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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 219 and 252

RIN 0750-AE93

Defense Federal Acquisition Regulation Supplement; Small Business Programs (DFARS Case 2003-D047)

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

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending Defense Federal Acquisition Regulation Supplement (DFARS) text pertaining to small business programs. The rule updates and clarifies policy for contracting with small business and small disadvantaged business concerns and relocates text to the DFARS companion resource, Procedures, Guidance, and Information.

EFFECTIVE DATE: April 26, 2007.

FOR FURTHER INFORMATION CONTACT: Ms. Deborah Tronic, Defense Acquisition Regulations System, OUSD(AT&L)DPAP(DARS), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0289; facsimile (703) 602-0350. Please cite DFARS Case 2003-D047.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends DFARS Part 219 and corresponding contract clauses. The DFARS changes—

- Update and clarify requirements for contracting with small business and small disadvantaged business concerns; and
- Delete text containing procedures for referring matters to the Small Business Administration; procedures for processing contract awards under the 8(a) Program; and information on the DoD test program for negotiation of comprehensive small business subcontracting plans. Text on these subjects has been relocated to the DFARS companion resource, Procedures, Guidance, and Information (PGI), available at <http://www.acq.osd.mil/dpap/dars/pgi>.

DoD published a proposed rule at 71 FR 9303 on February 23, 2006. Three respondents submitted comments on the

proposed rule. A discussion of the comments is provided below.

1. *Comment:* One respondent stated that the proposed changes to subcontracting plan requirements at DFARS 219.704(2) and 252.219-7003(g) would create an ambiguity. These changes proposed to amend text requiring contractors to notify the administrative contracting officer (ACO) of any substitutions of “firms that are not small, small disadvantaged, or women-owned small businesses for the firms listed in the subcontracting plan,” to instead indicate that the contractor must notify the ACO of any substitutions of small businesses specifically identified in the subcontracting plan. The respondent stated that ACOs and contractors could interpret this change to mean that contractors would be required to provide notification when substituting any firm, even one that is a small business concern, for one that is listed in the subcontracting plan. The respondent recommended that the rule instead require contractors to notify the ACO of any substitutions of “firms that are not small business concerns” for the firms listed in the subcontracting plan.

DoD Response: DoD agrees that the language in the proposed rule could be ambiguous. Therefore, the final rule has been written to clarify the existing policy, *i.e.*, that the contractor must notify the ACO of any substitutions of firms that are not small business firms, for the small business firms specifically identified in the subcontracting plan.

2. *Comment:* One respondent recommended deleting the proposed text at 219.704(3), which contains a reference to the procedures in DFARS 215.304 regarding evaluation of offers that require a subcontracting plan. The respondent recommended that the proposed 219.704(3) be replaced with text stating that offerors with approved commercial or comprehensive subcontracting plans are not required to submit contract-specific goals, and that those offerors will be evaluated based on Standard Form 295 information and Defense Contract Management Agency evaluations of company-wide performance under their small business programs. In addition, the respondent recommended that 219.704 state that contracting officers may accept commercial subcontracting plans for both commercial item and noncommercial item contracts, provided the plan covers the entire production of both commercial and noncommercial items as set forth at FAR 52.219-9(g).

DoD Response: The issues addressed in this comment go beyond the scope of the changes being made under this

DFARS case. DoD recognizes the importance of the issues raised by the respondent and is currently working independently of this case to resolve those issues. Any proposed changes to the DFARS that might result would be published under a separate case for public comment.

3. *Comment:* One respondent stated that deleting DFARS text and putting it in PGI requires contracting officers to research multiple locations to ensure they are complying with all the necessary requirements. The respondent stated that deleting requirements would be streamlining, not moving them to another area which may cause uncertainty and ambiguity.

DoD Response: DoD has moved non-regulatory requirements and guidance that do not significantly impact the public, from DFARS to PGI to facilitate rapid dissemination of any future changes, thus streamlining the process. Where there is related text in PGI, a link to this text is imbedded in DFARS. Through these links, the user is able to view the related PGI text side-by-side with the DFARS text. PGI also contains information on training, deviations, policy memoranda, and other information (*e.g.*, guidebooks) that is not available in the DFARS.

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.*, because the rule makes no significant change to DoD policy for contracting with small business and small disadvantaged business concerns.

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 219 and 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 219 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 219 and 252 continues to read as follows:

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

PART 219—SMALL BUSINESS PROGRAMS

■ 2. Section 219.000 is revised to read as follows:

219.000 Scope of part.

This part also implements 10 U.S.C. 2323, which—

(1) Is applicable to DoD through fiscal year 2009; and

(2) Establishes goals for awards to small disadvantaged business (SDB) concerns, historically black colleges and universities (HBCUs), and minority institutions (MIs). See 226.370 for policy on contracting with HBCU/MIs.

219.202–1 [Removed]

■ 3. Section 219.202–1 is removed.

■ 4. The heading of Subpart 219.6 is revised to read as follows:

Subpart 219.6—Certificates of Competency and Determinations of Responsibility

■ 5. Section 219.602 is revised to read as follows:

219.602 Procedures.

When making a nonresponsibility determination for a small business concern, follow the procedures at PGI 219.602.

219.602–1 and 219.602–3 [Removed]

■ 6. Sections 219.602–1 and 219.602–3 are removed.

■ 7. Section 219.702 is revised to read as follows:

219.702 Statutory requirements.

(1) Section 834 of Public Law 101–189, as amended (15 U.S.C. 637 note), requires DoD to establish a test program to determine whether comprehensive subcontracting plans on a corporate, division, or plant-wide basis will reduce administrative burdens while enhancing subcontracting opportunities for small and small disadvantaged business concerns. See PGI 219.702 for the requirements of the test program.

(2) Comprehensive subcontracting plans shall not be subject to application of liquidated damages during the period of the test program (Section 402, Pub. L. 101–574).

219.703 [Amended]

■ 8. Section 219.703 is amended in paragraph (a)(2)(B) by removing “Small, Small Disadvantaged and Women-Owned”.

■ 9. Section 219.704 is revised to read as follows:

219.704 Subcontracting plan requirements.

(1) The goal for use of small disadvantaged business concerns shall include subcontracts with historically black colleges and universities and minority institutions (see Subpart 226.70), in addition to subcontracts with small disadvantaged business concerns. Subcontracts with historically black colleges and universities and minority institutions do not have to be included in the small disadvantaged business goal in commercial items subcontracting plans.

(2) In those subcontracting plans which specifically identify small businesses, prime contractors shall notify the administrative contracting officer of any substitutions of firms that are not small business firms, for the small business firms specifically identified in the subcontracting plan. Notifications shall be in writing and shall occur within a reasonable period of time after award of the subcontract. Contractor-specified formats shall be acceptable.

(3) See 215.304 for evaluation of offers in acquisitions that require a subcontracting plan.

219.705–2 [Removed]

■ 10. Section 219.705–2 is removed.

■ 11. Section 219.708 is amended by revising the section heading and paragraph (b)(1) to read as follows:

219.708 Contract clauses.

(b)(1)(A) Use the clause at 252.219–7003, Small Business Subcontracting Plan (DoD Contracts), in solicitations and contracts that contain the clause at FAR 52.219–9, Small Business Subcontracting Plan.

(B) In contracts with contractors that have comprehensive subcontracting plans approved under the test program described in 219.702, use the clause at 252.219–7004, Small Business Subcontracting Plan (Test Program), instead of the clauses at 252.219–7003, Small Business Subcontracting Plan (DoD Contracts), and FAR 52.219–9, Small Business Subcontracting Plan.

* * * * *

■ 12. Section 219.800 is amended by revising paragraph (a) to read as follows:

219.800 General.

(a) By Partnership Agreement (PA) between the Small Business Administration (SBA) and the Department of Defense (DoD), the SBA has delegated to the Under Secretary of Defense (Acquisition, Technology, and Logistics) its authority under paragraph 8(a)(1)(A) of the Small Business Act (15

U.S.C. 637(a)) to enter into 8(a) prime contracts, and its authority under 8(a)(1)(B) of the Small Business Act to award the performance of those contracts to eligible 8(a) Program participants. However, the SBA remains the prime contractor on all 8(a) contracts, continues to determine eligibility of concerns for contract award, and retains appeal rights under FAR 19.810. The SBA delegates only the authority to sign contracts on its behalf. Consistent with the provisions of the PA, this authority is hereby redelegated to DoD contracting officers. A copy of the PA, which includes the PA's expiration date, is available at PGI 219.800.

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■ 13. Section 219.803 is revised to read as follows:

219.803 Selecting acquisitions for the 8(a) Program.

When selecting acquisitions for the 8(a) Program, follow the procedures at PGI 219.803.

■ 14. Section 219.804 is revised to read as follows:

219.804 Evaluation, offering, and acceptance.

When processing requirements under the PA, follow the procedures at PGI 219.804.

219.804–2 and 219.804–3 [Removed]

■ 15. Sections 219.804–2 and 219.804–3 are removed.

■ 16. Section 219.805–2 is revised to read as follows:

219.805–2 Procedures.

When processing requirements under the PA, follow the procedures at PGI 219.805–2 for requesting eligibility determinations.

■ 17. Sections 219.808–1 and 219.811 are revised to read as follows:

219.808–1 Sole source.

For sole source requirements processed under the PA, follow the procedures at PGI 219.808–1.

219.811 Preparing the contracts.

When preparing awards under the PA, follow the procedures at PGI 219.811.

219.811–1 and 219.811–2 [Removed]

■ 18. Sections 219.811–1 and 219.811–2 are removed.

■ 19. Section 219.811–3 is amended by revising paragraph (3) to read as follows:

219.811–3 Contract clauses.

* * * * *

(3) Use the clause at 252.219–7011, Notification to Delay Performance, in

solicitations and purchase orders issued under the PA cited in 219.800.

219.812 [Removed]

■ 20. Section 219.812 is removed.

■ 21. Section 219.1101 is added to read as follows:

219.1101 General.

The determination to use or suspend the price evaluation adjustment for DoD acquisitions can be found at <http://www.acq.osd.mil/dpap/dars/classdev/index.htm>.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 22. Section 252.212–7001 is amended by revising the clause date and paragraphs (b)(2) and (3) to read as follows:

252.212–7001 Contract terms and conditions required to implement Statutes or Executive orders applicable to Defense acquisitions of commercial items.

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CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS APPLICABLE TO DEFENSE ACQUISITIONS OF COMMERCIAL ITEMS (APR 2007)

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(b) * * *
(2) 252.219–7003, Small Business Subcontracting Plan (DoD Contracts) (APR 2007) (15 U.S.C. 637).

(3) 252.219–7004, Small Business Subcontracting Plan (Test Program) (APR 2007) (15 U.S.C. 637 note).

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■ 23. Section 252.219–7003 is amended by revising the section heading, the clause title and date, the introductory text preceding paragraph (a), and paragraph (g) to read as follows:

252.219–7003 Small business subcontracting plan (DoD contracts).

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SMALL BUSINESS SUBCONTRACTING PLAN (DOD CONTRACTS) (APR 2007)

This clause supplements the Federal Acquisition Regulation 52.219–9, Small Business Subcontracting Plan, clause of this contract.

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(g) In those subcontracting plans which specifically identify small businesses, the Contractor shall notify the Administrative Contracting Officer of any substitutions of firms that are not small business firms, for the small business firms specifically identified in the subcontracting plan. Notifications shall be in writing and shall occur within a reasonable period of time after award of the subcontract. Contractor-specified formats shall be acceptable.

■ 24. Section 252.219–7004 is amended by revising the section heading, the clause title and date, and paragraph (d) to read as follows:

252.219–7004 Small business subcontracting plan (test program).

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SMALL BUSINESS SUBCONTRACTING PLAN (TEST PROGRAM) (APR 2007)

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(d) The failure of the Contractor or subcontractor to comply in good faith with (1) the clause of this contract entitled “Utilization of Small Business Concerns,” or (2) an approved plan required by this clause, shall be a material breach of the contract.

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 222

RIN 0750–AF59

Defense Federal Acquisition Regulation Supplement; Wage Determinations (DFARS Case 2006–D043)

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

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to update procedures for obtaining Department of Labor wage determinations for construction and service contracts. The DFARS amendments are consistent with changes made to the Federal Acquisition Regulation.

EFFECTIVE DATE: April 26, 2007.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone (703) 602–0328; facsimile (703) 602–0350. Please cite DFARS Case 2006–D043.

SUPPLEMENTARY INFORMATION:

A. Background

Item IV of Federal Acquisition Circular 2005–10, published at 71 FR 36930 on June 28, 2006, amended the Federal Acquisition Regulation to implement the Wage Determinations OnLine internet Website as the source for obtaining Department of Labor wage

determinations for construction and service contracts.

This final rule makes the following corresponding DFARS changes:

- Revises the heading of sections 222.001 and 222.1008.
- Relocates text addressing use of the Service Contract Act Directory of Occupations, from 222.1008–2 to 222.1008–1, and updates the text to reflect the replacement of Standard Form 98a with the electronic e98 process.

○ Removes obsolete text at 222.1008–7 and 222.1014.

In addition, this final rule adds DFARS section 222.404–2, which contains a reference to internal DoD procedures for obtaining clarification of proper application of construction wage rate schedules.

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 under 41 U.S.C. 418b is not required. However, DoD will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should cite DFARS Case 2006–D043.

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 222

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR part 222 is amended as follows:

PART 222—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 1. The authority citation for 48 CFR part 222 continues to read as follows:

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

■ 2. Section 222.001 is amended by revising the section heading to read as follows: