

on January 15, 2009, is adopted as a final rule without change.

[FR Doc. E9-27849 Filed 11-18-09; 8:45 am]

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 203 and 252

RIN 0750-AG09

#### Defense Federal Acquisition Regulation Supplement; Whistleblower Protections for Contractor Employees (DFARS Case 2008-D012)

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

**ACTION:** Final rule.

**SUMMARY:** DoD has adopted as final, without change, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 846 of the National Defense Authorization Act for Fiscal Year 2008 and section 842 of the National Defense Authorization Act for Fiscal Year 2009. These laws address protections for contractor employees who disclose information to Government officials with regard to waste or mismanagement, danger to public health or safety, or violation of law related to a DoD contract.

**DATES:** *Effective Date:* November 19, 2009.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy Williams, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone 703-602-0328; facsimile 703-602-7887. Please cite DFARS Case 2008-D012.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

DoD published an interim rule at 74 FR 2410 on January 15, 2009, to implement section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181) and Section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417). These laws address whistleblower rights and protections for DoD contractor employees.

DoD received no comments on the interim rule. Therefore, DoD has adopted the interim rule as a final rule without change.

This rule was 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.* Although the rule contains a requirement for contractors to inform employees in writing of their whistleblower rights and protections, compliance with this requirement is not expected to have a significant cost or administrative impact on contractors.

#### 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 203 and 252

Government procurement.

Amy G. Williams,

*Editor, Defense Acquisition Regulations System.*

■ Accordingly, the interim rule amending 48 CFR parts 203 and 252, which was published at 74 FR 2410 on January 15, 2009, is adopted as a final rule without change.

[FR Doc. E9-27847 Filed 11-18-09; 8:45 am]

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Part 205

#### Defense Federal Acquisition Regulation Supplement (DFARS); Technical Amendments

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

**ACTION:** Final rule.

**SUMMARY:** DoD is making a technical amendment to the Defense Federal Acquisition Regulation Supplement (DFARS) to correct a cross-reference within the DFARS text.

**DATES:** *Effective Date:* November 19, 2009.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy Williams, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062.

Telephone 703-602-0328; facsimile 703-602-7887.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This final rule amends DFARS text at 205.301, by correcting the cross-reference in paragraph (a)(s-70)(i)(B) to the exception for acquisitions of chemical warfare protective clothing from the restrictions on food, clothing, fabrics, and hand or measuring tools at 225.7002.

#### List of Subjects in 48 CFR Part 205

Government procurement.

Amy G. Williams,

*Editor, Defense Acquisition Regulations System.*

■ Therefore, 48 CFR part 205 is amended as follows:

#### PART 205—PUBLICIZING CONTRACT ACTIONS

■ 1. The authority citation for 48 CFR part 205 continues to read as follows:

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

■ 2. In section 205.301, paragraph (a)(i)(B) is revised to read as follows:

##### 205.301 General.

(a) \* \* \*

(i) \* \* \*

(B) The acquisition is for chemical warfare protective clothing, and the contracting officer has determined that an exception to domestic source requirements applies because the acquisition furthers an agreement with a qualifying country, in accordance with 225.7002-2(n).

\* \* \* \* \*

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Part 208

RIN 0750-AG03

#### Defense Federal Acquisition Regulation Supplement; Competition Requirements for Purchases From Federal Prison Industries (DFARS Case 2008-D015)

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

**ACTION:** Final rule.

**SUMMARY:** DoD has adopted as final, without change, an interim rule

amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 827 of the National Defense Authorization Act for Fiscal Year 2008. Section 827 requires the use of competitive procedures in the acquisition of items for which Federal Prison Industries has a significant market share.

**DATES:** *Effective Date:* November 19, 2009.

**FOR FURTHER INFORMATION CONTACT:** Ms. Cassandra Freeman, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone 703-602-8383; facsimile 703-602-7887. Please cite DFARS Case 2008-D015.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

Section 827 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181) amended 10 U.S.C. 2410n to require the use of competitive procedures in the acquisition of items for which Federal Prison Industries (FPI) has a significant market share. Section 827 provides that FPI shall be treated as having a significant share of the market for a product if DoD, in consultation with the Office of Federal Procurement Policy, determines that the FPI share of the DoD market for the category of products including that product is greater than five percent.

DoD published an interim rule at 73 FR 46816 on August 12, 2008, to implement section 827 of Public Law 110-181. Five sources submitted comments on the interim rule. The respondents expressed general support for section 827 as a means of increasing competition and ensuring the best value for the Government. A discussion of other comments received from the respondents is provided below.

1. *Comment:* Although section 827 of Public Law 110-181 is limited to products, DoD acquisition personnel should take the spirit of the statute into account when procuring services.

*DoD Response:* In accordance with FAR 8.605(g), FPI is not a mandatory source for services. Therefore, application of this DFARS rule to the acquisition of services is unnecessary.

2. *Comment:* The 5 percent threshold should be applied to individual items, rather than to entire Federal supply classes. FPI will be supplying more than 50 percent of DoD's requirements for ballistic helmets, even though it only supplies 3.8 percent of the overall Federal supply class (FSC 4870—Armor, Personal) to which this item belongs. A mechanism should be available to group

products of a similar type and characteristics into smaller sub-classes in order to comply with the statutory intent.

*DoD Response:* Section 827 specifically provides for application of its requirements to categories of products, rather than individual items. As a practical matter, it would be difficult, if not impossible, to determine up-to-date market share percentages at the individual item level. Given the number of items acquired by the Federal Government, Federal supply classes are the most practical groupings of items; sub-classes would be too numerous for practical applicability. In accordance with FAR 8.604 and 8.605, waiver and exception mechanisms exist to permit acquisition of FPI Schedule items from other sources if necessary.

3. *Comment:* DoD has not required FPI to compete on a level playing field for those procurements where private industry is now allowed to participate. Ordinarily, when U.S. Government agencies compete with private sector entities for the provision of goods or services to other Government agencies, such competitions are governed by OMB Circular A-76. Among other things, OMB Circular A-76 requires that, when considering the cost to the Government of an agency's submittal, the purchasing agency must consider both the price charged and the amount of any subsidy provided by the Government to the agency bidding for such work. Now that FPI is being required to compete for the supply of certain products, the provisions of OMB Circular A-76 should apply to such competitions and, although private industry now has the right to compete against FPI in certain areas, it will be at a significant disadvantage unless and until the Government's subsidies to FPI are considered when evaluating its pricing.

*DoD Response:* This comment pertains to acquisitions that employ comparability determinations, rather than to those where competitive procedures are used because of FPI's significant market share. Therefore, the comment is outside the scope of this DFARS case. However, a recent Government Accountability Office (GAO) decision (B-400328) addressed this issue as follows:

"We find no statute or regulation \* \* \* that specifically requires an agency to conduct an A-76 study and competition, or otherwise adjust its evaluation to account for any FPI competitive advantages simply because FPI is a potential or actual competitor. For example, neither 18 U.S.C. 4124 nor 10 U.S.C. 4210n refers to A-76, and FAR § 7.302(b)(2) does not establish a separate requirement that agencies must meet

when FPI is a potential or actual competitor. Likewise, we are aware of no requirement that an agency otherwise notify offerors of FPI's participation in a procurement or to equalize FPI's alleged competitive advantages. Further, while FPI transactions constitute intragovernmental transfers (18 U.S.C. 4124(c)), and not contracts, there was no solicitation, statutory, or regulatory provision that required the agency to specifically evaluate the impact of this difference."

4. *Comment:* DoD should conduct yearly or semi-yearly market studies to determine FPI's current market share for a product.

*DoD Response:* As permitted by section 827(b)(2) of Public Law 110-181, DoD will modify the list of products for which FPI has a significant market share when new data indicate the need for modification. The latest update was made on June 3, 2009, and is available at [http://www.acq.osd.mil/dpap/cpic/cp/specific\\_policy\\_areas.html#federal\\_prison](http://www.acq.osd.mil/dpap/cpic/cp/specific_policy_areas.html#federal_prison). DoD does not consider it necessary to establish a specific schedule for updating the list.

5. *Comment:* Textiles and clothing should be added to the list of items for which FPI has a significant market share, based on sales information in FPI's 2007 Annual Report.

*DoD Response:* Textiles and clothing fall within the 8000 series of Federal supply classes. The initial list, published on March 28, 2008, was based on DoD contract data for fiscal year 2006, which indicated that FPI's market share during that fiscal year did not exceed 5 percent for any of the Federal supply classes in the 8000 series. The current list, published on June 3, 2009, is based on fiscal year 2008 contract data and contains three federal supply classes within the 8000 series: 8405, Men's Outerwear; 8415, Special Purpose Clothing; and 8420, Men's Underwear and Nightwear.

6. *Comment:* The web site referenced in the rule at 208.602-70(b) does not take you directly to the list of Federal supply classes for which FPI has a significant market share. Recommend referencing a site that provides a better link to the list.

*DoD Response:* The web site referenced at 208.602-70(b) now provides direct access to the list.

This rule was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

**B. Regulatory Flexibility Act**

DoD has prepared a final regulatory flexibility analysis consistent with 5 U.S.C. 604. A copy of the analysis may be obtained from the point of contact

specified herein. The analysis is summarized as follows:

The objective of the rule is to provide for competition in the acquisition of items for which FPI has a significant market share. The legal basis for the rule is 10 U.S.C. 2410n, as amended by section 827 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181). The rule is expected to benefit small business concerns that offer items for which FPI has a significant market share, by permitting those concerns to compete for additional DoD contract awards. The rule also could adversely impact small business concerns that provide supplies and services to FPI relative to the affected items. There are no practical alternatives that would accomplish the objectives of section 827 of Public Law 110–181.

### 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 208

Government procurement.

Amy G. Williams,

Editor, Defense Acquisition Regulations System.

■ Accordingly, the interim rule amending 48 CFR part 208, which was published at 73 FR 46816 on August 12, 2008, is adopted as a final rule without change.

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Part 212

RIN 0750–AG17

#### Defense Federal Acquisition Regulation Supplement; Pilot Program for Transition to Follow-On Contracting After Use of Other Transaction Authority (DFARS Case 2008–D030)

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

**ACTION:** Final rule.

**SUMMARY:** DoD has adopted as final, without change, an interim rule amending the Defense Federal

Acquisition Regulation Supplement (DFARS) to implement section 824 of the National Defense Authorization Act for Fiscal Year 2009. Section 824 amended the DoD pilot program for transition to follow-on contracting after use of other transaction authority, to establish a new program expiration date and to include items developed under research projects within the scope of the program.

**DATES:** *Effective Date:* November 19, 2009.

**FOR FURTHER INFORMATION CONTACT:** Ms. Cassandra Freeman, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone 703–602–8383; facsimile 703–602–7887. Please cite DFARS Case 2008–D030.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

DoD published an interim rule at 74 FR 2415 on January 15, 2009, to implement section 824 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417). The rule amended the DoD pilot program for transition to follow-on contracting after use of other transaction authority, to establish a new program expiration date and to add items developed under research projects to the types of items to which the program applies. The pilot program provides that certain items that do not otherwise meet the definition of “commercial item” may be treated as commercial items in the award of contracts and subcontracts that follow an other transaction agreement.

DoD received no comments on the interim rule. Therefore, DoD has adopted the interim rule as a final rule without change.

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.* Although the rule is expected to ease the transition of nontraditional defense contractors from the use of other transaction agreements to standard contracts, the economic impact is not expected to 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 Part 212

Government procurement.

Amy G. Williams,

Editor, Defense Acquisition Regulations System.

■ Accordingly, the interim rule amending 48 CFR part 212, which was published at 74 FR 2415 on January 15, 2009, is adopted as a final rule without change.

[FR Doc. E9–27843 Filed 11–18–09; 8:45 am]

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 225, 236, and 252

RIN 0750–AG16

#### Defense Federal Acquisition Regulation Supplement; Steel for Military Construction Projects (DFARS Case 2008–D038)

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

**ACTION:** Final rule.

**SUMMARY:** DoD has adopted as final, without change, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 108 of the Military Construction and Veterans Affairs Appropriations Act, 2009. Section 108 requires that American steel producers, fabricators, and manufacturers be given the opportunity to compete for contracts and subcontracts for the acquisition of steel for use in military construction projects or activities.

**DATES:** *Effective Date:* November 19, 2009.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy Williams, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone 703–602–0328; facsimile 703–602–7887. Please cite DFARS Case 2008–D038.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

DoD published an interim rule at 74 FR 2417 on January 15, 2009, to implement section 108 of the Military Construction and Veterans Affairs