

(2) The contracting officer may use streamlined procedures, including oral presentations;

(3) The competition requirements in FAR part 6 and the policies in FAR subpart 15.3 do not apply to the ordering process, but the contracting officer shall consider price or cost under each order as one of the factors in the selection decision; and

(4) The contracting officer should consider past performance on earlier orders under the contract, including quality, timeliness, and cost control.

[FR Doc. 02-27110 Filed 10-24-02; 8:45 am]

BILLING CODE 5001-08-P

## DEPARTMENT OF DEFENSE

### 48 CFR Part 201

[DFARS Case 2002-D021]

#### Defense Federal Acquisition Regulation Supplement; Contracting Officer Qualifications

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 Section 824 of the National Defense Authorization Act for Fiscal Year 2002. Section 824 revised the qualification requirements that a new entrant into the contracting field must meet in order to serve as a contracting officer with authority to award or administer contracts exceeding the simplified acquisition threshold.

**EFFECTIVE DATE:** October 25, 2002.

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan Schneider, Defense Acquisition Regulations Council, OUSD (AT&L) DP (DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0326; facsimile (703) 602-0350. Please cite DFARS Case 2002-D021.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This final rule revises DFARS 201.603-2 to implement Section 824 of the National Defense Authorization Act for Fiscal Year 2002 (Public Law 107-107). Section 824 amended 10 U.S.C. 1724 to revise the qualification requirements that a new entrant into the contracting field must meet in order to serve as a contracting officer with authority to award or administer contracts exceeding the simplified acquisition threshold. The revised qualifications include a requirement for a baccalaureate degree and 24 semester

credit hours of study in a business-related discipline.

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 2002-D021.

##### 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 201

Government procurement.

##### Michele P. Peterson,

*Executive Editor, Defense Acquisition Regulations Council.*

Therefore, 48 CFR part 201 is amended as follows:

1. The authority citation for 48 CFR part 201 continues to read as follows:

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

#### PART 201—FEDERAL ACQUISITION REGULATIONS SYSTEM

2. Section 201.603-2 is revised to read as follows:

##### 201.603-2 Selection.

(1) In accordance with 10 U.S.C. 1724, in order to qualify to serve as a contracting officer with authority to award or administer contracts for amounts above the simplified acquisition threshold, a person must—

(i) Have completed all contracting courses required for a contracting officer to serve in the grade in which the employee or member of the armed forces will serve;

(ii) Have at least 2 years experience in a contracting position;

(iii) Have—

(A) Received a baccalaureate degree from an accredited educational institution; and

(B) Completed at least 24 semester credit hours, or equivalent, of study from an accredited institution of higher education in any of the following

disciplines: accounting, business finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, and organization and management; and

(iv) Meet such additional requirements, based on the dollar value and complexity of the contracts awarded or administered in the position, as may be established by the Secretary of Defense.

(2) The qualification requirements in paragraph (1)(iii) of this subsection do not apply to a DoD employee or member of the armed forces who—

(i) On or before September 30, 2000, occupied—

(A) A contracting officer position with authority to award or administer contracts above the simplified acquisition threshold; or

(B) A position either as an employee in the GS-1102 occupational series or a member of the armed forces in an occupational specialty similar to the GS-1102 series;

(ii) Is in a contingency contracting force; or

(iii) Is an individual appointed to a 3-year developmental position.

Information on developmental opportunities is contained in DoD Manual 5000.52-M, Acquisition Career Development Program.

(3) Waivers to the requirements in paragraph (1) of this subsection may be authorized. Information on waivers is contained in DoD Manual 5000.52-M.

[FR Doc. 02-27107 Filed 10-24-02; 8:45 am]

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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: Final rule.

**SUMMARY:** DoD has issued a final rule amending 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.

**EFFECTIVE DATE:** October 25, 2002.

**FOR FURTHER INFORMATION CONTACT:** Ms. Susan Schneider, Defense Acquisition Regulations Council, OUSD (AT&L) DP (DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0326; facsimile

(703) 602-0350. Please cite DFARS Case 2000-D023.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This 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 offer DoD favorable terms and pricing for commercial software and related services. Associated DFARS changes are made in Parts 208, 239, 251, and 252.

DoD published a proposed rule at 67 FR 4231 on January 29, 2002. Five sources submitted comments on the proposed rule. DoD considered all comments in the development of the final rule. A discussion of the comments is provided below:

*Comment:* Due to a lack of central budget control, "profit centers" cannot bargain as a unit to establish an Enterprise Software Agreement (ESA), and vendors must contract with each organization individually. *DoD Response:* The lack of a centralized approach to DoD software budgeting is a prime reason for the existence of the Enterprise Software Initiative (ESI). By consolidating established department and agency requirements for commercial software, ESI gains pricing and terms concessions not normally available to the individual or the small command buyer.

*Comment:* New vendors may be at a competitive disadvantage. Lack of objective performance criteria will deny new vendors the opportunity to compete on merit versus familiarity. *DoD Response:* ESI does not eliminate the need for acquisition planning and market research. Use of ESAs is not mandatory, but must be considered only when requirements for products available under the agreements have already been established.

*Comment:* The term "most favored customer" at 208.7403(e)(2) is vague and should be eliminated from the rule. *DoD Response:* The intent is to give the software product manager (SPM) the opportunity to adjust the ESA to provide the best value to the customer. The language at 208.7403(e)(2) has been revised to more clearly convey this intent.

*Comment:* The rule will reduce the number of vendors able to market and sell commercial software products to DoD. *DoD Response:* Authorized commercial resellers with General Services Administration (GSA) Federal

Supply Schedules are eligible to carry ESAs for commercial software products. In this sense, the software manufacturer determines the universe of potentially eligible resellers, and the resellers themselves decide whether or not to apply for and maintain a GSA Schedule, and whether or not to comply with the terms and conditions of a DoD ESA.

*Comment:* The "nonstandard" methods of the rule may encourage software manufacturers to keep products off ESAs. *DoD Response:* The use of blanket purchase agreements against GSA Schedules is a standard DoD acquisition practice. There is no evidence to indicate that this rule will discourage manufacturers from seeking ESAs or from placing commercial products on ESAs.

*Comment:* Industrial funding fees will cancel potential savings of volume purchases. *DoD Response:* No additional resources are required to manage ESAs. DoD ESAs result in lower overhead for contract maintenance and result in net savings or cost avoidance for the Government.

*Comment:* Use of BPAs against GSA Schedules for the acquisition of software implies incorporation of the clause at FAR 52.227-14, Rights of Data. This clause may conflict with DoD policy on intellectual property rights and uses. The rule should follow DoD, not GSA, policy. *DoD Response:* Use of BPAs against GSA Schedules is a standard acquisition practice in DoD and is in accordance with FAR subpart 8.4 and DFARS subpart 208.4.

*Comment:* Customized terms and conditions must often be negotiated. The 90-day process for allowing the SPM to negotiate on behalf of the purchaser adds needless delay and cost. *DoD Response:* Many ESAs contain special provisions for pricing and other terms and conditions. Should those provisions not be sufficient, the SPM is given up to 90 days to renegotiate the ESA. Historically, the turn-around time has been much quicker than 90 days. However, purchasers have the option to pursue a waiver to the use of the ESA if the SPM cannot negotiate satisfactory terms and conditions within the purchaser's required timeframe.

*Comment:* The use of the term "commercial software or related services such as software maintenance" is overly broad. The phrase "related services" should be deleted. *DoD Response:* The phrase "related services" does address a broad range of services. It is the intent of ESI to address software asset management across the spectrum and throughout the life cycle of enterprise software management, rather

than limit its scope to software acquisition and software maintenance.

*Comment:* The term "software maintenance" should be defined. *DoD Response:* A definition of "software maintenance" has been added at 208.7401.

*Comment:* Read literally, the rule could require DoD customers to acquire hardware without preloaded software. *DoD Response:* The rule is not intended to preclude the acquisition of preloaded software with computers from the original equipment manufacturer. The language at 208.7400(a) has been revised to clarify the intent.

*Comment:* The rule appears to support the development of software acquisition processes without the benefit of public comment. This may result in processes inconsistent with Federal Acquisition Streamlining Act requirements pertaining to the acquisition of commercial items. *DoD Response:* DoD policy is to make maximum practical use of GSA Schedules, and ESI has established BPAs against GSA Schedules for DoD use. Software asset management encompasses all aspects of life-cycle management. Should any elements of implementing the software asset management process require public comment, those elements will be published accordingly as has been done for this DFARS rule.

*Comment:* Software manufacturers and resellers cannot be expected to offer the favorable terms and discounts sought through ESI without DoD's commitment to purchase the quantities that result in the lowest prices. There is no evidence that DoD is willing or is able to make such a commitment. *DoD Response:* Many manufacturers and resellers have offered favorable terms and conditions without a commitment to specific quantities, for a chance at increased market share or additional DoD exposure.

*Comment:* The acquisition procedures in 208.7403 should be revised for clarity and for consistency with DoD Chief Information Officer Guidance and Policy Memorandum No. 12-8430 dated July 26, 2000, pertaining to requirements for use of ESAs, rationale for use of alternate sources, and reimbursement of funds to the SPM. *DoD Response:* This section has been revised to clarify procedures for determining when use of an ESA is appropriate, and to clarify documentation requirements when use of an alternate source is deemed necessary. However, SPM reimbursement of funds is a procedure handled outside of the contracting arena, and, therefore, is not considered

appropriate for inclusion in this DFARS rule.

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 certifies that this final rule will not 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.

### 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, 48 CFR Parts 208, 239, 251, and 252 are amended 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, where practicable;
- (b) Under a service contract;
- (c) Under a contract or agreement administered by another agency (*e.g.*, under an interagency agreement);
- (d) Under a Federal Supply Schedule contract or blanket purchase agreement established in accordance with FAR 8.404(b)(4); 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 an 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 maintenance* means services normally provided by a software company as standard services at established catalog or market prices, *e.g.*, the right to receive and use upgraded versions of software, updates, and revisions.

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

#### 208.7402 General.

Departments and agencies shall fulfill requirements for commercial software and related services, such as software maintenance, in accordance with the DoD Enterprise Software Initiative (ESI) (see Web site at <http://www.don-imit.navy.mil/esi>). ESI promotes the use of enterprise software agreements (ESAs) with contractors that allow DoD to obtain favorable terms and pricing for commercial software and related services. ESI does not dictate the products or services to be acquired.

#### 208.7403 Acquisition procedures.

(a) After requirements are determined, the requiring official shall review the information at the ESI website to determine if the required commercial software or related services are available from DoD inventory (*e.g.*, Golden Disks and DoD-wide software maintenance agreements). If the software or services are available, the requiring official shall fulfill the requirement from the DoD inventory.

(b) If the required commercial software or related services are not in the DoD inventory, and 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 services are on an ESA, the contracting officer or requiring official shall review the terms and conditions and prices in accordance with otherwise applicable source selection requirements.

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

(e) If existing ESAs do not represent the best value to the Government, the software product manager (SPM) shall 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 shall notify the SPM of specific concerns about existing ESA terms and conditions or prices through the ESI webpage.

(2) The SPM shall consider adjusting, within the scope of the ESA, terms and conditions or prices to provide the best value to the customer.

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

(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 fulfill 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. The rationale for use of an alternate source shall be included in the waiver

request and shall be provided to the SPM.

**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.;
- c. In Table 51–1, in paragraph 2.b.(1) in the last sentence, and in paragraph 2.b.(2) in the last sentence, by removing “telefax” and adding in its place “facsimile”; and
- d. In Table 51–1, 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);
- b. By removing paragraph (b) and redesignating paragraphs (c) through (f) as paragraphs (b) through (e); and
- c. In newly designated paragraph (c)(4), in the last sentence, by removing “Such” and adding in its place “The”. The revised text reads as follows:

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

\* \* \* \* \*

**Ordering from Government Supply Sources (OCT 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: Any price reductions negotiated as part of an Enterprise Software Agreement issued under a Federal Supply Schedule contract shall control. In the event of any other inconsistencies between an Enterprise Software Agreement, established as a Federal Supply Schedule blanket purchase agreement, and the Federal Supply Schedule contract, the latter shall govern.

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

\* \* \* \* \*

[FR Doc. 02–27109 Filed 10–24–02; 8:45 am]

**BILLING CODE 5001–08–P**

**DEPARTMENT OF DEFENSE**

**48 CFR Parts 212, 226, and 237**

[DFARS Case 2000–D306]

**Defense Federal Acquisition Regulation Supplement; Performance-Based Contracting Using Federal Acquisition Regulation Part 12 Procedures**

**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 Section 821(b) of the National Defense Authorization Act for Fiscal Year 2001. Section 821(b) permits DoD to treat certain performance-based service contracts and task orders as contracts for the procurement of commercial items.

**EFFECTIVE DATE:** October 25, 2002.

**FOR FURTHER INFORMATION CONTACT:** Ms. Sandra Haberlin, Defense Acquisition Regulations Council, OUSD (AT&L) DP (DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone (703) 602–0289; facsimile (703) 602–0350. Please cite DFARS Case 2000–D306.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This rule revises and finalizes the interim rule published at 66 FR 63335 on December 6, 2001. The rule implements Section 821(b) of the National Defense Authorization Act for Fiscal Year 2001 (Public Law 106–398). Section 821(b) permits DoD to use Federal Acquisition Regulation (FAR) Part 12 (Acquisition of Commercial Items) procedures for performance-based service contracts and task orders, if certain conditions are met.

Four respondents submitted comments on the interim rule. A discussion of the comments is provided below:

*Comment:* The rule appears to contradict the language in FAR Subpart 13.5, which permits the use of simplified procedures for the acquisition of commercial items in amounts exceeding the simplified acquisition threshold but not exceeding \$5 million. Section 212.102 of the rule prohibits the use of FAR Subpart 13.5 procedures when using FAR Part 12 for acquisitions that are performance-based. *DoD Response:* Do not concur. FAR 12.102 authorizes the use of FAR Part 12 in conjunction with FAR Part 13, 14, or 15, when acquiring supplies or services that meet the definition of commercial