DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
RESEARCH, DEVELOPMENT AND ACQUISITION
1000 NAVY PENTAGON
WASHINGTON, DC 20350-1000

APR 12 2005

MEMORANDUM FOR DISTRIBUTION

Subj: CONTRACT PERIOD FOR TASK AND DELIVERY ORDER CONTRACTS

Ref: (a) DASN (ACQ) memo of May 17, 2004
(b) Section 843 of the National Defense Authorization Act for Fiscal Year 2004, Public Law 108-136
(c) Section 813 of the National Defense Authorization Act for Fiscal Year 2005, Public Law 108-375

Encl: (1) Interim DFARS rule published at 69 FR 74992 on December 15, 2004

Reference (a) provided notification and guidance regarding the requirements of reference (b). Reference (b) placed a five-year limit on the period of task or delivery order contracts awarded under 10 U.S.C. 2304a. Reference (c) further amended 10 U.S.C. 2304a to permit a total period of up to 10 years, which may be exceeded if the head of the agency determines in writing that exceptional circumstances necessitate a longer contract period.

Enclosure (1) was published in the Federal Register on December 15, 2004 to implement the requirements of references (b) and (c). The interim DFARS rule provides clarifications and guidance on the applicability of the statutory requirements.

Please ensure that all Department of the Navy contracting officers and acquisition personnel under your cognizance are aware of and comply with these requirements. The DASN(ACQ) point of contact is Mr. Clarence Belton, 703-693-4006, clarence.belton@navy.mil.

M.F. TAGGARD
Chief of Staff/Policy
For DASN(ACQ)

Subj: CONTRACT PERIOD FOR TASK AND DELIVERY ORDER CONTRACTS

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DoD received no comments on the interim DFARS rule. However, the final rule includes the following additional changes:

• Amendment of the trade agreements clauses at DFARS 252.225–7021, 252.225–7036, and 252.225–7045 to remove the statement that United States law will apply to resolve any claim of breach of contract. This statement is no longer necessary, because the final rule published in FAC 2001–25 contains a new FAR clause, 52.233–4, Applicable Law for Breach of Contract Claim, that is prescribed for inclusion in all contracts.

• A minor amendment at DFARS 225.502(c)(i)(B) to clarify that, in acquisitions subject to a Free Trade Agreement, only eligible products of the applicable Free Trade Agreement country are exempt from application of the Buy American Act or Balance of Payments Program evaluation factor (*e.g.*, for acquisitions between $25,000 and $58,550, a Mexican end product would be a "NAFTA country end product" but would not be an "eligible product," in accordance with the thresholds at FAR 25.402).

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD certifies that this final rule will not 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.* Although the rule opens up Government procurement to the products of Chile, and lowers the trade agreements threshold for the products of Singapore, the economic impact on U.S. small businesses will not be significant. DoD applies the trade agreements to only those non-defense items listed at DFARS 225.401–70, and acquisitions below $100,000 that are set aside for small businesses are exempt.

C. Paperwork Reduction Act

This rule affects the certification and information collection requirements in the provisions at DFARS 252.225–7020 and 252.225–7035, currently approved by the Office of Management and Budget under Clearance Number 0704–0229. The impact, however, is negligible. In the provision at DFARS 252.225–7020, Trade Agreements Certificate, the offeror no longer has to list offers of end products from Chile as nondesignated country end products. However, offers of Chilean end products would have been unlikely, because purchase of foreign products other than eligible products is prohibited by the Trade Agreements Act. In the provision at DFARS 252.225–7035, Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate, the offeror must list all end products that are not domestic end products. The offeror will list products of Chile and Singapore on the list of Free Trade Agreement country end products, rather than the list of "other foreign end products."

List of Subjects in 48 CFR Parts 212, 213, 225, and 252

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

■ Accordingly, the interim rule amending 48 CFR parts 212, 213, 225, and 252, which was published at 69 FR 1926 on January 13, 2004, is adopted as a final rule with the following changes:

■ 1. The authority citation for 48 CFR parts 212, 213, 225, and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 225—FOREIGN ACQUISITION

225.502 [Amended]

■ 2. Section 225.502 is amended in paragraph (c)(i)(B) by removing "end" and adding in its place "eligible".

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.212–7001 [Amended]

■ 3. Section 252.212–7001 is amended as follows:

■ a. By revising the clause date to read "(DEC 2004)";

■ b. In paragraph (b), in entry "252.225–7021", by removing "(JUN 2004)" and adding in its place "(DEC 2004)"; and

■ c. In paragraph (b), in entry "252.225–7036", by removing "(JAN 2004)" the first place it appears and adding in its place "(DEC 2004)".

252.225–7021 [Amended]

■ 4. Section 252.225–7021 is amended as follows:

■ a. By revising the clause date to read "(DEC 2004)";

■ b. By removing paragraph (e); and

■ c. By redesignating paragraph (f) as paragraph (e).

252.225–7036 [Amended]

■ 5. Section 252.225–7036 is amended as follows:

■ a. By revising the clause date to read "(DEC 2004)"; and

■ b. By removing paragraph (e).

252.225–7045 [Amended]

■ 6. Section 252.225–7045 is amended as follows:

■ a. By revising the clause date to read "(DEC 2004)"; and

■ b. By removing paragraph (d).

[FR Doc. 04–27345 Filed 12–14–04; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

48 CFR Part 217

[DFARS Case 2003–D097/2004–D023]

Defense Federal Acquisition Regulation Supplement; Contract Period for Task and Delivery Order Contracts

AGENCY: Department of Defense (DoD).

ACTION: Interim rule with request for comments.

SUMMARY: DoD has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 843 of the National Defense Authorization Act for Fiscal Year 2004 and Section 813 of the National Defense Authorization Act for Fiscal Year 2005. Section 843 placed a 5-year limit on the period of task or delivery order contracts awarded under 10 U.S.C. 2304a. Section 813 further amended 10 U.S.C. 2304a to permit a total period of up to 10 years, which may be exceeded if the head of the agency determines in writing that exceptional circumstances require a longer contract period. The DFARS rule clarifies that the 10-year limit applies to the ordering period, establishes a limit on the length of orders, and includes other key information regarding applicability.

DATES: *Effective date:* December 15, 2004.

Comment date: Comments on the interim rule should be submitted to the address shown below on or before February 14, 2005, to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2003–D097, using any of the following methods:

• Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

• Defense Acquisition Regulations Web Site: *http://emissary.acq.osd.mil/dar/dfars.nsf/pubcomm.* Follow the instructions for submitting comments.

• E-mail: *dfars@osd.mil.* Include DFARS Case 2003–D097 in the subject line of the message.

ENCLOSURE(1)

- Fax: (703) 602–0350.
- Mail: Defense Acquisition Regulations Council, Attn: Ms. Robin Schulze, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062.
- Hand Delivery/Courier: Defense Acquisition Regulations Council, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202–3402.

All comments received will be posted to *http://emissary.acq.osd.mil/dar/dfars.nsf.*

FOR FURTHER INFORMATION CONTACT: Robin Schulze, (703) 602–0326.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule implements Section 843 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) and Section 813 of the National Defense Authorization Act for Fiscal Year 2005 (Pub. L. 108–375). Section 843 amended the general authority for task and delivery order contracts at 10 U.S.C. 2304a to specify that a task or delivery order contract entered into under that section may cover a total period of not more than 5 years. Section 813 further amended 10 U.S.C. 2304a to permit a total ordering period of not more than 10 years, unless the head of the agency determines in writing that exceptional circumstances necessitate a longer ordering period.

DoD published an interim rule implementing Section 843 of Public Law 108–136 at 69 FR 13478 on March 23, 2004. Twenty-three respondents submitted comments on the interim rule. A discussion of the comments is provided below. This second interim rule implements Section 813 of Public Law 108–375 and incorporates changes made as a result of public comments received on the interim rule published on March 23, 2004. Differences between the first and second interim rules are addressed in the discussion of comments 1, 2, 3, and 7 below.

1. *Comment: Ordering period vice period of performance.* Twelve respondents expressed concern that the rule did not specify whether the 5-year limit applies to the ordering period or the period of performance. Respondents pointed out that if performance is limited to 5 years, the end result is that this type of contract may only be able to have a base year and 2 or 3 option years to ensure that all work is completed by the end of the fifth year.

DoD Response: The second interim rule incorporates the 10-year limit allowed by Section 813 and clarifies that the limit applies to the ordering period. In making this clarification, DoD determined that it was important to establish a reasonable limit on the period of performance for task or delivery orders issued during the ordering period and established such a limit in the rule at 217.204(e)(iii).

2. *Comment: Six-month extension for services.* Two respondents raised concerns as to whether the 5-year limit imposed by Section 843 was inclusive of any 6-month extension permitted by the clause at FAR 52.217–8, Option to Extend Services. Another respondent identified the exception at FAR 16.505(c)(2)(ii) for contracted advisory and assistance services that permits such contracts to exceed 5 years by 6 months in certain circumstances. This respondent suggested that the DFARS rule supplement FAR 16.505(c)(2) to clarify whether contracts for advisory and assistance services can be longer than 5 years.

DoD Response: For contracts issued pursuant to 10 U.S.C. 2304a, the ordering period is restricted to a maximum of 10 years unless the head of the agency determines in writing that exceptional circumstances require a longer ordering period. However, the performance period of an order may extend no more than 1 year beyond the 10-year limit or extended limit unless approved by the senior procurement executive. The authority at FAR 16.505(c)(2)(ii), for advisory and assistance services, derives from 10 U.S.C. 2304b and is unaffected by Section 843 or 813, which limit only task or delivery order contracts awarded pursuant to 10 U.S.C. 2304a. The second interim rule clarifies that contracts for advisory and assistance services are governed by the requirements of 10 U.S.C. 2304b and FAR 16.505(c).

3. *Comment: Exception for Information Technology.* One respondent suggested that the 5-year limit imposed by Section 843 should not apply to information technology contracts and that the rule should be clarified to identify this exception. The respondent identified the Clinger-Cohen Act (Pub. L. 104–106) as the authority for the exception for information technology.

DoD Response: The Clinger-Cohen Act does not provide an exception for information technology. The limits in Sections 843 and 813 apply to all task and delivery order contracts awarded under 10 U.S.C. 2304a, including those for information technology. The second interim rule clarifies this point at 217.204(e)(ii).

4. *Comment: Applicability to contracts awarded before the interim rule.* One respondent requested that the rule address the applicability of Section 843 to contracts awarded after the enactment of Section 843, but before the issuance of the interim rule. Another respondent assumed that the 5-year limit precluded agencies from placing orders under contracts awarded prior to the enactment of Section 843. Another respondent expressed concern that some of the military departments unilaterally implemented the 5-year limit for existing indefinite-delivery indefinite-quantity contracts or chose to implement the limit for new solicitations issued prior to the effective date of the rule. Two respondents recommended that the background information for the rule state that the 5-year limit is applicable only to contracts that result from solicitations issued on or after March 23, 2004.

DoD Response: Generally, statutes take effect on the date of enactment unless they expressly state a different effective date (*e.g.*, "upon implementation in regulations, or 180 days, whichever comes first"). Consistent with FAR 1.108(d), as a matter of policy, the DFARS implementation of the Section 843 limitation was effective for solicitations issued on or after March 23, 2004, the date of publication of the first interim rule. The DFARS implementation of the Section 813 limitation is effective on the date of publication of this second interim rule. In accordance with FAR 1.108(d)(2), contracting officers may amend solicitations issued before the effective date of this second interim rule to incorporate the longer ordering period.

5. *Comment: Applicability to existing contracts.* One respondent raised questions about the applicability of the 5-year limit to new solicitations issued for new delivery orders to be awarded against existing contracts. Specifically, whether the 5-year limit (1) would apply to the entire contract, including previously awarded delivery orders; (2) would apply to merely the single delivery order and any additional delivery orders solicited after the interim rule; or (3) would not apply. Another respondent questioned whether an existing contract that has a 7-year ordering period but has reached a quantity or dollar ceiling in 5 years could be modified, with a justification and approval, to increase the ceiling. The same respondent questioned whether an existing contract could be modified to extend the ordering period beyond 5 years.

DoD Response: Neither Section 843 nor 813 has retroactive effect. Under Section 813, a contracting officer may exercise existing options and may modify existing contracts to add new

options or otherwise extend the ordering period up to 10 years, or longer if authorized by the head of the agency. Additionally, an existing contract may be modified to extend the existing ordering period, provided the justification for the new work is documented in a justification and approval in accordance with FAR 6.304.

6. *Comment: Options on Orders and Within Scope Changes.* One respondent requested that the rule address the use of option periods attached to task and delivery orders. The respondent suggested that every order should be permitted to contain up to four option periods. Another respondent suggested that within-scope changes could extend the ordering period beyond 5 years and requested that the rule clarify whether the 5-year limit applies to within-scope changes.

DoD Response: Options and modifications may be issued to extend the total ordering period for a contract or an individual order; however, the total ordering period may not exceed 10 years unless authorized by the head of the agency.

7. *Comment: Disappointed with Implementation.* Two respondents expressed disappointment that DoD rushed to implement Section 843 and that the interim rule provided only the barest coverage. The respondents recommended that the final rule expand the coverage to include key elements from the question and answer document made available on the Defense Procurement and Acquisition Policy Web site.

DoD Response: DoD has a responsibility to promptly implement laws enacted by Congress. It was also necessary to issue an interim rule to ensure consistent implementation within DoD. The second interim rule has been expanded to include key elements regarding applicability from the question and answer document and changes required by the enactment of Section 813.

8. *Comment: Program Impacts.* Four respondents identified programs or missions that will be impacted by the 5-year limit.

DoD Response: DoD agrees that the 5-year limit may have had an adverse impact on the ability of agencies to accomplish their missions. The second interim rule minimizes the impact to the extent permitted by Section 813.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD has prepared an initial regulatory flexibility analysis consistent with 5 U.S.C. 604. The analysis is summarized as follows: This interim rule applies to all new DoD solicitations for supplies or services that will result in a task or delivery order contract awarded under the authority of 10 U.S.C. 2304a. It may affect businesses interested in submitting offers for such contracts. The impact on small entities is unknown at this time. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subpart in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2003–D097.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. 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 Section 813 of the National Defense Authorization Act for Fiscal Year 2005 (Pub. L. 108–375). Section 813 provides that the total period of a task or delivery order contract awarded under 10 U.S.C. 2304a may not exceed 10 years, unless the head of the agency determines in writing that exceptional circumstances require a longer contract period. Section 813 became effective upon enactment on October 28, 2004. 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 217

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

■ Therefore, 48 CFR part 217 is amended as follows:

■ 1. The authority citation for 48 CFR part 217 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 217—SPECIAL CONTRACTING METHODS

■ 2. Section 217.204 is revised to read as follows:

217.204 Contracts.

(e)(i) Notwithstanding FAR 17.204(e), the ordering period of a task order or delivery order contract awarded by DoD pursuant to 10 U.S.C. 2304a—

(A) May be for any period up to 5 years;

(B) May be subsequently extended for one or more successive periods in accordance with an option provided in the contract or a modification of the contract; and

(C) Shall not exceed 10 years unless the head of the agency determines in writing that exceptional circumstances require a longer ordering period.

(ii) DoD must submit a report to Congress when an ordering period is extended beyond 10 years in accordance with paragraph (e)(i)(C) of this section. Follow the procedures at PGI 217.204(e) for reporting requirements.

(iii) Paragraph (e)(i) of this section—

(A) Also applies to information technology task or delivery order contracts;

(B) Does not apply to contracts, including task or delivery order contracts, awarded under other statutory authority; and

(C) Does not apply to the following:

(1) Advisory and assistance service task order contracts (authorized by 10 U.S.C. 2304b that are limited by statute to 5 years, with the authority to extend an additional 6 months (see FAR 16.505(c)).

(2) Definite-quantity contracts.

(3) GSA schedule contracts.

(4) Multi-agency contracts awarded by agencies other than NASA, DoD, or the Coast Guard.

(iv) Obtain approval from the senior procurement executive before issuing an order against a task or delivery order contract subject to paragraph (e)(i) of this section, if performance under the order is expected to extend more than 1 year beyond the 10-year limit or extended limit described in paragraph (e)(i)(C) of this section (see FAR 37.106 for funding and term of service contracts).

[FR Doc. 04–27346 Filed 12–14–04; 8:45 am]

BILLING CODE 5001–08–P