



(Billing Code 5001-06)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 205, 212, 225, and 252

RIN 0750-AI51

Defense Federal Acquisition Regulation Supplement: Acquisition of the American Flag (DFARS Case 2015-D005)

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 implement sections of the Department of Defense Appropriations Acts for Fiscal Year (FY) 2014 and FY 2015 that prohibit use of funds made available under the acts for the purchase or manufacture of a flag of the United States, unless such flag is manufactured in the United States.

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 2015-D005, using any of the following methods:

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

comments via the Federal eRulemaking portal by entering "DFARS Case 2015-D005" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2015-D005." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2015-D005" on your attached document.

- o E-mail: osd.dfars@mail.mil. Include DFARS Case 2015-D005 in the subject line of the message.

- o Fax: 571-372-6094.

- o Mail: Defense Acquisition Regulations System, Attn: Ms. Amy G. Williams, OUSD(AT&L)DPAP/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. Amy G. Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement sections 8123 of the Department of Defense Appropriations Act, 2014 (Division C, Title VIII of Pub. L. 113-76) and section 8119 of the Department of Defense Appropriations Act, 2015 (Division C, Title VIII of Pub. L. 113-235). These sections prohibit the use of funds appropriated under those acts for the purchase or manufacture of a flag of the United States unless such flag is treated as a covered item under 10 U.S.C. 2533a(b) (commonly known as the Berry Amendment). With some exceptions, the Berry Amendment restricts the purchase of certain items of food, clothing, fabrics, and hand or measuring tools (whether as end products or components), unless the items have been grown, reprocessed, reused, or produced in the United States.

II. Discussion and Analysis

The Berry Amendment is implemented in DFARS 225.7002 and associated clauses DFARS 252.225-7012 and 252.225-7015.

This rule proposes to amend DFARS 225-7002-1, 225-7002-2, and 225.7002-3, and add a new clause at 252.225-70XX, Acquisition of the American Flag. Conforming changes are also required in DFARS 212.301(f) to apply the new clause to the acquisition of commercial items. Since most, if not all, flags are commercial items, this statute would be without affect if not applied to commercial items. Furthermore, this is an appropriations act restriction, which specifically prohibits the expenditure of any

funds appropriated under these acts, unless the flags to be acquired are manufactured in the United States (regardless of whether the flags are commercial items.)

III. 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.

IV. 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. based on a review of historical purchasing data. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This rule is necessary to implement sections 8123 and 8119 of the DoD Appropriations Acts for FYs 2014 and 2015, respectively, and the same provision in subsequent DoD appropriations acts.

The objective of the rule is to prohibit acquisition of a flag of the United States (Product or Service Code 8345), unless such flag, including the materials and components thereof, is manufactured in the United States, consistent with the requirements at 10 U.S.C. 2533a. The legal basis for the rule is sections 8123 and 8119 of the DoD Appropriations Acts for FYs 2014 and 2015 (Division C of Pub. Laws 113-76 and 113-235, respectively).

Based on FY 2013 Federal Procurement Data System data, there was only one acquisition of flags from a small business that exceeded the simplified acquisition threshold. There are no projected reporting or recordkeeping requirements. The rule only requires that if a contractor is to provide flags of the United States to DoD under a contract that exceeds the simplified acquisition threshold, the flags must be manufactured in the United States.

The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no significant alternatives that meet the requirement of the statute.

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 2015-D005), in correspondence.

V. 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 205, 212, 225, and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 205, 212, 225, and 252 are proposed to be amended as follows:

1. The authority citation for parts 205, 212, 225, and 252 continues to read as follows:

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

PART 205—PUBLICIZING CONTRACT ACTIONS

205.301 [Amended]

2. Amend section 205.301, in paragraph (a)(S-70)(i) introductory text by removing "225.7002-1(a)(2) through (10)" and adding "225.7002-1(a)(1)(ii) through (x)" in its place.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

3. Amend section 212.301, by adding paragraph (f)(ix)(CC) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f) * * *

(ix) * * *

(CC) Use the clause at 252.225-70XX, Acquisition of the American Flag, as prescribed in 225.7002-3(c), to comply with section 8123 of the DoD Appropriations Act, 2014 (Pub. L. 113-76, Division C, Title VIII), and the same provision in subsequent DoD appropriations acts.

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PART 225—FOREIGN ACQUISITION

4. Revise the section 225.7002 heading to read as follows:

225.7002 Restrictions on food, clothing, fabrics, hand or measuring tools, and flags.

5. Amend section 225.7002-1 by—

- a. Redesignating paragraphs (a) and (b) as (1) and (2), respectively;
- b. Redesignating the introductory text as paragraph (a);
- c. In the newly redesignated paragraph (1), further redesignating paragraphs (1) through (10) as (1)(i) through (x), respectively;

- d. In the newly redesignated paragraph (1)(iii), further redesignating paragraphs (i) through (iii) as paragraphs (1)(iii)(A) through (C), respectively;
- e. In the newly redesignated paragraph (1)(x), removing "(Federal Supply Class 8465)" and adding "(Product or Service Code (PSC) 8465)" in its place, and removing "paragraph (a)" and adding "paragraph (a)(1)" in its place;
- f. In the newly redesignated paragraph (2), removing "see PGI 225.7002-1(b)" and adding "see PGI 225.7002-1(a)(2)" in its place; and
- g. Adding a new paragraph (b).

The addition reads as follows:

225.7002-1 Restrictions.

* * * * *

(b) In accordance with section 8123 of the Department of Defense Appropriations Act, 2014 (Pub. L. 113-76, Division C, Title VIII), and the same provision in subsequent Defense appropriations acts, except as provided in 225.7002-2, do not acquire a flag of the United States (PSC 8345), unless such flag, including the materials and components thereof, is manufactured in the United States, consistent with the requirements at 10 U.S.C. 2533a.

225.7002-2 [Amended]

6. Amend section 225.7002-2 by—

- a. In paragraph (l), removing "Section 8118" and adding "section 8118" in its place;
- b. In paragraph (m)(1)(i), removing "Federal Supply Group" and adding "Product or Service Group (PSG)" in its place;
- c. In paragraph (m)(1)(ii), removing "Federal Supply Group" and adding "PSG" in its place in two places; and
- d. In paragraph (m)(1)(iv), removing "Federal Supply Class" and adding "PSC" in its place.

7. Amend section 225.7002-3 by adding a new paragraph (c) to read as follows:

225.7002-3 Contract clauses.

* * * * *

(c) Use the clause at 252.225-70XX, Acquisition of the American Flag, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that are for the acquisition of the American flag, with an estimated value that exceeds the simplified acquisition threshold.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

8. Add section 252.225-70XX to read as follows:

252.225-70XX Acquisition of the American Flag.

As prescribed in 225.7002-3(c), use the following clause:

ACQUISITION OF THE AMERICAN FLAG (DATE)

(a) Definition. United States, as used in this clause, means the 50 States, the District of Columbia, and outlying areas.

(b) If the Contractor is required to deliver under this contract one or more American flags (Product or Service Code 8345), such flag(s), including the materials and components thereof, shall be manufactured in the United States, consistent with the requirements at 10 U.S.C. 2533a (commonly known as the "Berry Amendment").

(c) This clause does not apply to the acquisition of any end items or components related to flying or displaying the flag (e.g., flagpoles and accessories).

(End of clause)