairness in the acquisition of supplies and services (see FAR 25.408). These obligations include, among others, that an agency shall not impose the condition that, in order for an offeror to be allowed to submit an offer or be awarded a contract, the offeror has been previously awarded one or more contracts by an agency of the United States Government or that the offeror has prior work experience in the United States (see FAR 15.305(a)(2)(iv)).

II. Discussion and Analysis

This interim rule adds the Republic of Korea to the definition of "Free Trade Agreement country" in multiple locations in the DFARS. The Republic of Korea was already listed as a designated country because it is party to the WTO GPA. The excluded services for Korea FTA are the same as for the WTO GPA. By implementation of this Korea FTA, eligible goods and services from Korea are now covered when valued at or above \$100,000, rather than at or above the WTO GPA threshold of \$202,000. The threshold for the Korea FTA for construction is the same as the threshold for the WTO GPA for construction.

The Korea FTA \$100,000 threshold for supplies and services is higher than the threshold for supplies and services for most of the FTAs (\$77,494), but not as high as the Bahrain, Morocco, and Peru FTA threshold for supplies and services (\$202,000). Therefore, new alternates are required for the provision

and clause for acquisition of photovoltaic devices (DFARS 252.225-7017 and 252.225-7018) and the Buy American Act—Free Trade Agreements—Balance of Payments Program provision and clause (DFARS 252.225-7035 and 252.225-7036) to cover acquisitions that are valued at \$77,494 or more but less than \$100,000. In that dollar range, all FTAs are applicable, except for the Bahrain, Korea, Morocco, and Peru FTAs.

Because the Korea FTA construction threshold of \$7,777,000 is the same as the WTO GPA threshold, no new clause alternates are required for the Balance of Payments Program—Construction Material under Trade Agreements clause (DFARS 252.225-7045).

There are also conforming changes to the clause prescriptions at DFARS 225.1101, Alternate A, Annual Representations and Certifications, and DFARS 252.212-7001, Contract Terms and Conditions required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items.

A minor correction was made to paragraph (c) of DFARS 252.225-7036, Buy American Act—Free Trade Agreements—Balance of Payments Program to add Peruvian end products to the list of end products not covered by the clause. The definition of "Peruvian end products" had been added to paragraph (a), but was not then added in paragraph (c). This makes paragraph (c) consistent with the trade agreement thresholds specified in FAR 25.402(b), as already implemented in paragraph (c) of Alternate II to DFARS 252.225-7036, as well as in the basic provision at DFARS 252.225-7035 and its Alternate II.

III. 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 a significant regulatory action and, therefore, was 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.

IV. 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.* Korea is already a designated country under the WTO GPA. Although the rule now opens up Government procurement to the goods and services of Korea at or above the threshold of \$100,000, DoD does not anticipate any significant economic impact on U.S. small businesses. The Department of Defense only applies the trade agreements to the non-defense items listed at DFARS 225.401–70, and acquisitions that are set aside or provide other forms of preference for small businesses are exempt. FAR 19.502–2 states that acquisitions that do not exceed \$150,000 (except as described in paragraph (1) of the definition of “simplified acquisition threshold” at FAR 2.101) are automatically reserved exclusively for small business concerns, unless the contracting officer determines that there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns.

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 2012–D025), in correspondence.

V. Paperwork Reduction Act

This rule affects the certification and information collection requirements in the provisions at DFARS 252.225–7020 and 252.225–7035, currently approved under OMB Control Number 0704–0229, titled Defense Federal Acquisition Regulation Supplement part 225, Foreign Acquisition, and related clauses, in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35). The impact, however, is negligible, because it is just a question of under which category offered goods from the Republic of Korea would be listed. The rule also affects DFARS 252.225–7018, which is a variant of the Buy American-trade agreements certifications already approved, which was issued as an interim rule under DFARS Case 2011–D046 (76 FR 78858, December 20, 2011).

VI. 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 promulgate this interim rule without prior opportunity for public comment. This action is necessary because the FTA with the Republic of Korea, for which the President signed the implementing legislation into law on October 21, 2011 (Pub. L. 112–041), entered into force on March 15, 2012. This is a reciprocal agreement, approved by Congress and the President of the United States. It is important for the United States Government to honor its new trade obligations to the Republic of Korea, as the Republic of Korea in turn honors its new trade obligations to the United States. However, pursuant to 41 U.S.C. 1707 and FAR 1.501–3(b), DoD will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 225 and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 225 and 252 are 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

225.1101 [Amended]

■ 2. Section 225.1101 is amended by:

■ a. Adding paragraphs (10)(v) and (vi);

■ b. In paragraph (11)(i)(A), removing “\$77,494” and adding “\$100,000” in its place; and

■ c. Adding paragraph 11(i)(C).

The additions read as follows:

225.1101 Acquisition of supplies.

* * * * *

(10) * * *

(v) Use the provision with its Alternate IV when the clause at 252.225–7036 is used with its Alternate IV.

(vi) Use the provision with its Alternate V when the clause at 252.225–7036 is used with its Alternate V.

(11)(i) * * *

(C) Use the clause with its Alternate IV when the estimated value equals or exceeds \$77,494 but is less than \$100,000, except if the acquisition is of

end products in support of operations in Afghanistan, use with its Alternate V.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Section 252.204–7007 is amended by removing the clause date “(MAR 2012)” and adding “(MAY 2012)” in its place and revising paragraph (d)(2)(vi) to read as follows:

252.204–7007 Alternate A, Annual Representations and Certifications.

* * * * *

(d) * * *

(2) * * *

___ (vi) 252.225–7035, Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate.

___ Use with Alternate I.

___ Use with Alternate II.

___ Use with Alternate III.

___ Use with Alternate IV.

___ Use with Alternate V.

* * * * *

■ 4. Section 252.212–7001 is amended by removing the clause date “(APR 2012)” and adding “(MAY 2012)” in its place, revising paragraphs (b)(12) and (b)(13)(i), and revising paragraph (b)(16) to read as follows:

252.212–7001 Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items.

* * * * *

(b) * * *

(12) ___ 252.225–7017, Photovoltaic Devices (MAY 2012) (Section 846 of Pub. L. 111–383).

(13)(i) ___ 252.225–7021, Trade Agreements (MAY 2012) (19 U.S.C. 2501–2518 and 19 U.S.C. 3301 note).

* * * * *

(16)(i) ___ 252.225–7036, Buy American Act—Free Trade Agreements—Balance of Payments Program (MAY 2012) (41 U.S.C. chapter 83 and 19 U.S.C. 3301 note).

(ii) ___ Alternate I (OCT 2011) of 252.225–7036.

(iii) ___ Alternate II (OCT 2011) of 252.225–7036.

(iv) ___ Alternate III (OCT 2011) of 252.225–7036.

(v) ___ Alternate IV (MAY 2012) of 252.225–7036.

(vi) ___ Alternate V (MAY 2012) of 252.225–7036.

* * * * *

■ 5. Section 252.225–7017 is amended by—

■ a. Removing the clause date “(MAR 2012)” and adding “(MAY 2012)” in its place;

- b. In paragraph (a), in the definition of “Designated country”, revising paragraph (ii);
- c. In paragraph (a), revising the definition of “Free Trade Agreement country” and adding, in alphabetical order, the definition of “Korean photovoltaic device”;
- d. Redesignating paragraphs (c)(3) and (c)(4) as paragraphs (c)(4) and (c)(5), and adding newly designated paragraph (c)(3); and
- e. In newly designated paragraph (c)(4), removing “\$77,494” and adding “\$100,000” in its place.

The additions and revisions read as follows:

252.225-7017 Photovoltaic Devices.

* * * * *

(a) * * *

(ii) A Free Trade Agreement country (Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Peru, or Singapore);

* * * * *

Free Trade Agreement country means Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Peru, or Singapore.

* * * * *

Korean photovoltaic device means an article that—

(i) Is wholly manufactured in Korea; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Korea (Republic of) into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

* * * * *

(c) * * *

(3) \$77,494 or more but less than \$100,000, then the Contractor shall utilize under this contract only domestic photovoltaic devices, qualifying country photovoltaic devices, or Free Trade Agreement country photovoltaic devices (other than Bahrainian, Korean, Moroccan, or Peruvian photovoltaic devices), unless, in its offer, it specified utilization of other foreign photovoltaic devices in paragraph (c)(4)(ii) of the Photovoltaic Devices—Certificate provision of the solicitation. If the Contractor certified in its offer that it will utilize a qualifying country photovoltaic device or a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Korean,

Moroccan, or Peruvian photovoltaic device), the Contractor shall utilize a qualifying country photovoltaic device; a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Korean, Moroccan, or Peruvian photovoltaic device), or, at the Contractor’s option, a domestic photovoltaic device;

* * * * *

■ 6. Section 252.225-7018 is amended by—

■ a. Removing the clause date “(MAR 2012)” and adding “(MAY 2012)” in its place;

■ b. In paragraph (a), removing “*Free Trade Agreement photovoltaic device, least developed country photovoltaic device,*” and adding “*Free Trade Agreement photovoltaic device, Korean photovoltaic device, least developed country photovoltaic device*” in its place;

■ c. Redesignating paragraphs (c)(4) and (c)(5) as paragraphs (c)(5) and (c)(6), and adding newly designated paragraph (c)(4); and

■ d. In newly designated paragraph (c)(5), removing “\$77,494” and adding “\$100,000” in its place.

The additions and revisions read as follows:

252.225-7018 Photovoltaic Devices—Certificate.

* * * * *

(c) * * *

(4) If \$77,494 or more but less than \$100,000—

(i) The offeror certifies that each photovoltaic device to be utilized in performance of the contract is a domestic photovoltaic device; a qualifying country (except Australian or Canadian) photovoltaic device; a Free Trade Agreement country photovoltaic device (other than a Bahrainian, Korean, Moroccan, or Peruvian photovoltaic device) [*Offeror to specify country of origin _____*]; or

(ii) The offered foreign photovoltaic devices (other than those from countries listed in paragraph (c)(4)(i) of this provision) are the product of _____. [*Offeror to specify country of origin, if known, and provide documentation that the cost of a domestic photovoltaic device. would be unreasonable in comparison to the cost of the proposed foreign photovoltaic device.*]

* * * * *

252.225-7021 [Amended]

■ 7. Section 252.225-7021 is amended by—

■ a. Removing the clause date “(JAN 2012)” and adding “(MAY 2012)” in its place; and

■ b. In paragraph (a), in the definition of “Designated country”, paragraph (ii), removing “Guatemala, Honduras, Mexico” and adding “Guatemala, Honduras, Korea (Republic of), Mexico” in its place.

■ 8. Section 252.225-7035 is amended by adding Alternates IV and V to read as follows:

252.225-7035 Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate.

* * * * *

ALTERNATE IV (MAY 2012) As prescribed in 225.1101(10)(v), add a definition of “Korean end product” in paragraph (a) of the basic provision; substitute the phrase “Free Trade Agreement country end products other than Bahrainian end products, Korean end products, Moroccan end products, or Peruvian end products” for the phrase “Free Trade Agreement country end products other than Bahrainian end products, Moroccan end products, or Peruvian end products” in paragraphs (b)(2) and (c)(2)(ii) of the basic provision.

ALTERNATE V (MAY 2012) As prescribed in 225.1101(10)(vi), substitute the following paragraphs (a), (b)(2), (c)(2)(i), and (c)(2)(ii) for paragraphs (a), (b)(2), (c)(2)(i), and (c)(2)(ii) of the basic clause:

(a) *Definitions. Bahrainian end product, commercially available off-the-shelf (COTS) item, component, domestic end product, Free Trade Agreement country, Free Trade Agreement country end product, foreign end product, Korean end product, Moroccan end product, Peruvian end product, qualifying country end product, South Caucasus/Central and South Asian (SC/CASA) state end product, and United States, as used in this provision, have the meanings given in the Buy American Act—Free Trade Agreements—Balance of Payments Program clause of this solicitation.*

(b)(2) For line items subject to Free Trade Agreements, will evaluate offers of qualifying country end products, SC/CASA state end products, or Free Trade Agreement end products other than Bahrainian end products, Korean end products, Moroccan end products, or Peruvian end products without regard to the restrictions of the Buy American Act or the Balance of Payments Program.

(c)(2)(i) The offeror certifies that the following supplies are qualifying country (except Australian or Canadian) or SC/CASA state end products:

(Line Item Number)

(Country of Origin)

(ii) The offeror certifies that the following supplies are Free Trade Agreement country end products other than Bahrainian end products, Korean end products, Moroccan end products, or Peruvian end products:

(Line Item Number)

(Country of Origin)

■ 9. Section 252.225–7036 is amended by—

■ a. Removing the clause date “(OCT 2011)” and adding “(MAY 2012)” in its place;

■ b. In paragraph (a) in the definition of “Free Trade Agreement country”, removing “Guatemala, Honduras, Mexico,” and adding “Guatemala, Honduras, Korea (Republic of), Mexico” in its place;

■ c. Revising paragraph (c); and

■ d. Adding Alternates IV and V.

The additions and revisions read as follows:

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

* * * * *

(c) The Contractor shall deliver under this contract only domestic end products unless, in its offer, it specified delivery of qualifying country end products, Free Trade Agreement country end products other than Bahrainian end products, Moroccan end products, or Peruvian end products, or other foreign end products in the Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate provision of the solicitation. If the Contractor certified in its offer that it will deliver a qualifying country end product or a Free Trade Agreement country end product other than a Bahrainian end product, a Moroccan end product, or a Peruvian end product, the Contractor shall deliver a qualifying country end product, a Free Trade Agreement country end product other than a Bahrainian end product, a Moroccan end product, or a Peruvian end product, or, at the Contractor’s option, a domestic end product.

* * * * *

ALTERNATE IV (MAY 2012)

As prescribed in 225.1101(11)(i)(C), add the following definition to paragraph (a) and substitute the following paragraph (c) for paragraph (c) of the basic clause:

(a) *Korean end product* means an article that—

(i) Is wholly the growth, product, or manufacture of Korea; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Korea (Republic of) into a new and different article of commerce with a name,

character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product, includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

(c) The Contractor shall deliver under this contract only domestic end products unless, in its offer, it specified delivery of qualifying country end products, Free Trade Agreement country end products other than Bahrainian end products, Korean end products, Moroccan end products, or Peruvian end products, or other foreign end products in the Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate provision of the solicitation. If the Contractor certified in its offer that it will deliver a qualifying country end product or a Free Trade Agreement country end product other than a Bahrainian end product, a Korean end product, a Moroccan end product, or a Peruvian end product, the Contractor shall deliver a qualifying country end product, a Free Trade Agreement country end product other than a Bahrainian end product, a Moroccan end product, or a Peruvian end product, or, at the Contractor’s option, a domestic end product.

ALTERNATE V (MAY 2012)

As prescribed in 225.1101(11)(i)(C), add the following new definitions to paragraph (a) and substitute the following paragraph (c) for paragraph (c) of the basic clause:

(a) *Korean end product* means an article that—

(i) Is wholly the growth, product, or manufacture of Korea; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Korea (Republic of) into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product, includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

South Caucasus/Central and South Asian (SC/CASA) state means Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Pakistan, Tajikistan, Turkmenistan, or Uzbekistan.

South Caucasus/Central and South Asian (SC/CASA) state end product means an article that—

(i) Is wholly the growth, product, or manufacture of an SC/CASA state; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in an SC/CASA state into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase

under a supply contract, but for purposes of calculating the value of the end product, includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

(c) The Contractor shall deliver under this contract only domestic end products unless, in its offer, it specified delivery of qualifying country end products, SC/CASA state end products, Free Trade Agreement country end products other than Bahrainian end products, Korean end products, Moroccan end products, or Peruvian end products, or other foreign end products in the Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate provision of the solicitation. If the Contractor certified in its offer that it will deliver a qualifying country end product, SC/CASA state end products, or a Free Trade Agreement country end product other than a Bahrainian end product, a Korean end product, a Moroccan end product, or a Peruvian end product, the Contractor shall deliver a qualifying country end product, an SC/CASA state end product, a Free Trade Agreement country end product other than a Bahrainian end product, a Korean end product, a Moroccan end product, or a Peruvian end product or, at the Contractor’s option, a domestic end product.

252.225–7045 [Amended]

■ 10. Section 252.225–7045 is amended by—

■ a. Removing the clause date “(JAN 2012)” and adding “(MAY 2012)” in its place; and

■ b. In paragraph (a) in the definition of “Designated country”, amending paragraph (2) by removing “Guatemala, Honduras, Mexico” and adding “Guatemala, Honduras, Korea (Republic of), Mexico” in its place.

[FR Doc. 2012–11558 Filed 5–21–12; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 252

RIN 0750–AH72

Defense Federal Acquisition Regulation Supplement: New Free Trade Agreement With Colombia (DFARS Case 2012–D032)

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

ACTION: Interim rule.

SUMMARY: DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement the United States—Colombia Trade Promotion