

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Part 225**

RIN 0750-AH17

Defense Federal Acquisition Regulation Supplement; Nonavailability Exception for Procurement of Hand or Measuring Tools (DFARS Case 2011-D025)

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

ACTION: Final rule.

SUMMARY: DoD is adopting an interim rule as a final rule with minor changes. The interim rule implemented part of the National Defense Authorization Act for Fiscal Year 2011, which provides a domestic nonavailability exception to the requirement known as the Berry Amendment to acquire only domestic hand or measuring tools.

DATES: *Effective date:* August 19, 2011.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, telephone 703-602-0328.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD published an interim rule in the *Federal Register* (76 FR 14588) on March 17, 2011, to implement section 847 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111-383). Section 847 provides a domestic nonavailability exception to the requirement at 10 U.S.C. 2533a (Berry Amendment) to acquire only domestic hand or measuring tools. The domestic nonavailability exception was previously limited to the items covered in 10 U.S.C. 2533(b)(1) (food, clothing, fabrics, and fibers).

The public comment period closed on May 16, 2011. One respondent submitted comments on the interim rule.

II. Discussion/Analysis**A. Public Comments**

The respondent noted high unemployment and recommended that, in order to create more employment for U.S. workers, the Government should minimize (if not eliminate) purchases from outside the United States, if the purchases can be procured within the United States.

The respondent suggested that sometimes nonavailability of domestic hand or measuring tools may be a planning issue. The respondent

suggested forecasting DoD needs 12-18 months in advance, providing acquisition history for the past 2 or 3 years, and posting all this data on a Web site open to all CCR-registered organizations. According to the respondent, U.S. companies could then do a better job of planning, including the ramp-up of supply to ensure availability. The respondent believes that this action could potentially eliminate the need for DoD to source hand or measuring tools from sources outside of the United States.

Response: As required by 10 U.S.C. 2533a, DoD does not purchase foreign hand or measuring tools, if domestically manufactured tools can be acquired.

There is definitely a need to interface with the industry about DoD requirements. Better forecasting for everything that DoD purchases clearly benefits all stakeholders. U.S. companies already have access to acquisition history for National Stock Numbers (NSNs) through such sources as FedBizOpps and DIBBS (Defense Logistics Agency Internet Bid Board System). For items that DoD manages and stocks, Government demand planners are able to produce a 12-month forecast in order to assist the industry in understanding its requirements. However, not all items are centrally managed.

DoD does not manage acquisition of hand or measuring tools. These items are assigned to GSA for supply management. This makes it difficult for DoD to predict and aggregate planned purchases across the entire DoD. In FY 2010, DoD had 3,850 contract actions for acquisition of hand or measuring tools, for a total dollar value of \$347 million.

Furthermore, adequate planning and notification to industry of an annual forecast will not be effective in obtaining domestic hand or measuring tools if there is an insufficient domestic supplier base. The fact that DoD only received one response to the interim rule may indicate that an insufficient pool of domestic contractors is available to supply DoD's requirements for hand or measuring tools as and when needed, in a satisfactory quality and sufficient quantity. The reason for enactment of the legislation is that market research has indicated that some types of commercial hand or measuring tools are no longer manufactured in the United States. Many hand or measuring tools are commercially available off-the-shelf (COTS) items. Revenue derived from Government sales is generally a very small percentage of overall revenue for manufacturers of commercially available off-the-shelf items. To the extent that the commercial market has

transitioned to purchase of foreign hand or measuring tools, DoD does not generally buy sufficient quantities of these tools to influence the industry to produce domestic tools, unless there is also a commercial market for them.

B. Other Changes

The final rule includes a conforming change to 225.7002-2(c), which provides an exception to the restrictions of the Berry Amendment for acquisitions of items listed in FAR 25.104(a), Nonavailable articles. Previously, hand or measuring tools were excluded from this exception because the statute did not provide an exception based on domestic nonavailability. Now that domestic nonavailability is an authorized exception, there is no need to exclude them at 225.7002-2(c).

Additionally, the final rule includes language at 225.7002-1(b) that directs contracting officers to the corresponding site in DFARS Procedures, Guidance, and Information for additional guidance on interpretation of the Berry Amendment restriction on foreign acquisition of hand or measuring tools.

III. Regulatory Flexibility Act

DoD certifies that this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act because the rule only allows purchase of hand or measuring tools from foreign sources when such tools are not available from domestic sources. If no domestic sources produce the tools, then allowing purchase from a foreign source will not impact any U.S. small business.

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).

List of Subjects in 48 CFR Part 225

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, the interim rule published at 76 FR 14588 on March 17, 2011, is adopted as final with the following changes:

PART 225—FOREIGN ACQUISITION

■ 1. The authority citation for 48 CFR part 225 continues to read as follows:

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

■ 2. Amend section 225.7002-1 by revising paragraph (b) to read as follows:

225.7002-1 Restrictions.

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(b) Hand or measuring tools, unless the tools were produced in the United States. For additional guidance, see PGI 225.7002-1(b).

■ 3. Amend section 225-7002-2 by revising paragraph (c) to read as follows:

225.7002-2 Exceptions.

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(c) Acquisitions of items listed in FAR 25.104(a).

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 216, 225, and 252

RIN 0750-AH28

Defense Federal Acquisition Regulation Supplement; Contractors Performing Private Security Functions (DFARS Case 2011-D023)

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

ACTION: Interim rule.

SUMMARY: DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008, which establish minimum processes and requirements for the selection, accountability, training, equipping, and conduct of personnel performing private security functions.

DATES: *Effective Date:* August 19, 2011.

Comment Date: Comments on the interim rule should be submitted in writing to the address shown below on or before October 18, 2011, to be considered in the formation of the final rule.

○ *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting "DFARS Case 2011-D023" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2011-D023." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company

name (if any), and "DFARS Case 2011-D023" on your attached document.

○ *E-mail:* dfars@osd.mil. Include DFARS Case 2011-D023 in the subject line of the message.

○ *Fax:* 703-602-0350.

○ *Mail:* Defense Acquisition Regulations System, Attn: Meredith Murphy, 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), please check 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: Meredith Murphy, Defense Acquisition Regulations System, OUSD (AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 703-602-1302; facsimile 703-602-0350.

SUPPLEMENTARY INFORMATION:

I. Background

The NDAA for FY 2008 (Pub. L. 110-181, enacted October 28, 2008), section 862, entitled "Contractors Performing Private Security Functions in Areas of Combat Operations or Other Significant Military Operations," was amended by section 853 of the NDAA for FY 2009 (Pub. L. 110-417, enacted October 14, 2008) and sections 831 and 832 of the NDAA for FY 2011 (Pub. L. 111-383, enacted January 7, 2011). An interim final rule was published in the **Federal Register** on July 17, 2009, to meet the mandate of section 862 of the FY 2008 NDAA to provide policy and guidance regulating the actions of DoD and other Governmental private security contractors. A clause to cover the interagency requirements will be covered by a separate and subsequent FAR rule currently under development.

This interim rule is focused solely on providing implementing contractual language and a contract clause mandated by statute and applicable to DoD contracts only. While section 862 of the 2008 NDAA required standardization of rules for private security contractors among Government agencies, DOD's underlying instruction, the Department of Defense Instruction (DoDI) 3020.50, entitled "Private Security Contractors Operating in Areas of Contingency Operations, Combat Operations, or Other Significant Operations" at <http://www.dtic.mil/whs/directives/corres/pdf> was written to

cover both DoD private security contractors (in all contingency operations) and interagency private security contractors (in combat operations). This interim rule implements the legislation by establishing (1) regulations addressing the selection, training, equipping, and conduct of personnel performing private security functions in areas of contingency operations, complex contingency operations, or other military operations or exercises that are designated by the combatant commander, (2) a contract clause, and (3) remedies.

Section 833 of the NDAA for FY 2011 is entitled "Standards and Certification for Private Security Contractors." This provision mandates the establishment of third-party certification processes for determining whether private security contractors adhere to standards for operational and business practices. The required industry standard is currently under development and will be incorporated in the DFARS once the standard is published.

The regulations implementing the referenced statutory provisions are in DFARS subpart 225.3, entitled "Contracts Performed Outside the United States." DFARS 225.302-3, Definitions, provides the definition of "private security functions" from section 862, as amended, and the definition of "complex contingency operations" from JP-102 (DoD Dictionary). This coverage does not apply to the performance of private security functions within the United States or outside the United States in areas that are not (a) contingency operations, (b) complex contingency operations, or (c) other military operations designated by the combatant commander. Importantly, DFARS 225.302 applies to the performance of private security functions in the applicable areas, without regard to whether the DoD contractor is a private security contractor. For example, a contractor delivering construction materials in an area of contingency operations might subcontract with a private security contractor to protect its supplies and employees during delivery. Although the supplier of the construction materials is not a private security contractor, the requirements of DFARS 252.225-7039, Contractors Performing Private Security Functions, are applicable. As a further example, the same contractor, if delivering construction materials to a base in Germany is not governed, at this time, by the requirements and limitations of DFARS 252.225.7039 because Germany is not an area of contingency operations,