

Federal Communications Commission.

**William F. Caton,**

*Deputy Secretary.*

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## DEPARTMENT OF DEFENSE

### 48 CFR Parts 208, 239, 251, and 252

[DFARS Case 2000-D023]

#### Defense Federal Acquisition Regulation Supplement; Enterprise Software Agreements

**AGENCY:** Department of Defense (DoD).

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to add policy pertaining to the use of enterprise software agreements for the acquisition of commercial software and software maintenance.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before April 1, 2002, to be considered in the formation of the final rule.

**ADDRESSES:** Respondents may submit comments directly on the World Wide Web at <http://emissary.acq.osd.mil/dar/dfars.nsf/pubcomm>. As an alternative, respondents may e-mail comments to: [dfars@acq.osd.mil](mailto:dfars@acq.osd.mil). Please cite DFARS Case 2000-D023 in the subject line of e-mailed comments.

Respondents that cannot submit comments using either of the above methods may submit comments to: Defense Acquisition Regulations Council, Attn: Ms. Susan Schneider, OUSD(AT&L)DP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062; facsimile (703) 602-0350. Please cite DFARS Case 2000-D023.

At the end of the comment period, interested parties may view public comments on the World Wide Web at <http://emissary.acq.osd.mil/dar/dfars.nsf>.

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan Schneider, (703) 602-0326. Please cite DFARS Case 2000-D023.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This proposed rule adds a new DFARS Subpart 208.74 to address the use of enterprise software agreements for the acquisition of commercial software and software maintenance in accordance with the DoD Enterprise Software Initiative. This initiative

promotes the use of enterprise software agreements with contractors that allow DoD to obtain favorable terms and pricing for commercial software and related services. Associated DFARS changes are made in parts 208, 239, 251, and 252.

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

##### B. Regulatory Flexibility Act

The proposed rule is not expected 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 most enterprise software agreements are blanket purchase agreements established under Federal Supply Schedules. Establishment of such agreements is already permitted by section 8.404(b)(4) of the Federal Acquisition Regulation. Therefore, an initial regulatory flexibility analysis has not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected DFARS subparts also will be considered in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2000-D023 in correspondence.

##### 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 208, 239, 251, and 252

Government procurement.

**Michele P. Peterson,**

*Executive Editor, Defense Acquisition Regulations Council.*

Therefore, DoD proposes to amend 48 CFR Parts 208, 239, 251, and 252 as follows:

1. The authority citation for 48 CFR Parts 208, 239, 251, and 252 continues to read as follows:

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

#### PART 208—REQUIRED SOURCES OF SUPPLIES AND SERVICES

2. Section 208.001 is amended by revising paragraph (a)(1)(v) to read as follows:

#### 208.001 Priorities for use of Government supply sources.

(a)(1)(v) See Subpart 208.70, Coordinated Acquisition, and Subpart 208.74, Enterprise Software Agreements.

\* \* \* \* \*

3. Subpart 208.74 is added to read as follows:

#### Subpart 208.74—Enterprise Software Agreements

Sec.

208.7400 Scope of subpart.

208.7401 Definitions.

208.7402 General.

208.7403 Acquisition procedures.

#### 208.7400 Scope of subpart.

This subpart prescribes policy and procedures for acquisition of commercial software and software maintenance, including software and software maintenance that is acquired—

- (a) As part of a system or system upgrade;
- (b) Under a service contract;
- (c) Under a contract administered by another agency;
- (d) Under an interagency agreement;

or

- (e) By a contractor that is authorized to order from a Government supply source pursuant to FAR 51.101.

#### 208.7401 Definitions.

As used in this subpart—  
*Enterprise software agreement* means a blanket purchase agreement or a contract that is used to acquire designated commercial software or related services such as software maintenance.

*Enterprise Software Initiative* means an initiative led by the DoD Chief Information Officer to develop processes for DoD-wide software asset management.

*Golden Disk* means a purchased license or entitlement to distribute an unlimited or bulk number of copies of software throughout DoD.

*Software product manager* means the person who manages an enterprise software agreement.

#### 208.7402 General.

Departments and agencies must fulfill requirements for commercial software and related services, such as software maintenance, in accordance with the DoD Enterprise Software Initiative (ESI). ESI promotes the use of enterprise software agreements (ESA) with contractors that allow DoD to obtain favorable terms and pricing for commercial software and related services.

#### 208.7403 Acquisition procedures.

(a) Requiring officials must obtain commercial software rights or

maintenance from available existing DoD inventories (e.g.; Golden Disks and DoD-wide software maintenance agreements) before proceeding with an acquisition. DoD inventories and other ESI information are listed on the ESI website at <http://www.don-imit.navy.mil/esi>.

(b) If the required commercial software or related service is not in the DoD inventory, or not on an ESA, the contracting officer or requiring official may fulfill the requirement by other means. Existing ESAs are listed on the ESI website.

(c) If the commercial software or related service is on an ESA, the contracting officer or requiring official must review the terms and conditions and prices.

(d) If an ESA's terms and conditions and prices represent the best value to the Government, the contracting officer or the requiring official must fulfill the requirement for supplies or services through the ESA.

(e) If existing ESAs do not represent the best value to the Government, the software product manager (SPM) must be given an opportunity to provide the same or a better value to the Government under the ESAs before the contracting officer or requiring official may continue with alternate acquisition methods.

(1) The contracting officer or requiring official must notify the SPM of specific concerns about existing ESA terms and conditions or prices through the ESI webpage.

(2) The SPM will consider adjusting the ESA terms and conditions or prices to reflect "most favored customer" status.

(i) Within 3 working days, the SPM will—

(A) Update the ESA;

(B) Provide an estimated date by which the update will be accomplished; or

(C) Inform the contracting officer or requiring official that no change will be made to the ESA.

(ii) If the SPM informs the contracting officer or requiring official that no change will be made to the ESA terms and conditions or prices, the contracting officer or requiring official may obtain the requirement by other means.

(iii) If the SPM does not respond within 3 working days or does not plan to adjust the ESA within 90 days, the contracting officer or requiring official may fulfill the requirement by other means.

(3) A management official designated by the department or agency may waive the requirement to obtain commercial software or related services through an ESA after the steps in paragraphs (e)(1) and (e)(2)(i) of this section are complete.

**PART 239—ACQUISITION OF INFORMATION TECHNOLOGY**

4. Subpart 239.1 is added to read as follows:

**Subpart 239.1—General**

Sec.

239.101 Policy.

**239.101 Policy.**

See Subpart 208.74 when acquiring commercial software or software maintenance.

**PART 251—USE OF GOVERNMENT SOURCES BY CONTRACTORS**

5. Section 251.102 is amended as follows:

a. By revising paragraph (f);

b. In Table 51–1, by revising paragraph 1., and by adding paragraph 2.c. to read as follows:

**251.102 Authorization to use Government supply sources.**

\* \* \* \* \*

(f) The authorizing agency is also responsible for promptly considering requests of the DoD supply source for authority to refuse to honor requisitions from a contractor that is indebted to DoD and has failed to pay proper invoices in a timely manner.

**Table 51–1, Authorization To Purchase From Government Supply Sources**

\* \* \* \* \*

1. You are hereby authorized to use Government sources in performing Contract No. \_\_\_\_\_ for *[insert applicable military department or defense agency]*, as follows: *[Insert applicable purchasing authority given to the contractor.]*

2. \* \* \*

c. Enterprise Software Initiative. Place orders in accordance with the terms and conditions of the attached Enterprise

Software Agreement(s), or instructions for obtaining commercial software or software maintenance from Enterprise Software Initiative inventories, and this authorization. Attach a copy of this authorization to the order (unless a copy was previously furnished to the Enterprise Software Agreement contractor).

Insert the following statement in the order:

This order is placed under written authorization from \_\_\_\_\_ dated \_\_\_\_\_ (\* \_\_\_\_\_). In the event of any inconsistency between the terms and conditions of this order, and those of the Enterprise Software Agreement, the latter will govern.

\* \* \* \* \*

**PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

6. Section 252.251–7000 is amended as follows:

a. By revising the clause date and paragraph (a); and

b. In paragraph (d)(4) in the last sentence by removing "Such" and adding in its place "The".

**252.251–7000 Ordering From Government Supply Sources.**

\* \* \* \* \*

**Ordering From Government Supply Sources (XXX 2002)**

(a) When placing orders under Federal Supply Schedules, Personal Property Rehabilitation Price Schedules, or Enterprise Software Agreements, the Contractor shall follow the terms of the applicable schedule or agreement and authorization. Include in each order:

(1) A copy of the authorization (unless a copy was previously furnished to the Federal Supply Schedule, Personal Property Rehabilitation Price Schedule, or Enterprise Software Agreement contractor).

(2) The following statement:

This order is placed under written authorization from \_\_\_\_\_ dated \_\_\_\_\_. In the event of any inconsistency between the terms and conditions of this order and those of your Federal Supply Schedule contract, Personal Property Rehabilitation Price Schedule contract, or Enterprise Software Agreement, the latter will govern.

(3) The completed address(es) to which the Contractor's mail, freight, and billing documents are to be directed.

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