

(Pub. L. 111–118) and similar sections in subsequent DoD appropriations acts.

\* \* \* \* \*

■ 3. Amend section 212.504 by revising paragraph (a)(xix) to read as follows:

**212.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.**

(a) \* \* \*

(xix) Section 8116 of the Defense Appropriations Act for Fiscal Year 2010 (Pub. L. 111–118) and similar sections in subsequent DoD appropriations acts.

\* \* \* \* \*

**Subpart 222.74—Restrictions on the Use of Mandatory Arbitration Agreements**

■ 4. Revise section 222.7400 to read as follows:

**222.7400 Scope of subpart.**

This subpart implements section 8116 of the Defense Appropriations Act for Fiscal Year 2010 (Pub. L. 111–118) and similar sections in subsequent DoD appropriations acts.

■ 5. Amend section 222.7402 as follows:

■ (a) Revise the introductory text to paragraph (a) as set forth below; and  
 ■ (b) Revise paragraph (b) as set forth below.

**222.7402 Policy.**

(a) Departments and agencies are prohibited from using funds appropriated or otherwise made available by the Fiscal Year 2010 Defense Appropriations Act (Pub. L. 111–118) or subsequent DoD appropriations acts for any contract (including task or delivery orders and bilateral modifications adding new work) in excess of \$1 million, unless the contractor agrees not to—

\* \* \* \* \*

(b) No funds appropriated or otherwise made available by the Fiscal Year 2010 Defense Appropriations Act (Pub. L. 111–118) or subsequent DoD appropriations acts may be expended unless the contractor certifies that it requires each covered subcontractor to agree not to enter into, and not to take any action to enforce, any provision of any agreement, as described in paragraph (a) of this section, with respect to any employee or independent contractor performing work related to such subcontract.

■ 6. Revise section 222.7405 as follows:

**222.7405 Contract clause.**

Use the clause at 252.222–7006, Restrictions on the Use of Mandatory Arbitration Agreements, in all solicitations and contracts (including

task or delivery orders and bilateral modifications adding new work) valued in excess of \$1 million utilizing funds appropriated or otherwise made available by the Defense Appropriations Act for Fiscal Year 2010 (Pub. L. 111–118) or subsequent DoD appropriations acts, except in contracts for the acquisition of commercial items, including commercially available off-the-shelf items.

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**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 212 and 252**

RIN 0750–AH27

**Defense Federal Acquisition Regulation Supplement; Pilot Program for Acquisition of Military-Purpose Nondevelopmental Items (DFARS Case 2011–D034)**

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

**ACTION:** Interim rule.

**SUMMARY:** DoD is issuing an interim rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 866 of the National Defense Authorization Act for Fiscal Year 2011. Section 866 authorized the Secretary of Defense to establish a pilot program to assess the feasibility and advisability of acquiring military-purpose nondevelopmental items in accordance with the streamlined procedures of the pilot program.

**DATES:** *Effective Date:* June 29, 2011.

*Comment date:* Comments on the interim rule should be submitted in writing to the address shown below on or before August 29, 2011, to be considered in the formation of the final rule.

**ADDRESSES:** You may submit comments, identified by DFARS Case 2011–D034, using any of the following methods:

○ *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “DFARS Case 2011–D034” under the heading “Enter keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “DFARS Case 2011–D034.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company

name (if any), and “DFARS Case 2011–D034” on your attached document.

○ *E-mail:* [dfars@osd.mil](mailto:dfars@osd.mil). Include DFARS Case 2011–D034 in the subject line of the message.

○ *Fax:* 703–602–0350.

○ *Mail:* Defense Acquisition Regulations Council, *Attn:* Mr. Manuel Quinones, OUSD(AT&L)DPAP(DAR), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060.

*Instructions:* Please submit comments only and cite “DFARS Case 2011–D034” in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

To confirm receipt of your comment(s), please check <http://www.regulations.gov> approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** Mr. Manuel Quinones, telephone 703–602–8383.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Section 866 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2011 (Pub. L. 111–383), enacted on January 7, 2011, authorized the Secretary of Defense to carry out a pilot program to assess the feasibility and advisability of acquiring military-purpose nondevelopmental items in accordance with the streamlined procedures of the pilot program. The authority for this pilot program expires on January 6, 2016. Under this pilot program, DoD may enter into contracts with nontraditional defense contractors for the purpose of—

—Enabling DoD to acquire items that otherwise might not have been available to DoD;

—Assisting DoD in the rapid acquisition and fielding of capabilities needed to meet urgent operational needs; and

—Protecting the interests of the United States in paying fair and reasonable prices for the item or items acquired.

This pilot program is designed to test whether the streamlined procedures, similar to those available for commercial items, can serve as an effective incentive for nontraditional defense contractors to (1) channel investment and innovation into areas that are useful to DoD and (2) provide items developed exclusively at private expense to meet validated military requirements.

## II. Executive Orders 12866 and 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 a significant regulatory action and, therefore, was 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

DoD has prepared an initial regulatory flexibility analysis consistent with 5 U.S.C. 604. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows.

DoD is issuing an interim rule to amend the DFARS to implement section 866 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111–383). Section 866 authorized the Secretary of Defense to establish a pilot program to assess the feasibility and advisability of acquiring military-purpose nondevelopmental items.

The objective of this rule is to establish a new DoD pilot program at DFARS Subpart 212.71, entitled Pilot Program for Acquisition of Military-Purpose Nondevelopmental Items. Under this pilot program, DoD may enter into contracts with nontraditional defense contractors for the purpose of (1) Enabling DoD to acquire items that otherwise might not have been available to DoD; (2) assisting DoD in the rapid acquisition and fielding of capabilities needed to meet urgent operational needs; and (3) protecting the interests of the United States in paying fair and reasonable prices for the item or items acquired. It is anticipated that items similar to commercial all-terrain vehicles or programmable robots, which can be modified for use in a contingency environment, may result from use of this authority. The legal basis is section 866 of the National Defense Authorization Act for Fiscal Year 2011.

Since this is a new pilot program, data to support potential impact to small entities is not yet available. Consistent with the overall purpose of the program to attract nontraditional defense

contractors, DoD anticipates that this rule will have a positive economic impact to small entities.

The interim rule affects contractors that are not currently performing and have not performed, for at least the one-year period preceding the solicitation of sources by DoD for the procurement or transaction, any of the following for DoD—

—Any contract or subcontract that is subject to full coverage under the cost accounting standards prescribed pursuant to section 26 of the Office of Federal Procurement Policy Act (41 U.S.C. 1502) and the regulations implementing such section; or

—Any other contract in excess of the certified cost or pricing data threshold under which the contractor is required to submit certified cost or pricing data.

This interim rule does not impose any new reporting, recordkeeping or other compliance requirements on contractors. There are no rules that duplicate, overlap or conflict with this rule. There are no known significant alternatives to the rule.

Accordingly, 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.

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 2011–D034) in correspondence.

## IV. Paperwork Reduction Act

The rule does not impose 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).

## V. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comments. The rule implements section 866 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111–383). Section 866 was effective upon enactment on January 7, 2011. This action is necessary as DoD continues to search for ways to acquire and deploy

innovative technologies and solutions to meet urgent operational needs. Without this interim rule, DoD will be unable to test whether the streamlined procedures similar to those available for commercial items can serve as an effective incentive for non-traditional defense contractors to (1) channel investment and innovation into areas that are useful to DOD and (2) provide items developed exclusively at private expense to meet validated military requirements.

## List of Subjects in 48 CFR Parts 212 and 252

Government procurement.

### Mary Overstreet,

*Editor, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 212 and 252 are amended as follows:

- 1. The authority citation for 48 CFR parts 212 and 252 continues to read as follows:

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

## PART 212—ACQUISITION OF COMMERCIAL ITEMS

- 2. Amend part 212 by adding new subpart 212.71 to read as follows:

### Subpart 212.71—Pilot Program for Acquisition of Military-Purpose Nondevelopmental Items

212.7100	Scope.
212.7101	Definitions.
212.7102	Pilot program.
212.7103	Solicitation provision.
212.7100	Scope.

This subpart establishes the pilot program authorized by section 866 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111–383).

#### 212.7101 Definitions.

*Military-purpose nondevelopmental item, nondevelopmental item, and nontraditional defense contractor, as used in this subpart, are defined in the provision at 252.212–7002.*

#### 212.7102 Pilot program.

##### 212.7102–1 Contracts under the program.

The contracting officer may enter into contracts with nontraditional defense contractors for the acquisition of military-purpose nondevelopmental items. See PGI 212.7102 for file documentation requirements. Each contract entered into under the pilot program shall—

- (a) Be awarded using competitive procedures;

(b) Be a firm-fixed-price contract, or a fixed-price contract with an economic price adjustment clause;

(c) Be in an amount not in excess of \$50 million;

(d) Provide—

(1) For the delivery of an initial lot of production quantities of completed items not later than nine months after the date of the award of such contract; and

(2) That failure to make delivery as provided for under paragraph (d)(1) may result in termination for cause; and

(e) Be—

(1) Exempt from the requirement to submit certified cost or pricing data;

(2) Exempt from the cost accounting standards under section 26 of the Office of Procurement Policy Act (41 U.S.C. 1502); and

(3) Subject to the requirement to provide data other than certified cost or pricing data for the purpose of price reasonableness determinations.

**212.7102-2 Reporting requirements.**

Departments and agencies shall prepare a consolidated annual report to provide information about contracts awarded under this pilot authority. The report shall be submitted to the Office of the Deputy Director, Defense Procurement and Acquisition Policy (Contract Policy and International Contracting), by October 31 each year in accordance with the procedures at PGI 212.7102. See PGI 212.7102 for annual reporting format.

**212.7102-3 Sunset of the pilot authority.**

(a) The authority to carry out the pilot program described in this subpart expires on January 6, 2016.

(b) The expiration under paragraph (a) of this section of the authority to carry out the pilot program will not affect the validity of any contract awarded under the pilot program before the expiration of the pilot program under that paragraph.

**212.7103 Solicitation provision.**

Use the provision at 252.212-7002, Pilot Program for Acquisition of Military-Purpose Nondevelopmental Items, in all solicitations that meet the applicability criteria of 212.7102-1 for this pilot program.

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

■ 3. Amend part 252 by adding new section 252.212-7002 to read as follows:

**252.212-7002 Pilot Program for Acquisition of Military-Purpose Nondevelopmental Items.**

As prescribed in 212.7103, use the following provision:

**PILOT PROGRAM FOR ACQUISITION OF MILITARY-PURPOSE NONDEVELOPMENTAL ITEMS (JUN 2011)**

(a) *Definitions.* As used in this provision—  
*Military-purpose nondevelopmental item* means a nondevelopmental item that meets a validated military requirement, as determined in writing by the responsible program manager, and has been developed exclusively at private expense. An item shall not be considered to be developed at private expense if development of the item was paid for in whole or in part through—

(1) Independent research and development costs or bid and proposal costs, per the definition in FAR 31.205-18, that have been reimbursed directly or indirectly by a Federal agency or have been submitted to a Federal agency for reimbursement; or

(2) Foreign government funding.

“Nondevelopmental item” is defined in FAR 2.101 and for the purpose of this subpart also includes previously developed items of supply that require modifications other than those customarily available in the commercial marketplace if such modifications are consistent with the requirement of DFARS 212.7102-2(d)(1).

*Nontraditional defense contractor* means an entity that is not currently performing and has not performed, for at least the one-year period preceding the solicitation of sources by the Department of Defense for the procurement or transaction, any of the following for the Department of Defense—

(1) Any contract or subcontract that is subject to full coverage under the cost accounting standards prescribed pursuant to Section 26 of the Office of Federal Procurement Policy Act (41 U.S.C. section 1502) and the regulations implementing such section; or

(2) Any other contract in excess of the certified cost or pricing data threshold under which the contractor is required to submit certified cost or pricing data.

(b) *Notice.* This is a procurement action under section 866 of the National Defense Authorization Act for Fiscal Year 2011, Pilot Program for Acquisition of Military-Purpose Nondevelopmental Items, and is subject to the limitations outlined in DFARS 212.7102.

(c) *Representation.* By submission of its offer, the offeror represents that it is a nontraditional defense contractor.

(End of provision)

\* \* \* \* \*

[FR Doc. 2011-16316 Filed 6-28-11; 8:45 am]

**BILLING CODE 5001-08-P**

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Part 215**

RIN 0750-AH30

**Defense Federal Acquisition Regulation Supplement; Management of Manufacturing Risk in Major Defense Acquisition Programs (DFARS Case 2011-D031)**

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

**ACTION:** Interim rule.

**SUMMARY:** DoD is issuing an interim rule to implement section 812 of the National Defense Authorization Act for Fiscal Year 2011. Section 812(b)(5) instructs DoD to issue guidance that, at a minimum, shall require appropriate consideration of the manufacturing readiness and manufacturing-readiness processes of potential contractors and subcontractors as a part of the source selection process for major defense acquisition programs.

**DATES:** Effective June 29, 2011.

Comments on the interim rule should be submitted in writing to the address shown below on or before August 29, 2011 to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2011-D031, using any of the following methods:

○ *Regulations.gov:* <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting “DFARS Case 2011-D031” under the heading “Enter keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “DFARS Case 2011-D031.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “DFARS Case 2011-D031” on your attached document.

○ *E-mail:* [dfars@osd.mil](mailto:dfars@osd.mil). Include DFARS Case 2011-D031 in the subject line of the message.

○ *Fax:* 703-602-0350.

○ *Mail:* Defense Acquisition Regulations System, Attn: Mr. Dustin Pitsch, OUSD (AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s),