

4. To facilitate full, frank and open discussion and presentations, any Neutral who has participated in a non-binding ADR procedure that has failed to resolve the underlying dispute will be recused from further participation in the matter unless the parties expressly agree otherwise in writing and the Board concurs. Further, the recused Neutral will not discuss the merits of the dispute or substantive matters involved in the ADR proceedings with other Board personnel.

5. Written material prepared specifically for use in an ADR proceeding, oral presentations made at an ADR proceeding, and all discussions in connection with such proceedings between the parties and the Neutral are confidential and, unless otherwise specifically agreed by the parties, inadmissible as evidence in any pending or future Board proceeding involving the parties or matter in dispute. However, evidence otherwise admissible before the Board is not rendered inadmissible because of its use in the ADR proceeding.

6. The ADR method and the procedures and requirements implementing the ADR method will be prescribed by the written agreement of the parties and approved by the Board. ADR methods can be used successfully at any stage of the litigation.

7. The following are examples of ADR methods commonly used at the Board:

(a) *Nonbinding*—

Mediations: A Neutral is an Administrative Judge who will not normally hear or have any formal or informal decision-making authority in the matter and who is appointed for the purpose of facilitating settlement. In many circumstances, settlement can be fostered by a frank, in-depth discussion of the strengths and weaknesses of each party's position with the Neutral. The agenda for meetings with the Neutral will be flexible to accommodate the requirements of the case. To further the settlement effort, the Neutral may meet with the parties either jointly or individually. A Neutral's recommendations are not binding on the parties. When this method is selected, the ADR agreement must contain a provision in which the parties and counsel agree not to subpoena the Neutral in any legal action or administrative proceeding of any kind to produce any notes or documents related to the ADR proceeding or to testify concerning any such notes or documents or concerning his/her thoughts or impressions.

(b) *Binding*—

Summary Proceeding With Binding Decision: A summary proceeding with binding decision is a procedure whereby the resolution of the appeal is expedited and the parties try their appeal informally before an Administrative Judge. A binding "bench" decision may be issued upon conclusion of the proceeding, or a binding summary written decision will be issued by the judge no later than ten days following the later of conclusion of the proceeding or receipt of a transcript. The parties must agree in the ADR agreement that all decisions, rulings, and orders by the Board under this method shall be final, conclusive, not appealable, and may not be set aside, except for fraud. All such decisions, rulings, and orders will have no

precedential value. Pre-hearing, hearing, and post-hearing procedures and rules applicable to appeals generally will be modified or eliminated to expedite resolution of the appeal.

(c) *Other Agreed Methods*—The parties and the Board may agree upon other informal methods, binding or nonbinding that are structured and tailored to suit the requirements of the individual case.

8. The above-listed ADR procedures are intended to shorten and simplify the Board's more formalized procedures. Generally, if the parties resolve their dispute by agreement, they benefit in terms of cost and time savings and maintenance or restoration of amicable relations. The Board will not view the parties' participation in ADR proceedings as a sign of weakness. Any method adopted for dispute resolution depends upon both parties having a firm, good faith commitment to resolve their differences. Absent such intention, the best structured dispute resolution procedure is unlikely to be successful.

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 229 and 252

RIN 0750-AI19

#### Defense Federal Acquisition Regulation Supplement: Clauses With Alternates—Taxes (DFARS Case 2013-D025)

**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 create an overarching prescription for a tax-related clause with an alternate and adds a separate prescription for the basic clause. The rule also proposes to include in the regulation the full text of the alternate clause.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before April 29, 2014, to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2013-D025, using any of the following methods:

○ *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2013-D025" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that

corresponds with "DFARS Case 2013-D025." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D025" on your attached document.

○ *Email:* [dfars@mail.mil](mailto:dfars@mail.mil). Include DFARS Case 2013-D025 in the subject line of the message.

○ *Fax:* 571-372-6094.

○ *Mail:* Defense Acquisition Regulations System, Attn: Ms. Annette Gray, 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](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:

Annette Gray, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6093.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

DoD is undertaking a revision of provisions and clauses with alternates and the associated prescriptions, in order to clarify usage and facilitate the use of automated contract writing systems. These changes do not affect the meaning or applicability of the provisions or clauses.

##### II. Discussion

This proposed rule addresses the single DFARS part 229 clause that has an alternate, 252.229-7001, Tax Relief. The naming convention results in proposed new clause titles, i.e., Tax Relief—Basic and Tax Relief—Alternate I.

An umbrella prescription is proposed for the elements common to the basic clause and the alternate. The specific prescriptions for the basic clause and the alternate address only the requirements for their use that enable the selection of the basic or the alternate. The planned changes will increase the clarity and ease of use but will not revise the applicability in any way. The presentation of the text of the clause alternate in the regulations would no longer consist solely of paragraph (d) with a reference to the basic clause, but would include the entire text of paragraphs (a) through (c)

along with paragraph (d). Further, this proposed rule also revises the applicable clause preface, i.e., the language in part 252 that precedes the clause, but still identifies the difference from the basic clause.

### 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 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.

### IV. 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.*, because it merely revises the prescriptions for a basic clause with alternate, and includes the full text of the clause in the alternate. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The purpose of this rule is to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to create an overarching prescription for use of the basic and alternate of DFARS clause 252.229-7001, Tax Relief, a separate prescription for the basic clause, and to include the full text of the clause alternate.

Employing a prescription for the basic version and alternate of DFARS clause 252.229-7001 will facilitate the use of automated contract writing systems. The current convention requires the prescription for the basic provision or clause to address all the possibilities covered by the alternates, and then the prescription for each alternate addresses only what is different for the use of that particular alternate. Instead of the current convention for alternates to show only paragraphs changed from the basic version of the provision or clause, this rule proposes to include the full text of the clause alternate.

There will be no impact on small business entities since DFARS clause

252.229-7001 is used only in solicitations and contracts when award is made to a foreign concern and performance is in a foreign country.

This rule does not add any new information collection requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules. No alternatives were identified that will accomplish 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 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 2013-D025), in correspondence.

### V. 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 229 and 252

Government procurement.

**Manuel Quinones,**

*Editor, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 229 and 252 are proposed to be amended as follows:

- 1. The authority citation for parts 229 and 252 continues to read as follows:

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

### PART 229—TAXES

- 2. Revise section 229.402-70 to read as follows:

#### 229.402-70 Additional clauses.

(a) Use the basic or the alternate of the clause at 252.229-7001, Tax Relief, in solicitations and contracts when a contract will be awarded to a foreign concern for performance in a foreign country.

(1) Use the clause Tax Relief—Basic in solicitations and contracts when the contract will be performed in a foreign country other than Germany.

(2) Use the clause Tax Relief—Alternate I in solicitations and contracts when the contract will be performed in Germany.

### PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 3. Amend section 252.229-7001 by—
  - a. Revising the introductory text, clause title and date; and
  - b. Revising Alternate I.

#### 252.229-7001 Tax Relief.

As prescribed in 229.402-70(a), use one of the following clauses:

*Basic.* As prescribed at 229.402-70(a)(1), use the following clause.

#### Tax Relief—Basic (Date)

\* \* \* \* \*

*Alternate I.* As prescribed at 229.402-70(a)(2), use the following clause, which adds a paragraph (d) not included in the basic clause.

#### Tax Relief—Alternate (Date)

(a) Prices set forth in this contract are exclusive of all taxes and duties from which the United States Government is exempt by virtue of tax agreements between the United States Government and the Contractor's government. The following taxes or duties have been excluded from the contract price:

NAME OF TAX: (*Offeror insert*) RATE (PERCENTAGE): (*Offeror insert*)

(b) The Contractor's invoice shall list separately the gross price, amount of tax deducted, and net price charged.

(c) When items manufactured to United States Government specifications are being acquired, the Contractor shall identify the materials or components intended to be imported in order to ensure that relief from import duties is obtained. If the Contractor intends to use imported products from inventories on hand, the price of which includes a factor for import duties, the Contractor shall ensure the United States Government's exemption from these taxes. The Contractor may obtain a refund of the import duties from its government or request the duty-free import of an amount of supplies or components corresponding to that used from inventory for this contract.

(d) Tax relief will be claimed in Germany pursuant to the provisions of the Agreement Between the United States of America and Germany Concerning Tax Relief to be Accorded by Germany to United States Expenditures in the Interest of Common Defense. The Contractor shall use Abwicklungsschein fuer abgabenbegünstigte Lieferungen/Leistungen nach dem Offshore Steuerabkommen (Performance Certificate for Tax-Free Deliveries/Performance according to the Offshore Tax Relief Agreement) or other documentary evidence acceptable to the German tax authorities. All purchases made and paid for on a tax-free basis during a 30-day period may be accumulated, totaled, and reported as tax-free.

(End of clause)

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