

Telephone (703) 602-0311; facsimile (703) 602-0350.

List of Subjects in 48 CFR Parts 202, 213, and 252

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

■ Therefore, 48 CFR Parts 202, 213, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR Parts 202, 213, and 252 continues to read as follows:

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

PART 202—DEFINITIONS OF WORDS AND TERMS

202.101 [Amended]

■ 2. Section 202.101 is amended in the definition of “Contracting activity”, under the heading “NAVY”, by removing “Marine Corps Materiel Command” and adding in its place “Marine Corps Systems Command”.

PART 213—SIMPLIFIED ACQUISITION PROCEDURES

213.301 [Amended]

■ 3. Section 213.301 is amended in paragraph (2)(ii)(B) by removing “8.001” and adding in its place “8.002”.

213.302-5 [Amended]

■ 4. Section 213.302-5 is amended as follows:

■ a. In paragraph (d) introductory text, in the first sentence, by removing “Buy American Act—Balance of Payments Program—Supplies” and adding in its place “Buy American Act—Supplies”; and

■ b. In paragraph (d)(ii), by removing “225.1101(13)” and adding in its place “225.1101(10)”.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.212-7001 [Amended]

■ 5. Section 252.212-7001 is amended in paragraph (b), in entry “252.225-7021” by removing “(APR 2003)” and adding in its place “(AUG 2003)”.

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DEPARTMENT OF DEFENSE

48 CFR Parts 226 and 252

[DFARS Case 2002-D033]

Defense Federal Acquisition Regulation Supplement; Indian Incentive Program

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 8021 of the DoD Appropriations Act for Fiscal Year 2003. Section 8021 revises the criteria for application of the Indian Incentive Program to DoD contracts.

DATES: Effective date: October 1, 2003.

Comment date: Comments on the interim rule should be submitted to the address shown below on or before December 1, 2003, 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. Please cite DFARS Case 2002-D033 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. Angelena Moy, OUSD (AT&L) DPAP (DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062; facsimile (703) 602-0350. Please cite DFARS Case 2002-D033.

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. Angelena Moy, (703) 602-1302.

SUPPLEMENTARY INFORMATION:

A. Background

The Indian Incentive Program provides for incentive payments to contractors, and subcontractors at any tier, that use Indian organizations and Indian-owned economic enterprises as subcontractors. DoD implementation of the Indian Incentive Program is in DFARS Subpart 226.1 and the clause at 252.226-7001. Section 8021 of the DoD Appropriations Act for Fiscal Year 2003 (Public Law 107-248) revises the criteria for application of the Indian Incentive Program by establishing a \$500,000 threshold for contracts and

subcontracts under which incentives may be paid; by authorizing incentive payments for subcontracts awarded to Native Hawaiian small business concerns; and by adding contracts and subcontracts for commercial items to the Program. This interim rule amends DFARS subpart 226.1 and the clause at 252.226-7001 to implement section 8021 of Public Law 107-248.

In addition, this interim rule incorporates changes to the clause at 252.226-7001 resulting from the proposed rule published at 67 FR 70389 on November 22, 2002, under DFARS Case 2002-D013. That proposed rule removed references to specific contract types from the clause, since the Indian Incentive Program applies to all contract types. Four sources submitted comments on the proposed rule. A discussion of the comments is provided below.

1. Comment: The rule should clarify that a contractor can receive a separate equitable adjustment in addition to the incentive payment under the clause. The equitable adjustment would apply if the cost of subcontracting with an Indian organization exceeds the cost of subcontracting with a non-Indian source. The 1996 version of the Indian Incentive clause at FAR 52.226-1 substantiates this position.

DoD Response: Do not concur. 25 U.S.C. 1544 provides that “a contractor * * * may be allowed an additional amount of compensation equal to 5 percent of the amount paid, or to be paid, to a subcontractor or supplier, in carrying out the contract if such subcontractor or supplier is an Indian organization or Indian-owned economic enterprise * * *” Section 8021 of Public Law 107-248 appropriates funds “only for incentive payments authorized by * * * 25 U.S.C. 1544 * * *” Accordingly, the clause at DFARS 252.226-7001 provides for an incentive payment of 5 percent of the amount of a subcontract awarded to an Indian organization or Indian-owned economic enterprise.

When the Indian Incentive Program was added to the FAR as an interim rule on August 22, 1991 (56 FR 41736), the clause at 52.226-1 provided that a contract adjustment under the Program would be the lesser of (1) the difference between the price of the subcontract awarded to an Indian concern and the price of the otherwise low, non-Indian offeror, or (2) 5 percent of the price of the subcontract awarded to an Indian concern. When the FAR rule was finalized on July 26, 1996 (61 FR 39210), the clause was revised to eliminate the first option and to specify the “5 percent” payment method as the

sole method of incentive payment under the Program. Confusion has existed because the FAR and DFARS clauses have used the terms "incentive" and "adjustment" interchangeably. However, the statutes and the implementing clauses historically have permitted only one type of incentive payment per subcontract award. To clarify this point, DoD has replaced the term "adjustment" with the term "incentive" each place it appeared in the clause at 252.226-7001.

2. Comment: The requirement of DFARS 252.226-7001(d), that prohibits an incentive payment from being made within 50 working days of subcontract award, is arbitrary and should be deleted. The contracting officer should have the flexibility to make a case-by-case determination of when it is appropriate to make the incentive payment.

DoD Response: Concur. The interim rule eliminates the 50-day waiting period.

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 may 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.* DoD has prepared an initial regulatory flexibility analysis, which is summarized as follows:

This interim rule amends the DFARS to implement Section 8021 of the DoD Appropriations Act for Fiscal Year 2003. Section 8021 does the following: (1) Appropriates funds for implementation of the Indian Incentive Program; (2) establishes a threshold of \$500,000 for contracts and subcontracts under which incentives may be paid; (3) expands the Program to permit incentive payments for subcontract awards to Native Hawaiian small business concerns; and (4) adds contracts and subcontracts for commercial items to the Program, provided the commercial items are produced or manufactured in whole or in part by an Indian organization or enterprise or Native Hawaiian small business concern. The rule will apply to contractors and subcontractors that subcontract work under DoD contracts, and will pertain to subcontract awards to Indian organizations, Indian-owned economic enterprises, and Native Hawaiian small business concerns. The net effect on small entities is unknown at this time. DoD knows of no alternatives that would meet the

requirements of Section 8021 of the DoD Appropriations Act for Fiscal Year 2003.

A copy of the analysis may be obtained from the address specified herein. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2002-D033.

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 2003 (Pub. L. 107-248). Section 8021 revises the criteria for application of the Indian Incentive Program by establishing a \$500,000 threshold for contracts and subcontracts under which incentives may be paid; by authorizing incentive payments for subcontracts awarded to Native Hawaiian small business concerns; and by adding contracts and subcontracts for commercial items to the Program. Section 8021 became effective upon enactment, on October 23, 2002. Comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Parts 226 and 252

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

■ Therefore, 48 CFR parts 226 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 226 and 252 continues to read as follows:

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

PART 226—OTHER SOCIOECONOMIC PROGRAMS

■ 2. Sections 226.103 and 226.104 are revised to read as follows:

226.103 Procedures.

(f) The contracting officer shall—
(i) Submit a request for funding of the Indian incentive to the Office of Small and Disadvantaged Business Utilization, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics) (OUSD(AT&L)SADBU), 1777 North Kent Street, Suite 9100, Arlington, VA 22209; and

(ii) Upon receipt of funding from OUSD(AT&L)SADBU, issue a contract modification to add the Indian incentive funding for payment of the contractor's request for adjustment as described in the clause at 252.226-7001, Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns.

226.104 Contract clause.

Use the clause at 252.226-7001, Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns, in solicitations and contracts for supplies or services exceeding \$500,000 in value for which subcontracting opportunities may exist.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Section 252.212-7001 is amended as follows:

- a. By revising the clause date to read "(Oct 2003)"; and
- b. In paragraph (b) by adding, in numerical order, entry "252.226-7001" to read as follows:

252.212-7001 Contract terms and conditions required to implement statutes or Executive orders applicable to Defense acquisitions of commercial items.

* * * * *

(b) * * *

252.226-7001 Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns (Oct 2003) (Section 8021 of Pub. L. 107-248).

* * * * *

■ 4. Section 252.226-7001 is revised to read as follows:

252.226-7001 Utilization of Indian organizations, Indian-owned economic enterprises, and native Hawaiian small business concerns.

As prescribed in 226.104, use the following clause:

Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns (Oct 2003)

(a) *Definitions.* As used in this clause—

Indian means any person who is a member of any Indian tribe, band, group, pueblo, or community that is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs (BIA) in accordance with 25 U.S.C. 1452(c) and any "Native" as defined in the Alaska Native Claims Settlement Act (43 U.S.C. 1601).

Indian organization means the governing body of any Indian tribe or entity established or recognized by the governing body of an Indian tribe for the purposes of 25 U.S.C. chapter 17.

Indian-owned economic enterprise means any Indian-owned (as determined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit, provided that Indian ownership constitutes not less than 51 percent of the enterprise.

Indian tribe means any Indian tribe, band, group, pueblo, or community, including native villages and native groups (including corporations organized by Kenai, Juneau, Sitka, and Kodiak) as defined in the Alaska Native Claims Settlement Act, that is recognized by the Federal Government as eligible for services from BIA in accordance with 25 U.S.C. 1452(c).

Interested party means a contractor or an actual or prospective offeror whose direct economic interest would be affected by the award of a subcontract or by the failure to award a subcontract.

Native Hawaiian small business concern means an entity that is—

(1) A small business concern as defined in section 3 of the Small Business Act (15 U.S.C. 632) and relevant implementing regulations; and

(2) Owned and controlled by a Native Hawaiian as defined in 25 U.S.C. 4221(9).

(b) The Contractor shall use its best efforts to give Indian organizations, Indian-owned economic enterprises, and Native Hawaiian small business concerns the maximum practicable opportunity to participate in the subcontracts it awards, to the fullest extent consistent with efficient performance of the contract.

(c) The Contracting Officer and the Contractor, acting in good faith, may rely on the representation of an Indian organization, Indian-owned economic enterprise, or Native Hawaiian small business concern as to its eligibility, unless an interested party challenges its status or the Contracting Officer has independent reason to question that status.

(d) In the event of a challenge to the representation of a subcontractor, the Contracting Officer will refer the matter to—

(1) For matters relating to Indian organizations or Indian-owned economic enterprises: U.S. Department of the Interior, Bureau of Indian Affairs, Attn: Chief, Division of Contracting and Grants Administration, 1849 C Street NW, MS-2626-MIB, Washington, DC 20240-4000. The BIA will determine the eligibility and will notify the Contracting Officer.

(2) For matters relating to Native Hawaiian small business concerns: Department of Hawaiian Home Lands, PO Box 1879, Honolulu, HI 96805. The Department of Hawaiian Home Lands will determine the

eligibility and will notify the Contracting Officer.

(e) No incentive payment will be made—

(1) While a challenge is pending; or

(2) If a subcontractor is determined to be an ineligible participant.

(f)(1) The Contractor, on its own behalf or on behalf of a subcontractor at any tier, may request an incentive payment in accordance with this clause.

(2) The incentive amount that may be requested is 5 percent of the estimated cost, target cost, or fixed price included in the subcontract at the time of award to the Indian organization, Indian-owned economic enterprise, or Native Hawaiian small business concern.

(3) In the case of a subcontract for commercial items, the Contractor may receive an incentive payment only if the subcontracted items are produced or manufactured in whole or in part by an Indian organization, Indian-owned economic enterprise, or Native Hawaiian small business concern.

(4) The Contractor has the burden of proving the amount claimed and shall assert its request for an incentive payment prior to completion of contract performance.

(5) The Contracting Officer, subject to the terms and conditions of the contract and the availability of funds, will authorize an incentive payment of 5 percent of the estimated cost, target cost, or fixed price included in the subcontract awarded to the Indian organization, Indian-owned economic enterprise, or Native Hawaiian small business concern.

(6) If the Contractor requests and receives an incentive payment on behalf of a subcontractor, the Contractor is obligated to pay the subcontractor the incentive amount.

(g) The Contractor shall insert the substance of this clause, including this paragraph (g), in all subcontracts exceeding \$500,000 for which further subcontracting opportunities may exist.

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DEPARTMENT OF DEFENSE

48 CFR Part 237

[DFARS Case 2002-D024]

Defense Federal Acquisition Regulation Supplement; Approval of Service Contracts and Task Orders

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 801(b) of the National Defense Authorization Act for Fiscal Year 2002. Section 801(b) requires DoD to establish and implement a management structure for the procurement of services.

DATES: Effective date: October 1, 2003.

Comment date: Comments on the interim rule should be submitted to the address shown below on or before December 1, 2003, 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. Please cite DFARS Case 2002-D024 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: Mr. Steven Cohen, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062; facsimile (703) 602-0350. Please cite DFARS Case 2002-D024.

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: Mr. Steven Cohen, (703) 602-0293.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule adds DFARS section 237.170, Approval of contracts and task orders for services, to implement Section 801(b) of the National Defense Authorization Act for Fiscal Year 2002 (Public Law 107-107).

Section 801 of Public Law 107-107 established a series of requirements impacting the acquisition of services in DoD. On May 31, 2002, the Under Secretary of Defense (Acquisition, Technology, and Logistics) issued a policy memorandum that established a review structure and process for the acquisition of services in accordance with section 801(d). The policy memorandum is available on the World Wide Web at <http://www.acq.osd.mil/dpap>.

This interim DFARS rule implements section 801(b) of Public Law 107-107 by establishing approval requirements for contracts and task orders for services. The rule prohibits the acquisition of services through use of a DoD contract or task order that is not performance based, or through any contract or task order that is awarded by an agency other than DoD, unless certain approval requirements are met. With respect to services acquisitions through a contract or task order awarded by an agency other than DoD, the rule requires approval in accordance with department or agency procedures. Each of the three