

substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* because most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive fixed-price basis and do not utilize award-fee type incentives. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2006–D021) in correspondence.

### 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 216 and 252

Government procurement.

**Ynette R. Shelkin,**

*Editor, Defense Acquisition Regulations System.*

Therefore, DoD proposes to amend 48 CFR parts 216 and 252 as follows:

1. The authority citation for 48 CFR parts 216 and 252 continues to read as follows:

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

### PART 216—TYPES OF CONTRACTS

2. Add sections 216.401 and 216.401–70 to read as follows:

#### 216.401 General.

(e) Award-fee plans required in FAR 16.401(e) must be incorporated into all award-fee type contracts.

#### 216.401–70 Objective criteria.

(1) Contracting officers will use objective criteria to the maximum extent possible to measure contract performance. Objective criteria are associated with cost-plus-incentive-fee and fixed-price incentive contracts.

(2) When objective criteria exist but the contracting officer determines that it is in the best interest of the Government also to incentivize subjective elements of performance, the most appropriate contract type is a multiple-incentive contract containing both objective

incentives and subjective award-fee criteria (*i.e.*, cost-plus-incentive-fee/award-fee or fixed-price-incentive/award-fee).

(3) See PGI 216.401–70 for guidance on the use of award-fee contracts.

3. Revise section 216.405–2 to read as follows:

#### 216.405–2 Cost-plus-award-fee contracts.

(1) *Award-fee pool.* The award-fee pool is the total available award fee for each evaluation period for the life of the contract. The contracting officer must perform an analysis of appropriate fee distribution to ensure at least 40% of the award fee is held for the final evaluation so that the award fee is appropriately distributed over all evaluation periods to incentivize the contractor throughout performance of the contract.

(2) *Award-fee evaluation and payments.* Award-fee payments other than payments resulting from the evaluation at the end of an award-fee period are prohibited. (This prohibition does not apply to base-fee payments.) The fee-determining official's rating for award-fee evaluations will be provided to the contractor within 45 calendar days of the end of the period being evaluated. The final award-fee payment will be consistent with the contracting officer's final evaluation of the contractor's overall performance against the cost, schedule, and performance outcomes specified in the award-fee plan.

#### (3) Limitations.

(i) The CPAF contract shall not be used—

(A) To avoid—

(1) Establishing cost-plus-fixed-fee contracts when the criteria for cost-plus-fixed-fee contracts apply; or

(2) Developing objective targets so a cost-plus-incentive-fee contract can be used; or

(B) For either engineering development or operational system development acquisitions that have specifications suitable for simultaneous research and development and production, except a CPAF contract may be used for individual engineering development or operational system development acquisitions ancillary to the development of a major weapon system or equipment, where—

(1) It is more advantageous; and

(2) The purpose of the acquisition is clearly to determine or solve specific problems associated with the major weapon system or equipment.

(ii) Do not apply the weighted guidelines method to CPAF contracts for either the base (fixed) fee or the award fee.

(iii) The base fee shall not exceed three percent of the estimated cost of the contract exclusive of the fee.

(4) See PGI 216.405–2 for guidance on the use of cost-plus-award-fee contracts.

4. Add section 216.406 to read as follows:

#### 216.406 Contract clauses.

(e) Use the clause at 252.216–70XX, Award Fee, in solicitations and contracts when an award-fee contract is contemplated.

### PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Add section 252.216–70XX to read as follows:

#### 252.216–70XX Award fee.

As prescribed in 216.406(e), insert the following clause:

#### AWARD FEE (DATE)

The Contractor may earn award fee from a minimum of zero dollars to the maximum amount stated in the award-fee plan in this contract. In no event will award fee be paid to the Contractor for any evaluation period in which the Government rates the Contractor's overall cost, schedule, and technical performance below satisfactory. The Government may unilaterally revise the award-fee plan prior to the beginning of any rating period in order to redirect Contractor emphasis.

(End of clause)

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### DEPARTMENT OF DEFENSE

#### Defense Acquisition Regulations System

#### 48 CFR Parts 245 and 252

RIN 0750–AG64

#### Defense Federal Acquisition Regulation Supplement; Reporting of Government Property Lost, Stolen, Damaged, or Destroyed (DFARS Case 2008–D049)

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

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** DoD proposes to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to require contractors to report loss, theft, damage, and destruction (LTDD) of Government property to the DCMA “eTools” application.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before June 29, 2010 to be considered in the formation of the final rule.

**ADDRESSES:** You may submit comments, identified by DFARS Case 2008–D049, 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–D049 in the subject line of the message.

*Fax:* 703–602–0350.

*Mail:* Defense Acquisition Regulations System, Attn: Ms. Mary Overstreet, OUSD(AT&L)DPAP(DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301–3060.

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

**FOR FURTHER INFORMATION CONTACT:** Ms. Mary Overstreet, 703–602–0311.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

DoD is pursuing the migration from paper-based processes to greater use of automation. This proposed rule revises requirements for all DoD contractors to report the loss, theft, damage, and destruction (LTDD) of Government property to the DCMA “eTools” application.

**B. Regulatory Flexibility Act**

DoD has prepared an initial regulatory flexibility analysis consistent with 5 U.S.C. 603. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows:

The objective of this rule is to provide DoD with a single repository of all LTDD data to improve accountability and control of DoD assets and contractor oversight.

The rule generally will apply to DoD contractors provided with Government-furnished property. The proposed clause at 252.245–70XX Reporting Loss, Theft, Damage, or Destruction of Government Property, requires the contractor to use the Defense Contract Management Agency “e-Tools” software application for reporting of loss, damage, or destruction of Government property, which can be accessed from the DCMA homepage External Web Access Management application at <http://www.dcmamil>. This rule is not expected 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 any start-up costs that contractors will incur to comply with the rule are expected to be minimal, and any such costs should be offset by the reduced administrative costs that are expected to result from implementation of this rule.

At this time, DoD is unable to estimate the number of small entities to which this rule will apply. Therefore, DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2008–D049) in correspondence.

**C. Paperwork Reduction Act**

The information collection requirements under this proposed rule were formerly set forth under FAR 52.245–1(f)(vi), and have been approved by the Office of Management and Budget under Clearance Number 9000–0075. The requirements of this proposed rule are not expected to change significantly the burden hours approved under Clearance Number 9000–0075.

**List of Subjects in 48 CFR Parts 245 and 252**

Government procurement.

**Ynette R. Shelkin,**

*Editor, Defense Acquisition Regulations System.*

Therefore, DoD proposes to amend 48 CFR parts 245 and 252 as follows:

1. The authority citation for 48 CFR parts 245 and 252 continues to read as follows:

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

**PART 245—GOVERNMENT PROPERTY**

2. Amend section 245.102 by adding paragraph (4) to read as follows:

**245.102 Policy.**

\* \* \* \* \*

(4) *Reporting of Government Property Lost, Damaged, Destroyed, or Stolen.*

(i) The Defense Contract Management Agency (DCMA) “e-Tools” software application shall be the DoD data repository for reporting of loss, theft, damage, or destruction of Government property in the possession of contractors. Reporting value shall be at acquisition cost. The “e-Tools” system can be accessed from the DCMA home

page External Web Access Management application at <http://www.dcmamil>.

(ii) Unless otherwise provided for in the contract, the requirements of paragraph (4)(i) of this section do not apply to normal and reasonable inventory adjustments of “low risk” consumable material such as common hardware, as agreed to by the contractor and Government Property Administrator. Such losses are typically a product of normal process variation.

(iii) Reporting requirements apply to losses outside such variation. For example, due to theft of; or when losses occur due to a failure to provide adequate storage or security, *e.g.*, failure to repair a leaky roof; or due to “acts of God,” *e.g.*, tornado damages warehouse or stockroom.

(iv) The aforementioned reporting requirements in no way change the liability provisions or reporting requirements under the clauses at FAR 52.245–1, Government Property, or FAR 52.245–2, Government Property Installation Operation Services.

4. Amend section 245.107–70 by revising the section heading, redesignating the introductory text as paragraph (1), and adding paragraph (2) to read as follows:

**245.107–70 Contract Clauses.**

(1) Use the clause at 252.245–7000, Government-Furnished Mapping, Charting, and Geodesy Property, in solicitations and contracts when mapping, charting, and geodesy property is to be furnished.

(2) Use the clause at 252.245–70XX in solicitations and contracts that contain the clause at—

(i) FAR 52.245–1, Government Property; or

(ii) FAR 52.245–2, Government Property Installation Operation Services.

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

5. Section 252.245–70XX is added to read as follows:

**252.245–70XX Reporting Loss, Theft, Damage, or Destruction of Government Property.**

As prescribed in 245.107–70, use the following clause:

**REPORTING LOSS, THEFT, DAMAGE, OR DESTRUCTION OF GOVERNMENT PROPERTY (DATE)**

(a) *Definitions.* As used in this clause—  
*Acquisition cost*, for Government-furnished property, means the amount identified in the contract, or in the absence of such identification, the item’s fair-market value.

*Government property* means all property owned or leased by the Government.

Government property includes both Government-furnished property and Contractor-acquired property. Government property consists of material, equipment, special tooling, special test equipment, and real property.

(b) *Policy for Contractor Reporting of Government Property Lost, Stolen, Damaged, or Destroyed.*

(1) The Contractor shall use the Defense Contract Management Agency (DCMA) "e-Tools" software application for reporting of loss, theft, damage, or destruction of Government property. Reporting value shall be at acquisition cost. The "e-Tools" system can be accessed from the DCMA home page External Web Access Management application at <http://www.dcmamail.com>.

(2) Unless otherwise provided for in this contract, the requirements of paragraph (b) (1) of this clause do not apply to normal and reasonable inventory adjustments, *i.e.*, losses of "low risk" consumable material such as common hardware, as agreed to by the Contractor and the Government Property Administrator. Such losses are typically a product of normal process variation. The Contractor shall ensure that its property management system provides adequate management control measures, *e.g.*, statistical process controls, as a means of managing such variation.

(3) Reporting requirements apply to losses outside such variation. For example, due to theft of; or when losses occur due to a failure to provide adequate storage or security, *e.g.*, failure to repair a leaky roof; or due to "acts of God," *e.g.*, tornado damages warehouse or stockroom.

(4) The aforementioned reporting requirements in no way change the liability provisions or reporting requirements under the clauses at FAR 52.245-1, Government Property, or FAR 52.245-2, Government Property Installation Operation Services.

(End of clause)

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 216

Docket No. 0907301201-91203-01

RIN 0648-AY15

#### Implementation of Fish and Fish Product Import Provisions of the Marine Mammal Protection Act

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

**ACTION:** Advance notice of proposed rulemaking; request for comments.

**SUMMARY:** NMFS issues this advance notice of proposed rulemaking to

announce that it is developing procedures to implement provisions of the Marine Mammal Protection Act for imports of fish and fish products. NMFS is seeking advance public comment on the development of these procedures and on the types of information to be considered in the process.

**DATES:** Written comments must be received by 5 p.m. on June 29, 2010.

**ADDRESSES:** You may submit comments by any of the following methods:

(1) **Electronic Submissions:** Submit all electronic public comments via the Federal eRulemaking Portal at <http://www.regulations.gov>.

(2) **Mail:** Director, Office of International Affairs, Attn: MMPA Fish Import Provisions, NMFS, F/IA, 1315 East-West Highway, Silver Spring, MD 20910

(3) **Fax:** (301) 713-2313

All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe portable document file (pdf) formats only.

**FOR FURTHER INFORMATION CONTACT:** Michael Simpkins at [Michael.Simpkins@noaa.gov](mailto:Michael.Simpkins@noaa.gov) or 301-713-9090.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Marine Mammal Protection Act (MMPA), 16 U.S.C. 1361-1423h, contains provisions addressing bycatch, or the incidental mortality and serious injury, of marine mammals in both domestic and foreign fisheries. With respect to foreign fisheries, section 101(a)(2) of the MMPA (16 U.S.C. 1371(a)(2)) states that "[t]he Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. For purposes of applying the preceding sentence, the Secretary [of Commerce]- (A) shall insist on reasonable proof from the government of any nation from which fish or fish

products will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States."

This rulemaking would define the "United States standards" referred to in MMPA section 101(a)(2), along with any associated criteria by which the United States would assess foreign fisheries that supply fish and fish product imports to the United States (hereafter "import-supplying fisheries") with respect to marine mammal bycatch. The rule also would describe procedures for ensuring the established standards and their associated criteria are met, as well as procedures for developing recommendations regarding import prohibitions if those standards and associated criteria are not met. In defining the standards and associated criteria by which marine mammal bycatch in import-supplying fisheries would be evaluated, this rulemaking would consider U.S. statutory provisions and regulations applied to the management of incidental mortality and serious injury of marine mammals, including provisions of the MMPA, the Endangered Species Act (ESA), and the High Seas Driftnet Fishing Moratorium Protection Act (HSDFMFA).

This rulemaking also would recognize existing bilateral or multilateral arrangements to address marine mammal bycatch in foreign fisheries as well as the potential for such arrangements in the future. In the case of eastern tropical Pacific yellowfin tuna purse seine fisheries, marine mammal bycatch is covered by section 101(a)(2)(B) and Title III of the MMPA (16 U.S.C. 1371(a)(2)(B) & 1411-1417, respectively), which incorporate requirements adopted under the auspices of the Agreement on the International Dolphin Conservation Program (AIDCP).

#### U.S. Incidental Marine Mammal Mortality and Serious Injury Statutory Provisions

Section 2 of the MMPA describes several broad goals, including (1) maintaining the health and stability of the marine ecosystem; (2) retaining marine mammals as a significant functioning element in the ecosystem of which they are a part; and (3) ensuring that marine mammals can remain at or recover to their optimum sustainable population. The term "optimum sustainable population" is defined in section 3(9) (16 U.S.C. 1362(9), 50 CFR 216.3) of the MMPA as "the number of animals which will result in the maximum productivity of the