

**DEPARTMENT OF DEFENSE****Defense Acquisition Regulations System****48 CFR Part 209**

RIN 0750-AF97

**Defense Federal Acquisition Regulation Supplement; Clean Air Act and Clean Water Act Exemptions (DFARS Case 2007-D022)**

**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 address the procedures that apply when it is necessary to award to a contractor that is otherwise excluded from Federal procurement programs due to a violation of the Clean Air Act or the Clean Water Act.

**DATES:** *Effective Date:* January 15, 2009.

**FOR FURTHER INFORMATION CONTACT:** Ms. Angie Sawyer, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone 703-602-8384; facsimile 703-602-7887. Please cite DFARS Case 2007-D022.

**SUPPLEMENTARY INFORMATION:****A. Background**

The List of Parties Excluded from Federal Procurement and Nonprocurement Programs, maintained by the General Services Administration, identifies contractor facilities where no part of a Federal contract or subcontract may be performed due to a violation of the Clean Air Act (42 U.S.C. 7606) or the Clean Water Act (33 U.S.C. 1368). In accordance with Executive Order 11738, the head of a Federal agency may grant an exemption permitting award to a contractor using an otherwise ineligible facility, if the head of the agency determines that the exemption is in the paramount interest of the United States. This final rule amends the procedures specified in the DFARS for processing such an exemption, to more closely align with the requirements of Executive Order 11738.

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 under 41 U.S.C. 418b 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 2007-D022.

**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 209**

Government procurement.

**Michele P. Peterson,**

*Editor, Defense Acquisition Regulations System.*

■ Therefore, 48 CFR part 209 is amended as follows:

**PART 209—CONTRACTOR QUALIFICATIONS**

■ 1. The authority citation for 48 CFR part 209 continues to read as follows:

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

■ 2. Section 209.405 is amended by revising paragraph (b) to read as follows:

**209.405 Effect of listing.**

\* \* \* \* \*

(b)(i) The Procurement Cause and Treatment Code "H" annotation in the GSA List of Parties Excluded from Federal Procurement and Nonprocurement Programs identifies contractor facilities where no part of a contract or subcontract may be performed because of a violation of the Clean Air Act (42 U.S.C. 7606) or the Clean Water Act (33 U.S.C. 1368).

(ii) Under the authority of Section 8 of Executive Order 11738, the agency head may grant an exemption permitting award to a contractor using a Code "H" ineligible facility if the agency head determines that such an exemption is in the paramount interest of the United States.

(A) The agency head may delegate this exemption authority to a level no lower than a general or flag officer or a member of the Senior Executive Service.

(B) The official granting the exemption—

(1) Shall promptly notify the Environmental Protection Agency suspending and debaring official of the exemption and the corresponding justification; and

(2) May grant a class exemption only after consulting with the Environmental Protection Agency suspending and debaring official.

(C) Exemptions shall be for a period not to exceed one year. The continuing necessity for each exemption shall be reviewed annually and, upon the making of a new determination, may be extended for periods not to exceed one year.

(D) All exemptions must be reported annually to the Environmental Protection Agency suspending and debaring official.

(E) See PGI 209.405 for additional procedures and information.

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**DEPARTMENT OF DEFENSE****Defense Acquisition Regulations System****48 CFR Part 209**

RIN 0750-AG20

**Defense Federal Acquisition Regulation Supplement; Responsible Prospective Contractors (DFARS Case 2008-D022)**

**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 address use of the Past Performance Information Retrieval System (PPIRS) in determining contractor responsibility. PPIRS is a Web-based application that stores information regarding contractor performance on Government contracts.

**DATES:** *Effective Date:* January 15, 2009.

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael Benavides, Defense Acquisition Regulations System, OUSD(AT&L)DPAP(DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone 703-602-1302; facsimile 703-602-7887. Please cite DFARS Case 2008-D022.

**SUPPLEMENTARY INFORMATION:****A. Background**

This final rule adds text at DFARS 209.105-1 to address use of PPIRS (available at <http://www.ppirs.gov>) in meeting requirements for determining contractor responsibility. The rule emphasizes that use of PPIRS information regarding contract

termination for cause or default is just one consideration in making a determination of contractor responsibility.

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 under 41 U.S.C. 418b 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 2008–D022.

### 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 209

Government procurement.

**Michele P. Peterson,**  
*Editor, Defense Acquisition Regulations System.*

■ Therefore, 48 CFR part 209 is amended as follows:

#### PART 209—CONTRACTOR QUALIFICATIONS

■ 1. The authority citation for 48 CFR part 209 continues to read as follows:

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

■ 2. Section 209.105–1 is revised to read as follows:

##### 209.105–1 Obtaining information.

(1) For guidance on using the Excluded Parties List System, see PGI 209.105–1.

(2) A satisfactory performance record is a factor in determining contractor responsibility (*see* FAR 9.104–1(c)). One source of information relating to contractor performance is the Past Performance Information Retrieval System (PPIRS), available at <http://www.ppirs.gov>. Information relating to contract terminations for cause and for default is also available through PPIRS (*see* PGI 212.403(c) and PGI 249.470). This termination information is just one

consideration in determining contractor responsibility.

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Part 212

RIN 0750–AG17

#### Defense Federal Acquisition Regulation Supplement; Pilot Program for Transition to Follow-On Contracting After Use of Other Transaction Authority (DFARS Case 2008–D030)

**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 824 of the National Defense Authorization Act for Fiscal Year 2009. Section 824 amended the DoD pilot program for transition to follow-on contracting after use of other transaction authority, to establish a new program expiration date and to include items developed under research projects within the scope of the program.

**DATES:** *Effective date:* January 15, 2009.

*Comment date:* Comments on the interim rule should be submitted in writing to the address shown below on or before March 16, 2009, to be considered in the formation of the final rule.

**ADDRESSES:** You may submit comments, identified by DFARS Case 2008–D030, using any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *E-mail:* [dfars@osd.mil](mailto:dfars@osd.mil). Include DFARS Case 2008–D030 in the subject line of the message.
- *Fax:* 703–602–7887.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Angie Sawyer, OUSD(AT&L)DPAP(DARS), IMD 3D139, 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](http://www.regulations.gov), including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** Ms. Angie Sawyer, 703–602–8384.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This interim rule amends the DoD pilot program addressed in DFARS Subpart 212.70, Pilot Program for Transition to Follow-On Contracting After Use of Other Transaction Authority. The pilot program implements Section 845(e) of the National Defense Authorization Act for Fiscal Year 1994 (10 U.S.C. 2371 note), and provides that certain items that do not otherwise meet the definition of “commercial item” may be treated as commercial items in the award of contracts and subcontracts that follow an other transaction agreement. Section 824 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417) amended the authority for the pilot program to establish a new program expiration date of September 30, 2010, and to add items developed under research projects in accordance with 10 U.S.C. 2371 to the types of items to which the program applies.

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.* Although the rule is expected to ease the transition of nontraditional defense contractors from the use of other transaction agreements to standard contracts, the economic impact is not expected to be substantial. 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 2008–D030.

##### 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.*