

**DEPARTMENT OF DEFENSE****Defense Acquisition Regulations System****48 CFR Parts 211, 212, and 232**

RIN 0750-A113

**Defense Federal Acquisition Regulation Supplement: Application of Certain Clauses to Acquisitions of Commercial Items (DFARS Case 2013-D035)**

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

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to clarify the applicability of two clauses to acquisitions of commercial items.

**DATES:** Effective July 31, 2014.

**FOR FURTHER INFORMATION CONTACT:** Ms. Janetta Brewer, telephone 571-372-6104.

**SUPPLEMENTARY INFORMATION:****I. Background**

DoD published a proposed rule in the *Federal Register* at 78 FR 73472 on December 6, 2013, to clarify the applicability of DFARS 252.211-7008, Use of Government-Assigned Serial Numbers, and DFARS 252.232-7006, Wide Area WorkFlow Payment Instructions, to acquisitions of commercial items. The rule proposed adding these two clauses to the list at DFARS 212.301(f) of solicitation provisions and contract clauses for the acquisition of commercial items and revising the clause prescriptions to require their inclusion in solicitations and contracts for acquisitions using FAR part 12 procedures. One respondent submitted a public comment in response to the proposed rule.

**II. Discussion and Analysis**

DoD reviewed the public comment in the development of the final rule. There are no changes from the proposed rule in the final rule, except renumbering at 212.301 due to DFARS baseline changes. A discussion of the comment is provided, as follows:

*Comment:* The respondent stated that the rule appears to be a cost cutting measure that will reduce exploitation of tax monies being used to purchase products for the Government at an inflated rate.

*Response:* The rule clarifies the applicability of DFARS 252.211-7008

and 252.232-7006 to acquisitions of commercial items.

**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**

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, and is summarized as follows:

This rule revises DFARS part 212, Acquisition of Commercial Items, to clarify the applicability of DFARS 252.211-7008, Use of Government-Assigned Serial Numbers, and DFARS 252.232-7006, Wide Area WorkFlow Payment Instructions, to acquisitions of commercial items.

This final rule applies to contractors, regardless of size or business ownership, when responding to DoD solicitations or being awarded contracts that are acquired utilizing FAR part 12 procedures. The rule is not expected to have a significant impact on small entities as it merely clarifies the use of two DFARS clauses. The final rule is expected to have a slightly positive impact because the additional clarity will help contracting officers and small businesses better understand DoD's requirements.

No public comments were received in response to the initial regulatory flexibility analysis. The rule does not contain any reporting or recordkeeping requirements and does not require contractors to expend significant cost or effort. There are no known significant alternatives to the rule that would further minimize any economic impact of the rule on small entities

**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 Parts 211, 212, and 232**

Government procurement.

**Amy G. Williams,**

*Deputy, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 211, 212, and 232 are amended as follows:

■ 1. The authority citation for 48 CFR parts 211, 212, and 232 continues to read as follows:

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

**PART 211—DESCRIBING AGENCY NEEDS**

■ 2. In section 211.274-6, paragraph (c) introductory text is revised to read as follows:

**211.274-6 Contract clauses.**

\* \* \* \* \*

(c) Use the clause at 252.211-7008, Use of Government-Assigned Serial Numbers, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that—

\* \* \* \* \*

**PART 212—ACQUISITION OF COMMERCIAL ITEMS**

■ 3. Amend section 212.301 by—

■ a. Redesignating—

■ i. Paragraphs (f)(1ii) through (lxx) as (f)(liv) through (lxxii);

■ ii. Paragraphs (f)(xv) through (li) as (f)(xvi) through (lii); and

■ b. Adding new paragraphs (f)(xv) and (liii).

■ The additions read as follows:

**212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

(f) \* \* \*

(xv) Use the clause at 252.211-7008, Use of Government-Assigned Serial Numbers, as prescribed in 211.274-6(c).

\* \* \* \* \*

(liii) Use the clause at 252.232-7006, Wide Area WorkFlow Payment Instructions, as prescribed in 232.7004(b).

\* \* \* \* \*

**PART 232—CONTRACT FINANCING**

■ 4. In section 232.7004, revise the section heading and paragraph (b) to read as follows:

**232.7004 Contract clauses.**

\* \* \* \* \*

(b) Use the clause at 252.232–7006, Wide Area WorkFlow Payment Instructions, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, when 252.232–7003 is used and neither 232.7003(b) nor (c) apply. See PGI 232.7004 for instructions on completing the clause.

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Part 225

RIN 0750–A111

#### Defense Federal Acquisition Regulation Supplement: Domestically Nonavailable Articles—Elimination of DoD-Unique List (DFARS Case 2013–D020)

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

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to remove the DoD-unique list of domestically nonavailable articles because these items have been found to be either available domestically or are not used by DoD.

**DATES:** Effective July 31, 2014.

**FOR FURTHER INFORMATION CONTACT:** Ms. Lee Renna, telephone 571–372–6095.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

DoD published a proposed rule in the *Federal Register* at 78 FR 73474 on December 6, 2013, to remove section 225.104 in its entirety because the articles currently listed no longer qualify as an exception to the Buy American statute (41 U.S.C. 8302(a)), on the basis of their nonavailability. The two items listed at section 225.104 that are being removed have been found to be either (1) available from domestic producers in the case of aluminum clad steel wire, or (2) DoD does not use the item in the case of the sperm-whale oil. Two public comments were submitted in response to the proposed rule.

##### II. Discussion and Analysis

No changes are being made to the final rule as a result of the two public comments. The first respondent stated

support for the rule and the second respondent noted that there should be no change to the rule.

##### 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

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, and is summarized as follows.

This final rule amends the Defense Acquisition Regulation Supplement (DFARS) by removing the DoD-unique list of domestically nonavailable articles that have been found to be either available domestically or are not used by DoD. Of the two items on the list, aluminum-clad steel is produced and available in the United States, and DoD does not use sperm-whale oil.

This rule will not have an impact on small entities as it merely removes from the DFARS a listing of an item that is now domestically available and an item that is not used by DoD. The removal of the nonavailability exception to the Buy American statute for aluminum-clad steel wire will neither increase nor decrease small businesses' participation in future procurements, particularly with regard to set-asides under the Small Business Program. This conclusion is primarily attributed to the application of the nonmanufacturer rule. Under the nonmanufacturer rule, any small business concern proposing to furnish a product that it did not itself manufacture must furnish the product of a domestic small business manufacturer. However, in industries where the Small Business Administration (SBA) has determined there are no domestic small business manufacturers, SBA may issue a waiver to the nonmanufacturer rule to permit small businesses to provide any firm's product (see FAR 19.102(f)(7)). Reinstatement of the Buy American

statute restrictions has no effect on the application of the nonmanufacturer rule. With respect to the procurement of sperm-whale oil, DoD does not use this product in any application. As such, a discussion of future procurement opportunities for this substance is no longer relevant.

No comments were received from the public in response to the initial regulatory flexibility analysis. This rule does not add any new information collection, reporting, or record keeping requirements. No alternatives were identified that will accomplish the objectives of the rule.

##### V. Paperwork Reduction Act

This 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.

Amy G. Williams,

*Deputy, 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 continues to read as follows:

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

##### 225.104 [Removed]

■ 2. Remove section 225.104.

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 225 and 236

RIN 0750–A133

#### Defense Federal Acquisition Regulation Supplement: Use of Military Construction Funds in Countries Bordering the Arabian Sea (DFARS Case 2014–D016)

**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