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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 225 and 252

RIN: 0750-AH73

**Defense Federal Acquisition Regulation Supplement;
Acquisition of Tents and Other Temporary Structures (DFARS Case
2012-D015)**

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

ACTION: Interim rule.

SUMMARY: DoD is issuing an interim rule to implement sections of the National Defense Authorization Act for Fiscal Year 2012 that address the acquisition of tents and other temporary structures.

DATES: Effective date: [Insert date of publication in the Federal Register].

Comment date: Comments are due by [insert date 60 days from date of publication].

ADDRESSES: Submit comments identified by DFARS Case 2012-D015, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by

inserting "DFARS Case 2012-D015" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2012-D015." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2012-D015" on your attached document.

- o Email: dfars@osd.mil. Include DFARS Case 2012-D015 in the subject line of the message.

- o Fax: 571-372-6094.

- o Mail: Defense Acquisition Regulations System, Attn: Amy G. Williams, OUSD(AT&L)DPAP/DARS, Room 3B855, 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).

SUPPLEMENTARY INFORMATION:

I. Background

This interim rule amends DFARS subpart 225.70 and the associated DFARS clauses at 252.212-7001 and 252.225-7012, in order to implement sections 368 and 821 of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112-81).

- Section 368 requires award of contracts that provide the best value, when acquiring tents and other temporary structures, regardless of whether purchased by DoD or by another agency on behalf of DoD.
- Section 821 amends 10 U.S.C. 2533a (the "Berry Amendment"), to extend the restriction requiring acquisition of domestic tents to include the structural components of tents, applicable to acquisitions that exceed the simplified acquisition threshold. There is also an exception for domestic nonavailability (see DFARS 225.7002-2).

The interim rule provides a definition of "structural component of a tent" and also provides examples of the type of temporary structures covered by this regulation.

II. 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 a significant regulatory action and, therefore, was 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.

III. Regulatory Flexibility Act

DoD does not expect this interim 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. However, an initial regulatory flexibility analysis has been prepared and is summarized as follows:

The objectives of this interim rule are to—

- Require that contracts for the acquisition of tents and other temporary structures provide best value, regardless of whether purchased by DoD or by another agency on behalf of DoD; and
- Extend the domestic source restriction of 10 U.S.C. 2533a (the "Berry Amendment") to cover the structural components of tents, in order to promote the use of domestic materials and enhance growth of the United States economy.

The legal basis for this interim rule is sections 368 and 821 of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112-81).

The requirement to award contracts that provide best value to the Government does not have any impact on small business entities, because that is already a general requirement for all acquisitions.

The domestic source restriction on the structural components of tents may affect approximately 40 or less small business concerns at the prime contract level. Review of the Fiscal Year 2011 data on acquisition of items with product or service code 8340 (tents or tarpaulins) identified 49 actions with small business concerns (contracts or orders), estimated value of \$48.6 million, of which about 10 percent appeared to be for other than tents (e.g., prefabricated metal buildings and components, metal household furnishings, or electrical equipment). The Federal Procurement Data System does not provide data on components, so it is not known the extent to which the providers of tents currently utilize domestic or foreign structural components. An exception may be granted if a component is domestically nonavailable. However, this rule promotes the use of domestic components, and should, therefore, be favorable to small entities that provide domestic structural components of tents. The requirements of the rule will not apply below the simplified acquisition threshold.

This rule does not impose any reporting or recordkeeping requirements.

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

DoD did not identify any significant alternatives that would accomplish the stated objectives of the statute. The rule specifically implements the statutory requirement.

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 2012-D015) in correspondence.

IV. Applicability.

This interim rule does not apply below the simplified acquisition threshold. Section 821 amends 10 U.S.C. 2533a (the "Berry Amendment"), which specifically exempts acquisitions below the simplified acquisition threshold. The "Berry Amendment", implemented at DFARS clause 252.225-7012, Preference for Certain Domestic Commodities, specifically applies to contracts or subcontracts for the acquisition of commercial items that are articles, items, specialty metals, or tools covered by the "Berry Amendment" (including tents and components of tents) (see section 8109 of Pub. L. 104-208) and is included in the clause list in DFARS clause 252.212-7001, Contract Terms

and Conditions required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items.

Section 368 only imposes requirements on the internal operating procedures of DoD, and does not address application below the simplified acquisition threshold. Most acquisitions of tents and other temporary structures exceed the simplified acquisition threshold. In accordance with 41 U.S.C. 1901, simplified acquisition procedures are to be used to promote efficiency and economy in contracting to avoid unnecessary burdens for agencies and contractors. Written acquisition plans are not required for acquisitions below the simplified acquisition threshold. Therefore, this rule does not apply to acquisitions of tents and other temporary structures below the simplified acquisition threshold.

V. Paperwork Reduction Act

This rule does not impose 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).

VI. 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 sections

368 and 821 of the National Defense Authorization Act for Fiscal Year 2012. This requirement became effective upon enactment, December 23, 2011. This action is necessary in order to enable contracting officers to comply with this new requirement, which will promote the use of domestic materials and enhance growth of the United States economy. Pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), 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 225 and 252

Government procurement.

Ynette R. Shelkin

Editor, 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 225.7001 by revising paragraph (e) to read as follows:

225.7001 Definitions.

* * * * *

(e) Structural component of a tent is defined in the clause at 252.225-7012, Preference for Certain Domestic Commodities.

3. Amend section 225.7002-1 by revising paragraph (a)(3) to

read as follows:

225.7002-1 Restrictions.

* * * * *

(a) * * *

(3) Tents and the structural components of tents, tarpaulins, or covers. In addition, in accordance with section 368 of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112-81)–

(i) When acquiring tents or other temporary structures for use by the Armed Forces, the contracting officer shall award contracts that provide the best value (see FAR 15.101).

Temporary structures covered by this paragraph (a)(3)(i) are nonpermanent buildings, including tactical shelters, nonpermanent modular or pre-fabricated buildings, or portable or relocatable buildings, such as trailers or equipment configured for occupancy (see also DFARS 246.270-2)). Determination of best value includes consideration of the total life-cycle costs of such tents or structures, including the costs associated with any equipment, fuel, or electricity needed to heat, cool, or light such tents or structures (see FAR 7.105(a)(3)(i) and PGI 207.105(a)(3)(i)).

(ii) These requirements apply to any agency or department that acquires tents or other temporary structures on behalf of DoD (see FAR 17.503(d)(2)).

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PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.212-7001 [Amended]

4. Amend section 252.212-7001 in paragraph (b) (9) by removing "(JUN 2010)" and adding "(JUN 2012)" in its place.

5. Amend section 252.225-7012—

a. By removing the clause date "(JUN 2010)" and adding "(JUN 2012)" in its place;

b. In paragraph (a), by removing the numerical designations (1) through (5) from the definitions and adding, in alphabetical order, the definition of "Structural component of a tent"; and

c. By revising paragraph (b) (3).

The addition and revision read as follows:

252.225-7012 Preference for Certain Domestic Commodities.

* * * * *

(a) * * *

Structural component of a tent—

(i) Means a component that contributes to the form and stability of the tent (e.g., poles, frames, flooring, guy ropes, pegs);

(ii) Does not include equipment such as heating, cooling, or lighting.

* * * * *

(b) * * *

(3) Tents and structural components of tents, tarpaulins, and covers.

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