



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 247, and 252

[Docket DARS-2018-0040]

RIN 0750-AJ94

Defense Federal Acquisition Regulation Supplement: Modification of DFARS Clause "Transportation of Supplies by Sea" (DFARS Case 2018-D028)

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

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to modify the text of an existing DFARS clause to include the text of another DFARS clause, in order to streamline instructions to contractors regarding notifications of transportation of supplies by sea.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2018-D028, using any of the following methods:

o Federal eRulemaking Portal: <http://www.regulations.gov>. Search for "DFARS Case 2018-D028". Select "Submit a Comment Now" and follow the instructions provided to submit a comment. Please include "DFARS Case 2018-D028" on any attached document.

o Email: osd.dfars@mail.mil. Include DFARS Case 2018-D028 in the subject line of the message.

o Fax: 571-372-6094.

o Mail: Defense Acquisition Regulations System, Attn: Carrie Moore, OUSD(A&S)DPC/DARS, Room 3B941, 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: Ms. Carrie Moore, telephone 571-372-6093.

SUPPLEMENTARY INFORMATION:

I. Background

This rule proposes to modify DFARS clause 252.247-7023, Transportation of Supplies By Sea, to include the instructions currently specified in DFARS clause 252.247-7024, Notification

of Supplies By Sea. Combining these clauses will result in DFARS clause 252.247-7024 being removed.

II. Discussion and Analysis

DFARS provision 252.247-7022, Representation of Extent of Transportation By Sea, is included in solicitations and requires an offeror to represent with its offer whether it anticipates that supplies will or will not be transported by sea in the performance of the contract.

DFARS clause 252.247-7023 is included in all contracts, except for those that directly purchase ocean transportation services, and provides contractors with terms and conditions that apply when transporting supplies by sea under the contract.

DFARS clause 252.247-7024, Notification of Transportation of Supplies By Sea, is included in contracts when the contractor indicated in DFARS provision 252.247-7022 that it did not anticipate transporting supplies by sea. The clause requires the contractor to notify the Government in the event that, during performance of the contract, the contractor learns that supplies will be transported by sea, and requires the contractor to comply with the terms and conditions in DFARS clause 252.247-7023.

Since DFARS clause 252.247-7023 is included in all contracts, and DFARS clause 252.247-7024 is associated with the

requirements of 252.247-7023, the text of the two clauses can be combined to help minimize the number of clauses contained in the contract, while still maintaining the intent of both clauses.

The modification of this DFARS text supports a recommendation from the DoD Regulatory Reform Task Force. On February 24, 2017, the President signed Executive Order (E.O.) 13777, *Enforcing the Regulatory Reform Agenda*, which established a Federal policy "to alleviate unnecessary regulatory burdens" on the American people. In accordance with E.O. 13777, DoD established a Regulatory Reform Task Force to review and validate DoD regulations, including the DFARS. The DoD Task Force reviewed the requirements of DFARS clause 252.247-7023 and 252.247-7024 and determined that the clauses could be combined.

A public notice of the establishment of the DFARS Subgroup to the DoD Regulatory Reform Task Force, for the purpose of reviewing DFARS provisions and clauses, was published in the Federal Register at 82 FR 35741 on August 1, 2017, and requested public input. Two respondents submitted a public comment on these clauses summarized as follows:

Comment: Both respondents recommended DoD remove these clauses, as they are based on the requirements of the Cargo Preference Act of 1904 (10 U.S.C. 2631), which was written at a time before many modern forms of cargo transportation were

invented and overly burdens the DoD supply chain to use US-flag ships. The respondents also suggested that DoD follow the less burdensome Cargo Preference Act of 1954 (46 U.S.C. 1241(b)).

Response: DoD must comply with the requirements of 10 U.S.C. 2631. Currently, 10 U.S.C. 2631 requires 100 percent of all items for or owned by DoD that require transportation by sea be carried exclusively on U.S. flag vessels. This cargo policy helps retain and encourage a privately owned and operated U.S.-flag merchant marine, which benefits the U.S. in terms of trade and in times of emergency. It is not in the Government's best interests to rescind 10 U.S.C. 2631. In the event that a U.S.-flag vessel is not available for timely shipment or the freight charges are excessive or unreasonable, the clause permits the contractor to submit a request to use a foreign-flag vessel to the contracting officer. For this reason, DoD does not concur that the DoD supply chain is necessarily overburdened by this Act.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, including Commercially Available Off-The-Shelf Items

This rule does not create any new provisions or clauses. This rule merely consolidates existing instructions regarding

notifications of transportation of supplies by sea in a single DFARS clause.

IV. Executive Orders 12866 and 13563

E.O. 12866, Regulatory Planning and Review, and E.O. 13563, Improving Regulation and Regulatory Review, 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. The Office of Management and Budget, Office of Information and Regulatory Affairs (OIRA), has determined that this is not a significant regulatory action as defined under section 3(f) of E.O. 12866 and, therefore, was not subject to review under section 6(b). This rule is not a major rule as defined at 5 U.S.C. 804(2).

V. Executive Order 13771

This proposed rule is not expected to be an E.O. 13771, Reducing Regulation and Controlling Regulatory Costs, regulatory action, because this proposed rule is not significant under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this proposed 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 rule is not creating any new requirements or changing any existing requirements for contractors. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The Department of Defense (DoD) is proposing to modify DFARS clause 252.247-7023, Transportation of Supplies By Sea, to include the instructions currently specified in DFARS clause 252.247-7024, Notification of Supplies By Sea. Combining these clauses will result in DFARS clause 252.247-7024 being removed.

The objective of this proposed rule is to streamline the instructions to contractors pertaining to the transportation of supplies by sea. The combination of these DFARS clauses supports a recommendation from the DoD Regulatory Reform Task Force under Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs.

Based on data available in the Federal Procurement Data System for fiscal year 2016, DoD awarded approximately 83,000 contract actions that included DFARS clause 252.247-7023 to 22,000 unique

entities, of which approximately 39,000 awards (47 percent) were made to 15,000 unique small businesses entities (68 percent).

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses.

This rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the proposed rule that would meet the proposed objectives.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities. DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2018-D028) in correspondence.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply; however, these changes to the DFARS do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 0704-0245, titled: Defense Federal Acquisition Regulation Supplement (DFARS) Part 247, Transportation and Related Clauses.

List of Subjects in 48 CFR Parts 212, 247, and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations
System.

Therefore, 48 CFR parts 212, 247, and 252 are proposed to be amended as follows:

1. The authority citation for 48 CFR parts 212, 247, and 252 continues to read as follows:

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

PART 212—ACQUISITION OF COMMERCIAL ITEMS

212.301 [Amended]

2. Amend section 212.301 by:

- a. Removing paragraph (f)(xix)(D);
- b. Redesignating paragraphs (f)(xix)(E) through (H) as paragraphs (f)(xix)(D) through (G), respectively;
- c. In the newly redesignated paragraph (f)(xix)(D), removing "247.574(d)" and adding "247.574(c)" in its place;
- d. In the newly redesignated paragraph (f)(xix)(E), removing "247.574(e)" and adding "247.574(d)" in its place;
- e. In the newly redesignated paragraph (f)(xix)(F), removing "247.574(f)" and adding "247.574(e)" in its place; and

f. In the newly redesignated paragraph (f) (xix) (G), removing "U.S" and adding "U.S." in its place.

PART 247—TRANSPORTATION

247.574 [Amended]

3. Amend section 247.574 by:

- a. Removing paragraph (c); and
- b. Redesignating paragraphs (d) through (f) as paragraphs (c) through (e), respectively.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Amend section 252.247-7023 by:

- a. In the clause heading, removing the date "(APR 2014)" and adding "(DATE)" in its place;
- b. Redesignating paragraph (h) as paragraph (i);
- c. Adding a new paragraph (h); and
- d. In the newly redesignated paragraphs (i)(1) and (2), removing "paragraph (h)" and adding "paragraph (i)" in both places;
- e. In Alternate I:
 - i. In the clause heading, removing the date of "(APR 2014)" and adding "(DATE)" in its place;
 - ii. Redesignating paragraph (h) as paragraph (i);
 - iii. Adding a new paragraph (h); and

iv. In the newly redesignated paragraphs (i) (1) and (2), removing "paragraph (h)" and adding "paragraph (i)" in both places;

f. In Alternate II-

i. In the clause heading, removing the date of "(APR 2014)" and adding "(DATE)" in its place;

ii. Redesignating paragraph (h) as paragraph (i);

iii. Adding a new paragraph (h); and

iv. In the newly redesignated paragraphs (i) (1) and (2), removing "paragraph (h)" and adding "paragraph (i)" in both places.

The additions read as follows:

252.247-7023 Transportation of Supplies by Sea.

* * * * *

(h) If the Contractor has indicated by the response to the solicitation provision, Representation of Extent of Transportation by Sea, that it did not anticipate transporting by sea any supplies; however, after the award of this contract, the Contractor learns that supplies will be transported by sea, the Contractor-

(1) Shall notify the Contracting Officer of that fact; and

(2) Hereby agrees to comply with all the terms and

conditions of this clause.

* * * * *

Alternate I. * * *

* * * * *

(h) If the Contractor has indicated by the response to the solicitation provision, Representation of Extent of Transportation by Sea, that it did not anticipate transporting by sea any supplies; however, after the award of this contract, the Contractor learns that supplies will be transported by sea, the Contractor—

(1) Shall notify the Contracting Officer of that fact; and

(2) Hereby agrees to comply with all the terms and conditions of this clause.

* * * * *

Alternate II. * * *

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(h) If the Contractor has indicated by the response to the solicitation provision, Representation of Extent of Transportation by Sea, that it did not anticipate transporting by sea any supplies, but the contractor learns after the award of the contract that supplies will be transported by sea, the Contractor shall notify the Contracting Officer of that fact.

* * * * *

252.247-7024 [Removed and Reserved]

4. Remove and reserve section 252.247-7024.

252.247-7025 [Amended]

5. Amend section 252.247-7025, in the introductory text, by removing "247.574(d)" and adding "247.574(c)" in its place.

252.247-7026 [Amended]

6. Amend section 252.247-7026, in the introductory text, by removing "247.574(e)" and adding "247.574(d)" in its place.

252.247-7027 [Amended]

7. Amend section 252.247-7027, in the introductory text, by removing "247.574(f)" and adding "247.574(e)" in its place.

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