Part II

Department of Defense

Defense Acquisitions Regulations System
Defense Federal Acquisition Regulation Supplements; Final Rules and Proposed Rules
DEPARTMENT OF DEFENSE

Action: Final rule.

Summary: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to incorporate adjusted thresholds for application of the World Trade Organization Government Procurement Agreement and the Free Trade Agreements, as determined by the United States Trade Representative. Additionally, this rule includes language in prescriptions for use of contract clauses intended to clarify their applicability to commercial items.

Dates: Effective Date: January 30, 2012.

Trade agreement

<table>
<thead>
<tr>
<th>WTO GPA FTAs:</th>
<th>Supply contract (equal to or exceeding)</th>
<th>Construction contract (equal to or exceeding)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia FTA</td>
<td>$202,000</td>
<td>$7,777,000</td>
</tr>
<tr>
<td>Bahrain FTA</td>
<td>77,494</td>
<td>7,777,000</td>
</tr>
<tr>
<td>Chile FTA</td>
<td>202,000</td>
<td>10,074,262</td>
</tr>
<tr>
<td>China FTA</td>
<td>77,494</td>
<td>7,777,000</td>
</tr>
<tr>
<td>Morocco FTA</td>
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<td>7,777,000</td>
</tr>
<tr>
<td>NAFTA:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>—Canada</td>
<td>25,000</td>
<td>10,074,262</td>
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<tr>
<td>—Mexico</td>
<td>77,494</td>
<td>10,074,262</td>
</tr>
<tr>
<td>Peru FTA</td>
<td>202,000</td>
<td>7,777,000</td>
</tr>
<tr>
<td>Singapore FTA</td>
<td>77,494</td>
<td>7,777,000</td>
</tr>
</tbody>
</table>

II. Discussion and Analysis

This final rule implements the new thresholds in the clause prescriptions at DFARS 225.1101 and 225.7503.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 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). E.O. 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 E.O. 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

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant DFARS revision within the meaning of FAR 1.501–1 and 41 U.S.C. 1707 and does not require publication for public comment.

V. Paperwork Reduction Act

The 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 225

Government procurement.

Ynette R. Shelkin, Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 225 is amended as follows:

PART 225—FOREIGN ACQUISITION

1. The authority citation for 48 CFR part 225 is revised to read as follows:


2. In section 225.1101, revise paragraph (11)(i) to read as follows:

   225.1101 Acquisition of supplies.
   * * * * * (11)(i) Except as provided in paragraph (11)(ii) of this section, use the clause at 252.225–7036, Buy American Act—Free Trade Agreements—Balance of Payments Program, instead of the clause at FAR 52.225–3, Buy American Act—Free Trade Agreements—Israeli Trade Agreement, in solicitations and contracts for the items listed at 225.401–70, including acquisitions of commercial items or components, when the estimated value equals or exceeds $25,000, but is less than $202,000, and a Free Trade Agreement applies to the acquisition.

   (A) Use the basic clause when the estimated value equals or exceeds $77,494.

   (B) Use the clause with its Alternate I when the estimated value equals or exceeds $25,000 but is less than $77,494.

   * * * * *

3. In section 225.7503, revise paragraphs (a)(1) and (b) to read as follows:

   225.7503 Contract clauses.
   * * * * *

   (a)(1) Use the clause at 252.225–7044, Balance of Payments Program—Construction Material, in solicitations and contracts for construction to be performed outside the United States, including acquisitions of commercial items or components, with a value...
greater than the simplified acquisition threshold but less than $7,777,000.

(b)(1) Use the clause at 252.225–7045, Balance of Payments Program—Construction Material Under Trade Agreements, in solicitations and contracts for construction to be performed outside the United States with a value of $7,777,000 or more, including acquisitions of commercial items or components.

(2) For acquisitions with a value of $7,777,000 or more, but less than $10,074,262, including acquisitions of commercial items or components, use the clause with its Alternate I, unless the acquisition is in support of Afghanistan.

(3) If the acquisition is for construction with a value of $10,074,262 or more and is in support of operations in Afghanistan, use the clause with its Alternate II.

(4) If the acquisition is for construction with a value of $7,777,000 or more, but less than $10,074,262, and is in support of operations in Afghanistan, use the clause with its Alternate III.

SUPPLEMENTARY INFORMATION:

I. Background

On September 15, 2011, Armenia became a party to the World Trade Organization Government Procurement Agreement (WTO GPA). The Trade Agreements Act (19 U.S.C. 2501 et seq.) provides the authority for the President to waive the Buy American Act and other discriminatory provisions for eligible products from countries that have signed an international trade agreement with the United States (such as the WTO GPA). The President has delegated this waiver authority to the U.S. Trade Representative (see FAR 25.402).

On September 22, 2011, because Armenia became a party to the WTO GPA and because the U.S. Trade Representative has determined that Armenia will provide appropriate reciprocal competitive Government procurement opportunities to United States products and services and suppliers of such products and services, the U.S. Trade Representative published a notice in the Federal Register (76 FR 58856) waiving the Buy American Act and other discriminatory provisions for eligible products from Armenia.

II. Discussion and Analysis

FAR 25.003 defines WTO GPA countries by listing the parties to the WTO GPA, and defines “designated country” as a WTO GPA country, a Free Trade Agreement country, a least designated country, or a Caribbean Basin country.

Because Armenia is now a WTO GPA country and therefore also a designated country, as determined by the U.S. Trade Representative, this final rule adds Armenia to the lists of WTO GPA countries within the definition of “designated country” at DFARS 252.225–7021. Trade Agreements, and 252.225–7045, Balance of Payments Program—Construction Material Under Trade Agreements. Conforming changes were also made to the clause date at 252.225–7001(b)(12)(i).

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 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

The Regulatory Flexibility Act does not apply to this rule because an initial regulatory flexibility analysis is only required for proposed or interim rules that require publication for public comment (5 U.S.C. 603) and a final regulatory flexibility analysis is only required for final rules that were previously published for public comment, and for which an initial regulatory flexibility analysis was prepared (5 U.S.C. 604).

Publication of this final rule for public comment is not required by statute (41 U.S.C. 1707) because it recognizes actions taken by the United States Trade Representative that do not have a significant effect on contractors or offerors or a significant effect beyond the internal operating procedures of the Government. Therefore, publication for public comment under 41 U.S.C. 1707 is not required.

V. Paperwork Reduction Act

The Paperwork Reduction Act does apply because the final rule affects the certification and information collection requirement in the provisions at DFARS 252.225–7020, Trade Agreements Certificate, currently approved under OMB clearance 0704–0229, DFARS Part 225, Foreign Acquisition, and associated clauses. DFARS provision 252.225–7020 relies on the definition of “designated country” in DFARS 252.225–7021, which now includes Armenia. The impact, however, is negligible. Comments regarding the burden estimates or any other aspect of this collection of information, including suggestions for reducing the burden, in response to approved OMB clearance 0704–0229, should be sent, not later than March 30, 2012 to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, with a copy to the Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD (AT&L) DPAP (DARS), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060. Requesters may obtain a copy of the supporting statement for the burden...