

(g) * * *

(5) If the Contractor fails to respond to the Contracting Officer's request for information or additional information under paragraph (g)(1) of this clause, the Contracting Officer will issue a final decision, in accordance with paragraph (f) of this clause and the Disputes clause of this contract, pertaining to the validity of the asserted restriction.

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- 13. Amend 252.227-7037 by—
- (a) Amending the introductory text by removing “227.7102-3(c)” and adding in its place “227.7102-4(c)”;
- (b) Amending the clause date by removing “(SEP 1999)” and adding in its place “(SEP 2011)”; and
- (c) Revising paragraphs (b), (c), (f), and (l) to read as follows:

252.227-7037 Validation of restrictive markings on technical data.

* * * * *

(b) *Presumption regarding development exclusively at private expense.*

(1) *Commercial items.* For commercially available off-the-shelf items (defined at 41 U.S.C. 104) in all cases, and for all other commercial items except as provided in paragraph (b)(2) of this clause, the Contracting Officer will presume that a Contractor's asserted use or release restrictions are justified on the basis that the item, component, or process was developed exclusively at private expense. The Contracting Officer shall not challenge such assertions unless the Contracting Officer has information that demonstrates that the item, component, or process was not developed exclusively at private expense.

(2) *Major systems.* The presumption of development exclusively at private expense does not apply to major systems or subsystems or components thereof, except for commercially available off-the-shelf items (which are governed by paragraph (b)(1) of this clause). When the Contracting Officer challenges an asserted restriction regarding technical data for a major system or a subsystem or component thereof on the basis that the item, component, or process was not developed exclusively at private expense, the Contracting Officer will sustain the challenge unless information provided by the Contractor or subcontractor demonstrates that the item, component, or process was developed exclusively at private expense.

(c) *Justification.* The Contractor or subcontractor at any tier is responsible for maintaining records sufficient to justify the validity of its markings that

impose restrictions on the Government and others to use, duplicate, or disclose technical data delivered or required to be delivered under the contract or subcontract. Except as provided in paragraph (b)(1) of this clause, the Contractor or subcontractor shall be prepared to furnish to the Contracting Officer a written justification for such restrictive markings in response to a challenge under paragraph (e) of this clause.

* * * * *

(f) *Final decision when Contractor or subcontractor fails to respond.* Upon a failure of a Contractor or subcontractor to submit any response to the challenge notice the Contracting Officer will issue a final decision to the Contractor or subcontractor in accordance with paragraph (b) of this clause and the Disputes clause of this contract pertaining to the validity of the asserted restriction. This final decision shall be issued as soon as possible after the expiration of the time period of paragraph (e)(1)(ii) or (e)(2) of this clause. Following issuance of the final decision, the Contracting Officer will comply with the procedures in paragraphs (g)(2)(ii) through (iv) of this clause.

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(l) *Flowdown.* The Contractor or subcontractor agrees to insert this clause in contractual instruments with its subcontractors or suppliers at any tier requiring the delivery of technical data.

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- 14. Amend section 252.244-7000 by—

- (a) Amending the clause date by removing “(AUG 2011)” and adding in its place “(SEP 2011)”;
- (b) Redesignating paragraphs (c) through (h) as (e) through (j), respectively; and
- (c) Adding new paragraphs (c) and (d) as follows:

252.244-7000 Subcontracts for commercial items and commercial components (DoD contracts).

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(c) 252.227-7015, Technical Data—Commercial Items (SEP 2011), if applicable (see 227.7102-4(a)).

(d) 252.227-7037, Validation of Restrictive Markings on Technical Data (SEP 2011), if applicable (see 227.7102-4(c)).

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 213

RIN 0750-AH07

Defense Federal Acquisition Regulation Supplement; Ships Bunkers Easy Acquisition (SEA) Card® and Aircraft Ground Services (DFARS Case 2009-D019)

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 to allow the use of U.S. Government fuel cards in lieu of a Purchase Order-Invoice-Voucher for fuel, oil, and refueling-related items for purchases not exceeding the simplified acquisition threshold.

DATES: *Effective Date:* September 20, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Dustin Pitsch, telephone 703-602-0289.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal register** at 76 FR 21849 on April 19, 2011, to add language to Defense Federal Acquisition Regulation Supplement (DFARS) 213.306(a)(1)(A) to include purchases of marine fuel, oil, and refueling-related items up to the simplified acquisition threshold using the Ships Bunkers Easy Acquisition (SEA) Card® in lieu of the SF 44, Purchase Order-Invoice-Voucher. Additionally, this section is revised to include additional ground refueling-related services when using the AIR Card®. These changes for use of the AIR Card® and SEA Card® will improve the refueling capability of aircraft and smaller vessels at non-contract locations. No public comments were received in response to the proposed rule.

II. Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and

equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. 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.

III. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, and is summarized as follows:

This is a final rule to revise the Defense Federal Acquisition Regulation Supplement (DFARS) at 213 to permit the use of U.S. Government fuel cards in lieu of an SF 44, Purchase Order-Invoice-Voucher, for fuel, oil, and refueling-related items for purchases not exceeding the simplified acquisition threshold. The objective of this rule is to amend DFARS 213.306(a)(1)(A) to (1) Permit the purchase of marine fuel using the Ships' bunkers Easy Acquisition (SEA) Card® in lieu of the SF44, Purchase Order-Invoice-Voucher, up to the simplified acquisition threshold and (2) provide additional ground refueling-related services when using the AIR Card®. The legal basis is 41 U.S.C. 1303 and 48 CFR chapter 1.

Purchases of aviation fuel are on-the-spot, over the counter transactions ("gas and go"), but generally exceed the micro-purchase threshold due to the price of aviation fuel and oil fuel tank capacities. Previously, the threshold for SF44/AIR Card® purchases of fuel and oil was set at the simplified acquisition threshold at DFARS 213.306(a)(1)(A) under DFARS Case 2007-D017 (see final rule published at 72 FR 6484 on February 12, 2007).

The military services and the U.S. Coast Guard have small vessels that fulfill valid mission needs in direct support of national security. Unlike larger vessels, small vessels' movements and needs are often unpredictable. These small vessels must procure fuel away from their home stations, but because of their smaller size and unique mission requirements are unable to use the Defense Logistics Agency energy bunkers contracts available at major seaports. Due to port restrictions, bunkering merchants do not typically provide support to smaller vessels. Instead, these smaller vessels frequent non-contract merchants or "marina-type merchants" that otherwise serve civilian recreational watercraft and similar needs.

No public comments were received in response to the initial regulatory flexibility analysis.

Approximately 80% of "marina-type merchants" are considered small businesses. Marina-type merchants accepting the SEA Card® will pay a normal fee to the banking institution or processing center, similar to VISA charges these merchants incur from other credit card clients. In addition, merchants are expected to benefit from accelerated payments, since they will be paid by the banking institution in accordance with their merchant agreement. The rule facilitates open market purchases, benefits merchants by making it much easier for merchants to do business with the military and will not have a significant cost or administrative impact on contractors, subcontractors, or offerors.

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 does not have a significant effect beyond DoD's internal operating procedures, substituting the use of a fuel card (AIR Card® and SEA Card®) in lieu of the SF44, Purchase Order-Invoice-Voucher.

IV. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 213

Government procurement.

Mary Overstreet,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 213 is amended as follows:

PART 213—SIMPLIFIED ACQUISITION PROCEDURES

■ 1. The authority citation for 48 CFR part 213 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 2. Section 213.306 is amended to revise paragraph (a)(1)(A) to read as follows:

213.306 SF 44, Purchase Order-Invoice-Voucher.

(a)(1) * * *

(A) *Fuel and oil.* U.S. Government fuel cards may be used in lieu of an SF 44 for fuel, oil, and authorized

refueling-related items (see PGI 213.306 for procedures on use of fuel cards);

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 215

RIN 0750-AG82

Defense Federal Acquisition Regulations Supplement; Discussions Prior to Contract Award (DFARS Case 2010-D013)

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

ACTION: Final rule.

SUMMARY: DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to strongly encourage discussions prior to award for source selections of procurements estimated at \$100 million or more.

DATES: *Effective Date:* September 20, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Dustin Pitsch, telephone 703-602-0289.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule at 75 FR 71647 on November 24, 2010, to implement the recommendation of the DoD Source Selection Joint Analysis Team (JAT) to strongly encourage the use of discussions in all competitive negotiated procurements over \$100 million. The period for public comment closed on January 24, 2011, and three respondents provided comments.

The rule proposed to amend DFARS part 215 to strongly recommend, for acquisitions of more than \$100 million, that contracting officers hold discussions rather than use the authority at FAR 52.215-1 to award on initial offers without discussions.

II. Discussion and Analysis

A. Proposed rule is excessive

Comment: One respondent said that the proposed rule is "overkill."

Response: No change was made in the final rule in response to this comment. The JAT advises that data shows that the number of protests filed against the award of competitive negotiated contracts and orders over \$100 million is substantially higher when discussions are not held. A preference for holding