

**List of Subjects in 48 CFR Part 204**

Government procurement.

**Mary Overstreet,**

*Editor, Defense Acquisition Regulations System.*

Therefore, 48 CFR part 204 continues to read as follows:

**PART 204—ADMINISTRATIVE MATTERS**

■ 1. The authority citation for 48 CFR part 204 continues to read as follows:

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

■ 2. Revise section 204.7005 to read as follows:

**204.7005 Assignment of order codes.**

(a) Defense Procurement and Acquisition Policy, Program Development and Implementation, maintains the order code assignments for use in the first two positions of an order number when an activity places an order against another activity's contract or agreement (*see* 204.7004(d)(2)).

(b) Contracting activities shall follow the procedures at PGI 204.7005 for requests for assignment of or changes in two-character order codes.

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**DEPARTMENT OF DEFENSE****Defense Acquisition Regulations System****48 CFR Parts 212 and 222**

**RIN 0750-AH34**

**Defense Federal Acquisition Regulation Supplement; Extension of Restrictions on the Use of Mandatory Arbitration Agreements (DFARS Case 2011-D035)**

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

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule to implement section 8102 of the DoD and Full-Year Continuing Appropriations Act, 2011 and similar sections in subsequent appropriations acts, to extend the restriction on the use of mandatory arbitration agreements, when awarding contracts that exceed \$1 million, to use of 2011 and subsequent fiscal year funds appropriated or otherwise made available by this Act or any subsequent DoD appropriation act. Section 8102

allows the Secretary of Defense to waive applicability to a particular contractor or subcontractor, if determined necessary to avoid harm to national security.

**DATES:** *Effective date:* June 29, 2011.

**FOR FURTHER INFORMATION CONTACT:** Mr. Julian Thrash, 703-602-0310.

**SUPPLEMENTARY INFORMATION:****I. Background**

Section 8102 of the DoD and Full-Year Continuing Appropriations, 2011 (Pub. L. 112-10), prohibits the use of Fiscal Year (FY) 2011 funds for any contract (including task or delivery orders and bilateral modifications adding new work) in excess of \$1 million, if the contractor restricts its employees to arbitration for claims under title VII of the Civil Rights Act of 1964, or tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.

This rule does not apply to the acquisition of commercial items. Section 8102(b) requires the contractor to certify compliance by subcontractors.

Additionally, enforcement of the mandatory arbitration provisions related to the covered areas, does not affect the enforcement of other aspects of an agreement that is not related to those areas.

This rule allows the Secretary of Defense to waive applicability to a particular contract or subcontract, if determined necessary to avoid harm to national security.

Section 8102 of the DoD and Full-Year Continuing Appropriations, 2011, extends the restrictions of section 8116 of the Defense Appropriations Act for Fiscal Year 2010 (Pub. L. 111-118). In implementing section 8116, public comments were obtained under DFARS Case 2010-D004.

This final rule does not constitute a significant DFARS revision as defined at FAR 1.501-1 because the requirements are already in place and this final rule merely extends the existing DFARS coverage. Therefore, there is no significant cost or administrative impact on contractors or offerors resulting from issuance of this rule and public comment is not required in accordance with 41 U.S.C. 1707(a).

Since DoD anticipates that this will be an ongoing requirement, this rule applies to use of all subsequent fiscal year funds appropriated or otherwise made available under subsequent DoD appropriations acts. If the restriction is

removed at a future date, DoD will amend the DFARS accordingly.

**II. Executive Orders 12866 and 13563**

Executive Orders 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). Executive Order 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 Executive Order 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**

The Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant DFARS revision within the meaning of FAR 1.501 and public comment is not required in accordance with 41 U.S.C. 1707.

**IV. 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 212 and 222**

Government procurement.

**Mary Overstreet,**

*Editor, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 212 and 222 are amended as follows:

■ 1. The authority citation for 48 CFR parts 219 and 252 continues to read as follows:

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

**PART 212—ACQUISITION OF COMMERCIAL ITEMS**

■ 2. Amend section 212.503 by revising paragraph (a)(xi) to read as follows:

**212.503 Applicability of certain laws to Executive Agency contracts for the acquisition of commercial items.**

(a) \* \* \*

(xi) Section 8116 of the Defense Appropriations Act for Fiscal Year 2010

(Pub. L. 111–118) and similar sections in subsequent DoD appropriations acts.

\* \* \* \* \*

■ 3. Amend section 212.504 by revising paragraph (a)(xix) to read as follows:

**212.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.**

(a) \* \* \*

(xix) Section 8116 of the Defense Appropriations Act for Fiscal Year 2010 (Pub. L. 111–118) and similar sections in subsequent DoD appropriations acts.

\* \* \* \* \*

**Subpart 222.74—Restrictions on the Use of Mandatory Arbitration Agreements**

■ 4. Revise section 222.7400 to read as follows:

**222.7400 Scope of subpart.**

This subpart implements section 8116 of the Defense Appropriations Act for Fiscal Year 2010 (Pub. L. 111–118) and similar sections in subsequent DoD appropriations acts.

■ 5. Amend section 222.7402 as follows:

■ (a) Revise the introductory text to paragraph (a) as set forth below; and  
 ■ (b) Revise paragraph (b) as set forth below.

**222.7402 Policy.**

(a) Departments and agencies are prohibited from using funds appropriated or otherwise made available by the Fiscal Year 2010 Defense Appropriations Act (Pub. L. 111–118) or subsequent DoD appropriations acts for any contract (including task or delivery orders and bilateral modifications adding new work) in excess of \$1 million, unless the contractor agrees not to—

\* \* \* \* \*

(b) No funds appropriated or otherwise made available by the Fiscal Year 2010 Defense Appropriations Act (Pub. L. 111–118) or subsequent DoD appropriations acts may be expended unless the contractor certifies that it requires each covered subcontractor to agree not to enter into, and not to take any action to enforce, any provision of any agreement, as described in paragraph (a) of this section, with respect to any employee or independent contractor performing work related to such subcontract.

■ 6. Revise section 222.7405 as follows:

**222.7405 Contract clause.**

Use the clause at 252.222–7006, Restrictions on the Use of Mandatory Arbitration Agreements, in all solicitations and contracts (including

task or delivery orders and bilateral modifications adding new work) valued in excess of \$1 million utilizing funds appropriated or otherwise made available by the Defense Appropriations Act for Fiscal Year 2010 (Pub. L. 111–118) or subsequent DoD appropriations acts, except in contracts for the acquisition of commercial items, including commercially available off-the-shelf items.

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**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 212 and 252**

RIN 0750–AH27

**Defense Federal Acquisition Regulation Supplement; Pilot Program for Acquisition of Military-Purpose Nondevelopmental Items (DFARS Case 2011–D034)**

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

**ACTION:** Interim rule.

**SUMMARY:** DoD is issuing an interim rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 866 of the National Defense Authorization Act for Fiscal Year 2011. Section 866 authorized the Secretary of Defense to establish a pilot program to assess the feasibility and advisability of acquiring military-purpose nondevelopmental items in accordance with the streamlined procedures of the pilot program.

**DATES:** *Effective Date:* June 29, 2011.

*Comment date:* Comments on the interim rule should be submitted in writing to the address shown below on or before August 29, 2011, to be considered in the formation of the final rule.

**ADDRESSES:** You may submit comments, identified by DFARS Case 2011–D034, using any of the following methods:

○ *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “DFARS Case 2011–D034” under the heading “Enter keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “DFARS Case 2011–D034.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company

name (if any), and “DFARS Case 2011–D034” on your attached document.

○ *E-mail:* [dfars@osd.mil](mailto:dfars@osd.mil). Include DFARS Case 2011–D034 in the subject line of the message.

○ *Fax:* 703–602–0350.

○ *Mail:* Defense Acquisition Regulations Council, *Attn:* Mr. Manuel Quinones, OUSD(AT&L)DPAP(DAR), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060.

*Instructions:* Please submit comments only and cite “DFARS Case 2011–D034” in all correspondence related to this case. All comments received 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:** Mr. Manuel Quinones, telephone 703–602–8383.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Section 866 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2011 (Pub. L. 111–383), enacted on January 7, 2011, authorized the Secretary of Defense to carry out a pilot program to assess the feasibility and advisability of acquiring military-purpose nondevelopmental items in accordance with the streamlined procedures of the pilot program. The authority for this pilot program expires on January 6, 2016. Under this pilot program, DoD may enter into contracts with nontraditional defense contractors for the purpose of—

—Enabling DoD to acquire items that otherwise might not have been available to DoD;

—Assisting DoD in the rapid acquisition and fielding of capabilities needed to meet urgent operational needs; and

—Protecting the interests of the United States in paying fair and reasonable prices for the item or items acquired.

This pilot program is designed to test whether the streamlined procedures, similar to those available for commercial items, can serve as an effective incentive for nontraditional defense contractors to (1) channel investment and innovation into areas that are useful to DoD and (2) provide items developed exclusively at private expense to meet validated military requirements.