5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 225 and 252

[Docket DARS-2018-0004]

RIN 0750-AJ22

Defense Federal Acquisition Regulation Supplement: Restrictions on Acquisitions from Foreign Sources (DFARS Case 2017-D011)

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 implement sections of the National Defense Authorization Act for Fiscal Year 2017 to apply domestic source requirements to acquisitions at or below the simplified acquisition threshold when acquiring athletic footwear to be furnished to enlisted members of the Armed Forces upon their initial entry into the Armed Forces, and add Australia and the United Kingdom to the definition of the "National Technology and Industrial Base."

DATES: Effective **[Insert date of publication in the FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the *Federal Register* at 83 FR 42828 on August 24, 2018, to implement sections 817 and 881(b) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017.

Section 817 extends the domestic source requirements of 10 U.S.C. 2533a (the Berry Amendment) below the simplified acquisition threshold, when acquiring athletic footwear to be furnished to the members of the Army, Navy, Air Force, or Marine Corps upon their initial entry into the Armed Forces.

Section 881(b) amends 10 U.S.C. 2500(1) by adding Australia and the United Kingdom of Great Britain and Northern Ireland to the United States and Canada as the countries within which the activities of the national technology and industrial base are conducted. 10 U.S.C. 2534, Miscellaneous Limitations on the Procurement of Goods Other Than United States Goods, requires that DoD only procure certain items if the manufacturer of the items is part of the national technology and industrial base.

One respondent submitted a public comment in response to the proposed rule.

II. Discussion and Analysis

The public comment received addressed concern with regard to importation of radioactive steel and use of radioactively

contaminated scrap metal. This issue is outside the scope of this rule. There were no changes from the proposed rule as a result of this public comment.

However, the final rule is affected by a change in the baseline. On May 30, 2018, DoD published a final rule in the *Federal Register* (83 FR 24890) to amend the DFARS to implement section 813(a) of the NDAA for FY 2018 (Pub. L. 115-91), which amended 10 U.S.C. 2534(c) to establish a sunset date of October 1, 2018, for the limitation on procurement of chemical weapons antidote contained in automatic injectors (and components for such injectors). The final rule deleted DFARS 225.7005 in its entirety to remove the limitation as implemented in the DFARS. As a result, this final rule does not include the changes proposed to DFARS 225.7005-1.

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

This rule amends the applicability of existing DFARS solicitation provisions and contract clauses as follows:

- To implement section 817 of the NDAA for FY 2017, this rule extends use of DFARS clause 252.225-7012, Preference for Certain Domestic Commodities, to acquisitions at or below the simplified acquisition threshold (SAT) when buying athletic footwear to be furnished to enlisted members of the

Armed Forces upon their initial entry into the Armed Forces. This clause is already prescribed for use in solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items.

- To implement section 881(b) of the NDAA for FY 2017, this rule modifies the provision at DFARS 252.225-7037, Evaluation of Offers for Air Circuit Breakers, and the clause at DFARS 252.225-7038, Restriction on Acquisition of Air Circuit Breakers, to add Australia as a country from which items restricted by 10 U.S.C. 2534 may be purchased. This rule does not change the prescriptions for the use of this provision or clause, which are already required for use in solicitations and contracts for commercial items, including COTS items. The clause does not apply below the SAT.

A. Applicability to Contracts at or Below the SAT

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the SAT. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulation (FAR) Council makes a written determination that it is not in the best interest of the Federal

Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial items and is intended to limit the applicability of laws to contracts for the acquisition of commercial items. 41 U.S.C. 1906 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Likewise, 41 U.S.C. 1907 governs the applicability of laws to COTS items, with the Administrator for Federal Procurement Policy the decision authority to determine that it is in the best interest of the Government to apply a provision of law to acquisitions of COTS items in the FAR. The Director, DPC, is the appropriate authority to make comparable determinations for regulations to

be published in the DFARS, which is part of the FAR system of regulations.

C. Determinations

A determination under 41 U.S.C. 1905 is not required to prescribe DFARS 252.225-7012 for use in solicitations and contracts valued at or below the SAT, because section 817 of the NDAA for FY 2017 specifically states that DoD shall acquire athletic footwear that complies with the requirements of 10 U.S.C. 2533a "without regard to the applicability of any simplified acquisition threshold under chapter 137 of title 10 (or any other provision of law)."

A determination under 41 U.S.C. 1906 and 1907 is not required to apply the requirements of DFARS 252.225-7037 and 252.225-7038 to acquisitions for commercial items, including COTS items, because the statute that this provision and clause implements is not a covered statute subject to 41 U.S.C. 1905-1907. At the time of the Federal Acquisition Streamlining Act of 1994 (FASA) (Pub. L. 103-355), now codified in part at 41 U.S.C. 1905-1907, this provision and clause were a single clause, DFARS 252.225-7029, Restriction on Acquisition of Air Circuit Breakers, which implemented 10 U.S.C. 2534. Because 10 U.S.C. 2534 predated FASA, it was not subject to 41 U.S.C. 1905-1907. The DFARS clause 252.225-7029 was included on the initial list of statutes applicable to the acquisition of commercial items at DFARS

252.212-7001, incorporated in the DFARS by DFARS Case 95-D712 on November 30, 1995 (Defense Acquisition Circular 91-9).

IV. 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.

V. Executive Order 13771

This final rule is not subject to E.O. 13771, because this rule is not significant under E.O. 12866.

VI. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared and is summarized as follows:

This rule implements sections 817 and 881(b) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328). The objective of the rule is to—

- Remove the exception to domestic source restriction of the Berry Amendment (10 U.S.C. 2533a) for acquisitions at or below the simplified acquisition threshold when buying athletic footwear to be furnished to enlisted members of the Armed Forces upon their initial entry into the Armed Forces, as required by section 817 of the NDAA for FY 2017; and
- Allow acquisition of certain items from Australia and the United Kingdom, for which purchase is currently restricted to items from the United States or Canada, in accordance with 10 U.S.C. 2534, in accordance with section 881(b) of the NDAA for FY 2017 and 10 U.S.C. 2534.

There were no significant issues raised by the public comment in response to the initial regulatory flexibility analysis.

With regard to implementation of section 817, this rule may apply to only a few small entities, because there are few sources that meet the domestic source requirements of the Berry Amendment with regard to athletic footwear. The Defense Logistics Agency (DLA) estimates a potential annual demand for approximately 200,000 to 250,000 pairs of athletic shoes to be delivered at the rate of approximately 27,500 pairs per month. In response to a request for information issued by DLA in

December 2016, there were 5 responses from athletic footwear manufacturers, one of which was a small business. Small entities who are athletic shoe manufacturers could likely support portions of the Department's total requirements for athletic footwear. In addition, there are likely a number of domestic component suppliers who are small entities who would benefit from this new requirement as well. On the other hand, small entities that cannot provide athletic shoes that meet the domestic source requirements of the Berry Amendment, will no longer be able to compete for acquisition of athletic footwear at or below the simplified acquisition threshold that are for the purpose of providing athletic footwear to enlisted members of the Armed Forces upon their initial entry into the Armed Forces.

With regard to implementation of section 881(b), this rule will not apply to any small entities at the prime contract level, as there are only a few prime contractors for the restricted items, which are all U.S. firms that are other than small businesses. For the definition of "small business," the Regulatory Flexibility Act refers to the Small Business Act, which in turn allows the U.S. Small Business Administration (SBA) Administrator to specify detailed definitions or standards (5 USC 601(3) and 15 USC 632(a)). The SBA regulations at 13 CFR 121.105(a)(1) discuss who is a small business, providing that

except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor. Therefore, if an item currently purchased from a U.S. entity that is other than a small business were to be purchased from an entity in the Australia or the United Kingdom, there could be an impact on a few small entities that are currently subcontractors to a U.S. prime contractor.

There are no reporting, recordkeeping, or other compliance requirements of the rule, other than to furnish athletic footwear compliant with the Berry Amendment and the other restricted items manufactured by a manufacturer that is part of the national technology and industrial base (which is now expanded to include the United Kingdom and Australia, as well as the United States and Canada.

By extending the restriction of the Berry Amendment to acquisitions that do not exceed simplified acquisition threshold, this rule may benefit small entities that can provide Berry Amendment-compliant athletic footwear, because they may be more able to compete for smaller acquisitions. DoD was unable

to identify any alternatives that would meet the requirements of the statutes.

VII. 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 225 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 225 and 252 are amended as follows:

1. The authority citation for 48 CFR parts 225 and 252 continues to read as follows:

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

PART 225—FOREIGN ACQUISITION

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

225.7002-2 Exceptions.

* * * * *

(a) Acquisitions at or below the simplified acquisition threshold, except for athletic footwear purchased by DoD for use by

members of the Army, Navy, Air Force, or Marine Corps upon their initial entry into the Armed Forces (section 817 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328)).

* * * * *

225.7002-3 [Amended]

3. Amend section 225.7002-3, in paragraph (a) by removing "commercial items, that exceed the simplified acquisition threshold" and adding "commercial items" in its place.

225.7004-1 [Amended]

4. Amend section 225.7004-1 by removing "United States or Canada" and adding "United States, Australia, Canada, or the United Kingdom" in its place.

225.7004-3 [Amended]

5. Amend section 225.7004-3 by:

a. In paragraph (a) by removing "manufactured in the United States or Canada" and adding "manufactured in the United States, Australia, Canada, or the United Kingdom" in two places.

b. In paragraphs (a), (b), and (c) by removing "United States and Canada" and adding "United States, Australia, Canada, or the United Kingdom" in its place wherever it appears.

225.7006-1 [Amended]

6. Amend section 225.7006-1 by removing "United States or Canada" and adding "United States, Australia, Canada, or the United Kingdom" in its place.

7. Revise section 225.7006-3 to read as follows:

225.7006-3 Waiver.

The waiver criteria at 225.7008(a) apply to this restriction.

8. Amend section 225.7006-4 by revising paragraphs (a)(2) and (b)(2) to read as follows:

225.7006-4 Solicitation provision and contract clause.

(a) * * *

(2) A waiver has been granted.

(b) * * *

(2) A waiver has been granted.

PART 252——SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.225-7037 [Amended]

9. Amend section 252.225-7037 by:

a. Removing the provision date of "(JUN 2012)" and adding "(DEC 2018)" in its place; and

b. In paragraphs (a) and (b), removing "outlying areas, Canada," and adding "outlying areas, Australia, Canada," in its place in both places.

252.225-7038 [Amended]

10. Amend section 252.225-7038 by:

a. Removing the provision date of "(JUN 2005)" and adding "(DEC 2018)" on its place; and

b. Removing "outlying areas, Canada," and adding "outlying areas, Australia, Canada," in its place.

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