

(b) The approval authorities specified in this section apply instead of those otherwise specified in FAR 9.202(a)(1), 9.202(c), or 9.206-1(c), for the procurement, modification, repair, and overhaul of aviation critical safety items.

#### 209.270-4 Procedures.

For items identified as aviation critical safety items—

(a) The head of the design control activity shall—

(1) Approve qualification requirements in accordance with procedures established by the design control activity; and

(2) Qualify and identify aviation critical safety item suppliers and products.

(b) The contracting officer shall—

(1) Ensure that the head of the design control activity has determined that a prospective contractor or its product meets or can meet the established qualification standards before the date specified for award of the contract;

(2) Refer any offers received from an unapproved source to the head of the design control activity for approval. The head of the design control activity will determine whether the offeror or its product meets or can meet the established qualification standards before the date specified for award of the contract; and

(3) Refer any requests for qualification to the design control activity.

(c) See 246.407 (S-70) and 246.504 for quality assurance requirements.

#### PART 217—SPECIAL CONTRACTING METHODS

■ 3. Section 217.7501 is amended in paragraph (b)(2) by adding a third sentence to read as follows:

##### 217.7501 General.

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \* See 209.270 for requirements applicable to replenishment parts for aviation critical safety items.

\* \* \* \* \*

#### PART 246—QUALITY ASSURANCE

■ 4. Section 246.407 is amended by adding, after paragraph (f)(iii), a new paragraph (S-70) to read as follows:

##### 246.407 Nonconforming supplies or services.

\* \* \* \* \*

(S-70) The head of the design control activity is the approval authority for acceptance of any nonconforming aviation critical safety items or

nonconforming modification, repair, or overhaul of such items (see 209.270).

■ 5. Subpart 246.5 is added to read as follows:

#### Subpart 246.5—Acceptance

Sec.

246.504 Certificate of conformance.

##### 246.504 Certificate of conformance.

Before authorizing a certificate of conformance for aviation critical safety items, obtain the concurrence of the head of the design control activity (see 209.270).

[FR Doc. 04-21014 Filed 9-16-04; 8:45 am]

BILLING CODE 5001-08-P

#### DEPARTMENT OF DEFENSE

##### 48 CFR Parts 225 and 252

[DFARS Case 2003-D099]

##### Defense Federal Acquisition Regulation Supplement; Berry Amendment Changes

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

**SUMMARY:** DoD has adopted as final, without change, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Sections 826 and 827 of the National Defense Authorization Act for Fiscal Year 2004. Sections 826 and 827 provide exceptions to the domestic source requirements of the Berry Amendment. Section 826 applies to the acquisition of food, specialty metals, and hand or measuring tools needed to support contingency operations or to fulfill other urgent requirements. Section 827 applies to the acquisition of waste and byproducts of cotton or wool fiber for use in the production of propellants and explosives.

**EFFECTIVE DATE:** September 17, 2004.

**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 2003-D099.

##### SUPPLEMENTARY INFORMATION:

##### A. Background

DoD published an interim rule at 69 FR 26508 on May 13, 2004, to implement Sections 826 and 827 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136). The rule amended DFARS 225.7002-2

and 252.225-7012 to provide new exceptions to the domestic source requirements of the Berry Amendment (10 U.S.C. 2533a), as authorized by Sections 826 and 827 of Public Law 108-136. DoD received no comments on the interim rule. Therefore, DoD has adopted the interim rule as a final rule without change.

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 the exceptions to domestic source requirements authorized by the rule are limited to acquisitions of (1) Food, specialty metals, and hand or measuring tools needed to support contingency operations or to fulfill other urgent requirements; and (2) waste and byproducts of cotton or wool fiber for use in the production of propellants and explosives.

##### 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 225 and 252

Government procurement.

##### Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR parts 225 and 252, which was published at 69 FR 26508 on May 13, 2004, is adopted as a final rule without change.

Michele P. Peterson,

*Executive Editor, Defense Acquisition Regulations Council.*

[FR Doc. 04-21020 Filed 9-16-04; 8:45 am]

BILLING CODE 5001-08-P

#### 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: Final rule.

**SUMMARY:** DoD has adopted as final, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement DoD Appropriations Act provisions pertaining to the Indian Incentive Program. The Program permits incentive payments to contractors, and subcontractors at any tier, that use Indian organizations, Indian-owned economic enterprises, and Native Hawaiian small business concerns as subcontractors.

**EFFECTIVE DATE:** September 17, 2004.

**FOR FURTHER INFORMATION CONTACT:** Ms. Donna Hairston-Benford, Defense Acquisition Regulations Council, OUSD (AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0289; facsimile (703) 602-0350. Please cite DFARS Case 2002-D033.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

DoD published an interim rule at 68 FR 56561 on October 1, 2003, to implement Section 8021 of the DoD Appropriations Act for Fiscal Year 2003 (Public Law 107-248). Section 8021 revised 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 of the DoD Appropriations Act for Fiscal Year 2004 (Public Law 108-87) and Section 8021 of the DoD Appropriations Act for Fiscal Year 2005 (Public Law 108-287) contain similar provisions.

Fourteen sources submitted comments on the interim rule. A discussion of the comments is provided below. Differences between the interim and final rules are addressed in the response to Comments 1 and 6.

1. *Comment:* Revise requirements for use of the Indian incentive clause at DFARS 252.226-7001, to require inclusion of the clause in all contracts and subcontracts exceeding \$500,000, instead of the present requirement for inclusion of the clause in contracts and subcontracts exceeding \$500,000 when "subcontracting opportunities may exist." This change would eliminate the possibility that a subcontracting opportunity might be overlooked.

*DoD Response:* Concur. The recommended change has been made in the final rule at 226.104 and 252.226-7001(g).

2. *Comment:* The rule should include the statutory requirement for inclusion of the incentive clause in subcontracts exceeding \$500,000 at any tier.

*DoD Response:* The rule requires inclusion of the clause, including the flowdown requirement, in all subcontracts exceeding \$500,000. This covers all subcontracts exceeding \$500,000 at all tiers.

3. *Comment:* The \$500,000 threshold for inclusion of the incentive clause in contracts and subcontracts is restrictive and should be lowered to \$100,000 or less.

*DoD Response:* Do not concur. The \$500,000 threshold is consistent with the Appropriations Act provisions.

4. *Comment:* With regard to the requirement for subcontracted commercial items to be produced or manufactured in whole or in part by a Native firm, the phrase "produced or manufactured in whole or in part" should be clarified. Solutions offered were: Use of the manufacturing standards established by the North American Industry Classification System (NAICS) codes; use of a percentage such as that contained in the nonmanufacturer rule at FAR 19.102(f)(2); or a reference to the Small Business Administration regulations at 13 CFR 121.406.

*DoD Response:* Do not concur. Placing such a restriction on the eligibility of a subcontract awarded to a Native firm would be without statutory basis.

5. *Comment:* Can an Indian business provide a non-commercial item as a reseller for the actual manufacturer?

*DoD Response:* Neither the Appropriations Act provisions nor the DFARS rule place any manufacturing conditions on non-commercial items subcontracted under the Program.

6. *Comment:* The rule should clarify that Alaska Native Corporations are eligible for participation in Program.

*DoD Response:* The rule already provides for participation of Alaska Native Corporations, through the definitions of "Indian" and "Indian-owned economic enterprise" in the clause at 252.226-7001. Minor changes have been made to the definition of "Indian" to clarify this point.

7. *Comment:* Are businesses owned by individual Federally recognized American Indians eligible for participation in the Program, as well as those businesses owned by Federally recognized tribes and organizations?

*DoD Response:* Yes. The definitions at 252.226-7001 provide for participation by Indian-owned businesses that are individually owned or tribally owned.

8. *Comment:* The Indian Incentive Program should also be applied to DoD

Family Housing Privatization contracts. Presently, the incentive clause cannot be included in these contracts, because the privatization contracts are not considered DoD contracts.

*DoD Response:* This comment is outside the scope of the DFARS rule. Therefore, no change has been made to the rule as a result of this comment.

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 a final regulatory flexibility analysis. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows:

This rule amends the DFARS to implement Section 8021 of the DoD Appropriations Act for Fiscal Year 2003 (Public Law 107-248), Section 8021 of the DoD Appropriations Act for Fiscal Year 2004 (Public Law 108-87), and Section 8021 of the DoD Appropriations Act for Fiscal Year 2005 (Public Law 108-287) pertaining to the Indian Incentive Program. The Program permits incentive payments to contractors, and subcontractors at any tier, that use Indian organizations, Indian-owned economic enterprises, and Native Hawaiian small business concerns as subcontractors. DoD received no comments on the initial regulatory flexibility analysis. However, as a result of comments received on the interim rule, the final rule includes a change that prescribes use of the Indian incentive clause at DFARS 252.226-7001 in all contracts and subcontracts exceeding \$500,000, rather than in only those exceeding \$500,000 for which subcontracting opportunities are deemed to exist at the time of award of the contract or subcontract. The rule requires that maximum practicable opportunity be provided for Indian organizations, Indian-owned economic enterprises, and Native Hawaiian small business concerns to receive subcontract awards; and provides that a contractor or subcontractor that awards a subcontract to such an entity may receive an incentive payment of 5 percent of the amount of the subcontract. There are no practical alternatives that would accomplish the objectives of the applicable statutes.

### 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 226 and 252

Government procurement.

**Michele P. Peterson,**

*Executive Editor, Defense Acquisition Regulations Council.*

■ Accordingly, the interim rule amending 48 CFR parts 226 and 252, which was published at 68 FR 56561 on October 1, 2003, is adopted as a final rule with the following changes:

■ 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

##### 226.104 [Amended]

■ 2. Section 226.104 is amended by removing the phrase “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 “(SEP 2004)”; and

■ b. In paragraph (b) by revising 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 (SEP 2004) (Section 8021 of Public Law 107–248 and similar sections in subsequent DoD appropriations acts).

\* \* \* \* \*

■ 4. Section 252.226–7001 is amended as follows:

■ a. By revising the clause date to read “(SEP 2004)”; and

■ b. In paragraph (a) by revising the definition of “Indian”; and

■ c. By revising paragraph (g) to read as follows:

##### 252.226–7001 Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns.

\* \* \* \* \*

(a) \* \* \*

*Indian* means—

(1) 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

(2) Any “Native” as defined in the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*).

\* \* \* \* \*

(g) The Contractor shall insert the substance of this clause, including this paragraph (g), in all subcontracts exceeding \$500,000.

[FR Doc. 04–21015 Filed 9–16–04; 8:45 am]

BILLING CODE 5001–08–P

#### DEPARTMENT OF DEFENSE

##### 48 CFR Part 237

##### [DFARS Case 2003–D103]

##### Defense Federal Acquisition Regulation Supplement; Personal Services Contracts

**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 Sections 721 and 841 of the National Defense Authorization Act for Fiscal Year 2004. Section 721 provides permanent authority for DoD to enter into personal services contracts for health care at locations outside of DoD medical treatment facilities. Section 841 adds authority for DoD to enter into contracts for personal services that are to be performed outside the United States or that directly support the mission of a DoD intelligence or counter-intelligence organization or the special operations command.

**DATES:** *Effective date:* September 17, 2004.

*Comment date:* Comments on the interim rule should be submitted to the address shown below on or before November 16, 2004, to be considered in the formation of the final rule.

**ADDRESSES:** You may submit comments, identified by DFARS Case 2003–D103, 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](mailto:dfars@osd.mil). Include DFARS Case 2003–D103 in the subject line of the message.

• Fax: Primary: (703) 602–7887; Alternate: (703) 602–0350.

• Mail: Defense Acquisition Regulations Council, Attn: Ms. Teresa Brooks, 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:** Ms. Teresa Brooks, (703) 602–0326.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This interim rule amends DFARS Subpart 237.1 to implement Sections 721 and 841 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136).

Section 721 amends 10 U.S.C. 1091(a)(2) to provide permanent authority for DoD to enter into personal services contracts for health care at locations outside of DoD medical treatment facilities (such as military entrance processing stations). The law previously provided for this authority to expire on December 31, 2003.

Section 841 amends 10 U.S.C. 129b to add authority for DoD to enter into contracts for personal services that (1) are to be provided by individuals outside the United States to support DoD activities and programs outside the United States; (2) directly support the mission of a DoD intelligence or counter-intelligence organization; or (3) directly support the mission of the DoD special operations command. This authority applies if the services to be procured are urgent or unique and would not be practical to obtain by other means.

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