

relegation, to make such a domestic nonavailability determination:

(i) The Under Secretary of Defense (Acquisition, Technology, and Logistics).

(ii) The Secretary of the Army.

(iii) The Secretary of the Navy.

(iv) The Secretary of the Air Force.

(2) The supporting documentation for the determination shall include—

(i) An analysis of alternatives that would not require a domestic nonavailability determination; and

(ii) A written certification by the requiring activity, with specificity, why such alternatives are unacceptable.

(3) Defense agencies shall follow the procedures at PGI 225.7002-2(b)(3) when submitting a request for a domestic nonavailability determination.

(4) If an official listed in paragraph (b)(1)(ii) through (iv) of this subsection makes a domestic nonavailability determination for the acquisition of titanium or a product containing titanium, that official shall—

(i) Notify the congressional defense committees at least 10 days before the award of a contract that relies on such a determination; and

(ii) Provide a copy of the notification and the determination to the Director, Defense Procurement and Acquisition Policy, as specified in PGI 225.7002-2(b)(4).

(5) See PGI 225.7002-2(b)(5) for related policy memoranda.

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## DEPARTMENT OF DEFENSE

### 48 CFR Part 231

[DFARS Case 2004-D026]

#### Defense Federal Acquisition Regulation Supplement; Business Restructuring Costs—Delegation of Authority To Make Determinations Relating to Payment

**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 819 of the National Defense Authorization Act for Fiscal Year 2005. Section 819 contains changes concerning delegation of authority to make determinations relating to payment of defense contractors for business restructuring costs.

**DATES:** *Effective date:* July 26, 2005.

*Comment date:* Comments on the interim rule should be submitted to the address shown below on or before September 26, 2005 to be considered in the formation of the final rule.

**ADDRESSES:** You may submit comments, identified by DFARS Case 2004-D026, 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 2004-D026 in the subject line of the message.

- Fax: (703) 602-0350.

- Mail: Defense Acquisition Regulations Council, Attn: Mr. Bill Sain, 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:** Mr. Bill Sain, (703) 602-0293.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

10 U.S.C. 2325(a)(1), Limitation on Payment of Restructuring Costs, prohibits DoD from reimbursing a defense contractor for restructuring costs arising from a business combination that occurs after November 18, 1997, unless the Secretary of Defense determines in writing either: (i) That the amount of projected savings for DoD associated with the restructuring will be at least twice the amount of the costs allowed; or (ii) that the amount of projected savings for DoD associated with the restructuring will exceed the amount of the costs allowed and that the business combination will result in the preservation of a critical capability that otherwise might be lost to DoD.

10 U.S.C. 2325(a)(2) previously prohibited the Secretary of Defense from delegating the authority to make such written savings determinations below the level of an Assistant Secretary of Defense. The Secretary of Defense delegated the authority to make such determinations to the Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L)), or his Principal Deputy. Section 819 of the National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375) amended 10 U.S.C. 2325(a)(2) to permit

the Director of the Defense Contract Management Agency to make the required written determination of savings when restructuring costs are expected to be less than \$25 million over a 5-year period.

To implement Section 819, this interim rule adds paragraph (c)(4)(ii) to DFARS 231.205-70, External restructuring costs. The rule also makes changes to DFARS 231.205-70(b)(4), (c), and (e)(6) to remove unnecessary references to USD(AT&L) certifications for pre-November 19, 1997, business combinations; and makes editorial changes to DFARS 231.205-70(e)(6) to clarify the existing requirement for projected restructuring costs and savings to be computed on a present value basis.

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 Flexibility Act, 5 U.S.C. 601, *et seq.*, because the cost principle addressed in this rule applies only to DoD contractors that incur restructuring costs for external restructuring activities. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subpart in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2004-D026.

##### 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 819 of the National Defense Authorization Act for Fiscal Year 2005 (Pub. L. 108-375). Section 819 amended 10 U.S.C. 2325 to permit delegation of authority to the Director of the Defense Contract Management Agency for determinations relating to payment of

defense contractors for business restructuring costs. Section 819 became effective upon enactment on October 28, 2004. Comments received in response to this interim rule will be considered in the formation of the final rule.

#### List of Subjects in 48 CFR Part 231

Government procurement.

**Michele P. Peterson,**

*Editor, Defense Acquisition Regulations System.*

■ Therefore, 48 CFR part 231 is amended as follows:

#### PART 231—CONTRACT COST PRINCIPLES AND PROCEDURES

■ 1. The authority citation for 48 CFR part 231 continues to read as follows:

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

■ 2. Section 231.205–70 is amended as follows:

- a. In paragraph (b)(4) by revising the last sentence; and
- b. By revising paragraph (c), the heading of paragraph (e), and paragraph (e)(6) to read as follows:

#### 231.205–70 External restructuring costs.

\* \* \* \* \*

(b) \* \* \*

(4) \* \* \* For purposes of this definition, if restructuring costs associated with external restructuring activities allocated to DoD contracts are less than \$2.5 million, the costs shall not be subject to the audit, review, and determination requirements of paragraph (c)(4) of this subsection; instead, the normal rules for determining cost allowability in accordance with FAR part 31 shall apply.

\* \* \* \* \*

(c) *Limitations on cost allowability.* Restructuring costs associated with external restructuring activities shall not be allowed unless—

- (1) Such costs are allowable in accordance with FAR part 31 and DFARS part 231;
- (2) An audit of projected restructuring costs and restructuring savings is performed;
- (3) The cognizant administrative contracting officer (ACO) reviews the audit report and the projected costs and projected savings, and negotiates an advance agreement in accordance with paragraph (d) of this subsection; and
- (4)(i) The official designated in paragraph (c)(4)(ii) of this subsection determines in writing that the audited projected savings, on a present value basis, for DoD resulting from the restructuring will exceed either—

(A) The costs allowed by a factor of at least two to one; or

(B) The costs allowed, and the business combination will result in the preservation of a critical capability that might otherwise be lost to DoD.

(ii)(A) If the amount of restructuring costs is expected to exceed \$25 million over a 5-year period, the designated official is the Under Secretary of Defense (Acquisition, Technology, and Logistics) or the Principal Deputy. This authority may not be delegated below the level of an Assistant Secretary of Defense.

(B) For all other cases, the designated official is the Director of the Defense Contract Management Agency. The Director may not delegate this authority.

\* \* \* \* \*

(e) *Information needed to obtain a determination.*

\* \* \* \* \*

(6) The cognizant ACO's recommendation for a determination. This recommendation must clearly indicate one of the following, consistent with paragraph (c)(4)(i) of this subsection:

(i) The audited projected savings for DoD will exceed the costs allowed by a factor of at least two to one on a present value basis.

(ii) The business combination will result in the preservation of a critical capability that might otherwise be lost to DoD, and the audited projected savings for DoD will exceed the costs allowed on a present value basis.

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#### DEPARTMENT OF COMMERCE

#### National Oceanic and Atmospheric Administration

#### 50 CFR Part 229

[Docket No. 030221039–5193–22; I.D. 071905D]

#### Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan (ALWTRP)

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Temporary rule.

**SUMMARY:** The Assistant Administrator for Fisheries (AA), NOAA, announces temporary restrictions consistent with the requirements of the ALWTRP's

implementing regulations. These regulations apply to lobster trap/pot and anchored gillnet fishermen in an area totaling approximately 2,980 nm<sup>2</sup> (10,221 km<sup>2</sup>) in July, and 3,120 nm<sup>2</sup> (10,221 km<sup>2</sup>) in August, southeast of Chatham, MA for 15 days. The purpose of this action is to provide protection to an aggregation of northern right whales (right whales).

**DATES:** Effective beginning at 0001 hours July 28, 2005, through 2400 hours August 11, 2005.

**ADDRESSES:** Copies of the proposed and final Dynamic Area Management (DAM) rules, Environmental Assessments (EAs), Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, and progress reports on implementation of the ALWTRP may also be obtained by writing Diane Borggaard, NMFS/Northeast Region, One Blackburn Drive, Gloucester, MA 01930.

**FOR FURTHER INFORMATION CONTACT:** Diane Borggaard, NMFS/Northeast Region, 978–281–9300 x6503; or Kristy Long, NMFS, Office of Protected Resources, 301–713–1401.

#### SUPPLEMENTARY INFORMATION:

#### Electronic Access

Several of the background documents for the ALWTRP and the take reduction planning process can be downloaded from the ALWTRP web site at <http://www.nero.noaa.gov/whaletrpl/>.

#### Background

The ALWTRP was developed pursuant to section 118 of the Marine Mammal Protection Act (MMPA) to reduce the incidental mortality and serious injury of three endangered species of whales (right, fin, and humpback) due to incidental interaction with commercial fishing activities. In addition, the measures identified in the ALWTRP would provide conservation benefits to a fourth species (minke), which are neither listed as endangered nor threatened under the Endangered Species Act (ESA). The ALWTRP, implemented through regulations codified at 50 CFR 229.32, relies on a combination of fishing gear modifications and time/area closures to reduce the risk of whales becoming entangled in commercial fishing gear (and potentially suffering serious injury or mortality as a result).

On January 9, 2002, NMFS published the final rule to implement the ALWTRP's DAM program (67 FR 1133). On August 26, 2003, NMFS amended the regulations by publishing a final rule, which specifically identified gear modifications that may be allowed in a