

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

## PART 202—DEFINITIONS OF WORDS AND TERMS

■ 2. Section 202.101 is amended by adding a definition of *General public and non-governmental entities* in alphabetical order to read as follows:

### 202.101 Definitions.

\* \* \* \* \*

*General public and non-governmental entities*, as used in the definition of *commercial item* at FAR 2.101, do not include the Federal Government or a State, local, or foreign government (Pub. L. 110–181, Section 815(b)).

\* \* \* \* \*

## PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 3. Section 212.207 is added to read as follows:

### 212.207 Contract type.

(b) In accordance with Section 805 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181), use of time-and-materials and labor-hour contracts for the acquisition of commercial items is authorized only for the following:

(i) Services acquired for support of a commercial item.

(ii) Emergency repair services.

(iii) Any other commercial services only to the extent that the head of the agency concerned approves a written determination by the contracting officer that—

(A) The services to be acquired are commercial;

(B) If the services to be acquired are subject to FAR 15.403–1(c)(3)(ii), the offeror of the services has submitted sufficient information in accordance with that subsection;

(C) Such services are commonly sold to the general public through use of time-and-materials or labor-hour contracts; and

(D) The use of a time-and-materials or labor-hour contract type is in the best interest of the Government.

## PART 234—MAJOR SYSTEM ACQUISITION

■ 4. Section 234.7002 is revised to read as follows:

### 234.7002 Policy.

(a) *Major weapon systems.* (1) A DoD major weapon system may be treated as a commercial item, or acquired under procedures established for the acquisition of commercial items, only if—

(i) The Secretary of Defense determines that—

(A) The major weapon system is a commercial item as defined in FAR 2.101; and

(B) Such treatment is necessary to meet national security objectives;

(ii) The offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for such a system; and

(iii) The congressional defense committees are notified at least 30 days before such treatment or acquisition occurs. Follow the procedures at PGI 234.7002.

(2) The authority of the Secretary of Defense to make a determination under paragraph (a)(1) of this section may not be delegated below the level of the Deputy Secretary of Defense.

(b) *Subsystems.* A subsystem of a major weapon system (other than a commercially available off-the-shelf item) may be treated as a commercial item and acquired under procedures established for the acquisition of commercial items only if—

(1) The subsystem is intended for a major weapon system that is being acquired, or has been acquired, under procedures established for the acquisition of commercial items in accordance with paragraph (a) of this section; or

(2) The contracting officer determines in writing that—

(i) The subsystem is a commercial item; and

(ii) The offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for the subsystem.

(c) *Components and spare parts.* (1) A component or spare part for a major weapon system (other than a commercially available off-the-shelf item) may be treated as a commercial item only if—

(i) The component or spare part is intended for—

(A) A major weapon system that is being acquired, or has been acquired, under procedures established for the acquisition of commercial items in accordance with paragraph (a) of this section; or

(B) A subsystem of a major weapon system that is being acquired, or has been acquired, under procedures established for the acquisition of commercial items in accordance with paragraph (b) of this section; or

(ii) The contracting officer determines in writing that—

(A) The component or spare part is a commercial item; and

(B) The offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for the component or spare part.

(2) This paragraph (c) shall apply only to components and spare parts that are acquired by DoD through a prime contract or a modification to a prime contract, or through a subcontract under a prime contract or modification to a prime contract on which the prime contractor adds no, or negligible, value.

(d) *Relevant information.* To the extent necessary to make a determination under paragraph (a)(1)(ii), (b)(2), or (c)(1)(ii) of this section, the contracting officer may request the offeror to submit—

(1) Prices paid for the same or similar commercial items under comparable terms and conditions by both Government and commercial customers; and

(2) Other relevant information regarding the basis for price or cost, including information on labor costs, material costs, and overhead rates, if the contracting officer determines that the information described in paragraph (d)(1) of this section is not sufficient to determine price reasonableness.

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 204, 219, 225, and 252

#### Defense Federal Acquisition Regulation Supplement; Technical Amendments

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

**ACTION:** Final rule.

**SUMMARY:** DoD is making technical amendments to the Defense Federal Acquisition Regulation Supplement (DFARS) to update references within the DFARS text.

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

**FOR FURTHER INFORMATION CONTACT:** Ms. Michele Peterson, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone 703–602–0311; facsimile 703–602–7887.

**SUPPLEMENTARY INFORMATION:** This final rule amends DFARS text as follows:

- 204.7202–2, 219.708, 219.1204, and 225.1101. Updates cross-references.

- 225.301–4. Adds a reference to a DoD Web site.
- 252.225–7040. Updates a reference to a DoD publication.

#### List of Subjects in 48 CFR Parts 204, 219, 225, and 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR Parts 204, 219, 225, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR Parts 204, 219, 225, and 252 continues to read as follows:

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

#### PART 204—ADMINISTRATIVE MATTERS

■ 2. Section 204.7202–2 is revised to read as follows:

##### 204.7202–2 DUNS numbers.

Requirements for use of DUNS numbers are in FAR 4.605(b) and 4.607(a).

#### PART 219—SMALL BUSINESS PROGRAMS

##### 219.708 [Amended]

■ 3. Section 219.708 is amended in paragraphs (b)(2) and (c)(1) by removing “219.702(a)” and adding in its place “219.702”.

##### 219.1204 [Amended]

■ 4. Section 219.1204 is amended in paragraph (c), in the last sentence, by removing “219.702(a)” and adding in its place “219.702”.

#### PART 225—FOREIGN ACQUISITION

■ 5. Section 225.301–4 is amended in paragraph (2) by revising the last sentence to read as follows:

##### 225.301–4 Contract clause.

\* \* \* \* \*

(2) \* \* \* Information on the SPOT system is available at <http://www.dod.mil/bta/products/spot.html> and <http://www.acq.osd.mil/log/PS/spot.html>.

##### 225.1101 [Amended]

■ 6. Section 225.1101 is amended in paragraph (11)(i) introductory text by removing “paragraph (10)” and adding in its place “paragraph (11)”.

#### PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

##### 252.225–7040 [Amended]

■ 7. Section 252.225–7040 is amended as follows:

■ a. By revising the clause date to read “(JUL 2009)” and

■ b. In paragraph (n)(2) by removing “DoD Directive 2310.2, Personnel Recovery” and adding in its place “DoD Directive 3002.01E, Personnel Recovery in the Department of Defense”.

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#### DEPARTMENT OF DEFENSE

#### Defense Acquisition Regulations System

##### 48 CFR Part 207

##### RIN 0750–AF39

#### Defense Federal Acquisition Regulation Supplement; Lease of Vessels, Aircraft, and Combat Vehicles (DFARS Case 2006–D013)

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 statutory provisions relating to the leasing of vessels, aircraft, and combat vehicles. The rule applies to long-term leases and charters and to contracts with a substantial termination liability.

DATES: Effective Date: July 15, 2009.

FOR FURTHER INFORMATION CONTACT: Ms. Cassandra Freeman, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone 703–602–8383; facsimile 703–602–7887. Please cite DFARS Case 2006–D013.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

10 U.S.C. 2401, as amended by Section 815 of the National Defense Authorization Act for Fiscal Year 2006 (Pub. L. 109–163), permits a military department to award a long-term lease or charter, or a contract with a substantial termination liability, for a vessel, aircraft, or combat vehicle, only if the Secretary of the military department is specifically authorized by law to award the contract and provides

the appropriate notifications to the congressional defense committees.

Prior to the enactment of Public Law 109–163, the provisions of 10 U.S.C. 2401 applied to vessels and aircraft. Section 815 of Public Law 109–163 amended 10 U.S.C. 2401 to also include combat vehicles.

DoD published a proposed rule at 72 FR 28662 on May 22, 2007, to address the provisions of 10 U.S.C. 2401. Five sources submitted comments on the proposed rule. A discussion of the comments is provided below.

1. *Comment:* The proposed rule unduly applies its requirements to all leases and charters instead of only long-term leases and charters.

*DoD Response:* The rule has been amended to clarify that its requirements apply only to long-term leases and charters, and to contracts that provide for a substantial termination liability, consistent with the statutory provisions.

2. *Comment:* One respondent stated that the approval authority specified in the proposed rule (head of the agency) is not consistent with the approval authority specified in the statute (Secretary of the military department). Another respondent recommended delegation of the approval authority to the head of the contracting activity, to be consistent with the implementation of 10 U.S.C. 2401a at DFARS 207.470, for approval of leases and charters with terms of 18 months or more.

*DoD Response:* The final rule specifies the Secretary of the military department as the approval authority, consistent with 10 U.S.C. 2401. However, in accordance with FAR 1.108(b), the Secretary of the military department may delegate this authority as deemed appropriate.

3. *Comment:* The term “similar agreement” should be deleted from the rule, since this term is not defined in the DFARS or in the statute.

*DoD Response:* The term has been excluded from the final rule.

4. *Comment:* The rule should identify under what circumstances DoD can lease vessels, aircraft, and combat vehicles and how the decision to lease should be determined. In addition, the rule should include the definitions of the terms “long-term lease” and “substantial termination liability” found in 10 U.S.C. 2401(d).

*DoD Response:* The recommended changes have not been adopted. The rule is intended to inform contracting officers of the requirements of 10 U.S.C. 2401, but is not intended to address all aspects of leasing. Leasing is a highly specialized area that requires close coordination between the contracting officer and legal counsel.