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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 245

[Docket DARS-2016-0035]

RIN 0750-AJ11

Defense Federal Acquisition Regulation Supplement: Use of the Government Property Clause (DFARS Case 2015-D035)

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 expand the prescription for use of the Federal Acquisition Regulation (FAR) Government property clause.

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-D035, using any of the following methods:

- o Federal eRulemaking Portal: <http://www.regulations.gov>. Search for "DFARS Case 2015-D035." Select "Comment Now" and follow the instructions provided to submit a comment. Please

include "DFARS Case 2015-D035" on any attached documents.

- o Email: osd.dfars@mail.mil. Include DFARS Case 2015-D035 in the subject line of the message.

- o Fax: 571-372-6094.

- o Mail: Defense Acquisition Regulations System, Attn: Mr. Thomas Ruckdaschel, 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: Mr. Thomas Ruckdaschel, telephone 571-372-6088.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend DFARS 245.107 to strengthen the management and accountability of Government-furnished property (GFP). DoD has identified a gap in the current process that hinders full implementation of achieving accountability for GFP due to an exception to the use of the clause at FAR 52.245-1, Government Property.

DoD has implemented a transactional information technology solution to track, report, and manage GFP using the Wide Area WorkFlow suite of tools. This has been implemented through requirements in FAR clause 52.245-1, Government Property, and use of associated DFARS clauses relating to Government property. The basic property receipt and record-keeping requirements of FAR clause 52.245-1, and as proposed in this rule, mirror customary commercial record keeping practices. Customary commercial practice is to create receiving reports and keep records for incoming assets regardless of the source of such assets. A recent industry association survey revealed that all its member firms create receiving reports and establish records in some form to track GFP.

II. Discussion and Analysis

The current language at FAR 45.107 provides an exception whereby contracting officers can choose not to include the clause in purchase orders for property repairs, when the unit acquisition cost of Government property to be repaired does not exceed the simplified acquisition threshold (SAT). Acquisition value alone, however, is not an indicator of the criticality or sensitivity of the property. For example, the acquisition cost of individual items of firearms, body armor, night-vision equipment, computers, or cryptologic devices may be below the SAT, but the accountability requirements for these items are

fairly stringent. Omission of the Government property clause in purchase orders for repairs of these types of items increases risk of misuse or loss of the property and could call into dispute their ownership. To address this accountability gap, DoD is proposing to amend DFARS 245.107(1)(i) to require the use of FAR clause 52.245-1, Government Property, in all purchase orders for repair, maintenance, overhaul, or modification of Government property regardless of the unit acquisition cost of the items to be repaired. The rule also facilitates compliance with DoD Instruction 4161.02 entitled "Accountability and Management of Government Contract Property," which requires DoD components to use electronic transactions when transferring Government property to a contractor and upon return of property to DoD. Use of FAR clause 52.245-1, in conjunction with the following associated DFARS clauses, creates an electronic end-to-end process for GFP management—

- 252.245-7001, Tagging, Labeling, and Marking of Government-Furnished Property;
- 252.245-7002, Reporting Loss of Government Property;
- 252.245-7003, Contractor Property Management System Administration; and
- 252.211-7007, Reporting of Government-Furnished Property.

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 add any new provisions or clauses; however, the rule does change the prescription for DoD use of FAR clause 52.245-1, Government Property. DoD is proposing to amend DFARS 245.107(1)(i) to require the use of FAR clause 52.245-1, Government Property, in all purchase orders for repair, maintenance, overhaul, or modification of Government property regardless of the unit acquisition cost of the items to be repaired. FAR 45.107(a)(1)(iii) requires the clause to be used for contracts or modifications awarded under FAR part 12 procedures where Government property that exceeds the simplified acquisition threshold, as defined in FAR 2.101, is furnished or where the contractor is directed to acquire property for use under the contract that is titled in the Government. FAR 45.107(d) provides that purchase orders for property repair need not include a Government property clause when the acquisition cost of Government property to be repaired does not exceed the simplified acquisition threshold. This DFARS rule, however, will require all DoD purchase orders for repair, maintenance, overhaul, or modification of Government property to include FAR clause 52.245-1, Government Property, regardless of the unit acquisition cost of the items to be repaired.

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. 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. However, an initial regulatory flexibility analysis has been prepared and is summarized as follows:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to expand the prescription for use of the Federal Acquisition Regulation (FAR) clause 52.245-1, Government Property. The current language at FAR 45.107

provides an exception whereby contracting officers can choose not to include FAR clause 52.245-1 in purchase orders for repairs of Government-furnished property (GFP), when the unit acquisition cost of Government property to be repaired does not exceed the simplified acquisition threshold (SAT). Acquisition value alone, however, is not an indicator of the criticality or sensitivity of the property. As an example, the acquisition cost of individual items of firearms, body armor, night-vision equipment, computers, or cryptologic devices may be below the SAT, but the accountability requirements for these items are fairly stringent. Omission of the Government property clause in purchase orders for repairs of these types of items increases the risk of misuse or loss of the property and could call into dispute their ownership.

The objective of this rule is to strengthen the management and accountability of GFP. This rule proposes to amend DFARS 245.107 by requiring that FAR clause 52.245-1, Government Property, be incorporated in all DoD purchase orders involving repair, maintenance, overhaul, or modification of Government property, regardless of the unit acquisition cost of the Government property to be repaired.

Based on data available in the Federal Procurement Data System for fiscal year 2015, DoD awarded 735 purchase orders involving the repair of Government property at or below the simplified

acquisition threshold to 530 unique vendors, of which 328 (approximately 56 percent) were small businesses.

This rule contains reporting and recordkeeping requirements for those entities that repair Government property under purchase orders that contain the FAR 52.245-1 clause. Entities affected by this rule would be required to prepare a property record and receiving report for the Government property provided. Additionally, entities would be required to acknowledge receipt of assets in the Wide Area WorkFlow system. The professional skill sets required are those of mid-level administrative personnel.

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

There are no known significant alternatives to the rule to achieve accountability of Government-furnished property and resolve potential risks of loss or disputes for the ownership of property acquired with Government funds.

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 2015-D035), in correspondence.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies. The proposed rule contains information collection requirements. Accordingly, DoD has submitted a request for approval of a new information collection requirement concerning DFARS Case 2015-D035 to the Office of Management and Budget.

A. Public reporting burden for this collection of information is estimated to average one-half hour or 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden is estimated as follows:

Number of respondents: 530.

Responses per respondent: 3.8 approximately.

Total annual responses: 2,000.

Preparation hours per response: 0.5 hours.

Total response burden hours: 735.

Recordkeeping burden hours: 265.

Total annual burden hours: 1,000.

Frequency: On occasion.

Affected Public: Businesses or other for-profit institutions.

B. Request for Comments Regarding Paperwork Burden.

Written comments and recommendations on the proposed information collection, including suggestions for reducing this burden, should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, or email [Jasmeet K. Seehra@omb.eop.gov](mailto:Jasmeet.K.Seehra@omb.eop.gov), with a copy to the Defense Acquisition Regulations System, Attn: Mr. Thomas Ruckdaschel, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060. Comments can be received from 30 to 60 days after the date of this notice, but comments to OMB will be most useful if received by OMB within 30 days after the date of this notice.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the DFARS, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of

appropriate technological collection techniques or other forms of information technology.

To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Acquisition Regulations System, Attn: Mr. Thomas Ruckdaschel, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060, or email osd.dfars@mail.mil. Include DFARS Case 2015-D035 in the subject line of the message.

List of Subjects in 48 CFR Part 245

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR 245 is proposed to be amended as follows:

PART 245—GOVERNMENT PROPERTY

1. The authority citation for part 245 continues to read as follows:

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

2. Amend section 245.107 by—

a. Removing paragraph (6);

b. Redesignating paragraphs (1) through (5) as paragraphs (2) through (6), respectively; and

c. Adding a new paragraph (1).

The addition reads as follows:

245.107 Contract clauses.

(1)(i) In lieu of the prescription at FAR 45.107(d), use the clause at 52.245-1, Government Property, in all purchase orders for repair, maintenance, overhaul, or modification of Government property regardless of the unit acquisition cost of the items to be repaired.

(ii) For negotiated fixed-price contracts awarded on a basis other than submission of certified cost or pricing data for which Government property is provided, use the clause at FAR 52.245-1, Government Property, without its Alternate I.

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