

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Part 225**

RIN 0750-AF23

Defense Federal Acquisition Regulation Supplement; Buy American Act Exemption for Commercial Information Technology (DFARS Case 2005-D011)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement provisions of annual appropriations acts that authorize an exemption from the Buy American Act for the acquisition of commercial information technology.

DATES: *Effective Date:* October 4, 2006.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, Defense Acquisition Regulations System, OUSD(AT&L)DPAP(DARS), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0328; facsimile (703) 602-0350. Please cite DFARS Case 2005-D011.

SUPPLEMENTARY INFORMATION:**A. Background**

Section 535 of Division F of the Consolidated Appropriations Act, 2004 (Pub. L. 108-199); Section 517 of Division H of the Consolidated Appropriations Act, 2005 (Pub. L. 108-447); and Section 717 of the Consolidated Appropriations Act, 2006 (Pub. L. 109-115) provide an exemption from the Buy American Act for the acquisition of information technology that is a commercial item. This final rule amends the acquisition procedures in DFARS Part 225 to reflect the exemption, which previously had been implemented through the issuance of annual DoD-wide class deviations.

DoD published a proposed rule at 71 FR 18694 on April 12, 2006. Five sources submitted comments on the proposed rule. Three of the respondents supported the rule. A discussion of the other comments is provided below.

1. *Comment.* One respondent recommended that application of the Buy American Act restrictions to non-sensitive electrical and electronic products be reevaluated in the context of both the increasingly global economy and potential savings to the Government.

DoD Response. Revision of the application of the Buy American Act to electrical/electronic products would require statutory change and, therefore, is outside the scope of this DFARS case.

2. *Comment.* One respondent requested that the rule clearly apply as an exemption to the Berry Amendment requirements of the clause at DFARS 252.225-7014, Preference for Domestic Specialty Metals, for commercial information technology.

DoD Response. The appropriations act provisions contain authority only for an exemption from the Buy American Act (41 U.S.C. 10a-d). Therefore, DoD is unable to adopt this recommendation for an exemption from the Berry Amendment (10 U.S.C. 2533a).

3. *Comment.* One respondent disagreed with the rule, due to the security risk associated with foreign entities potentially gaining access to DoD information systems.

DoD Response. The policy in the rule is required by statute. The appropriations act provisions state that the restrictions of the Buy American Act "shall not apply" to the acquisition of information technology that is a commercial item. This policy has been in effect since May 2004, through the issuance of annual DoD-wide class deviations. Security of information technology is addressed in DFARS Subpart 239.71, which requires agencies to ensure that information assurance is provided for information technology in accordance with current policies, procedures, and statutes, to include—

- (1) The National Security Act;
- (2) The Clinger-Cohen Act;
- (3) National Security

Telecommunications and Information Systems Security Policy No. 11;

- (4) Federal Information Processing Standards;

(5) DoD Directive 8500.1, Information Assurance; and

- (6) DoD Instruction 8500.2,

Information Assurance Implementation. Therefore, DoD has adopted the proposed 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 has prepared a final regulatory flexibility analysis consistent with 5 U.S.C. 604. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows:

This final rule amends the DFARS to implement provisions of annual appropriations acts that authorize an

exemption from the Buy American Act for the acquisition of information technology that is a commercial item. The objective of the rule is to promote Government access to commercial information technology, by eliminating the application of domestic source requirements to the acquisition of such information technology. The rule applies to (1) All offerors responding to DoD solicitations for commercial information technology where the Buy American Act previously applied (generally, acquisitions between the micropurchase threshold of \$2,500 and the World Trade Organization Government Procurement Agreement (WTO GPA) threshold of \$193,000); and (2) manufacturers of components of commercial information technology products. Based on DD Form 350, Individual Contracting Action Report, data for Product Service Codes 7010 through 7050, which include ADP Equipment Software, Supplies, and Support Equipment, DoD awarded approximately 8,170 contracts to small business concerns for the acquisition of commercial information technology during fiscal year 2005. Of those contracts, 7,850 were under \$175,000, which was the WTO GPA threshold in 2005. The potential negative impact of increased competition from offerors of foreign products is expected to have minimal impact in the range of \$2,500 to \$100,000, because these awards are generally set aside for small business concerns. Furthermore, there will be a positive impact due to a reduction in administrative burden, since offerors and contractors will no longer need to track the origin of components to determine if an information technology product complies with Buy American Act requirements. The DD Form 350 system does not provide data at the subcontract level. However, manufacturers of domestic components of information technology products may face increased competition from manufacturers of foreign components as a result of this rule. There are no practical alternatives that would accomplish the objectives of the statutory requirements.

C. Paperwork Reduction Act

This rule will reduce the information collection requirements that have been approved by the Office of Management and Budget, under Control Number 0704-0229, for use through May 31, 2007. Under this clearance, 36,175 annual burden hours have been approved for the provision at DFARS 252.225-7000, Buy American Act—Balance of Payments Program Certificate; and 1,000 annual burden

hours have been approved for the provision at DFARS 252.225-7035, Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate. DoD estimates that the rule will result in a 5 percent reduction in the burden hours for the provision at DFARS 252.225-7000 (1,800 hours) and a 50 percent reduction in the burden hours for the provision at DFARS 252.225-7035 (500 hours).

List of Subjects in 48 CFR Part 225

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR Part 225 is amended as follows:

PART 225—FOREIGN ACQUISITION

■ 1. The authority citation for 48 CFR Part 225 continues to read as follows:

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

■ 2. Section 225.1101 is amended by revising paragraph (2)(iii), paragraph (10)(i) introductory text, and paragraph (10)(ii) to read as follows:

§ 225.1101 Acquisition of supplies.

* * * * *

(2) * * *

(iii) An exception to the Buy American Act or Balance of Payments Program applies (see FAR 25.103, 225.103, and 225.7501); or

* * * * *

(10)(i) Except as provided in paragraph (10)(ii) of this section, use the clause at 252.225-7036, Buy American Act—Free Trade Agreements—Balance of Payments Program, instead of the clause at FAR 52.225-3, Buy American Act—Free Trade Agreements—Israeli Trade Act, in solicitations and contracts for the items listed at 225.401-70, when the estimated value equals or exceeds \$25,000, but is less than \$193,000, and a Free Trade Agreement applies to the acquisition.

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(ii) Do not use the clause if—

(A) Purchase from foreign sources is restricted (see 225.401(a)(2)), unless the contracting officer anticipates a waiver of the restriction; or

(B) Acquiring information technology that is a commercial item, using fiscal year 2004 or subsequent funds (Section 535 of Division F of the Consolidated Appropriations Act, 2004 (Pub. L. 108-199), and the same provision in subsequent appropriations acts).

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■ 3. Section 225.7501 is amended by revising paragraphs (a)(2)(iv) and (v)

and adding paragraph (a)(2)(vi) to read as follows:

§ 225.7501 Policy.

* * * * *

(a) * * *

(2) * * *

(iv) An industrial gas;

(v) A brand drug specified by the Defense Medical Materiel Board; or

(vi) Information technology that is a commercial item, using fiscal year 2004 or subsequent funds (Section 535 of Division F of the Consolidated Appropriations Act, 2004 (Pub. L. 108-199), and the same provision in subsequent appropriations acts);

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[FR Doc. E6-16401 Filed 10-3-06; 8:45 am]

BILLING CODE 5001-08-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 236

RIN 0750-AF41

Defense Federal Acquisition Regulation Supplement; Congressional Notification of Architect-Engineer Services/Military Family Housing Contracts (DFARS Case 2006-D015)

AGENCY: Defense Acquisition Regulations System, 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 1031(a)(37) of the National Defense Authorization Act for Fiscal Year 2004. Section 1031(a)(37) amended the requirements for submission of a notification to Congress before the award of a contract for architectural and engineering services or construction design in connection with military construction, military family housing, or restoration or replacement of damaged or destroyed facilities.

DATES: *Effective date:* October 4, 2006.

Comment date: Comments on the interim rule should be submitted in writing to the address shown below on or before December 4, 2006, to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2006-D015, using any of the following methods:

• *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

• *E-mail:* dfars@osd.mil. Include DFARS Case 2006-D015 in the subject line of the message.

• *Fax:* (703) 602-0350.

• *Mail:* Defense Acquisition Regulations System, Attn: Ms. Debra Overstreet, OUSD(AT&L)DPAP(DARS), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062.

• *Hand Delivery/Courier:* Defense Acquisition Regulations System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202-3402.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Debra Overstreet, (703) 602-0310.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule revises DFARS 236.601 to implement Section 1031(a)(37) of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136). Section 1031(a)(37) amended the requirements at 10 U.S.C. 2807, for submission of a notification to Congress before the award of a contract for architectural and engineering services or construction design in connection with military construction, military family housing, or restoration or replacement of damaged or destroyed facilities. The amendments increased the contract dollar threshold for submission from \$500,000 to \$1,000,000; and reduced the time period for submission, from 21 to 14 days before obligation of funds, when the notification is provided in electronic medium.

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 rule relates to reporting requirements that are internal to the Government. 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