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48 CFR Parts 245 and 252

Defense Federal Acquisition Regulation Supplements; Marking of Government-Furnished Property; Reporting of Government Property Lost, Stolen, Damaged, or Destroyed; Final Rules

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 245 and 252**

[DFARS Case 2008–D050]

RIN 0750–AG44

Defense Federal Acquisition Regulation Supplement; Marking of Government-Furnished Property

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to require contractors to tag, label, or mark Government-furnished property items identified in the contract as subject to serialized item management.

DATES: *Effective Date:* February 2, 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Clare Zebrowski, 703–602–0289.

SUPPLEMENTARY INFORMATION:**I. Background**

This final rule provides a clause at DFARS 252.245–7001, Tagging, Labeling, and Marking of Government-Furnished Property, requiring contractors to tag, label, or mark Government-furnished property items identified in the contract when such items are subject to serialized item management. The final rule has been changed as follows—

- The proposed coverage in DFARS 211.274 has been relocated to DFARS subpart 245.1.
- DFARS 245.102(4) now provides the complete list of exceptions to the policy to require tagging, labeling, and marking of property, rather than including the exceptions in the clause, because the Government will identify to the contractor the items that require tagging, labeling, or marking. The list had been expanded to include exceptions based on determinations by the agency.
- Adds DFARS clause 252.245–7001, in lieu of proposed DFARS 252.211–70YY, to align with coverage being relocated from DFARS part 211 to part 245.
- The proposed definition of “Government-furnished property” has been deleted and replaced with a reference to the definition in FAR 52.245–1.

II. Discussion and Analysis

DoD published a proposed rule at 75 FR 25160 on May 7, 2010, and the public comment period closed on July 6, 2010. Three respondents submitted comments that are grouped into four categories. The following is a discussion of the comments and the changes included in this final rule as a result of those comments.

A. Location of Coverage

Comment: One respondent recommended that DFARS 211.274–5 should be redesignated as DFARS 245.102–70, as the mechanics for implementing this rule are not included at DFARS 211.274, but in FAR 52.245–1, Government Property.

DoD Response: The coverage has been relocated to DFARS part 245 from part 211.

Comment: One respondent recommended that the contract clause be placed in DFARS section 252.245, as opposed to DFARS 252.211.

DoD Response: DoD has made this change to coincide with the related recommendation to move the policy for marking Government-furnished property from DFARS part 211 to part 245.

B. Accountability

Comment: One respondent asked if the rule will require contractors to conduct periodic inventories, and if so, who is to receive the results of the inventories.

DoD Response: The rule does not contain a requirement for contractors to conduct physical inventories. However, the contractor is responsible under FAR 52.245–1, Government Property, paragraph (f)(1)(iv), to periodically perform, record, and disclose physical inventory results. Physical inventory results are generally provided to the assigned Government property administrator or other responsible Government official during a property management system analysis or audit.

Comment: One respondent asked if the contracting officer will be responsible for ensuring property accountability.

DoD Response: The contracting officer is responsible for ensuring that the contractor complies with all contract terms and conditions, to include Government property accountability.

Comment: One respondent asked if a chain of custody is feasible for property accountability or should accountability be delegated to a different Government official.

DoD Response: The contracting officer is responsible for ensuring compliance

with the terms and conditions of the contract. However, the contracting officer may appoint a property administrator (FAR 45.101) to administer the contract requirements relating to Government property in the possession of a contractor.

Comment: One respondent recommended that the rule specifically detail a tracking procedure, which could mirror existing policy for tracking Government property throughout DoD.

DoD Response: The respondent’s recommendation is outside the scope of the rule. It should be noted, however, that FAR 52.245–1, Government Property, paragraph (b)(1), already requires contractors to have a system to manage (control, use, preserve, protect, repair, and maintain) Government property in their possession.

Comment: One respondent recommended that the rule address who will be held responsible for lost, missing, or stolen property, and if contractors will be responsible for designating a responsible officer.

DoD Response: Contractor responsibility and liability requirements for lost, missing, or stolen property are provided under FAR 52.245–1, Government Property. Accordingly, it is neither necessary nor appropriate for the rule to require contractors to designate a responsible person, persons, or positions.

Comment: One respondent stated that the final rule should address the full cycle necessary to achieve the desired end-state of accountability and control.

DoD Response: The end-state to which the respondent refers is based on a variety of factors, many of which are beyond the scope of this rule. However, the tagging, labeling, and marking requirements contained in this rule are important enablers toward the desired end-state of accountability and control. Contractor responsibilities for accountability and control are provided under FAR 52.245–1, Government Property.

C. Policy

Comment: One respondent recommended a cross reference at 211.274–5 to policy at 245.102–70, with addition of policy at DFARS 245.102–70 regarding the requirement for contractors to tag, label, or mark items of Government-furnished property identified in the contract when the Government-furnished material and Government-furnished property are subject to serialized item management.

DoD Response: DoD has moved the entire discussion of policy to 245.102(4).

Comment: One respondent recommended that the rule address potential conflicts with related sections of the CFR.

DoD Response: DoD is unable to respond in detail to the comment as the respondent did not identify any specific potential conflicts.

Comment: One respondent asked if marked items will be annotated in the initial contract documents. Another respondent recommended that the Government provide drawings and instructions to the contractor on how and where to mark the Government-furnished property.

DoD Response: The rule requires identification in the contract of all Government-furnished property subject to serialized item management, in accordance with Procedures, Guidance, and Information 245.201–71, GFP attachments to solicitations and awards.

Comment: One respondent recommended that the rule include a reference to 48 CFR (DFARS) 245.105.

DoD Response: The requirements of DFARS 245.105 are not directed at contractors. Rather, they are directed at the Government agency responsible for contract administration. Contractor responsibilities for accountability and control are provided under FAR 52.245–1, Government Property.

D. Exceptions

Comment: One respondent asked what the impact of the rule is on the exceptions listed in 48 CFR (DFARS) 211.274–2(b).

DoD Response: The exceptions at 211.274–2 are exceptions to the requirement that the contractor be required to provide DoD unique item identification for delivered items based on determinations by the agency. The impact to the rule of not including the exceptions at DFARS 211.274–2(b) would be to create inconsistency in application of contractor requirements for marking, tagging, and labeling. While the exceptions at DFARS 211.274–2(b) apply to new deliverables, the principle applies to Government-furnished property as well. In recognition of this, DoD has addressed the potential inconsistent application by including these exceptions in the final rule. The exceptions listed at DFARS 211.274–2(b) have been added to DFARS 245.102(4).

Comment: One respondent asked if the exceptions to UID reporting for Government-furnished equipment at DFARS 211.274–4 are to remain unchanged, or will the section now only apply to non-Government-furnished contractor property.

DoD Response: The exceptions cited in DFARS 211.274–4 apply to the reporting requirements under DFARS 252.211–7007, Reporting of Government-Furnished Equipment in the DoD Item Unique Identification Registry. The exceptions do not apply to the requirements of this rule.

Comment: One respondent recommended that the rule include specific language assuring that contractor-acquired special tooling and special test equipment, having been physically marked by the contractor, and subsequently transferred in-place, does not have to be retagged, relabeled, or remarked until the tooling or test equipment leaves the contractor's possession or accountability.

DoD Response: The exception provided at paragraph (c)(1) of the proposed clause was sufficient to cover this concern. This statement has been retained in paragraph (c) of the final clause, to ensure that the contractor does not need to tag, label, or mark Government-furnished property that has already been tagged, labeled, or marked.

E. Definition

Comment: One respondent recommended that the definition of "Government-furnished property" not be repeated in the rule since it appears in both FAR part 45 and 52.245–1.

DoD Response: The final rule has been changed to reference the FAR definition.

F. Clause Prescription

Comment: One respondent recommended deleting the proposed reference at DFARS 211.274–6 to FAR 52.245–2, Government Property Installation Operation Services, as a condition for use of DFARS 252.245–70YY.

DoD Response: Use of the clause at 252.245–7001, Tagging, Labeling, and Marking of Government-Furnished Property, is not dependent on the presence of FAR 52.252–2. The new clause prescription at DFARS 245.107 now refers only to the presence of the FAR clause 52.245–1, Government Property.

G. Applicability to international and FMS contracts

Comment: One respondent asked if the rule applies to foreign Government and international contracts under 48 CFR (DFARS) 245.3.

DoD Response: The rule applies to contracts with foreign Governments and international organizations under DFARS 245.3.

Comment: One respondent asked about the impact on FMS sales.

DoD Response: The security assistance community will derive the same tagging, labeling, and marking benefits of this rule. The new DFARS clause is mandatory for all DoD contracts that contain the FAR clause 52.245–1, Government Property, including those for foreign customers.

H. Applicability to existing contracts

Comment: One respondent noted that on-going contracts were not priced to consider the implementation of this rule. Therefore, there may be a need for pricing adjustments for those contracts.

DoD Response: The clause does not apply to existing contracts unless the contracting officer executes a bilateral contract modification, consistent with FAR 1.108(d), which would require consideration.

III. Executive Order 12866

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. 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 individual specified herein. The analysis is summarized as follows:

The objective of the rule is to improve the accountability and control of DoD assets. The tagging, labeling, and marking requirements are consistent with DoD's use of unique identifiers to track and trace property items throughout their lifecycle. Three respondents provided twenty-three comments on the proposed rule. None of the comments was in response to the initial regulatory flexibility analysis. Therefore, there is no change to the rule in this regard.

The rule will apply to DoD contractors provided with Government-furnished property that is subject to serialized item management. The clause at DFARS 252.211–7001, Tagging, Labeling, and Marking of Government-Furnished Property, requires the contractor to tag, label, or mark Government-furnished property items identified in the contract when the requiring activity determines that such items are subject to serialized item management (serially-managed items).

This final 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.

Moreover, the rule excludes items, as determined by the head of the agency, that are to be used to support a contingency operation; or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack; or for which a determination and findings has been executed concluding that it is more cost effective for the Government requiring activity to assign, mark, and register the unique item identification after delivery of an item acquired from a small business concern or a commercial item acquired under FAR part 8 or part 12.

The rule does not duplicate, overlap, or conflict with any other Federal rules. DoD considers the approach described in the rule to be the most practical and beneficial for both Government and industry.

V. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96-511) does not apply because the rule does not impose additional 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 245 and 252

Government procurement.

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Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 245 and 252 are amended 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. In section 245.102, paragraph (4) is added to read as follows:

245.102 Policy.

* * * * *

(4) *Government-furnished property identification.*

(i) It is DoD policy that Government-furnished property be tagged, labeled, or marked based on DoD marking standards (MIL Standard 130) or other standards, when the requiring activity determines that such items are subject to serialized item management (serially-managed items). The list of Government-furnished property subject to serialized item management will be identified in the contract in accordance

with PGI 245.201-71, GFP attachments to solicitations and awards.

(ii) *Exceptions.* The Contractor will not be required to tag, label, or mark—

(A) Government-furnished property that was previously tagged, labeled, or marked;

(B) Items, as determined by the head of the agency, that are to be used to support a contingency operation; or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack;

(C) Items for which a determination and findings has been executed concluding that it is more cost effective for the Government requiring activity to assign, mark, and register the unique item identification after delivery of an item acquired from a small business concern or a commercial item acquired under FAR part 12 or part 8.

(1) The determination and findings shall be executed by—

(i) The Component Acquisition Executive for an Acquisition Category (ACAT) I program; or

(ii) The head of the contracting activity for all other programs.

(2) A copy of the executed determination and findings shall be provided to the DoD Unique Item Identification Policy Office at this address: OUSD (AT&L) DPAP/Program Development and Implementation, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060; or by facsimile to 703-602-6047.

(D) Items that are contractor-acquired property;

(E) Property under any statutory leasing authority;

(F) Property to which the Government has acquired a lien or title solely because of partial, advance, progress, or performance-based payments;

(G) Intellectual property or software; or

(H) Real property.

245.107-70 [Redesignated as 245.107]

■ 3. Section 245.107-70 is redesignated as 245.107 and revised to read as follows:

245.107 Contract clauses.

(a) 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.

(b) Use the clause at 252.245-7001, Tagging, Labeling, and Marking of Government-Furnished Property, in solicitations and contracts that contain the clause at FAR 52.245-1, Government Property.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. In section 252.245-7000, the introductory text is amended by removing “245.107-70” and adding in its place “245.107(a)”.

■ 5. Add section 252.245-7001 to read as follows:

252.245-7001 Tagging, Labeling, and Marking of Government-Furnished Property

As prescribed in 245.107(b), use the following clause:

TAGGING, LABELING, AND MARKING OF GOVERNMENT-FURNISHED PROPERTY (FEB 2011)

(a) *Definitions.* As used in this clause—
Government-furnished property is defined in the clause at FAR 52.245-1, Government Property.

Serially-managed item means an item designated by DoD to be uniquely tracked, controlled, or managed in maintenance, repair, and/or supply systems by means of its serial number.

(b) The Contractor shall tag, label, or mark Government-furnished property items identified in the contract as subject to serialized item management (serially-managed items).

(c) The Contractor is not required to tag, label, or mark Government-furnished property previously tagged, labeled, or marked.

(End of clause)

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 245 and 252

[DFARS Case 2008-D049]

RIN 0750-AG64

Defense Federal Acquisition Regulation Supplement; Reporting of Government Property Lost, Stolen, Damaged, or Destroyed

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to require contractors to report loss of Government property to the Defense Contract Management Agency (DCMA) eTools application.

DATES: *Effective Date:* February 2, 2011.
FOR FURTHER INFORMATION CONTACT: Ms. Clare Zebrowski, 703-602-0289.