

BILLING CODE 5001-08-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 222, and 252

RIN 0750-AG70

Defense Federal Acquisition Regulation Supplement; Restrictions
on the Use of Mandatory Arbitration Agreements (DFARS Case 2010-
D004)

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

ACTION: Interim rule with request for comments.

SUMMARY: DoD is issuing an interim rule to implement section
8116 of the DoD Appropriations Act for Fiscal Year 2010.
Section 8116 restricts the use of mandatory arbitration
agreements when using funds appropriated or otherwise made
available by this DoD Appropriations Act to award contracts that
exceed \$1 million. It allows the Secretary of Defense to waive
applicability to a particular contractor or subcontractor, if
determined necessary to avoid harm to national security.

DATES: *Effective date:* [Insert date of publication in the
FEDERAL REGISTER].

Comment date: Comments on this interim 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 the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2010-D004, using any of the following methods:

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

E-mail: dfars@osd.mil. Include DFARS Case 2010-D004 in the subject line of the message.

Fax: 703-602-0350.

Mail: Defense Acquisition Regulations System, Attn: Mr. Julian E. Thrash, 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.

FOR FURTHER INFORMATION CONTACT: Mr. Julian E. Thrash, 703-602-0310.

SUPPLEMENTARY INFORMATION:

A. Background

Section 8116 of the DoD Appropriations Act for Fiscal Year 2010 (FY 10) (Pub. L. 111-118) prohibits the use of funds appropriated or otherwise made available by the FY 10 DoD Appropriations Act for any contract (including task or delivery orders and bilateral modifications adding new work) in excess of

\$1 million, if the contractor restricts its employees to arbitration for claims under title VII of the Civil Rights Act of 1964, or tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention, hereinafter the "covered areas."

This rule does not apply to the acquisition of commercial items, including commercially available off-the-shelf items. After June 17, 2010, section 8116(b) requires the contractor to certify compliance by subcontractors.

Additionally, enforcement of this rule does not affect the enforcement of other aspects of an agreement that is not related to the covered areas.

This rule allows the Secretary of Defense to waive applicability to a particular contract or subcontract, if determined necessary to avoid harm to national security.

The following examples are provided to help determine applicability:

- A new order that exceeds \$1 million using funds appropriated or otherwise made available by the FY 10 DoD Appropriations Act, placed against an indefinite-delivery/indefinite-quantity contract for an applicable item or service, is covered by this

restriction, regardless of whether the basic indefinite-delivery/indefinite-quantity contract was covered.

- A funding modification adding more than \$1 million of funds appropriated or otherwise made available by the FY 10 DoD Appropriations Act to a contract that does not contain the clause at 252.222-7006 or 252.222-7999 (Deviation), is not covered.
- A bilateral modification adding new work that uses funds appropriated or otherwise made available by the FY 10 DoD Appropriations Act in excess of \$1 million is covered.
- The award of a new order using funds appropriated or otherwise made available by the FY 10 DoD Appropriations Act with a value of \$700,000 is not covered, since the value is under \$1 million.
- A contract valued at \$1.5 million awarded today, and only \$10,000 in funds appropriated or otherwise made available by the FY 10 DoD Appropriations Act will be obligated, with the remaining balance being FY 11 funding, is not covered, because the total value of funds appropriated or otherwise made available by the FY 10 DoD Appropriations Act is less than \$1 million.

- An entity or firm that does not have a contract in excess of \$1 million appropriated or otherwise made available by the FY 10 DoD Appropriations Act is not affected by the clause. The term "contractor" is narrowly applied only to the entity that has the contract. Unless a parent or subsidiary corporation is a party to the contract, it is not affected.

Contracting officers will modify existing contracts, on a bilateral basis, if using funds appropriated or otherwise made available by the FY 10 DoD Appropriations Act, when such funds will be used for bilateral modifications adding new work or orders that exceed \$1 million and are issued after the effective date of this interim rule. In the event that a contractor refuses to accept such a modification, the contractor will not be eligible for receipt of funds appropriated or otherwise made available by the FY 10 DoD Appropriations Act on such modifications or orders.

This is a significant regulatory action and, therefore, was subject to review under section (6)b of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This is not a major rule.

B. Regulatory Flexibility Act

DoD has prepared an initial regulatory flexibility analysis consistent with 5 U.S.C. 603. A copy of the analysis may be

obtained from the point of contact specified herein. The analysis is summarized as follows:

The objective of this rule is to implement section 8116 of the DoD Appropriations Act for Fiscal Year 2010 (Pub. L. 111-118). The clause at 252.222-7006, Restrictions on the Use of Mandatory Arbitration Agreements, prohibits the use of funds appropriated or otherwise made available by the FY 10 DoD Appropriations Act for any contract (including task or delivery orders and bilateral modifications adding new work) in excess of \$1 million, if the contractor restricts its employees to arbitration for claims under title VII of the Civil Rights Act of 1964, or tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention. Most contractors should not be impacted unless they have a covered claim. A significant number of small businesses provide only commercial items to the Government, and this rule does not apply to that portion of the business community. We anticipate that there will be limited, if any, additional costs imposed on small businesses unless there is, in fact, a covered claim filed against a particular contractor.

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 2010-D004) in correspondence.

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 (DoD) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comments. This action is necessary because section 8116 of the DoD Appropriations Act for Fiscal Year 2010 (Pub. L. 111-118) prohibits the use of funds appropriated or otherwise made available by the FY 10 DoD Appropriations Act for any contract (including task or delivery orders and bilateral modifications) in excess of \$1 million. This action is

necessary to provide implementing language quickly to preclude a contracting officer from inadvertently awarding a contract that is not in compliance with the DoD Appropriations Act for Fiscal Year 2010. Pursuant to 41 U.S.C. 418b, DoD will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 212, 222, and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 222, and 252 are amended as follows:

1. The authority citation for 48 CFR parts 212, 222, and 252 continues to read as follows:

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

Part 212-ACQUISITION OF COMMERCIAL ITEMS

2. Section 212.503 is amended by revising the heading and adding paragraph (a)(xi) to read as follows:

212.503 Applicability of certain laws to executive agency contracts for the acquisition of commercial items.

(a) * * *

(xi) Section 8116 of the Defense Appropriations Act for Fiscal Year 2010 (Pub. L. 111-118).

* * * * *

3. In section 212.504, add paragraph (a)(xix) to read as follows:

212.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.

(a) * * *

(xix) Section 8116 of the Defense Appropriations Act for Fiscal Year 2010 (Pub. L. 111-118).

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PART 222—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

4. Subpart 222.74 is added to read as follows:

SUBPART 222.74—RESTRICTIONS ON THE USE OF MANDATORY ARBITRATION AGREEMENTS

Sec.

222.7400 Scope of subpart.

222.7401 Policy.

222.7402 Applicability

222.7403 Waiver.

222.7404 Contract clause.

SUBPART 222.74—RESTRICTIONS ON THE USE OF MANDATORY ARBITRATION AGREEMENTS

222.7400 Scope of subpart.

This subpart implements section 8116 of the Defense Appropriations Act for Fiscal Year 2010 (Pub. L. 111-118).

222.7401 Policy.

(a) Departments and agencies are prohibited from using funds appropriated or otherwise made available by the Fiscal Year 2010 Defense Appropriations Act (Pub. L. 111-118) for any contract (including task or delivery orders and bilateral modifications adding new work) in excess of \$1 million, unless the contractor agrees not to—

(1) Enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration—

(i) Any claim under title VII of the Civil Rights Act of 1964; or

(ii) Any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention; or

(2) Take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration—

(i) Any claim under title VII of the Civil Rights Act of 1964; or

(ii) Any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.

(b) After June 17, 2010, no funds appropriated or otherwise made available by the Fiscal Year 2010 Defense Appropriations Act (Pub. L. 111-118) may be expended unless the contractor certifies that it requires each covered subcontractor to agree not to enter into, and not to take any action to enforce, any provision of any agreement, as described in paragraph (a) of this section, with respect to any employee or independent contractor performing work related to such subcontract.

222.7402 Applicability.

This requirement does not apply to the acquisition of commercial items.

222.7403 Waiver.

The Secretary of Defense may waive the applicability of paragraphs (a) or (b) of 222.7401, in accordance with PGI 222.7403, to a particular contract or subcontract, if the Secretary or the Deputy Secretary personally determines that the waiver is necessary to avoid harm to national security interests of the United States, and that the term of the contract or

subcontract is not longer than necessary to avoid such harm. The Secretary of Defense shall transmit the determination to Congress and simultaneously publish it in the Federal Register, not less than 15 business days before the contract or subcontract addressed in the determination may be awarded.

222.7404 Contract clause.

Use the clause at 252.222-7006 Restrictions on the Use of Mandatory Arbitration Agreements, in all solicitations and contracts valued in excess of \$1 million utilizing funds appropriated or otherwise made available by the Fiscal Year 2010 Defense Appropriations Act (Pub. L. 111-118), except in contracts for the acquisition of commercial items, including commercially available off-the-shelf items.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Section 252.222-7006 is added to read as follows:

252.222-7006 Restrictions on the Use of Mandatory Arbitration Agreements

As prescribed in 222.7404, use the following clause:

RESTRICTIONS ON THE USE OF MANDATORY ARBITRATION AGREEMENTS (DATE)

(a) *Definitions.* As used in this clause—

Covered subcontractor means any entity that has a subcontract valued in excess of \$1 million, except a subcontract for the acquisition of commercial items, including commercially available off-the-shelf items.

Subcontract means any contract, as defined in Federal Acquisition Regulation subpart 2.1, to furnish supplies or services for performance of this contract or a higher-tier subcontract thereunder.

(b) The Contractor—

(1) Agrees not to—

(i) Enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration—

(A) Any claim under title VII of the Civil Rights Act of 1964; or

(B) Any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention; or

(ii) Take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration—

(A) Any claim under title VII of the Civil Rights Act of 1964; or

(B) Any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction

of emotional distress, false imprisonment, or negligent hiring, supervision, or retention; and

(2) Certifies, by signature of the contract, for contracts awarded after June 17, 2010, that it requires each covered subcontractor to agree not to enter into, and not to take any action to enforce, any provision of any agreements, as described in paragraph (b)(1) of this clause, with respect to any employee or independent contractor performing work related to such subcontract.

(c) The prohibitions of this clause do not apply with respect to a contractor's or subcontractor's agreements with employees or independent contractors that may not be enforced in a court of the United States.

(d) The Secretary of Defense may waive the applicability of the restrictions of paragraph (b) of this clause in accordance with Defense Federal Acquisition Regulation Supplement 222.7403.

(End of clause)

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