



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 211 and 252

[Docket DARS-2019-0056]

RIN 0750-AK59

**Defense Federal Acquisition Regulation Supplement: Repeal of
DFARS Provision "Alternate Preservation, Packaging, and Packing"
(DFARS Case 2019-D022)**

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 remove a provision that is no longer necessary, pursuant to action taken by the Regulatory Reform Task Force.

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 2019-D022, using any of the following methods:

- o *Regulations.gov*: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS

Case 2019-D022" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2019-D022." Follow the instructions provided at the "Submit a Comment" screen. Please include "DFARS Case 2019-D022" on any attached document.

- o *Email:* *osd.dfars@mail.mil.* Include DFARS Case 2019-D022 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 remove the DFARS provision 252.211-7004, Alternate Preservation, Packaging, and Packing, from the DFARS as the provision is no longer necessary. DFARS provision

252.211-7004 is included in solicitations that include military preservation, packaging, or packing specifications when it is feasible to evaluate and award using commercial or industrial preservation, packaging, or packing methods. The provision: (1) notifies offerors that they may submit two prices for the item—one based on the military requirements and one based on commercial standards; (2) specifies the information to be provided with the proposed commercial alternative; and (3) requires the offeror to agree to use the military requirements if the proposed commercial standards are not accepted by the contracting officer.

Since the implementation of the provision, acquisition reform efforts have provided additional latitude to contracting officers to use performance and commercial specifications and standards, in lieu of military specifications and standards. As a result, contracting officers regularly rely on commercial preservation, packaging, and packing standards, unless the use of other specifications and standards is essential to the acquisition.

Additionally, agency acquisition officials have broad discretion to develop and apply factors that support a meaningful comparison between proposals. If the use of military versus commercial preservation, packaging, and packing standards shall be evaluated as part of a contract award, then the

solicitation will include an evaluation factor for such criteria to be considered in the source selection decision. The ability to make tradeoffs between commercial standards and military specifications and cost or price already exists for acquisition officials as part of acquisition planning; therefore, this provision is no longer necessary.

II. Discussion and Analysis

The removal of this DFARS provision 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. 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. No public comments were received on this clause. The DoD Regulatory Reform Task Force reviewed the requirements of DFARS clause 252.211-7004, determined that the DFARS coverage was unnecessary, and recommended its removal from the DFARS.

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

This proposed rule only removes the obsolete solicitation provision at DFARS 252.211-7004. The rule does not impose any new requirements on contracts at or below the simplified acquisition threshold or for commercial items, including commercially available off-the-shelf items.

IV. Executive Orders 12866 and 13563

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 rule is not expected to be subject to E.O. 13771, because this rule is not subject to 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 for contractors or changing any existing policies and practices. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The Department of Defense is proposing to repeal DFARS provision 252.211-7004, Alternate Preservation, Packaging, and Packing, as the provision is no longer necessary. This repeal is pursuant to action taken by the Regulatory Reform Task Force. The objective of this proposed rule is to reduce regulatory burden on the public. The repeal of this DFARS clause supports a recommendation from the DoD Regulatory Reform Task Force.

DoD does not collect data on the number of small businesses that respond to a solicitation that includes DFARS clause 252.211-7004 or the number of small businesses responding to such a solicitation with alternative preservation, packaging, or packing methods. Instead, DoD subject matter experts advise that approximately 375 solicitations are issued each year that contain military preservation, packaging, or packing requirements where commercial or industrial methods may also be acceptable. DoD estimates that it receives 1.5 responses to

each solicitation, for a total of 563 offers received in response to the solicitation. This total estimated number of responses does not delineate between the business size of the offerors or those offerors that did and did not proposed alternative methods for preservation, packaging, or packing in lieu of military specifications. Based on the information available, DoD does not anticipate that this rule will significantly impact small business entities.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. Rather, this rule proposes to eliminate a reporting requirement. This rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known alternative to the rule that will meet the stated objectives or minimize the impact on of the rule on small entities.

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 2019-D022) in correspondence.

VII. Paperwork Reduction Act

This rule removes the burden associated with DFARS 252.211-7004 from the information collection requirement currently approved under OMB Control Number 0704-0398, entitled DFARS Part 211, Describing Agency Needs, and Related Clauses at DFARS 252.211. This reduction is reflected in the proposed revision to and extension of the information collection, as published in the *Federal Register* on February 27, 2020, at 85 FR 11351.

List of Subjects in 48 CFR Parts 211 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 211 and 252 are proposed to be amended as follows:

1. The authority citation for 48 CFR parts 211 and 252 continues to read as follows:

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

PART 211—DESCRIBING AGENCY NEEDS

211.272 [Removed and Reserved]

2. Remove and reserve section 211.272.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.211-7004 [Removed and Reserved]

3. Remove and reserve section 252.211-7004.

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