

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.*

D. 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 publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements Section 8021 of the DoD Appropriations Act for Fiscal Year 2004 (Pub. L. 108-87) and Section 8021 of the DoD Appropriations Act for Fiscal Year 2005 (Pub. L. 108-287). These statutes require that small business concerns owned by Native Hawaiian Organizations be provided the same status as Indian tribes and Alaska Native Corporations with regard to contract awards under the Small Business Administration's 8(a) Program. Application of this status will permit small business concerns owned by Native Hawaiian Organizations to receive sole source contract awards under the 8(a) Program, in amounts exceeding the thresholds at which competition would otherwise be required. Comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Part 219

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR part 219 is amended as follows:

■ 1. The authority citation for 48 CFR part 219 continues to read as follows:

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

PART 219—SMALL BUSINESS PROGRAMS

■ 2. Section 219.805-1 is added to read as follows:

219.805-1 General.

(b)(2)(A) For acquisitions that exceed the competitive threshold and use fiscal year 2004 or 2005 appropriated funds, the SBA also may accept the requirement for a sole source 8(a) award on behalf of a small business concern owned by a Native Hawaiian Organization (Section 8021 of Pub. L. 108-87 and Section 8021 of Pub. L. 108-287).

(B) *Native Hawaiian Organization*, as used in this subsection and as defined by 15 U.S.C. 637(a)(15) and 13 CFR 124.3, means any community service organization serving Native Hawaiians in the State of Hawaii—

(1) That is a not-for-profit organization chartered by the State of Hawaii;

(2) That is controlled by Native Hawaiians; and

(3) Whose business activities will principally benefit such Native Hawaiians.

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DEPARTMENT OF DEFENSE

48 CFR Part 225

[DFARS Case 2004-D035]

Defense Federal Acquisition Regulation Supplement; Berry Amendment Memoranda

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement policy regarding acquisitions for which DoD determines that domestic items are not available to fulfill DoD requirements in a satisfactory quality and sufficient quantity at U.S. market prices.

DATES: Effective July 26, 2005.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, Defense Acquisition Regulations Council, OUSD (AT&L) DPAP (DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0328; facsimile (703) 602-0350. Please cite DFARS Case 2004-D035.

SUPPLEMENTARY INFORMATION:

A. Background

10 U.S.C. 2533a (the Berry Amendment) requires DoD to acquire certain items from domestic sources. 10 U.S.C. 2533a(c) provides an exception to this requirement if the Secretary of Defense or the Secretary of the military department concerned determines that satisfactory quality and sufficient quantity of such items cannot be procured as and when needed at U.S. market prices. DoD has issued the following memoranda regarding domestic nonavailability determinations under 10 U.S.C. 2533a(c):

The Deputy Secretary of Defense memorandum of May 1, 2001, provides that the Under Secretary of Defense for

Acquisition, Technology, and Logistics, and the Secretaries of the military departments may make domestic nonavailability determinations under the Berry Amendment, but may not redelegate this authority. The memorandum also requires an analysis of alternatives, and a certification as to why such alternatives are unacceptable.

The Under Secretary of Defense (Acquisition, Technology, and Logistics) memorandum of October 22, 2004, requires Congressional notification of any domestic nonavailability determinations involving titanium or products containing titanium.

This final rule amends DFARS

225.7002-2(b) to reflect the requirements of the DoD memoranda.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

This rule will not have a significant cost or administrative impact on contractors or offerors, or a significant effect beyond the internal operating procedures of DoD. Therefore, publication for public comment is not required. However, DoD will consider comments from small entities concerning the affected DFARS subpart in accordance with 5 U.S.C. 610. Such comments should cite DFARS Case 2004-D035.

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 Part 225

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR part 225 is amended as follows:

■ 1. The authority citation for 48 CFR part 225 continues to read as follows:

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

PART 225—FOREIGN ACQUISITION

■ 2. Section 225.7002-2 is amended by adding paragraphs (b)(1) through (5) to read as follows:

225.7002-2 Exceptions.

* * * * *

(b) * * *

(1) The following officials are authorized, without power of

relegation, to make such a domestic nonavailability determination:

(i) The Under Secretary of Defense (Acquisition, Technology, and Logistics).

(ii) The Secretary of the Army.

(iii) The Secretary of the Navy.

(iv) The Secretary of the Air Force.

(2) The supporting documentation for the determination shall include—

(i) An analysis of alternatives that would not require a domestic nonavailability determination; and

(ii) A written certification by the requiring activity, with specificity, why such alternatives are unacceptable.

(3) Defense agencies shall follow the procedures at PGI 225.7002-2(b)(3) when submitting a request for a domestic nonavailability determination.

(4) If an official listed in paragraph (b)(1)(ii) through (iv) of this subsection makes a domestic nonavailability determination for the acquisition of titanium or a product containing titanium, that official shall—

(i) Notify the congressional defense committees at least 10 days before the award of a contract that relies on such a determination; and

(ii) Provide a copy of the notification and the determination to the Director, Defense Procurement and Acquisition Policy, as specified in PGI 225.7002-2(b)(4).

(5) See PGI 225.7002-2(b)(5) for related policy memoranda.

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DEPARTMENT OF DEFENSE

48 CFR Part 231

[DFARS Case 2004-D026]

Defense Federal Acquisition Regulation Supplement; Business Restructuring Costs—Delegation of Authority To Make Determinations Relating to Payment

AGENCY: Department of Defense (DoD).

ACTION: Interim rule with request for comments.

SUMMARY: DoD has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 819 of the National Defense Authorization Act for Fiscal Year 2005. Section 819 contains changes concerning delegation of authority to make determinations relating to payment of defense contractors for business restructuring costs.

DATES: *Effective date:* July 26, 2005.

Comment date: Comments on the interim rule should be submitted to the address shown below on or before September 26, 2005 to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2004-D026, using any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Defense Acquisition Regulations Web Site: <http://emissary.acq.osd.mil/dar/dfars.nsf/pubcomm>. Follow the instructions for submitting comments.

- E-mail: dfars@osd.mil. Include DFARS Case 2004-D026 in the subject line of the message.

- Fax: (703) 602-0350.

- Mail: Defense Acquisition Regulations Council, Attn: Mr. Bill Sain, OUSD (AT&L) DPAP (DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062.

- Hand Delivery/Courier: Defense Acquisition Regulations Council, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202-3402. All comments received will be posted to <http://emissary.acq.osd.mil/dar/dfars.nsf>.

FOR FURTHER INFORMATION CONTACT: Mr. Bill Sain, (703) 602-0293.

SUPPLEMENTARY INFORMATION:

A. Background

10 U.S.C. 2325(a)(1), Limitation on Payment of Restructuring Costs, prohibits DoD from reimbursing a defense contractor for restructuring costs arising from a business combination that occurs after November 18, 1997, unless the Secretary of Defense determines in writing either: (i) That the amount of projected savings for DoD associated with the restructuring will be at least twice the amount of the costs allowed; or (ii) that the amount of projected savings for DoD associated with the restructuring will exceed the amount of the costs allowed and that the business combination will result in the preservation of a critical capability that otherwise might be lost to DoD.

10 U.S.C. 2325(a)(2) previously prohibited the Secretary of Defense from delegating the authority to make such written savings determinations below the level of an Assistant Secretary of Defense. The Secretary of Defense delegated the authority to make such determinations to the Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L)), or his Principal Deputy. Section 819 of the National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375) amended 10 U.S.C. 2325(a)(2) to permit

the Director of the Defense Contract Management Agency to make the required written determination of savings when restructuring costs are expected to be less than \$25 million over a 5-year period.

To implement Section 819, this interim rule adds paragraph (c)(4)(ii) to DFARS 231.205-70, External restructuring costs. The rule also makes changes to DFARS 231.205-70(b)(4), (c), and (e)(6) to remove unnecessary references to USD(AT&L) certifications for pre-November 19, 1997, business combinations; and makes editorial changes to DFARS 231.205-70(e)(6) to clarify the existing requirement for projected restructuring costs and savings to be computed on a present value basis.

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 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.*, because the cost principle addressed in this rule applies only to DoD contractors that incur restructuring costs for external restructuring activities. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subpart in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2004-D026.

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.*

D. 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 publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements Section 819 of the National Defense Authorization Act for Fiscal Year 2005 (Pub. L. 108-375). Section 819 amended 10 U.S.C. 2325 to permit delegation of authority to the Director of the Defense Contract Management Agency for determinations relating to payment of