

## PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Section 212.212 is revised to read as follows:

### 212.212 Computer software.

(1) Departments and agencies shall identify and evaluate, at all stages of the acquisition process (including concept refinement, concept decision, and technology development), opportunities for the use of commercial computer software and other non-developmental software in accordance with Section 803 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417).

(2) See Subpart 208.74 when acquiring commercial software or software maintenance. See 227.7202 for policy on the acquisition of commercial computer software and commercial computer software documentation.

## PART 239—ACQUISITION OF INFORMATION TECHNOLOGY

■ 3. Section 239.101 is amended by adding a second sentence to read as follows:

### 239.101 Policy.

\* \* \* See 227.7202 for policy on the acquisition of commercial computer software and commercial computer software documentation.

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Part 217

RIN 0750–AG24

### Defense Federal Acquisition Regulation Supplement; Limitation on Procurements on Behalf of DoD (DFARS Case 2008–D005)

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

**ACTION:** Interim rule with request for comments.

**SUMMARY:** DoD has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 801 of the National Defense Authorization Act for Fiscal Year 2008. Section 801 addresses internal controls for procurements made by non-DoD agencies on behalf of DoD.

**DATES:** *Effective date:* July 15, 2009.

*Comment date:* Comments on the interim rule should be submitted in writing to the address shown below on or before September 14, 2009, to be considered in the formation of the final rule.

**ADDRESSES:** You may submit comments, identified by DFARS Case 2008–D005, using any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *E-mail:* [dfars@osd.mil](mailto:dfars@osd.mil). Include DFARS Case 2008–D005 in the subject line of the message.

- *Fax:* 703–602–7887.

- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Cassandra Freeman, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062.

- *Hand Delivery/Courier:* Defense Acquisition Regulations System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202–3402.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** Ms. Cassandra Freeman, 703–602–8383.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This interim rule implements Section 801 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181). Section 801 places limitations on acquisitions made by non-DoD agencies on behalf of DoD. Such acquisitions exceeding the simplified acquisition threshold may be made only if the head of the non-DoD agency has certified that the non-DoD agency will comply with defense procurement requirements for the fiscal year.

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 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, *et seq.*, because the requirements of the rule are internal to the Government. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subpart in accordance with 5 U.S.C.

610. Such comments should be submitted separately and should cite DFARS Case 2008–D005.

##### 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.*

##### D. 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 publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements Section 801 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181). Section 801 places limitations on acquisitions made by non-DoD agencies on behalf of DoD, and requires DoD to issue guidance on the appropriate use of interagency contracting. Comments received in response to this interim rule will be considered in the formation of the final rule.

##### List of Subjects in 48 CFR Part 217

Government procurement.

**Michele P. Peterson,**

*Editor, Defense Acquisition Regulations System.*

■ Therefore, 48 CFR part 217 is amended as follows:

## PART 217—SPECIAL CONTRACTING METHODS

■ 1. The authority citation for 48 CFR part 217 continues to read as follows:

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

■ 2. Section 217.7800 is amended by revising paragraph (a) to read as follows:

### 217.7800 Scope of subpart.

\* \* \* \* \*

(a) Implements Section 854 of the National Defense Authorization Act for Fiscal Year 2005 (Pub. L. 108–375) and Section 801 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181); and

\* \* \* \* \*

■ 3. Sections 217.7801 and 217.7802 are revised to read as follows:

### 217.7801 Definitions.

As used in this subpart—  
*Acquisition official* means—

- (1) A DoD contracting officer; or
- (2) Any other DoD official authorized to approve a direct acquisition or an assisted acquisition on behalf of DoD.

*Assisted acquisition* means the type of interagency contracting through which acquisition officials of a non-DoD agency award a contract or a task or delivery order for the acquisition of supplies or services on behalf of DoD.

*Direct acquisition* means the type of interagency contracting through which DoD orders a supply or service from a Governmentwide acquisition contract maintained by a non-DoD agency.

*Non-DoD agency* means any department or agency of the Federal Government other than DoD.

**217.7802 Policy.**

(a) A DoD acquisition official may place an order, make a purchase, or otherwise acquire supplies or services for DoD in excess of the simplified acquisition threshold through a non-DoD agency in any fiscal year only if the head of the non-DoD agency has certified that the non-DoD agency will comply with defense procurement requirements for the fiscal year.

(1) This limitation shall not apply to the acquisition of supplies and services during any fiscal year for which there is

in effect a written determination of the Under Secretary of Defense for Acquisition, Technology, and Logistics, that it is necessary in the interest of DoD to acquire supplies and services through the non-DoD agency during the fiscal year. A written determination with respect to a non-DoD agency shall apply to any category of acquisitions through the non-DoD agency that is specified in the determination.

(2) Non-DoD agency certifications and additional information are available at [http://www.acq.osd.mil/dpap/cpic/cp/interagency\\_acquisition.html](http://www.acq.osd.mil/dpap/cpic/cp/interagency_acquisition.html).

(b) Departments and agencies shall establish and maintain procedures for reviewing and approving orders placed for supplies and services under non-DoD contracts, whether through direct acquisition or assisted acquisition, when the amount of the order exceeds the simplified acquisition threshold. These procedures shall include—

(1) Evaluating whether using a non-DoD contract for the acquisition is in the best interest of DoD. Factors to be considered include—

- (i) Satisfying customer requirements;
- (ii) Schedule;
- (iii) Cost effectiveness (taking into account discounts and fees); and
- (iv) Contract administration (including oversight);

(2) Determining that the tasks to be accomplished or supplies to be provided are within the scope of the contract to be used;

(3) Reviewing funding to ensure that it is used in accordance with appropriation limitations;

(4) Providing unique terms, conditions, and requirements to the assisting agency for incorporation into the order or contract as appropriate to comply with all applicable DoD-unique statutes, regulations, directives, and other requirements; and

(5) Collecting and reporting data on the use of assisted acquisition for analysis. Follow the reporting requirements in Subpart 204.6.

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