

request and shall be provided to the SPM.

#### **PART 239—ACQUISITION OF INFORMATION TECHNOLOGY**

4. Subpart 239.1 is added to read as follows:

##### **Subpart 239.1—General**

Sec.  
239.101 Policy.

##### **239.101 Policy.**

See Subpart 208.74 when acquiring commercial software or software maintenance.

#### **PART 251—USE OF GOVERNMENT SOURCES BY CONTRACTORS**

5. Section 251.102 is amended as follows:

- a. By revising paragraph (f);
- b. In Table 51–1, by revising paragraph 1.;
- c. In Table 51–1, in paragraph 2.b.(1) in the last sentence, and in paragraph 2.b.(2) in the last sentence, by removing “telefax” and adding in its place “facsimile”; and
- d. In Table 51–1, by adding paragraph 2.c. to read as follows:

##### **251.102 Authorization to use Government supply sources.**

\* \* \* \* \*

(f) The authorizing agency is also responsible for promptly considering requests of the DoD supply source for authority to refuse to honor requisitions from a contractor that is indebted to DoD and has failed to pay proper invoices in a timely manner.

##### **Table 51–1, Authorization To Purchase From Government Supply Sources**

\* \* \* \* \*

1. You are hereby authorized to use Government sources in performing Contract No. \_\_\_\_\_ for \_\_\_\_\_ [insert applicable military department or defense agency], as follows: \_\_\_\_\_ [Insert applicable purchasing authority given to the contractor.]

2. \* \* \*

c. Enterprise Software Initiative. Place orders in accordance with the terms and conditions of the attached Enterprise Software Agreement(s), or instructions for obtaining commercial software or software maintenance from Enterprise Software Initiative inventories, and this authorization. Attach a copy of this authorization to the order (unless a copy was previously furnished to the Enterprise Software Agreement contractor).

Insert the following statement in the order:

This order is placed under written authorization from \_\_\_\_\_ dated (\* \_\_\_\_\_). In the event of any inconsistency between the terms and conditions of this order, and those of the Enterprise Software Agreement, the latter will govern.

\* \* \* \* \*

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

6. Section 252.251–7000 is amended as follows:

- a. By revising the clause date and paragraph (a);
- b. By removing paragraph (b) and redesignating paragraphs (c) through (f) as paragraphs (b) through (e); and
- c. In newly designated paragraph (c)(4), in the last sentence, by removing “Such” and adding in its place “The”. The revised text reads as follows:

##### **252.251–7000 Ordering From Government Supply Sources.**

\* \* \* \* \*

##### **Ordering from Government Supply Sources (OCT 2002)**

(a) When placing orders under Federal Supply Schedules, Personal Property Rehabilitation Price Schedules, or Enterprise Software Agreements, the Contractor shall follow the terms of the applicable schedule or agreement and authorization. Include in each order:

(1) A copy of the authorization (unless a copy was previously furnished to the Federal Supply Schedule, Personal Property Rehabilitation Price Schedule, or Enterprise Software Agreement contractor).

(2) The following statement: Any price reductions negotiated as part of an Enterprise Software Agreement issued under a Federal Supply Schedule contract shall control. In the event of any other inconsistencies between an Enterprise Software Agreement, established as a Federal Supply Schedule blanket purchase agreement, and the Federal Supply Schedule contract, the latter shall govern.

(3) The completed address(es) to which the Contractor's mail, freight, and billing documents are to be directed.

\* \* \* \* \*

[FR Doc. 02–27109 Filed 10–24–02; 8:45 am]

**BILLING CODE 5001–08–P**

#### **DEPARTMENT OF DEFENSE**

##### **48 CFR Parts 212, 226, and 237**

[DFARS Case 2000–D306]

##### **Defense Federal Acquisition Regulation Supplement; Performance-Based Contracting Using Federal Acquisition Regulation Part 12 Procedures**

**AGENCY:** Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 821(b) of the National Defense Authorization Act for Fiscal Year 2001. Section 821(b) permits DoD to treat certain performance-based service contracts and task orders as contracts for the procurement of commercial items.

**EFFECTIVE DATE:** October 25, 2002.

**FOR FURTHER INFORMATION CONTACT:** Ms. Sandra Haberman, Defense Acquisition Regulations Council, OUSD (AT&L) DP (DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone (703) 602–0289; facsimile (703) 602–0350. Please cite DFARS Case 2000–D306.

##### **SUPPLEMENTARY INFORMATION:**

##### **A. Background**

This rule revises and finalizes the interim rule published at 66 FR 63335 on December 6, 2001. The rule implements Section 821(b) of the National Defense Authorization Act for Fiscal Year 2001 (Public Law 106–398). Section 821(b) permits DoD to use Federal Acquisition Regulation (FAR) Part 12 (Acquisition of Commercial Items) procedures for performance-based service contracts and task orders, if certain conditions are met.

Four respondents submitted comments on the interim rule. A discussion of the comments is provided below:

*Comment:* The rule appears to contradict the language in FAR Subpart 13.5, which permits the use of simplified procedures for the acquisition of commercial items in amounts exceeding the simplified acquisition threshold but not exceeding \$5 million. Section 212.102 of the rule prohibits the use of FAR Subpart 13.5 procedures when using FAR Part 12 for acquisitions that are performance-based. *DoD Response:* Do not concur. FAR 12.102 authorizes the use of FAR Part 12 in conjunction with FAR Part 13, 14, or 15, when acquiring supplies or services that meet the definition of commercial

item at FAR 2.101. DFARS 212.102 provides additional authority for use of FAR Part 12 to acquire services that do not meet the definition of commercial item, when performance-based contracting methods are used. Therefore, the prohibition against use of FAR Subpart 13.5 in conjunction with FAR Part 12 applies only to performance-based contracts for services that do not meet the definition of commercial item but can be acquired using FAR Part 12 pursuant to the authority in DFARS 212.102.

*Comment:* The statement in 212.102(a)(i) specifying that the rule applies to contracts or task orders “. . . entered into on or before October 30, 2003” should be changed to apply to contracts or task orders “. . . entered into after October 30, 2000, but before October 30, 2003.” The statute became effective on October 30, 2000, and this new authority is not available to task orders that were awarded prior to that date, but would be applicable to task orders awarded after that date even though the contract was awarded before October 30, 2000. *DoD Response:* Do not concur. The interim rule became effective on December 6, 2001. Since this date is in the past, there is no need to include it in the DFARS text. In addition, the rule, as written, does not preclude application to task orders issued under contracts that were awarded before the rule became effective.

*Comment:* The statement in 212.102(a)(i) that requires the use of quality assurance surveillance plans should be deleted from the rule. While such plans are a common best practice for performance-based contracts, this requirement is not part of the statute and, therefore, is not “in accordance with the Act.” *DoD Response:* Do not concur. While quality assurance surveillance plans are not specifically addressed in the statute, this requirement should be retained, because the plans are an element of performance-based contracting. See FAR Subpart 37.6, which establishes quality assurance as a component of performance-based contracting.

*Comment:* The statement in 212.102(a)(i) that permits application of the rule if award is made “to an entity that provides similar services at the same time to the general public under terms and conditions similar to those in the contract” should be changed to add, at the end, the phrase “or task order.” Under the law, it is clear that the two similarity tests are appropriately applied at either the contract level or at the task order level. *DoD Response:* Concur. The statement has been

amended to add the phrase “or task order.”

*Comment:* The cross-reference text at 237.601 should be changed from “See 212.102 for the use of FAR Part 12 procedures with performance-based contracting” to “See 212.102 for additional authority and specific conditions where it is appropriate to use FAR Part 12 procedures with performance-based contracting.” This change is necessary to avoid any misconception that DFARS 212.102 contains the *only* provisions for use of FAR Part 12 for performance-based contracts. Public Law 106–398 clearly established these conditions as an additional incentive for use of the performance-based service contract under FAR Part 12. *DoD Response:* Do not concur. The change is not necessary, as the DFARS does not indicate such a limitation.

*Comment:* The text at 212.102(a)(ii) should be changed from “\* \* \* modify paragraph (a) of the clause at FAR 52.212–4 \* \* \*” to “\* \* \* tailor paragraph (a) of the clause at FAR 52.212–4 \* \* \*” *DoD Response:* Concur. The word “tailor” is consistent with the terminology used in FAR Part 12. This change has been made in the final rule.

*Comment:* The statement in 212.102(a)(i) that permits application of the rule if award is made “to an entity that provides similar services at the same time to the general public \* \* \*” may exclude some small businesses, including 8(a) and native-owned firms, that focus their efforts on Government contracts. *DoD Response:* Partially concur. Firms that direct their efforts exclusively toward providing services to the Government will not meet this condition of the rule. However, this condition was established by Section 821(b) of Public Law 106–398 and cannot be deleted.

*Comment:* The rule reclassifies all service contracts of less than \$5 million as subject to FAR Part 12 procedures. DFARS 226.104(1) precludes use of the clause at 252.226–7001, Utilization of Indian Organizations and Indian-Owned Economic Enterprises—DoD Contracts, in any contract that uses FAR Part 12 procedures. Therefore, this rule eliminates all service contracts of less than \$5 million from the Indian Incentive Program, thereby causing significant harm to Native American service companies and Indian Tribal Corporations. DoD should remove the Part 12 exclusion from the clause prescription at DFARS 226.104(1). *DoD Response:* Partially concur. DoD does not agree that the rule reclassifies all service contracts of less than \$5 million as subject to FAR Part 12. The rule is

limited to performance-based contracting for services that meet specific criteria. DoD does agree that, as the interim rule was written, the Indian Incentive Program could not be used for any performance-based service contracts awarded using FAR Part 12 procedures. The FAR Part 12 exclusion at DFARS 226.104 was established prior to this rule and was intended to apply to the acquisition of supplies and services that meet the definition of commercial item at FAR 2.101. Since this rule permits the use of FAR Part 12 procedures for acquisition of services that do not meet the definition of commercial item, DFARS 226.104 has been amended to clarify that there is no restriction on use of the clause at 252.226–7001 in performance-based contracts for services that either are not commercial items, or are treated as commercial items solely as a result of the authority in 212.102.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

## B. Regulatory Flexibility Act

DoD certifies that this final rule will not 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.* The rule permits the use of FAR Part 12 procedures for the award of certain performance-based service contracts and task orders. While the use of FAR Part 12 procedures will improve the efficiency of contracting for these services, the economic impact on small entities will not be substantial.

## 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 212, 226, and 237

Government procurement.

Michele P. Peterson,  
Executive Editor, Defense Acquisition  
Regulations Council.

## Interim Rule Adopted as Final With Changes

Accordingly, the interim rule amending 48 CFR Parts 212 and 237, which was published at 66 FR 63335 on December 6, 2001, is adopted as a final rule with the following changes:

1. The authority citation for 48 CFR Parts 212, 226, and 237 continues to read as follows:

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

## **PART 212—ACQUISITION OF COMMERCIAL ITEMS**

2. Section 212.102 is revised to read as follows:

### **212.102 Applicability.**

(a)(i) In accordance with Section 821 of the National Defense Authorization Act for Fiscal Year 2001 (Pub. L. 106–398), the contracting officer also may use FAR Part 12 for any performance-based contracting for services if the contract or task order—

(A) Is not awarded using the procedures in FAR Subpart 13.5;

(B) Is entered into on or before October 30, 2003;

(C) Has a value of \$5 million or less;

(D) Meets the definition of performance-based contracting at FAR 2.101;

(E) Uses quality assurance surveillance plans;

(F) Includes performance incentives where appropriate;

(G) Specifies a firm-fixed price; and

(H) Is awarded to an entity that provides similar services at the same time to the general public under terms and conditions similar to those in the contract or task order.

(ii) In exercising the authority specified in paragraph (a)(i) of this section, the contracting officer should tailor paragraph (a) of the clause at FAR 52.212–4 as may be necessary to ensure the contract's remedies adequately protect the Government's interests.

## **PART 226—OTHER SOCIOECONOMIC PROGRAMS**

3. Section 226.104 is revised to read as follows:

### **226.104 Contract clause.**

Use the clause at 252.226–7001, Utilization of Indian Organizations and Indian-Owned Economic Enterprises—DoD Contracts, in solicitations and contracts for supplies or services that—

(1)(i) Are other than commercial items; or

(ii) Qualify to use FAR Part 12 procedures solely through the authority in 212.102; and

(2) Are expected to exceed the simplified acquisition threshold.

[FR Doc. 02–27108 Filed 10–24–02; 8:45 am]

**BILLING CODE 5001–08–P**

## **DEPARTMENT OF DEFENSE**

### **48 CFR Part 252**

[DFARS Case 2002–D028]

### **Defense Federal Acquisition Regulation Supplement; Caribbean Basin Country—Honduras**

**AGENCY:** Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to add Honduras to the list of Caribbean Basin countries whose products DoD may acquire under the Trade Agreements Act, in accordance with a determination of the United States Trade Representative.

**EFFECTIVE DATE:** October 25, 2002.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy Williams, Defense Acquisition Regulations Council, OUSD(AT&L)DP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone (703) 602–0328; facsimile (703) 602–0350. Please cite DFARS Case 2002–D028.

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Background**

This final rule amends the clauses at DFARS 252.225–7007, Buy American Act-Trade Agreements—Balance of Payments Program, and 252.225–7021, Trade Agreements, to add Honduras to the definition of “Caribbean Basin country.” The rule implements the direction of the United States Trade Representative to treat the products of Honduras as eligible products in acquisitions subject to the Trade Agreements Act (67 FR 46239, July 12, 2002).

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

##### **B. Regulatory Flexibility Act**

This rule will not have a significant cost or administrative impact on contractors or offerors, or a significant effect beyond the internal operating procedures of DoD. Therefore, publication for public comment is not required. However, DoD will consider comments from small entities concerning the affected DFARS subpart in accordance with 5 U.S.C. 610. Such comments should cite DFARS Case 2002–D028.

##### **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 Part 252**

Government procurement.

**Michele P. Peterson,**  
*Executive Editor, Defense Acquisition Regulations Council.*

Therefore, 48 CFR Part 252 is amended as follows:

1. The authority citation for 48 CFR part 252 continues to read as follows:

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

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

### **252.225–7007 [Amended]**

2. Section 252.225–7007 is amended as follows:

a. By revising the clause date to read “(OCT 2002)”; and

b. In paragraph (a)(1) by adding, in alphabetical order, “Honduras” to the list of countries.

### **252.225–7021 [Amended]**

3. Section 252.225–7021 is amended as follows:

a. By revising the clause date to read “(OCT 2002)”; and

b. In paragraph (a)(1) by adding, in alphabetical order, “Honduras” to the list of countries.

[FR Doc. 02–27105 Filed 10–24–02; 8:45 am]

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## **DEPARTMENT OF COMMERCE**

### **National Oceanic and Atmospheric Administration**

### **50 CFR Part 660**

[Docket No. 020430101–2101–01; I.D. 101102F]

### **Fisheries Off West Coast States and in the Western Pacific; West Coast Salmon Fisheries; Inseason Action 16–Adjustment of the Commercial Fishery from the Oregon-California Border to the Humboldt South Jetty**

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

**ACTION:** Inseason adjustment; request for comments.

**SUMMARY:** NMFS announces that the commercial salmon fishery in the area from the Oregon-California Border to the Humboldt South Jetty, was modified to