File Closeout Checklist

~~FAR~~/DFARS Case Number 97-0307

Case Manager (b)(6) Date Completed 11-20-98

("X" as completed)

X 1. All documents required by the "File Plan" (e.g. case chronology, case origination document, committee reports, etc.) included in case folder?

X 2. All documents filed in chronological order and at the folder appropriate leaf (see "File Plan")? No loose materials in the case folder(s)?

X 3. All material not part of the historical record removed?

X 4. All duplicate copies of documentation removed?

X 5. Case file reflects the final action taken on the case?

X a. If final rule, does the case chronology include the date of publication in the *Federal Register*? Copy of *Federal Register* notice filed in case folder?

___ b. If the rule was withdrawn, does the case chronology include the date the notice of withdrawal was published in the *Federal Register*? Copy of the *Federal Register* notice filed in the case folder?

___ c. If the case was closed without action, does the case chronology include the date of and reasons for closing?

X 6. All documents readable and in good shape?

___ 7. All case folders clearly labeled with case number, title of case, and volume number assigned (if more than one folder)?

"Cases closed" means cases for which a final rule has been published in the *Federal Register*, a notice of withdrawal has been published in the *Federal Register*, or decision has been made to close the case without action.

Exhibit 1

DFARS Chronology

Case: 97-D307

Date	Action
10-2-97	Case initiated by DAR Council Director
	Case tasked to committee/ad hoc group
10-28-97	Received cmte/ad hoc group report & draft rule
11-5-97	DAR Council first discussed cmte/ad hoc report Discuss again - 11-19
11-19-97	DAR Council agreed to ~~proposed~~/interim/~~final~~ rule
11-20-97	→ analyst, for inclusion in DAC 91-13.
3-9-98	~~Proposed~~/Interim rule published (63 FR 11522)
5-8-98	Public comment period closed
	No public comments.
	Public comments given to DARC to task cmte/ad hoc group
	Cmte/ad hoc group report & draft final rule due
	Cmte/ad hoc group report & draft final rule received
	Distributed report to DAR Council for discussion
	DAR Council first discussed cmte/ad hoc group report
5-13-98	DAR Council agreed to final DFARS rule w/o change
6-5-98	→ SB
~~Fm H 6-8-98~~	~~Final~~
11-20-98	Final rule published (63 FR 64426)

Delays Encountered:

for Construction Programs. After we receive the SF 424 and SF 424D, the Regional Director will obligate funds to you based on the approved Project Worksheets. You will then approve subgrants based on the Project Worksheets approved for each applicant.

5. Revise § 206.228(a)(2)(i) to read as follows:

§ 206.228 Allowable costs.

* * * * *

(a) * * *

(1) * * *

(2) *Statutory Administrative Costs*—(i) *Grantee.* Under section 406(f)(2) of the Stafford Act, we will pay you, the State, an allowance to cover the extraordinary costs that you incur to develop and validate Project Worksheets, to prepare final inspection reports, project applications, final audits, and to make related field inspections by State employees. Eligible costs include overtime pay and per diem and travel expenses, but do not include regular time for your State employees. The allowance to you will be based on the following percentages of the total amount of Federal assistance that we provide for all subgrantees in the State under sections 403, 406, 407, 502, and 503 of the Act:

* * * * *

Dated: November 13, 1998.

James L. Witt,

Director.

[FR Doc. 98-31044 Filed 11-19-98; 8:45 am]

BILLING CODE 6718-02-P

DEPARTMENT OF DEFENSE

48 CFR Parts 209, 213, 219, 225, 231, 235, 236, 252, and 253

Defense Federal Acquisition Regulation Supplement; Adoption of Interim Rules as Final Rules Without Change

AGENCY: Department of Defense (DoD).

ACTION: Final rules.

SUMMARY: The Director of Defense Procurement is adopting as final, without change, eight interim rules that amended the Defense Federal Acquisition Regulation Supplement (DFARS). The rules pertain to contractor responsibility, awards to small disadvantaged business concerns, small business subcontracting plans, domestic source restrictions, restructuring costs, research and development contracting, and construction in foreign countries.

EFFECTIVE DATE: November 20, 1998.

FOR FURTHER INFORMATION CONTACT: Ms. Michelle Peterson, (703) 602-0131.

SUPPLEMENTARY INFORMATION:

A. Background

The following is a summary of the eight interim rules that are adopted as final without change. DoD published the interim rules in the **Federal Register** for public comment and considered all comments received.

List of Firms Not Eligible for Defense Contracts (DFARS Case 97-D325) (63 FR 14836, March 27, 1998)

This rule amends DFARS Parts 209 and 252 to implement Section 843 of the National Defense Authorization Act for Fiscal Year 1998 (Public Law 105-85). Section 843 requires that the Secretary of Defense maintain a list of all firms that the Secretary has identified as being subject to a prohibition on contract award due to ownership or control of the firm by the government of a terrorist country; and that DoD contractors be prohibited from entering into subcontracts with firms on the list unless there is a compelling reason to do so.

Direct Award of 8(a) Contracts (DFARS Case 98-D011) (63 FR 33586, June 19, 1998)

This rule amends DFARS Parts 213, 219, 252, and 253 to implement a Memorandum of Understanding (MOU) dated May 6, 1998, between the Small Business Administration (SBA) and DoD. The MOU streamlines the processing procedures for contract awards under SBA's 8(a) Program by authorizing DoD to award contracts directly to 8(a) concerns.

Comprehensive Subcontracting Plans (DFARS Case 97-D323) (63 FR 14640, March 26, 1998)

This rule amends DFARS 219.702 to reflect revisions made to the DoD Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans, as required by Section 822 of the National Defense Authorization Act for Fiscal Year 1998 (Public Law 105-85). Section 822 extends, from September 30, 1998, to September 30, 2000, the expiration date for the test program; and provides for use of comprehensive subcontracting plans by participating contractors that are performing as subcontractors under DoD contracts.

Waiver of 10 U.S.C. 2534—United Kingdom (DFARS Case 98-D016) (63 FR 43887, August 17, 1998)

This rule amends DFARS Subpart 225.70 and the clauses at DFARS 252.225-7016 and 252.225-7029 to implement a waiver of the domestic source restrictions of 10 U.S.C. 2534(a) for certain items manufactured in the United Kingdom. The waiver was signed by the Under Secretary of Defense (Acquisition and Technology) on June 19, 1998, and became effective on August 4, 1998.

Allowability of Costs for Restructuring Bonuses (DFARS Case 97-D312) (62 FR 63035, November 26, 1997)

This rule amends DFARS 231.205-6 to implement Section 8083 of the National Defense Appropriations Act for Fiscal Year 1998 (Public Law 105-56). Section 8083 prohibits the use of fiscal year 1998 funds to reimburse a contractor for costs paid by the contractor to an employee for a bonus or other payment in excess of the normal salary paid by the contractor to the employee, when such payment is part of restructuring costs associated with a business combination.

Restructuring Costs (DFARS Case 97-D313) (63 FR 7308, February 13, 1998)

This rule amends DFARS 231.205-70 to implement Section 8092 of the National Defense Appropriations Act for Fiscal Year 1998 (Public Law 105-56) and Section 804 of the National Defense Authorization Act for Fiscal Year 1998 (Public Law 105-85). Sections 8092 and 804 restrict the reimbursement of restructuring costs associated with a business combination undertaken by a defense contractor unless certain conditions are met.

Streamlined Research and Development Contracting (DFARS Case 97-D002) (63 FR 34605, June 25, 1998)

This rule revises DFARS Subpart 235.70 to implement streamlined solicitation and contracting procedures for research and development acquisitions. The procedures use a standard solicitation and contract format, and use the World Wide Web to disseminate the standard format and publish the resulting solicitations.

Construction in Foreign Countries (DFARS Case 97-D307) (63 FR 11522, March 9, 1998)

This rule amends DFARS Part 236 and adds a new provision at 252.236-7012 to implement Section 112 of the Military Construction Appropriations Act for Fiscal Year 1998 (Public Law 105-45). Section 112 provides that no military construction appropriations may be used to award, to a foreign contractor, any contract estimated to exceed $1,000,000 for military construction in the United States territories and possessions in the Pacific

and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, except for: (1) Contract awards for which the lowest responsive and responsible bid of a United States firm exceeds the lowest responsive and responsible bid of a foreign firm by more than 20 percent, and (2) contract awards for military construction on Kwajalein Atoll for which the lowest responsive and responsible bid is submitted by a Marshallese firm.

B. Regulatory Flexibility Act

DoD certifies that these final rules 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., because:

List of Firms Not Eligible for Defense Contracts (DFARS Case 97-D325)—Few small entities are believed to subcontract with firms that are owned or controlled by the government of a terrorist country.

Direct Award of 8(a) Contracts (DFARS Case 98-D011)—The rule only affects the administrative procedures used to award 8(a) contracts.

Comprehensive Subcontracting Plans (DFARS Case 97-D323)—Small businesses are exempt from subcontracting plan requirements, and the rule does not change the obligation of large business concerns to maximize subcontracting opportunities for small business concerns.

Waiver of 10 U.S.C. 2534—United Kingdom (DFARS Case 98-D016)—There are no known small business manufacturers of the restricted air circuit breakers; defense appropriations acts presently impose domestic source restrictions on the acquisition of totally enclosed lifeboats and noncommercial ball and roller bearings; and the restrictions of 10 U.S.C. 2534(a) do not apply to acquisitions of commercial items incorporating ball or roller bearings.

Restructuring Costs (DFARS Case 97-D313) and Allowability of Costs for Restructuring Bonuses (DFARS Case 97-D312)—Most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive fixed-priced basis, and do not require application of the cost principles contained in these rules.

Streamlined Research and Development Contracting (DFARS Case 97-D002)—The rule merely provides an implementation of electronic contracting procedures already authorized by the FAR.

Construction in Foreign Countries (DFARS Case 97-D307)—The DFARS changes contained in this rule apply only to contracts for military construction on Kawjalein Atoll that are estimated to exceed $1,000,000; DoD awards approximately two such contracts annually.

C. Paperwork Reduction Act

The Office of Management and Budget (OMB) approved the information collection requirements associated with DFARS Case 97-D307, Construction in Foreign Countries, for use through August 31, 2001, under OMB Control Number 0704-0255. The other rules do not contain any information collection requirements that require the approval of OMB under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 209, 213, 219, 225, 231, 235, 236, 252, and 253

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

Interim Rules Adopted as Final Without Change

PART 209—CONTRACTOR QUALIFICATIONS, AND PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Accordingly, the interim rule amending 48 CFR parts 209 and 252, which was published at 63 FR 14836 on March 27, 1998, is adopted as a final rule without change.

PART 213—SIMPLIFIED ACQUISITION PROCEDURES, PART 219—SMALL BUSINESS PROGRAMS, PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES, AND PART 253—FORMS

Accordingly, the interim rule amending 48 CFR parts 213, 219, 252, and 253, which was published at 63 FR 33586 on June 19, 1998, is adopted as a final rule without change.

PART 219—SMALL BUSINESS PROGRAMS

Accordingly, the interim rule amending 48 CFR part 219, which was published at 63 FR 14640 on March 26, 1998, is adopted as a final rule without change.

PART 225—FOREIGN ACQUISITION, AND PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Accordingly, the interim rule amending 48 CFR parts 225 and 252, which was published at 63 FR 43887 on August 17, 1998, is adopted as a final rule without change.

PART 231—CONTRACT COST PRINCIPLES AND PROCEDURES

Accordingly, the interim rule amending 48 CFR part 231, which was published at 62 FR 63035 on November 26, 1997, is adopted as a final rule without change.

PART 231—CONTRACT COST PRINCIPLES AND PROCEDURES

Accordingly, the interim rule amending 48 CFR part 231, which was published at 63 FR 7308 on February 13, 1998, is adopted as a final rule without change.

PART 235—RESEARCH AND DEVELOPMENT CONTRACTING

Accordingly, the interim rule amending 48 CFR part 235, which was published at 63 FR 34605 on June 25, 1998, is adopted as a final rule without change.

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS, AND PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Accordingly, the interim rule amending 48 CFR parts 236 and 252 at sections 236.102, 236.274, 236.570, 252.236-7010, and 252.236-7012, which was published at 63 FR 11522 on March 9, 1998, is adopted as a final rule without change.

[FR Doc. 98-31038 Filed 11-19-98; 8:45 am]

BILLING CODE 5000-04-M

DEPARTMENT OF DEFENSE

48 CFR Parts 215, 217, 219, 226, 236, 252, and Appendix I to Chapter 2

[DFARS Case 98-D021]

Defense Federal Acquisition Regulation Supplement; Reform of Affirmative Action in Federal Procurement, Part II

AGENCY: Department of Defense (DoD).

ACTION: Interim rule with request for comments.

SUMMARY: The Director of Defense Procurement has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) guidance concerning programs for small disadvantaged business (SDB) concerns. These amendments conform to a Department of Justice (DoJ) proposal to reform affirmative action in Federal procurement, and are consistent with the changes made to the Federal Acquisition Regulation (FAR) in Federal

DEPARTMENT OF DEFENSE

48 CFR Parts 201, 202, 204, 209, 212, 214, 215, 216, 217, 219, 223, 225, 226, 227, 229, 231, 232, 233, 234, 235, 236, 237, 239, 241, 242, 243, 250, 252, 253, and Appendices G and I to Chapter 2

[Defense Acquisition Circular 91-13]

Defense Federal Acquisition Regulation Supplement; Miscellaneous Amendments

AGENCY: Department of Defense (DoD).

ACTION: Interim and final rules.

SUMMARY: Defense Acquisition Circular 91-13 amends the Defense Federal Acquisition Regulation Supplement (DFARS) to revise, finalize, or add language on the Defense Acquisition Regulations System, acquisition of commercial items, multiyear contracting, interagency acquisitions under the Economy Act, small business programs, the environment, foreign acquisition, utilization of Indian organizations, foreign patent interchange agreements, taxes, contract cost principles and procedures, contract financing, disputes and appeals, major system acquisition, research and development contracting, construction and architect-engineer contracts, service contracting, acquisition of information technology, acquisition of utility services, contract administration, extraordinary contractual actions, and contract reporting.

DATES: Effective date: March 9, 1998.

Comment date: Comments on the interim rule (Item XXIII: Sections 236.102, 236.274, 236.570, 252.236-7010, and 252.236-7012) should be submitted in writing to the address shown below on or before May 8, 1998 to be considered in the formulation of the final rule.

ADDRESSES: Interested parties should submit written comments on the interim rule (Item XXII) to: Defense Acquisition Regulations Council, Attn: Ms. Amy Williams PDUSD(A&T)DP(DAR), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062. Telefax number (703) 602-0350. E-mail comments submitted over the Internet should be addressed to: dfars@acq.osd.mil. Please cite DFARS Case 97-D307 in all correspondence related to this rule. E-mail comments should cite DFARS Case 97-D307 in the subject line.

FOR FURTHER INFORMATION CONTACT: Item XXIII—Ms. Amy Williams, (703) 602-0131.

All other items—Ms. Susan Buckmaster, (703) 602-0131.

SUPPLEMENTARY INFORMATION:

A. Background

Defense Acquisition Circular (DAC 91-13) includes 31 rules and miscellaneous editorial amendments. Eight of the rules (Items II, III, IV, V, XIII, XVI, XVII, and XXIX) were published previously in the **Federal Register** and thus are not included as part of this notice of amendments to the Code of Federal Regulations. These eight rules are included in the DAC to incorporate the previously published amendments into the loose-leaf edition of the DFARS.

B. Determination to Issue an Interim Rule

DAC 91-13, Item XXIII

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish this interim rule prior to affording the public an opportunity to comment. This rule amends the DFARS to implement Section 112 of the Military Construction Appropriations Act for Fiscal Year 1998 (Public Law 105-45). Section 112 provides that no military construction appropriations may be used to award, to a foreign contractor, any contract estimated to exceed $1,000,000 for military construction in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf; except for contract awards for which the lowest responsive and responsible bid of a United States firm exceeds the lowest responsive and responsible bid of a foreign firm by greater than 20 percent; and except for contract awards for military construction on Kwajalein Atoll for which the lowest responsive and responsible bid is submitted by a Marshallese firm. Section 112 was effective upon enactment on September 30, 1997. Comments received in response to the publication of this interim rule will be considered in formulating the final rule.

C. Regulatory Flexibility Act

DAC 91-13, Items I, VII, VIII, IX, XII, XV, XXI, XXII, XXV, XXVI, and XXVII

These final rules do not constitute significant revisions within the meaning of Federal Acquisition Regulation 1.501 and Public Law 98-577, and publication for public comment is not required. However, comments from small entities concerning the affected DFARS subparts will be considered in accordance with Section 610 of the Regulatory Flexibility Act (5 U.S.C. 610). Please cite the applicable DFARS case number in correspondence.

DAC 91-13, Items VI, XI, XIV, XVIII, XX, XXIV, and XXXI

DoD certifies that these rules 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.*, because:

Item VI, Multiyear Contracting and Other Miscellaneous Provisions—The rule primarily reorganizes and clarifies existing DFARS guidance pertaining to multiyear contracting, updates internal Government operating procedures for processing Economy Act orders, and makes minor amendments to reflect existing statutory and regulatory requirements.

Item XI, Duty-Free Entry—The rule does not constitute a change in policy but is a clarification of implementing procedures pertaining to duty-free entry of supplies and the North American Free Trade Agreement.

Item XIV, Contingent Fees—Foreign Military Sales—Most firms that pay or receive contingent fees on foreign military sales are not small business concerns.

Item XVIII, Cost Reimbursement Rules for Indirect Costs—Most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive, fixed-price basis and do not require application of the FAR or DFARS cost principles.

Item XX, Earned Value Management Systems—The rule only applies to contractors for certain major defense programs, and eliminates the requirement that such contractors use a unique management control system for DoD contracts.

Item XXIV, Architect-Engineer Selection Process—The rule streamlines, but does not significantly alter, the process for selection of firms for architect-engineer contracts.

Item XXXI, Reporting of Contract Performance Outside the United States—Most contractors that submit reports of contract performance outside the United States are not small business concerns.

DAC 91-13, Item XXIII

This interim rule is not expected 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.*, because the DFARS changes contained in this rule apply only to contracts for military construction on Kwajalein Atoll that are estimated to exceed $1,000,000; DoD awards approximately two such

contracts annually. An initial regulatory flexibility analysis has therefore not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected DFARS subparts also will be considered in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 97–D307 in correspondence.

DAC 91–13, Items X, XIX, XXVIII, and XXX

A final regulatory flexibility analysis has been performed for each of these rules. A copy of the analyses may be obtained from the address specified herein. Please cite the applicable DFARS case number in correspondence. The analyses are summarized as follows:

Item X, Buy American Act Exception for Information Technology Products (DFARS Case 97–D022)

This final rule implements the determination by the Under Secretary of Defense (Acquisition and Technology) (USD(A&T)) that it is not in the public interest to apply the restrictions of the Buy American Act to U.S. made information technology products, in acquisitions subject to the Trade Agreements Act. The legal basis for the rule is 41 U.S.C. 10a, which provides an exception to the requirements of the Buy American Act if the head of the agency determines that application of the restrictions is not in the public interest. The objective of the rule is to reduce burdensome recordkeeping and tracking requirements imposed on U.S. manufacturers of information technology products and to remove the competitive disadvantage imposed on some U.S. manufacturers of information technology products, when competing with foreign offerors of eligible information technology products against an offeror of an information technology product that qualifies as a domestic product under the Buy American Act. In acquisitions subject to the Trade Agreements Act, the rule provides that offers of U.S. made information technology products in Federal Supply Group 70 or 74 will be evaluated without regard to whether the product qualifies as a domestic product. The different rules of origin under the Buy American Act and the Trade Agreements Act result in disproportionately burdensome recordkeeping requirements on firms offering information technology products, because eligible offers under the Trade Agreements Act are exempt from the Buy American Act, but offers of U.S. made products are not exempt. This rule will relieve U.S. manufacturers of information technology products from the burden of researching and documenting the origin of components for information technology products, because the Buy American Act component test no longer applies. The rule will also simplify the evaluation of offers because, for acquisitions subject to the determination, there is only one class of U.S. made products, and no preference for domestic products. There were no public comments in response to the initial regulatory flexibility analysis prepared for the proposed rule published in the **Federal Register** at 62 FR 47407 on September 9, 1997. The rule will apply to all offerors/contractors offering information technology products in Federal Supply Group 70 or 74 to DoD, in acquisitions valued at $190,000 or more. Based on DD Form 350 data from the Washington Headquarters Services, in fiscal year 1996, DoD awarded 735 contracts meeting these criteria to 612 contractors, of which 214 were small businesses. The final rule does not impose any new reporting or recordkeeping requirements. The rule will result in a reduction of paperwork burden on offerors. There are no significant alternatives to the rule that would accomplish the stated objectives yet reduce any negative impact on small entities. This rule is expected to have a generally positive impact on small entities, because USD(A&T) has determined that removal of the competitive disadvantage for some U.S. made information technology end products, and the removal of burdensome requirements on U.S. manufacturers to separately track domestic and foreign components, outweighs the possible increase in use of foreign components.

Item XIX, Finance (DFARS Case 95–D710)

This final rule supplements the FAR rules published as Item VII of Federal Acquisition Circular 90–32 on September 18, 1995 (60 FR 48272), and Items I and IV of Federal Acquisition Circular 90–33 on September 26, 1995 (60 FR 49707 and 60 FR 49728). These DFARS revisions include the addition of 232.2, Commercial Item Purchase Financing, and 232.10, Performance-Based Payments; the deletion of 232.173, Reduction or Suspension of Contract Payments Upon Finding of Fraud, and 232.970, Payment of Subcontractors, since equivalent coverage is now provided in the FAR; and a number of editorial changes to reflect revisions made in the FAR. One of the issues raised by several respondents relates to the prompt payment periods specified in the rule: 30 days for commercial advance payments, and 14 days for commercial interim and performance-based payments. The respondents advocate the 7 days now allowed for progress payments. The DoD Contract Finance Committee made an assessment that no changes should be made to the prompt payment times in the DFARS rule. The payment period (14 days) for performance-based payments reflects the likely additional time required for verification of the contractor's claimed performance and analysis of what often will be a relatively extensive compilation of performance events. Thus, more time is allowed than for cost-based progress payments (7 days). The commercial advance payments period reflects the anticipated timing of most such requests. These requests for payment are expected to occur at the beginning of the contract, possibly being keyed to the actual contract signing date. Thus, a 30-day period has been allowed to enable the payment office to receive the contract, enter it into the payment office computer system, and process the contractor's request for payment. The commercial interim payment normally is expected to be submitted during the life of the contract, and after the payment office is prepared to process payment of such requests. A 14-day payment period has been adopted as a payment time reasonably capable of accommodating the wide diversity anticipated for commercial payment terms. The prompt payment periods established in the DFARS are shorter than the equivalent standard prompt payment periods (30 days) in FAR 32.906, and, thus, are more beneficial for small entities than the existing FAR policy. A second issue raised by several respondents concerns the provisions relating to the list of financial and other information that the Government must obtain to determine the financial responsibility of contractors. One respondent indicated its "concern with the substantial burdens that will be placed on the contracting officer and offeror." The requirement, stated in section 232.072 of the rule, was transferred verbatim from DFARS 232.172. This DFARS rule makes no policy change, only an editorial change to move the DFARS language to correspond to certain changes made to the FAR. In addition, the contracting officer is only required to obtain information sufficient to make a determination of the contractor's

financial responsibility. The changes made to the DFARS by this rule will apply to large and small entities whose DoD contracts include performance-based or commercial (advance or interim) type of financing. For the 11 months of available fiscal year 1997 DD Form 350 data (October 1996 through August 1997), less than 0.5 percent of small business contracts (98 out of a total of 40,102) used commercial or performance-based financing. Accordingly, the final rule does not impact a significant number of small entities. The rule imposes no reporting, recordkeeping, or other compliance requirements. Various alternatives involving shorter prompt payment periods were considered, but, as previously explained, were rejected since their implementation would be exceptionally costly and burdensome on payment offices.

Item XXVIII, Certification of Requests for Equitable Adjustment (DFARS Case 97-D302)

This rule finalizes, with changes, the interim rule published in the **Federal Register** on July 11, 1997 (62 FR 37146). The interim rule amended the DFARS to implement 10 U.S.C. 2410(a), which requires contractors to certify that requests for equitable adjustment that exceed the simplified acquisition threshold are made in good faith and that the supporting data are accurate and complete. There were no comments in response to the initial regulatory flexibility analysis prepared for the interim rule. The primary impact of the rule relates to requests in the range of $100,000 to $500,000, because requests in excess of $500,000 generally require submission of cost or pricing data and certification thereof. Many of the firms requesting equitable adjustment in amounts of $100,000 to $500,000 are construction contractors. It is estimated that the rule will affect approximately 330 small entities annually. Accounting skills will be necessary to provide the cost data to support the certification. The rule minimizes the economic impact on small entities, because the certification requirements of the rule apply only to requests exceeding the simplified acquisition threshold, and because the certification is limited to only that which is specifically required by 10 U.S.C. 2410(a). There is no other known alternative that would be consistent with the stated objective yet further reduce the burden on small entities.

Item XXX, Specialty Metals—Agreements With Qualifying Countries (DFARS Case 97-D007)

This final rule amends the clause at DFARS 252.225-7014 to make the exception in the clause consistent with the Berry Amendment (10 U.S.C. 2241 Note) and with the existing DFARS text at 225.7001-2(i). The objective of the rule is to clearly and accurately implement the Berry Amendment, which provides an exception to domestic source restrictions for the procurement of specialty metals, where such procurement is necessary in furtherance of agreements with foreign governments in which both governments agree to remove barriers to purchase of supplies produced in the other country. There were no public comments in response to the initial regulatory flexibility analysis or the proposed rule published in the **Federal Register** at 62 FR 23741 on May 1, 1997. The clause at DFARS 252.225-7014, Preference for Domestic Specialty Metals, is prescribed for use in all solicitations and contracts exceeding the simplified acquisition threshold that require delivery of an article containing specialty metals. The clause is prescribed for use with its Alternate I if the article containing specialty metals is for one of certain major programs. The basic clause only restricts the direct acquisition of specialty metals by the prime contractor, whereas Alternate I flows down the restriction to subcontractors at any tier. The rule does not affect the already unrestricted sources of specialty metals when acquiring qualifying country end products or when acquiring components including specialty metals for use in an end product for other than a major program. The rule does loosen the restriction on domestic specialty metals for prime contractors providing domestic or nonqualifying country end products, permitting them to incorporate specialty metals melted in a qualifying country (for both major and nonmajor programs); or qualifying country components containing specialty metals of unrestricted source for use in end products for major programs. Because the components subject to increased foreign competition are at a subcontract level, it is not possible to more specifically identify the items or whether they are produced by small business concerns. The rule imposes no new reporting, recordkeeping, or compliance requirements on offerors or contractors. One alternative considered was to require that the specialty metals incorporated in articles manufactured in a qualifying country also be melted in a qualifying country. This approach could slightly reduce the extent of foreign competition facing domestic entities. However, this approach appeared to go beyond the requirements of the statute being implemented.

D. Paperwork Reduction Act

DAC 91-13, Items I, VI, VII, VIII, IX, XII, XIV, XV, XVIII, XIX, XX, XXI, XXII, XXIV, XXV, XXVI, XXVII, and XXX

The Paperwork Reduction Act does not apply, because these rules contain no information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

DAC 91-13, Items X, XI, XXIII, XXVIII, and XXXI

The Paperwork Reduction Act applies. The Office of Management and Budget (OMB) has approved the information collection requirements as follows:

Item	OMB Control No.
X	0704-0187; 0704-0259
XI	0704-0229
XXIII	0704-0255
XXVIII	0704-0397
XXXI	0704-0229

E. Summary of Amendments

Defense Acquisition Circular (DAC) 91-13 amends the Defense Federal Acquisition Regulation Supplement (DFARS) 1991 edition. The amendments are summarized as follows:

Item I—Approval of Nonstatutory Certification Requirements (DFARS Case 97-D301)

This final rule adds a new section at DFARS 201.107 and amends 201.304 to implement Section 29 of the Office of Federal Procurement Policy Act (41 U.S.C. 425), as amended by Section 4301 of the Clinger-Cohen Act of 1996 (Public Law 104-106). Section 29 provides that a requirement for a certification by a contractor or offeror may not be included in a procurement regulation of an executive agency unless the certification requirement is specifically imposed by statute or approved in writing by the head of the executive agency.

Item II—Contract Action Reporting (DFARS Case 97-D013)

This final rule was issued by Departmental Letter 97-016, effective October 1, 1997 (62 FR 44221, August 20, 1997). The rule amends DFARS 204.670-2, 253.204-70 and 253.204-71 to revise DD Form 350 and DD Form

1057 contract action reporting requirements for compliance with the Clinger-Cohen Act of 1996 (Public Law 104-106) and to enhance data collection procedures.

Item III—Data Universal Numbering System (DUNS) Number (DFARS Case 97-D019)

This final rule was issued by Departmental Letter 97-020, effective October 1, 1997 (62 FR 48181, September 15, 1997). The rule amends DFARS 204.72 and 253.204-70 to replace guidance on use of DUNS numbers with references to the FAR guidance on that subject, and to remove guidance on locally developed coding systems that are no longer used.

Item IV—Single Process Initiative (DFARS Case 97-D014)

This interim rule was issued by Departmental Letter 97-017, effective August 20, 1997 (62 FR 44223, August 20, 1997). The rule adds guidance at DFARS 211.273 and 242.302(a) (S-70), and a contract clause at 252.211-7005, to implement the policy set forth in OUSD(A&T) memorandum dated April 30, 1997, as it relates to the Single Process Initiative (SPI) and new contracts. The rule encourages offerors to propose the use of nongovernment specifications and industrywide practices that meet the intent of military or Federal specifications and standards, and establishes that, in procurements of previously developed items, SPI processes shall be considered valid replacements for military or Federal specifications or standards, absent a specific determination to the contrary.

Item V—Truth in Negotiations and Related Changes (DFARS Case 95-D708)

This final rule was issued by Departmental Letter 97-015, effective July 29, 1997 (62 FR 40471, July 29, 1997). The rule amends DFARS parts 204, 215, 216, 232, 239, and 252 to update requirements pertaining to the submission of cost or pricing data. The rule also removes requirements pertaining to work measurement systems, as Section 2201(b) of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) repealed 10 U.S.C. 2406, which was the primary statute governing work measurement systems.

Item VI—Multiyear Contracting and Other Miscellaneous Provisions (DFARS Case 95-D703)

This final rule removes obsolete language at DFARS 216.301-3; revises subpart 217.1 to reorganize and clarify guidance on multiyear contracting; revises Subpart 217.5 to update guidance on processing interagency orders under the Economy Act; adds guidance at 233.204-70 and 250.102-70 pertaining to statutory limitations on Congressionally directed payment of a claim or request for equitable adjustment or relief; and amends subpart 237.2 to reflect the current numbering of FAR subpart 37.2.

Item VII—Qualified Nonprofit Agencies for the Blind or Severely Disabled (DFARS Case 97-D310)

This final rule amends DFARS 219.703 to implement Section 835 of the National Defense Authorization Act for Fiscal Year 1998 (Public Law 105-85). Section 835 amends 10 U.S.C. 2410d to extend, through September 30, 1999, the authority for contractors to claim credit toward their small business subcontracting goals for subcontracts awarded to qualified nonprofit agencies for the blind or severely disabled.

Item VIII—Pilot Mentor-Protégé Program (DFARS Case 97-D322)

This final rule amends DFARS 219.7104 and Appendix I to implement Section 821 of the National Defense Authorization Act for Fiscal Year 1998 (Public Law 105-85). Section 821 extends to September 30, 1999, the date by which an interested company must apply for participation as a mentor firm under the DoD Pilot Mentor-Protégé Program; and extends to September 30, 2000, the date by which a mentor firm must incur costs in order to be eligible for reimbursement under the Program.

Item IX—Recovered Material Certification (DFARS Case 97-D031)

This final rule amends DFARS 223.404 to reflect the FAR revisions that were published as Item V of Federal Acquisition Circular 97-01. The FAR revisions eliminated the requirement for agencies other than the Environmental Protection Agency (EPA) to specify minimum recovered material content standards for designated items, and eliminated the requirement for contractors to provide annual certifications under the clause at FAR 52.223-9, Certification and Estimate of Percentage of Recovered Material Content for EPA Designated Items.

Item X—Buy American Act Exception for Information Technology Products (DFARS Case 97-D022)

This final rule adds a new provision at DFARS 252.225-7020, Trade Agreements Certificate, and a new clause at 252.225-7021, Trade Agreements, and makes other amendments in parts 212, 225, and 252 to implement the determination made by the Under Secretary of Defense (Acquisition and Technology), on May 16, 1997, that it is not in the public interest to apply the restrictions of the Buy American Act to U.S. made information technology products, in acquisitions subject to the Trade Agreements Act.

Item XI—Duty-Free Entry (DFARS Case 96-D020)

This final rule amends DFARS Parts 225, 242, and 252 to clarify guidance regarding duty-free entry of supplies and implementation of the North American Free Trade Agreement.

Item XII—Trade Agreements Threshold (DFARS Case 97-D040)

This final rule amends DFARS 225.408(a) to increase, from $50,000 to $53,150, the threshold for use of the clause at 252.225-7036, North American Free Trade Agreement Implementation Act. The increase is based on the cumulative rate for the Producer Price Index for Finished Goods, as reported by the U.S. Bureau of Labor Statistics, and as notified to the NAFTA parties by the U.S. Department of State.

Item XIII—Application of Berry Amendment (DFARS Case 96-D333)

This final rule was issued by Departmental Letter 97-018, effective September 8, 1997 (62 FR 47153, September 8, 1997). The rule revises and finalizes the interim rule published as Item XXII of DAC 91-12, which implemented Section 8109 of the National Defense Appropriations Act for Fiscal Year 1997 (Public Law 104-208). Section 8109 provides that, in applying the domestic source restrictions of the Berry Amendment, the term "synthetic fabric and coated synthetic fabric" shall be deemed to include all textile fibers and yarns that are for use in such fabrics; and that the domestic source restrictions of the Berry Amendment shall apply to contracts and subcontracts for the procurement of commercial items. The final rule differs from the interim rule in that it amends DFARS 225.7002 and 252.225-7012 to expand the list of products that are exempt from the Berry Amendment restrictions on synthetic fabrics.

Item XIV—Contingent Fees—Foreign Military Sales (DFARS Case 96-D021)

The interim rule published as Item XXVII of DAC 91-12 is revised and finalized. The rule amends DFARS guidance pertaining to contingent fees for foreign military sales. The final rule differs from the interim rule in that it revises DFARS 225.7303-4 and

252.225-7027 to permit payment of contingent fees exceeding $50,000 under foreign military sales contracts if the foreign customer agrees to such fees in writing before contract award.

Item XV—Subcontracting Plans—Indian Incentives (DFARS Case 97-D309)

This final rule amends DFARS Subpart 226.1 to implement Section 8024 of the National Defense Appropriations Act for Fiscal Year 1998 (Public Law 105-56). Section 8024 provides that incentive payments under the Indian Incentive Program shall be available only to contractors that have submitted subcontracting plans pursuant to 15 U.S.C. 637, including comprehensive subcontracting plans submitted in accordance with the DoD test program.

Item XVI—Cost Principles (DFARS Case 95-D714)

This final rule was issued by Departmental Letter 97-019, effective September 8, 1997 (62 FR 47154, September 8, 1997). The rule amends DFARS Part 231 to implement Section 7202 of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355). Section 7202 prohibits the expenditure of funds to assist any DoD contractor in preparing any material, report, list, or analysis with respect to the actual or projected economic or employment impact in a particular State or congressional district of an acquisition program for which all research, development, testing, and evaluation has not been completed.

Item XVII—Allowability of Costs for Restructuring Bonuses (DFARS Case 97-D312)

This interim rule was issued by Departmental Letter 97-021, effective November 26, 1997 (62 FR 63035, November 26, 1997). The rule amends DFARS 231.205-6 to implement Section 8083 of the National Defense Appropriations Act for Fiscal Year 1998 (Public Law 105-56). Section 8083 prohibits the use of fiscal year 1998 funds to reimburse a contractor for costs paid by the contractor to an employee for a bonus or other payment in excess of the normal salary paid by the contractor to the employee, when such payment is part of restructuring costs associated with a business combination.

Item XVIII—Cost Reimbursement Rules for Indirect Costs (DFARS Case 96-D303)

This final rule removes the cost principle at DFARS 231.205-71 pertaining to defense capability preservation agreements. Section 1027 of the National Defense Authorization Act for Fiscal Year 1998 (Public Law 105-85) repealed the statute upon which this cost principle was based (Section 808 of Public Law 104-106).

Item XIX—Finance (DFARS Case 95-D710)

This final rule amends DFARS Part 232 to conform to the FAR revisions published as Item VII of FAC 90-32 and Items I and IV of FAC 90-33, which implemented provisions of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355). The rule adds a new subpart 232.2, Commercial Item Purchase Financing, and a new subpart 232.10, Performance-Based Payments; removes 232.173, Reduction or Suspension of Contract Payments Upon Finding of Fraud, and 232.970, Payment of Subcontractors, as equivalent guidance is now provided in FAR Part 32; and moves guidance pertaining to responsibility of contractors from 232.172 to 232.072, with no change in policy.

Item XX—Earned Value Management Systems (DFARS Case 96-D024)

The interim rule published in Item XXXIII of DAC 91-12 is revised and finalized. The rule amends DFARS Parts 234, 242, and 252 to recognize industry-standard guidelines for earned value management systems as an alternative to DoD-unique cost/schedule control systems under DoD contracts. The final rule differs from the interim rule in that it makes minor clarifying amendments at 234.005-70, 242.1107-70, and 252.234-7000; amends 252.234-7001 to clarify the timing of the initial application of the earned value management system and the integrated baseline reviews; and amends 252.242-7005 for consistency with the industry standard, Guidelines for Earned Value Management Systems.

Item XXI—Research and Development Definitions (DFARS Case 97-D021)

This final rule revises DFARS 235.001 to update the definitions pertaining to research and development, for consistency with the terms defined in DoD 7000.14-R, Financial Management Regulation.

Item XXII—Report of 10-Year Term Contracts (DFARS Case 97-D303)

This final rule removes DFARS 235.002, which required departments and agencies to notify Congress of any research and development contract with a period of performance exceeding 10 years. Section 1062(c) of the National Defense Authorization Act for Fiscal Year 1996 (Public Law 104-106) repealed the statute upon which this requirement was based (10 U.S.C. 2352).

Item XXIII—Construction in Foreign Countries (DFARS Case 97-D307)

This interim rule amends DFARS Part 236 and adds a new provision at 252.236-7012 to implement Section 112 of the Military Construction Appropriations Act for Fiscal Year 1998 (Public Law 105-45). Section 112 provides that no military construction appropriations may be used to award, to a foreign contractor, any contract estimated to exceed $1,000,000 for military construction in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, except for: (1) Contract awards for which the lowest responsive and responsible bid of a United States firm exceeds the lowest responsive and responsible bid of a foreign firm by more than 20 percent, and (2) contract awards for military construction on Kwajalein Atoll for which the lowest responsive and responsible bid is submitted by a Marshallese firm.

Item XXIV—Architect-Engineer Selection Process (DFARS Case 97-D015)

This final rule revises DFARS 236.602 to streamline the process for selection of firms for architect-engineer contracts. The rule eliminates requirements for formal constitution and minimum size of preselection boards; eliminates special approval requirements for selection of firms for contracts exceeding $500,000; and changes the criteria for inclusion of firms on a preselection list from "the maximum practicable number of qualified firms" to "the qualified firms that have a reasonable chance of being considered as most highly qualified by the selection board."

Item XXV—Overseas Architect-Engineer Services (DFARS Case 97-D034)

This final rule amends DFARS 236.609-70 to clarify the prescription for use of the provision at 252.236-7011, Overseas Architect-Engineer Services—Restriction to United States Firms. The provision is used in solicitations for architect-engineer contracts that are funded with military construction appropriations; estimated to exceed $500,000; and to be performed in Japan, in any North Atlantic Treaty Organization member country, or in countries bordering the Arabian Gulf.

Item XXVI—Uncompensated Overtime (DFARS Case 97-D037)

This final rule removes DFARS 237.102, 237.170, and 252.237-7019. This guidance has been superseded by the guidance on performance-based contracting and uncompensated overtime at FAR 37.102, 37.115, and 52.237-10. A related editorial change is made at DFARS 215.608(a)(1).

Item XXVII—Telecommunications Services (DFARS Case 97-D305)

This final rule revises the guidance on multiyear contracting for telecommunications resources at DFARS 239.7405 to reflect the elimination of the Federal Information Resources Management Regulations (FIRMR), and revisions made to the Federal Property Management Regulations (FPMR), as a result of the Information Technology Management Reform Act of 1996 (Public Law 104-106).

Item XXVIII—Certification of Requests for Equitable Adjustment (DFARS Case 97-D302)

The interim rule issued by Departmental Letter 97-014 on July 11, 1997, is revised and finalized. The rule implements 10 U.S.C. 2410(a), as amended by Section 2301 of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355). 10 U.S.C. 2410(a) requires contractors to certify that requests for equitable adjustment that exceed the simplified acquisition threshold are made in good faith and that the supporting data are accurate and complete. The final rule differs from the interim rule in that it amends DFARS 243.204-70 to clarify that the certification required by 10 U.S.C. 2410(a) is different from the certification of a claim under the Contract Disputes Act; and amends 252.243-7002 to clarify requirements for contractor disclosure of facts to support a certification of a request for equitable adjustment.

Item XXIX—Designation of Hong Kong (DFARS Case 97-D023)

This final rule was issued by Departmental Letter 97-013, effective July 11, 1997 (62 FR 37147, July 11, 1997). The rule amends DFARS 252.225-7007 to add Hong Kong as a designated country under the Trade Agreements Act of 1979, as directed by the U.S. Trade Representative.

Item XXX—Specialty Metals—Agreements with Qualifying Countries (DFARS Case 97-D007)

This final rule amends the clause at DFARS 252.225-7014, Preference for Domestic Specialty Metals, to specify that the requirements of the clause do not apply to specialty metals melted, or incorporated in articles manufactured, in a qualifying country listed in DFARS 225.872-1.

Item XXXI—Reporting of Contract Performance Outside the United States (DFARS Case 97-D029)

This final rule amends the clause at DFARS 252.225-7026, Reporting of Contract Performance Outside the United States, to increase the reporting threshold from $25,000 to the simplified acquisition threshold, under contracts exceeding $500,000. The rule also increases the threshold for incorporation of the clause in first-tier subcontracts from $100,000 to $500,000.

Editorial Revisions

(1) DFARS 201.201-1 is amended to reflect the issuance of DoDI 5000.63, Defense Acquisition Regulations (DAR) System.

(2) DFARS 202.101 is amended to update the list of Army contracting activities and to show the correct title "Under Secretary of Defense (Acquisition & Technology)" in the definition of "Head of the agency."

(3) DFARS 204.7003(a)(1)(i) is amended to change the designation of the last paragraph from "(L)" to "(M)" (*this revision is made only in the loose-leaf edition of the DFARS*).

(4) DFARS 209.403 is amended to reflect the change in name of the "Defense Mapping Agency" to the "National Imagery and Mapping Agency."

(5) DFARS 214.202-5 is amended to show the correct number of the clause "Brand Name or Equal."

(6) DFARS Subparts 216.4 and 216.5 are amended to conform to the current numbering of the corresponding FAR subparts.

(7) DFARS 227.676 and 229.101 are amended to update the telephone and telefax numbers of the United States European Command.

(8) DFARS Part 241 is amended to conform to the current numbering of FAR Part 41 and to update other FAR references. Corresponding amendments are made at DFARS 252.241-7000 and 252.241-7001.

(9) DFARS 252.212-7001 is amended to remove references to DFARS 252.242-7002 and 252.249-7001, which were deleted in DAC 91-12.

(10) DFARS 252.229-7004 is amended to correct a typographical error in the clause title.

(11) DFARS Appendix G is amended to update activity and names and addresses.

Note: This DAC incorporates, into the loose-leaf edition of the DFARS, revisions previously issued by Departmental Letters 97-13 through 97-21. DFARS revisions contained in Departmental Letter 97-12 and departmental letters issued after 97-21 will be covered in a future DAC.

List of Subjects in 48 CFR Parts 201, 202, 204, 209, 212, 214, 215, 216, 217, 219, 223, 225, 226, 227, 229, 231, 232, 233, 234, 235, 236, 237, 239, 241, 242, 243, 250, 252, and 253

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

Interim Rules Adopted as Final With Changes

PARTS 225 AND 252—[AMENDED]

The interim rule that was published at 62 FR 30831 on June 5, 1997, is adopted as final with amendments at sections 225.7303-4 and 252.225-7027, as set forth below (see amendatory instructions 40 and 86).

PARTS 234, 242, AND 252—[AMENDED]

The interim rule that was published at 62 FR 9990 on March 5, 1997, is adopted as final with amendments at sections 234.005-70, 242.1107-70, 252.234-7000, 252.234-7001, and 252.242-7005, as set forth below (see amendatory instructions 53, 72, 90, 91, and 97).

PARTS 235, 243, AND 252—[AMENDED]

The interim rule that was published at 62 FR 37146 on July 11, 1997, is adopted as final with amendments at sections 243.204-70 and 252.243-7002, as set forth below (see amendatory instructions 73 and 98).

Amendments to 48 CFR Chapter 2 (Defense Federal Acquisition Regulation Supplement)

48 CFR Chapter 2 (the Defense Federal Acquisition Regulation Supplement) is amended as follows:

1. The authority citation for 48 CFR parts 201, 202, 204, 209, 212, 214, 215, 216, 217, 219, 223, 225, 226, 227, 229, 231, 232, 233, 234, 235, 236, 237, 239, 241, 242, 243, 250, 252, 253, and Appendices G and I to subchapter I continues to read as follows:

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

energy conversion, materials and structures, and personnel support.

(b) *Applied research* (Category 6.2) means effort that translates promising basic research into solutions for broadly defined military needs, short or major development projects. This type of effort may vary from fairly fundamental applied research to sophisticated breadboard hardware, study, programming, and planning efforts that establish the initial feasibly and practicality of proposed solutions to technologies challenges. It includes studies, investigations, and nonsystem specific development efforts. The dominant characteristic of this category of effort is that it be pointed toward specific military needs with a view toward developing and evaluating the feasibility and practicability of proposed solutions and determining their parameters.

(c) *Advanced technology development* (Category 6.3A) means all efforts that have moved into the development and integration of hardware for field experiments and tests. The results of this type of effort are proof of technological feasibility and assessment of operability and producibility rather than the development of hardware for Service use. Projects in this category have a direct relevance to identified military needs. Advanced technology development is system specific (particularly for major platforms, i.e., aircraft, ships, missiles, and tanks, etc.) and includes advanced technology development that is used to demonstrate the general military utility or cost reduction potential of technology when applied to different types of military equipment or techniques. Advanced technology developments also includes evaluation and synthetic environment and proof-of-principle demonstrations in field exercises to evaluate system upgrades or provide new operational capabilities.

(d) *Demonstration and validation* (Category 6.3B) means all efforts necessary to evaluate integrated technologies in as realistic an operating environment as possible to assess the performance or cost reduction potential of advanced technology. The demonstration and validation phase is system specific and also includes advanced technology demonstrations that help expedite technology transition from the laboratory to operational use.

(e) *Engineering and manufacturing development* (Category 6.4) means those projects in engineering and manufacturing development for Service use but that have not received approval for full-rate production. This area is characterized by major line item projects, and program control will be exercised by review of individual projects. Engineering development includes engineering and manufacturing development projects consistent with the definitions within DoDD 5000.1.

(f) *Management support* (Category 6.5) means research and development effort directed toward support of installations or operations required for general research and development use. Included would be test ranges, military construction, maintenance support of laboratories, operation and maintenance of test aircraft and ships, and studies and analyses in support of the research and development program. Costs of laboratory personnel, either in-house or contractor-operated, would be assigned to appropriate projects or as a line item in the basic research, applied research, or advanced technology development program areas, as appropriate.

(g) *Operational system development* (Category 6.6) means those development projects, in support of development acquisition programs or upgrades, still in engineering and manufacturing development (DoDD 5000.1) but that have received approval for production through Defense Acquisition Board or other action, or for which production funds have been included in the DoD budget submission for the budget or subsequent fiscal year. All items in this area are major line item projects that appear as research, development, test, and evaluation costs of weapon system elements in other programs. Program control will be exercised by review of individual projects.

(h) *Research and development* ordinarily covers only the following categories:

(1) Basic research.

(2) Applied research.

(3) Technology development.

(4) Demonstration/validation.

(5) Engineering and manufacturing development.

(6) Operational system development.

235.002 [Removed]

55. Section 235.002 is removed.

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

56. Section 236.102 is amended by redesignating paragraphs (3) and (4) as paragraphs (4) and (5), respectively, and by adding a new paragraph (3) to read as follows:

236.102 Definitions.

* * * * *

(3) *Marshallese firm* is defined in the provision at 252.236–7012, Military Construction on Kwajalein Atoll—Evaluation Preference.

* * * * *

57. Section 236.274 is amended by revising paragraph (a) to read as follows:

236.274 Construction in foreign countries.

(a) In accordance with Section 112 of Pub. L. 105–45, military construction contracts funded with military construction appropriations, that are estimated to exceed $1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, shall be awarded only to United States firms, unless—

(1) The lowest responsive and responsible offer of a United States firm exceeds the lowest responsive and responsible offer of a foreign firm by more than 20 percent; or

(2) The contract is for military construction on Kwajalein Atoll and the lowest responsive and responsible offer is submitted by a Marshallese firm.

* * * * *

58. Section 236.570 is amended by revising paragraph (c) to read as follows:

236.570 Additional provisions and clauses.

* * * * *

(c) Use the following provisions in solicitations for military construction contracts that are funded with military construction appropriations and are estimated to exceed $1,000,000:

(1) 252.236–7010, Overseas Military Construction—Preference for United States Firms, when contract performance will be in a United States territory or possession in the Pacific or in a country bordering the Arabian Gulf.

(2) 252.236–7012, Military Construction on Kwajalein Atoll—Evaluation Preference, when contract performance will be on Kwajalein Atoll.

* * * * *

59. Sections 236.602–2 and 236.602–4 are revised to read as follows:

236.602–2 Evaluation boards.

(a) Preselection boards may be used to identify to the section board the qualified firms that have a reasonable chance of being considered as most highly qualified by the selection board.

236.602–4 Selection authority.

(a) The selection authority shall be at a level appropriate for the dollar value and nature of the proposed contract.

(c) A finding that some of the firms on the selection report are unqualified does not preclude approval of the report, provided that a minimum of three most highly qualified firms remains. The

reasons for finding a firm or firms unqualified must be recorded.

60. Section 236.609-70 is amended by revising paragraph (b) to read as follows:

236.609-70 Additional provision and clause.

* * * * *

(b) Use the provision at 252.236-7011, Overseas Architect-Engineer Services—Restriction to United States Firms, in solicitations for A-E contracts that are—

(1) Funded with military construction appropriations;

(2) Estimated to exceed $500,000; and

(3) To be performed in Japan, in any North Atlantic Treaty Organization member country, or in countries bordering the Arabian Gulf.

PART 237—SERVICE CONTRACTING

237.102 [Removed]

61. Section 237.102 is removed.

62. Section 237.104 is amended by revising paragraph (f)(i) to read as follows:

237.104 Personal services contracts.

* * * * *

(f)(i) Payment to each expert or consultant for personal services under 5 U.S.C. 3109 shall not exceed the highest rate fixed by the Classification Act Schedules for grade GS-15 (see 5 CFR 304.105(a)).

* * * * *

237.170 through 237.170-3 [Removed]

63. Sections 237.170 through 237.170-3 are removed.

64. Section 237.201 is added to read as follows:

237.201 Definitions.

Advisory and assistance services.

(c) *Engineering and technical services.*

Engineering and technical services consist of—

(i) Contract field services, which are engineering and technical services provided on site at Defense locations by the trained and qualified engineers and technicians of commercial or industrial companies;

(ii) Contract plant services, which are engineering and technical services provided by the trained and qualified engineers and technicians of a manufacturer of military equipment or components in the manufacturer's own plants and facilities; and

(iii) Field service representatives, who are employees of a manufacturer of military equipment or components that provide a liaison or advisory service between their company and the military users of their company's equipment or components.

65. Section 237.203 is revised to read as follows:

237.203 Policy.

(1) Every contract for engineering and technical services, alone or as part of an end item, shall—

(i) Show those services as a separately priced line item;

(ii) Contain definitive specifications for the services; and

(iii) Show the work-months involved.

(2) Agency heads may authorize personal service contracts for contract field services to meet an unusual essential mission need. The authorization will be for an interim period only.

237.203-70 [Redesignated and Amended]

66. Section 237.203-70 is redesignated as section 237.270 and amended in paragraph (b) by revising "one year" to read "1-year" and by revising "two" to read "2".

237.205 and 237.206 [Redesignated]

67. Sections 237.205 and 237.206 are redesignated as sections 237.271 and 237.272 respectively.

PART 239—ACQUISITION OF INFORMATION TECHNOLOGY

68. Section 239.7405 is revised to read as follows:

239.7405 Multiyear contracting authority for telecommunications resources.

(a) The General Services Administration (GSA) has exclusive multiyear contracting authority for telecommunications resources. However, GSA may delegate this authority in certain instances (see Federal Property Management Regulations (FPMR) 101-35.6).

(b) In accordance with FPMR 101-35.6, executive agencies may enter into multiyear contracts for telecommunications resources if—

(1) The agency notifies GSA prior to using GSA's multiyear contracting authority;

(2) The contract life, including options, does not exceed 10 years; and

(3) The agency complies with OMB budget and accounting procedures relating to appropriated funds.

239.7406 [Amended]

69. Section 239.7406 is amended in the introductory text of paragraph (c) by removing reference "15.804-2" and adding in its place the reference "15.403-4"; and by removing the reference "15.804-5" and adding in its place the reference "15.403-3".

70. Part 241 is revised to read as follows:

PART 241—ACQUISITION OF UTILITY SERVICES

Subpart 241.1—General

Subpart 241.2—Acquiring Utility Services

Subpart 241.5—Solicitation Provisions and Contract Clauses

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

Subpart 241.1—General

241.101 Definitions.

As used in this part—

Definite term contract means a contract for utility services for a definite period of not less than one nor more than ten years.

Dual service area means a geographical area in which two or more utility suppliers are authorized under State law to provide services.

Indefinite term contract means a month-to-month contract for utility services which may be terminated by the Government upon proper notice.

Independent regulatory body means the Federal Energy Regulatory Commission, a state-wide agency, or an agency with less than state-wide jurisdiction when operating pursuant to state authority. The body has the power to fix, establish, or control the rates and services of utility suppliers.

Nonindependent regulatory body means a body that regulates a utility supplier which is owned or operated by the same entity that created the regulatory body, e.g., a municipal utility.

Regulated utility supplier means a utility supplier regulated by an independent regulatory body.

Service power procurement officer means for the—

Army, the Chief of Engineers;

Navy, the Commander, Naval Facilities Engineering Command;

Air Force, the head of a contracting activity; and

Defense Logistics Agency, the Executive Director of Contracting.

241.102 Applicability.

(a) This part applies to purchase of utility services from nonregulated and regulated utility suppliers. It includes the acquisition of liquefied petroleum gas as a utility service when purchased from regulated utility suppliers.

Earned Value Management System (Mar 1998)

(a) In the performance of this contract, the Contractor shall use an earned value management system (EVMS) that has been recognized by the cognizant Administrative Contracting Officer (ACO) as complying with the criteria provided in DoD 5000.2–R, Mandatory Procedures for Major Defense Acquisition Programs (MDAPs) and Major Automated Information System (MAIS) Acquisition Programs.

(b) If, at the time of award, the Contractor's EVMS has not been recognized by the cognizant ACO as complying with EVMS criteria (or the Contractor does not have an existing cost/schedule control system that has been accepted by the Department of Defense), the Contractor shall apply the system to the contract and shall be prepared to demonstrate to the ACO that the EVMS complies with the EVMS criteria referenced in paragraph (a) of this clause.

(c) The Government may require integrated baseline reviews. Such reviews shall be scheduled as early as practicable and should be conducted within 180 calendar days after (1) contract award, (2) the exercise of significant contract options, or (3) the incorporation of major modifications. The objective of the integrated baseline review is for the Government and the Contractor to jointly assess areas, such as the Contractor's planning, to ensure complete coverage of the statement of work, logical scheduling of the work activities, adequate resourcing, and identification of inherent risks.

(d) Unless a waiver is granted by the ACO, Contractor-proposed EVMS changes require approval of the ACO prior to implementation. The ACO shall advise the Contractor of the acceptability of such changes within 30 calendar days after receipt of the notice of proposed changes from the Contractor. If the advance approval requirements are waived by the ACO, the Contractor shall disclose EVMS changes to the ACO at least 14 calendar days prior to the effective date of implementation.

(e) The Contractor agrees to provide access to all pertinent records and data requested by the ACO or duly authorized representative. Access is to permit Government surveillance to ensure that the EVMS complies, and continues to comply, with the criteria referenced in paragraph (a) of this clause.

(f) The Contractor shall require the following subcontractors to comply with the requirements of this clause:

(Contracting Officer to insert names of subcontractors selected for application of EVMS criteria in accordance with 252.234–7000(c).)

_____

_____

_____

_____

(End of clause)

252.236–7010 [Amended]

92. Section 252.236–7010 is amended in the introductory text by revising the reference "236.570(c)" to read "236.570(c)(1)".

93. Section 252.236–7012 is added to read as follows:

252.236–7012 Military construction on Kwajalein Atoll—evaluation preference.

As prescribed in 236.570(c)(2), use the following provision:

Military Construction on Kwajalein Atoll—Evaluation Preference (Mar 1998)

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

(1) *Marshallese firm* means a local firm incorporated in the Marshall Islands, or otherwise legally organized under the laws of the Marshall Islands, that—

(i) Is more than 50 percent owned by citizens of the Marshall Islands; or

(ii) Complies with the following:

(A) The firm has done business in the Marshall Islands on a continuing basis for not less than 3 years prior to the date of issuance of this solicitation;

(B) Substantially all of the firm's directors of local operations, senior staff, and operating personnel are resident in the Marshall Islands or are U.S. citizens; and

(C) Most of the operating equipment and physical plant are in the Marshall Islands.

(2) *United States firm* means a firm incorporated in the United States that complies with the following:

(i) The corporate headquarters are in the United States;

(ii) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(iii) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms or Marshallese firms will be evaluated by adding 20 percent to the offer, unless application of the factor would not result in award to a United States firm.

(c) *Status.* The offeror is _____ a United States firm; _____ a Marshallese firm; _____ Other.

(End of provision)

252.237–7019 [Removed and Reserved]

94. Section 252.237–7019 is removed and reserved.

252.241–7000 [Amended]

95. Section 252.241–7000 is amended in the introductory text by revising the reference "241.007–70(a)" to read "241.501–70(a)".

252.241–7001 [Amended]

96. Section 252.241–7001 is amended in the introductory text by revising the reference "241.007–70(b)" to read "241.501–70(b)".

97. Section 252.242–7005 is amended by revising the clause date and paragraphs (b)(4) and (d) to read as follows:

252.242–7005 Cost/Schedule Status Report.

* * * * *

Cost/Schedule Status Report (Mar 1998)

* * * * *

(b) * * *

(4) Establishing constraints to preclude subjective adjustment of data to ensure that performance measurement remains realistic. The total allocated budget may exceed the contract budget base only after consultation with the Contracting Officer. For cost-reimbursement contracts, the contract budget base shall exclude changes for cost growth increase, other than for authorized changes to the contract scope; and

* * * * *

(d) The Government may require integrated baseline reviews. Such reviews shall be scheduled as early as practicable and should be conducted within 180 calendar days after (1) contract award, (2) the exercise of significant contract options, or (3) the incorporation of major modifications. The objective of the integrated baseline review is for the Government and the Contractor to jointly assess areas, such as the Contractor's planning, to ensure complete coverage of the statement of work, logical scheduling of the work activities, adequate resourcing, and identification of inherent risks.

* * * * *

98. Section 252.243–7002 is revised to read as follows:

252.243–7002 Requests for equitable adjustment.

As prescribed in 243.205–72, use the following clause:

Requests for Equitable Adjustment (Mar 1998)

(a) The amount of any request for equitable adjustment to contract terms shall accurately reflect the contract adjustment for which the Contractor believes the Government is liable. The request shall include only costs for performing the change, and shall not include any costs that already have been reimbursed or that have been separately claimed. All indirect costs included in the request shall be properly allocable to the change in accordance with applicable acquisition regulations.

(b) In accordance with 10 U.S.C. 2410(a), any request for equitable adjustment to contract terms that exceeds the simplified acquisition threshold shall bear, at the time of submission, the following certificate executed by an individual authorized to certify the request on behalf of the Contractor:

I certify that the request is made in good faith, and that the supporting data are accurate and complete to the best of my knowledge and belief.

_____

(Official's Name)

_____

(Title)

(c) The certification in paragraph (b) of this clause requires full disclosure of all relevant facts, including——

(1) Cost or pricing data if required in accordance with subsection 15.403–4 of the Federal Acquisition Regulation (FAR); and

(2) Information other than cost or pricing data, in accordance with subsection 15.403–3 of the FAR, including actual cost data and data to support any estimated costs, even if cost or pricing data are not required.

Case Management Record

Discussion Handout

DFARS Case 97-D307	**Date** October 2, 1997	
Title Construction in Foreign Countries		
Priority 1	**Submitted By** (b)(6)	**Originator Code** L
Case Manager (b)(6)	**Case References**	
FAR Cites	**DFARS Cites** 236.274	
Cognizant Committees Construction Committee		
Coordination FC		
Recommendation Task Cmte. RD: 10/29/97		

This is a new DFARS case established to implement section 112 of the Fiscal Year 1998 Military Construction Appropriations Act (Public Law 105-45, September 30, 1997). Section 112 provides that no military construction appropriations shall be used for military construction contracts that are estimated to exceed $1,000,000 and are to be performed in the United States territories and possession in the Pacific and on Kwajalein Atoll, unless the lowest responsive and responsible offer of a United States firm exceeds the lowest responsive and responsible offer of a foreign firm by more than 20 percent. Further, the Act provides that this restriction does not apply to contract awards for military construction on Kwajalein Atoll for which the lowest responsive and responsible bid is submitted by a Marshallese contractor.

Section 112 is partially implemented at 236.274(a) and the clause at DFARS 252.236-7010. The last sentence is new. The Construction Committee needs to revise the language at DFARS 236.274(a) and the clause at DFARS 252.236-7010.

236.272 Prequalification of sources.

(a) Prequalification procedures may be used when necessary to ensure timely and efficient performance of critical construction projects. Prequalification—

(1) Results in a list of sources determined to be qualified to perform a specific construction contract; and

(2) Limits offerors to those with proven competence to perform in the required manner.

(b) The head of the contracting activity must—

(1) Authorize the use of prequalification by determining, in writing, that a construction project is of an urgency or complexity that requires prequalification; and

(2) Approve the prequalification procedures.

(c) For small businesses, the prequalification procedures must require the qualifying authority to—

(1) Request a preliminary recommendation from the appropriate Small Business Administration regional office, if the qualifying authority believes a small business is not responsible;

(2) Permit the small business to submit a bid or proposal if the preliminary recommendation is that the small business is responsible; and

(3) Follow the procedures in FAR 19.6, if the small business is in line for award and is found nonresponsible.

236.273 Network analysis systems.

Use head of the contracting activity approved procedures for preparing and using network analysis systems, whether contractor prepared, or Government prepared.

236.274 Construction in foreign countries.

(a) In accordance with Section 112 of Pub. L. 104-32 and similar sections in subsequent military construction appropriations acts, military construction contracts that are estimated to exceed $1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, shall be awarded only to United States firms, unless the lowest responsive and responsible offer of a United States firm exceeds the lowest responsive and responsible offer of a foreign firm by more than 20 percent.

(b) When a technical working agreement with a foreign government is required for a construction contract—

(1) Consider inviting the Army Office of the Chief of Engineers, or the Naval Facilities Engineering Command to participate in the negotiations.

(2) The agreement should, as feasible and where not otherwise provided for in other agreements, cover all elements necessary for the construction that are required by

252.236-7010 Overseas Military Construction--Preference for United States Firms.
As prescribed in 236.570(c), use the following provision:

OVERSEAS MILITARY CONSTRUCTION--PREFERENCE FOR UNITED STATES FIRMS (JAN 1997)

(a) *Definition.*

"United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

(1) The corporate headquarters are in the United States;

(2) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(3) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms will be evaluated by adding 20 percent to the offer.

(c) *Status.* The offeror _____ is, _____ is not a United States firm.

(End of provision)

252.236-7011 Overseas Architect-Engineer Services--Restriction to United States Firms.
As prescribed in 236.609-70(b), use the following provision:

OVERSEAS ARCHITECT-ENGINEER SERVICES--RESTRICTION TO UNITED STATES FIRMS (JAN 1997)

(a) *Definition.*

"United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

(1) The corporate headquarters are in the United States;

(2) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(3) The firm employs United States citizens in key management positions.

(b) *Restriction.* Military construction appropriations acts restrict award of a contract, resulting from this solicitation, to a United States firm or a joint venture of United States and host nation firms.

Enrolled bill FY98. Military Construction Appropriations

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P.L. 105-45
September 30, 1997

FILE h2016.enr
--H.R.2016--
H.R.2016
One Hundred Fifth Congress
of the
United States of America
AT THE FIRST SESSION
Begun and held at the City of Washington on Tuesday,
the seventh day of January, one thousand nine hundred and
ninety-seven
An Act
Making appropriations for military construction, family housing,
and base realignment and closure for the Department of Defense for
the fiscal year ending September 30, 1998, and for other purposes.
[Italic->] Be it enacted by the Senate and House of
Representatives of the United States of America in Congress
assembled [<-Italic] , That the following sums are appropriated,
out of any money in the Treasury not otherwise appropriated, for
the fiscal year ending September 30, 1998, for military
construction, family housing, and base realignment and closure
functions administered by the Department of Defense, and for other
purposes, namely:

MILITARY CONSTRUCTION, ARMY

For acquisition, construction, installation, and equipment of temporary or permanent public works, military installations, facilities, and real property for the Army as currently authorized by law, including personnel in the Army Corps of Engineers and other personal services necessary for the purposes of this appropriation, and for construction and operation of facilities in support of the functions of the Commander in Chief, $714,377,000, to remain available until September 30, 2002: [Italic->] Provided [<-Italic] , That of this amount, not to exceed $65,577,000 shall be available for study, planning, design, architect and engineer services, and host nation support, as authorized by law, unless the Secretary of Defense determines that additional obligations are necessary for such purposes and notifies the Committees on Appropriations of both Houses of Congress of his determination and the reasons therefor.

MILITARY CONSTRUCTION, NAVY

For acquisition, construction, installation, and equipment of temporary or permanent public works, naval installations, facilities, and real property for the Navy as currently authorized by law, including personnel in the Naval Facilities Engineering Command and other personal services necessary for the purposes of this appropriation, $683,666,000, to remain available until September 30, 2002: [Italic->] Provided [<-Italic] , That of this amount, not to exceed $46,489,000 shall be available for study, planning, design, architect and engineer services, as authorized by law, unless the Secretary of Defense determines that additional obligations are necessary for such purposes and notifies the Committees on Appropriations of both Houses of Congress of his determination and the reasons therefor.

MILITARY CONSTRUCTION, AIR FORCE

For acquisition, construction, installation, and equipment of temporary or permanent public works, military installations, facilities, and real property for the Air Force as currently authorized by law, $701,855,000, to remain available until September 30, 2002: [Italic->] Provided [<-Italic] , That of this amount, not to exceed $44,880,000 shall be available for study, planning, design, architect and engineer services, as authorized by law, unless the Secretary of Defense determines that additional obligations are necessary for such purposes and notifies the Committees on Appropriations of both Houses of Congress of his

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determination and the reasons therefor.

MILITARY CONSTRUCTION, DEFENSE-WIDE

(INCLUDING TRANSFER OF FUNDS)

For acquisition, construction, installation, and equipment of temporary or permanent public works, installations, facilities, and real property for activities and agencies of the Department of Defense (other than the military departments), as currently authorized by law, $646,342,000, to remain available until September 30, 2002: [Italic->] Provided [<-Italic] , That such amounts of this appropriation as may be determined by the Secretary of Defense may be transferred to such appropriations of the Department of Defense available for military construction or family housing as he may designate, to be merged with and to be available for the same purposes, and for the same time period, as the appropriation or fund to which transferred: [Italic->] Provided further [<-Italic] , That of the amount appropriated, not to exceed $48,850,000 shall be available for study, planning, design, architect and engineer services, as authorized by law, unless the Secretary of Defense determines that additional obligations are necessary for such purposes and notifies the Committees on Appropriations of both Houses of Congress of his determination and the reasons therefor.

MILITARY CONSTRUCTION, ARMY NATIONAL GUARD

For construction, acquisition, expansion, rehabilitation, and conversion of facilities for the training and administration of the Army National Guard, and contributions therefor, as authorized by chapter 133 of title 10, United States Code, and Military Construction Authorization Acts, $118,350,000, to remain available until September 30, 2002.

MILITARY CONSTRUCTION, AIR NATIONAL GUARD

For construction, acquisition, expansion, rehabilitation, and conversion of facilities for the training and administration of the Air National Guard, and contributions therefor, as authorized by chapter 133 of title 10, United States Code, and Military Construction Authorization Acts, $190,444,000, to remain available until September 30, 2002.

MILITARY CONSTRUCTION, ARMY RESERVE

For construction, acquisition, expansion, rehabilitation, and conversion of facilities for the training and administration of the Army Reserve as authorized by chapter 133 of title 10, United States Code, and Military Construction Authorization Acts, $74,167,000, to remain available until September 30, 2002.

MILITARY CONSTRUCTION, NAVAL RESERVE

For construction, acquisition, expansion, rehabilitation, and conversion of facilities for the training and administration of the reserve components of the Navy and Marine Corps as authorized by chapter 133 of title 10, United States Code, and Military Construction Authorization Acts, $47,329,000, to remain available until September 30, 2002.

MILITARY CONSTRUCTION, AIR FORCE RESERVE

For construction, acquisition, expansion, rehabilitation, and conversion of facilities for the training and administration of the Air Force Reserve as authorized by chapter 133 of title 10, United States Code, and Military Construction Authorization Acts, $30,243,000, to remain available until September 30, 2002.

NORTH ATLANTIC TREATY ORGANIZATION

SECURITY INVESTMENT PROGRAM

For the United States share of the cost of the North Atlantic Treaty Organization Security Investment Program for the acquisition and construction of military facilities and installations (including international military headquarters) and for related expenses for the collective defense of the North Atlantic Treaty Area as authorized in Military Construction Authorization Acts and

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section 2806 of title 10, United States Code, $152,600,000, to remain available until expended.

FAMILY HOUSING, ARMY

For expenses of family housing for the Army for construction, including acquisition, replacement, addition, expansion, extension and alteration and for operation and maintenance, including debt payment, leasing, minor construction, principal and interest charges, and insurance premiums, as authorized by law, as follows: for Construction, $197,300,000, to remain available until September 30, 2002; for Operation and Maintenance, and for debt payment, $1,140,568,000; in all $1,337,868,000.

FAMILY HOUSING, NAVY AND MARINE CORPS

For expenses of family housing for the Navy and Marine Corps for construction, including acquisition, replacement, addition, expansion, extension and alteration and for operation and maintenance, including debt payment, leasing, minor construction, principal and interest charges, and insurance premiums, as authorized by law, as follows: for Construction, $393,832,000, to remain available until September 30, 2002; for Operation and Maintenance, and for debt payment, $976,504,000; in all $1,370,336,000.

FAMILY HOUSING, AIR FORCE

For expenses of family housing for the Air Force for construction, including acquisition, replacement, addition, expansion, extension and alteration and for operation and maintenance, including debt payment, leasing, minor construction, principal and interest charges, and insurance premiums, as authorized by law, as follows: for Construction, $295,709,000, to remain available until September 30, 2002; for Operation and Maintenance, and for debt payment, $830,234,000; in all $1,125,943,000.

FAMILY HOUSING, DEFENSE-WIDE

For expenses of family housing for the activities and agencies of the Department of Defense (other than the military departments) for construction, including acquisition, replacement, addition, expansion, extension and alteration, and for operation and maintenance, leasing, and minor construction, as authorized by law, as follows: for Construction, $4,950,000, to remain available until September 30, 2002; for Operation and Maintenance, $32,724,000; in all $37,674,000.

BASE REALIGNMENT AND CLOSURE ACCOUNT, PART II

For deposit into the Department of Defense Base Closure Account 1990 established by section 2906(a)(1) of the Department of Defense Authorization Act, 1991 (Public Law 101-510), $116,754,000, to remain available until expended: [Italic->] Provided [<-Italic] , That not more than $105,224,000 of the funds appropriated herein shall be available solely for environmental restoration, unless the Secretary of Defense determines that additional obligations are necessary for such purposes and notifies the Committees on Appropriations of both Houses of Congress of his determination and the reasons therefor.

BASE REALIGNMENT AND CLOSURE ACCOUNT, PART III

For deposit into the Department of Defense Base Closure Account 1990 established by section 2906(a)(1) of the Department of Defense Authorization Act, 1991 (Public Law 101-510), $768,702,000, to remain available until expended: [Italic->] Provided [<-Italic] , That not more than $398,499,000 of the funds appropriated herein shall be available solely for environmental restoration, unless the Secretary of Defense determines that additional obligations are necessary for such purposes and notifies the Committees on Appropriations of both Houses of Congress of his determination and the reasons therefor.

BASE REALIGNMENT AND CLOSURE ACCOUNT, PART IV

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For deposit into the Department of Defense Base Closure Account 1990 established by section 2906(a)(1) of the Department of Defense Authorization Act, 1991 (Public Law 101-510), $1,175,398,000, to remain available until expended: [Italic->] Provided [<-Italic] , That not more than $353,604,000 of the funds appropriated herein shall be available solely for environmental restoration, unless the Secretary of Defense determines that additional obligations are necessary for such purposes and notifies the Committees on Appropriations of both Houses of Congress of his determination and the reasons therefor.

GENERAL PROVISIONS

SEC. 101. None of the funds appropriated in Military Construction Appropriations Acts shall be expended for payments under a cost-plus-a-fixed-fee contract for work, where cost estimates exceed $25,000, to be performed within the United States, except Alaska, without the specific approval in writing of the Secretary of Defense setting forth the reasons therefor: [Italic->] Provided [<-Italic] , That the foregoing shall not apply in the case of contracts for environmental restoration at an installation that is being closed or realigned where payments are made from a Base Realignment and Closure Account.

SEC. 102. Funds appropriated to the Department of Defense for construction shall be available for hire of passenger motor vehicles.

SEC. 103. Funds appropriated to the Department of Defense for construction may be used for advances to the Federal Highway Administration, Department of Transportation, for the construction of access roads as authorized by section 210 of title 23, United States Code, when projects authorized therein are certified as important to the national defense by the Secretary of Defense.

SEC. 104. None of the funds appropriated in this Act may be used to begin construction of new bases inside the continental United States for which specific appropriations have not been made.

SEC. 105. No part of the funds provided in Military Construction Appropriations Acts shall be used for purchase of land or land easements in excess of 100 per centum of the value as determined by the Army Corps of Engineers or the Naval Facilities Engineering Command, except: (1) where there is a determination of value by a Federal court; or (2) purchases negotiated by the Attorney General or his designee; or (3) where the estimated value is less than $25,000; or (4) as otherwise determined by the Secretary of Defense to be in the public interest.

SEC. 106. None of the funds appropriated in Military Construction Appropriations Acts shall be used to: (1) acquire land; (2) provide for site preparation; or (3) install utilities for any family housing, except housing for which funds have been made available in annual Military Construction Appropriations Acts.

SEC. 107. None of the funds appropriated in Military Construction Appropriations Acts for minor construction may be used to transfer or relocate any activity from one base or installation to another, without prior notification to the Committees on Appropriations.

Buy American Act + Balance of Payments take care of

SEC. 108. No part of the funds appropriated in Military Construction Appropriations Acts may be used for the procurement of steel for any construction project or activity for which American steel producers, fabricators, and manufacturers have been denied the opportunity to compete for such steel procurement.

SEC. 109. None of the funds available to the Department of Defense for military construction or family housing during the current fiscal year may be used to pay real property taxes in any foreign nation.

SEC. 110. None of the funds appropriated in Military Construction Appropriations Acts may be used to initiate a new installation overseas without prior notification to the Committees on Appropriations.

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SEC. 111. None of the funds appropriated in Military Construction Appropriations Acts may be obligated for architect and engineer contracts estimated by the Government to exceed $500,000 for projects to be accomplished in Japan, in any NATO member country, or in countries bordering the Arabian Gulf, unless such contracts are awarded to United States firms or United States firms in joint venture with host nation firms.

Implemented at 252.236-7011 + 252.236-7012

SEC. 112. None of the funds appropriated in Military Construction Appropriations Acts for military construction in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, may be used to award any contract estimated by the Government to exceed $1,000,000 to a foreign contractor: [Italic->] Provided [<-Italic] , That this section shall not be applicable to contract awards for which the lowest responsive and responsible bid of a United States contractor exceeds the lowest responsive and responsible bid of a foreign contractor by greater than 20 per centum: [Italic->] Provided further [<-Italic] , That this section shall not apply to contract awards for military construction on Kwajalein Atoll for which the lowest responsive and responsible bid is submitted by a Marshallese contractor.

Partially implem. at 252.236-7012

new

SEC. 113. The Secretary of Defense is to inform the appropriate committees of Congress, including the Committees on Appropriations, of the plans and scope of any proposed military exercise involving United States personnel thirty days prior to its occurring, if amounts expended for construction, either temporary or permanent, are anticipated to exceed $100,000.

SEC. 114. Not more than 20 per centum of the appropriations in Military Construction Appropriations Acts which are limited for obligation during the current fiscal year shall be obligated during the last two months of the fiscal year.

(TRANSFER OF FUNDS)

SEC. 115. Funds appropriated to the Department of Defense for construction in prior years shall be available for construction authorized for each such military department by the authorizations enacted into law during the current session of Congress.

SEC. 116. For military construction or family housing projects that are being completed with funds otherwise expired or lapsed for obligation, expired or lapsed funds may be used to pay the cost of associated supervision, inspection, overhead, engineering and design on those projects and on subsequent claims, if any.

SEC. 117. Notwithstanding any other provision of law, any funds appropriated to a military department or defense agency for the construction of military projects may be obligated for a military construction project or contract, or for any portion of such a project or contract, at any time before the end of the fourth fiscal year after the fiscal year for which funds for such project were appropriated if the funds obligated for such project: (1) are obligated from funds available for military construction projects and (2) do not exceed the amount appropriated for such project, plus any amount by which the cost of such project is increased pursuant to law.

(TRANSFER OF FUNDS)

SEC. 118. During the five-year period after appropriations available to the Department of Defense for military construction and family housing operation and maintenance and construction have expired for obligation, upon a determination that such appropriations will not be necessary for the liquidation of obligations or for making authorized adjustments to such appropriations for obligations incurred during the period of availability of such appropriations, unobligated balances of such appropriations may be transferred into the appropriation `Foreign Currency Fluctuations, Construction, Defense' to be merged with and

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to be available for the same time period and for the same purposes as the appropriation to which transferred.

SEC. 119. The Secretary of Defense is to provide the Committees on Appropriations of the Senate and the House of Representatives with an annual report by February 15, containing details of the specific actions proposed to be taken by the Department of Defense during the current fiscal year to encourage other member nations of the North Atlantic Treaty Organization, Japan, Korea, and United States allies bordering the Arabian Gulf to assume a greater share of the common defense burden of such nations and the United States.

(TRANSFER OF FUNDS)

SEC. 120. During the current fiscal year, in addition to any other transfer authority available to the Department of Defense, proceeds deposited to the Department of Defense Base Closure Account established by section 207(a)(1) of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526) pursuant to section 207(a)(2)(C) of such Act, may be transferred to the account established by section 2906(a)(1) of the Department of Defense Authorization Act, 1991, to be merged with, and to be available for the same purposes and the same time period as that account.

SEC. 121. No funds appropriated pursuant to this Act may be expended by an entity unless the entity agrees that in expending the assistance the entity will comply with sections 2 through 4 of the Act of March 3, 1933 (41 U.S.C. 10a-10c, popularly known as the `Buy American Act').

SEC. 122. (a) In the case of any equipment or products that may be authorized to be purchased with financial assistance provided under this Act, it is the sense of the Congress that entities receiving such assistance should, in expending the assistance, purchase only American-made equipment and products.

(b) In providing financial assistance under this Act, the Secretary of the Treasury shall provide to each recipient of the assistance a notice describing the statement made in subsection (a) by the Congress.

(TRANSFER OF FUNDS)

SEC. 123. (a) Subject to thirty days prior notification to the Committees on Appropriations, such additional amounts as may be determined by the Secretary of Defense may be transferred to the Department of Defense Family Housing Improvement Fund from amounts appropriated for construction in `Family Housing' accounts, to be merged with and to be available for the same purposes and for the same period of time as amounts appropriated directly to the Fund: [Italic->] Provided [<-Italic] , That appropriations made available to the Fund shall be available to cover the costs, as defined in section 502(5) of the Congressional Budget Act of 1974, of direct loans or loan guarantees issued by the Department of Defense pursuant to the provisions of subchapter IV of chapter 169, title 10, United States Code, pertaining to alternative means of acquiring and improving military family housing and supporting facilities.

(b) Subject to thirty days prior notification to the Committees on Appropriations, such additional amounts as may be determined by the Secretary of Defense may be transferred to the Department of Defense Military Unaccompanied Housing Improvement Fund from amounts appropriated for the acquisition or construction of military unaccompanied housing in `Military Construction' accounts, to be merged with and to be available for the same purposes and for the same period of time as amounts appropriated directly to the Fund: [Italic->] Provided [<-Italic] , That appropriations made available to the Fund shall be available to cover the costs, as defined in section 502(5) of the Congressional Budget Act of 1974, of direct loans or loan guarantees issued by the Department of

Defense pursuant to the provisions of subchapter IV of chapter 169, title 10, United States Code, pertaining to alternative means of acquiring and improving military unaccompanied housing and ancillary supporting facilities.

SEC. 124. Notwithstanding any other provision of law, appropriations made available to the Department of Defense Family Housing Improvement Fund shall be the sole source of funds available for planning, administrative, and oversight costs incurred by the Housing Revitalization Support Office relating to military family housing initiatives and military unaccompanied housing initiatives undertaken pursuant to the provisions of subchapter IV of chapter 169, title 10, United States Code, pertaining to alternative means of acquiring and improving military family housing, military unaccompanied housing, and supporting facilities.

SEC. 125. Notwithstanding any other provisions in this Act, the following accounts are hereby reduced by the specified amounts--

`Military Construction, Army', $7,900,000;
`Military Construction, Navy', $5,600,000;
`Military Construction, Air Force', $7,600,000;
`Military Construction, Defense-wide', $6,100,000;
`North Atlantic Treaty Organization Security Investment Program', $1,000,000;
`Base Realignment and Closure Account, Part III', $8,000,000;
`Base Realignment and Closure Account, Part IV', $8,000,000;
`Family Housing, Army', $36,700,000;
`Family Housing, Navy and Marine Corps', $13,100,000;
`Family Housing, Air Force', $14,700,000; and
`Family Housing, Defense-wide', $100,000.

SEC. 126. Notwithstanding any other provision of law, from the funds appropriated in this Act for Military Construction, Army, the Secretary of the Army is directed to complete, using an Unspecified Minor Construction project, the Special Forces (Diver) Training Facility at Key West Naval Air Station, Florida, as authorized in the Military Construction Authorization Act for Fiscal Years 1990 and 1991 (Public Law 101-189).

SEC. 127. (a) LEASE OF PROPERTY AUTHORIZED- Notwithstanding any other provision of law, the Secretary of the Navy (hereinafter referred to as the `Secretary') may lease, without monetary consideration, to the city and county of Honolulu (hereinafter referred to as the `city') a parcel of land consisting of approximately 300 acres on Waipio Peninsula, Honolulu, Hawaii (hereinafter referred to as the `parcel').

(b) RELATED EASEMENT- The Secretary may also grant, without monetary consideration, an easement on, over, under and across that certain real property known as Waipio Point Access Road for access to and operation of the parcel.

(c) TERM- The term of the lease and easement authorized under this section shall be fifty (50) years.

(d) CONDITION OF USE- The lease and easement authorized under subsections (a) and (b) shall be subject to the following conditions:

(1) The city shall use the parcel for development and operation of a public soccer park and related recreational facilities, and for other civic and public purposes as may be approved by the Secretary.

(2) Facilities developed on the parcel shall be for public use and benefit; however, usage fees may be charged to defray facility operating and maintenance costs.

(3) The city shall comply with all explosive safety criteria affecting the city's use of the lease and easement areas, as established by the Secretary in connection with the explosive safety areas supporting the ordinance handling wharves located at West Loch Branch, Naval Magazine, Lualualei, Hawaii.

(9)

ftp://ftp.loc.gov/pub/thomas/c105/h2016.enr.txt

(4) The city shall, at its own cost and to the satisfaction of the Secretary, make any and all improvements to Waipio Point Access Road which the city determines are necessary to provide onstreet parking along said road, and adequate access to the parcel, including, but not limited to, any necessary appurtenant utility and drainage improvements. During the term of said easement, the cost of maintenance, repair and replacement of said road and improvements shall be borne by the city.

(5) The city shall install a non-potable irrigation water delivery system to service the parcel, and in doing so, the city shall size transmission lines capable of delivering approximately 2.5 million additional gallons of irrigation water per day to agricultural lands on Waipio Peninsula under the control of the Secretary.

(e) TERMINATION- If the Secretary determines at any time that the parcel is not being used for a purpose specified in subsection (d)(1), the lease and easement authorized under subsections (a) and (b) may be terminated, and all right, title, and interest in and to such real property, including any improvements thereon, shall revert to the United States, and the United States shall have the right of immediate entry thereon.

(f) EFFECT OF EXPIRATION OF LEASE- Unless otherwise specifically provided for in this section, at the end of the lease and easement term, the city shall either convey, without reimbursement, to the United States, all right, title, and interest of the city in and to the improvements subject to said lease and easement, or restore, to the extent practicable, the lease and easement areas to the satisfaction of the Secretary.

(g) DESCRIPTION OF PROPERTY- The exact acreage and legal description of the property subject to this section shall be determined by a survey satisfactory to the Secretary. The cost of such survey shall be borne by the city.

(h) ADDITIONAL TERMS AND CONDITIONS- The Secretary may require such additional terms and conditions in connection with the lease and easement to be granted under this section as the Secretary considers appropriate to protect the interests of the United States.

SEC. 128. (a) Not later than 60 days before issuing any solicitation for a contract with the private sector for military family housing or military unaccompanied housing, the Secretary of the military department concerned shall submit to the congressional defense committees the notice described in subsection (b).

(b)(1) A notice referred to in subsection (a) is a notice of any guarantee (including the making of mortgage or rental payments) proposed to be made by the Secretary to the private party under the contract involved in the event of--

(A) the closure or realignment of the installation for which housing is provided under the contract;

(B) a reduction in force of units stationed at such installation; or

(C) the extended deployment overseas of units stationed at such installation.

(2) Each notice under this subsection shall specify the nature of the guarantee involved and assess the extent and likelihood, if any, of the liability of the Federal Government with respect to the guarantee.

(c) In this section, the term `congressional defense committees' means the following:

(1) The Committee on Armed Services and the Military Construction Subcommittee, Committee on Appropriations of the Senate.

(2) The Committee on National Security and the Military Construction Subcommittee, Committee on Appropriations of the

ftp://ftp.loc.gov/pub/thomas/c105/h2016.enr.txt

House of Representatives.
This Act may be cited as the `Military Construction Appropriations Act, 1998'.
Speaker of the House of Representatives.
Vice President of the United States and
President of the Senate.

(b)(6)
10/30/98 11:44 AM

To (b)(6)

Subject: Conversion of Interim Rules to Final Rules Without Change

I'm planning to process the following rules as a group. The information that I have shows that all are conversions of interim rules to final rules without change. If the status of any of these has changed, or if there are any others that should be added, please let me know. Thanks.

97-D325 List of Firms Not Eligible for Defense Contracts
98-D011 Direct Award of 8(a) Contracts
97-D323 Comprehensive Subcontracting Plans
98-D016 Waiver of 10 U.S.C. 2534--United Kingdom
97-D312 Allowability of Costs for Restructuring Bonuses
97-D313 Restructuring Costs
97-D307 Construction in Foreign Countries

APPROVED DFARS COVERAGE
TRANSMITTAL FORM (6/90)

Case Manager: (b)(6) **Date:** June 5, 1998

DAR Case No: 97-D307 **DAR Case Title:** Construction in Foreign Countries

DFARS Cite(s): 236.102, 236.274, 236.570, and 252.236

Check One: **Final** X **Interim** _____ **Info** _____

DAC Intro Item:

This final rule finalizes without change the interim rule published as Item XXIII of DAC 91-13. The rule amends DFARS Part 236 and the clause at 252.236-7010 and adds a new clause at 252.236-7012 to implement Section 112 of the Fiscal Year 1998 Military Construction Appropriations Act (Pub. L. 105-45). Section 112 provides that the 20 percent preference for United States firms, when using military construction appropriations for military construction contracts that are estimated to exceed $1,000,000 and are to be performed on Kwajalein Atoll, does not apply to contract awards for which the lowest responsive and responsible offer is submitted by a Marshallese firm.

Public Comment:

_____ (Interim Rule) Comments invited _____ day comment period.
_____ (Interim/Final Rule) Does not have significant effect beyond internal operating procedures or significant cost or administrative impact on contractors.
X (Final Rule) Comments were requested on March 9, 1998 , 63 FR 11522

Reg Flex:

_____ (Interim Final Rule) Does not apply. Rule does not constitute significant revision.
_____ (Final Rule) Applies. A final RF analysis is attached.
X (Final Rule) DoD certifies that final rule will not have significant economic impact because it is estimated that DoD does not award more than 2 contracts per year that are for military construction on Kwajalein Atoll and exceed $1,000,000.
_____ (Interim Rule) Applies. May have significant economic impact because _____
_____ Initial RF analysis forwarded to SBA.
_____ Initial RF analysis delayed because _____ but will be forwarded by _____
_____ (Interim Rule) Applies but not expected to have significant economic impact. No RF Analysis

Paperwork Reduction

_____ (Interim/Final Rule) No information collection requirements.
_____ (Interim Rule) Applies. OMB approval requested.
x (Final Rule) Applies. OMB approved. Control number: 0704-0255
This rule does not result in any increase in information collection requirements.

Deviations:

_____ No.

_____ Yes. Deviation approval request attached.

Interim Rule:

_____ Determination of Urgency attached

APPROVED DFARS COVERAGE
TRANSMITTAL FORM (6/90)

Case Manager: (b)(6) **Date:** November 20, 1997

DAR Case No: 97-D307 **DAR Case Title:** Construction in Foreign Countries

DFARS Cite(s): 236.102, 236.274, 236.570, and 252.236-7010

Check One: **Final** _____ **Interim** X **Info** _____

DAC Intro Item:

This interim rule amends DFARS Part 236 and the clause at 252.236-7010 to implement Section 112 of the Fiscal Year 1998 Military Construction Appropriations Act (Pub. L. 105-45). Section 112 provides that the 20 percent preference for United States firms, when using military construction appropriations for military construction contracts that are estimated to exceed $1,000,000 and are to be performed on Kwajalein Atoll, does not apply to contract awards for which the lowest responsive and responsible offer is submitted by a Marshallese firm.

Public Comment:

X (Interim Rule) Comments invited 60 day comment period.
_____ (Interim/Final Rule) Does not have significant effect beyond internal operating procedures or significant cost or administrative impact on contractors.
_____ (Final Rule) Comments were requested on _____, _____ FR _____

Reg Flex:

_____ (Interim Final Rule) Does not apply. Rule does not constitute significant revision.
_____ (Final Rule) Applies. A final RF analysis is attached.
_____ (Final Rule) DoD certifies that final rule will not have significant economic impact because _____

_____ (Interim Rule) Applies. May have significant economic impact because _____

_____ Initial RF analysis forwarded to SBA.
_____ Initial RF analysis delayed because _____ but will be forwarded by _____

x (Interim Rule) Applies but not expected to have significant economic impact. No RF Analysis
It is estimated that DoD does not award more than 2 contracts per year that are for military construction on Kwajalein Atoll and exceed $1,000,000.

Paperwork Reduction

_____ (Interim/Final Rule) No information collection requirements.
_____ (Interim Rule) Applies. OMB approval requested.
x (Final Rule) Applies. OMB approved. Control number: 0704-0255
This rule does not result in any increase in information collection requirements.

Deviations:

_____ No.

_____ Yes. Deviation approval request attached.

Interim Rule:

x Determination of Urgency attached

DFARS Case 97-D307
Construction in Foreign Countries
Interim Rule

* * * * *

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

* * * * *

236.102 Definitions.

* * * * *

[(3) "Marshallese firm" is defined in Alternate I of the provision at 252.236-7010, Overseas Military Construction—Preference for United States Firms.]

(~~3~~**[4]**)"Network analysis system" means recognized scheduling systems that show the duration, sequential relationship, and interdependence of various work activities, e.g., critical path method.

(4**[5]**)"United States firm" is defined in the provisions at 252.236-7010, Overseas Military Construction--Preference for United States Firms, and 252.236-7011, Overseas Architect-Engineer Services--Restriction to United States Firms.

* * * * *

236.274 Construction in foreign countries.

(a) In accordance with Section 112 of Pub. L. ~~104-32~~ **[105-45]** ~~and similar sections in subsequent military construction appropriations acts~~, military construction contracts**[, funded with military construction appropriations,]** that are estimated to exceed $1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, shall be awarded only to United States firms, unless[—

(1) T~~t~~he lowest responsive and responsible offer of a United States firm exceeds the lowest responsive and responsible offer of a foreign firm by more than 20 percent**[, or**

(2) The contract is for military construction on Kwajalein Atoll and the lowest responsive and responsible offer is submitted by a Marshallese firm].

* * * * *

236.570 Additional provisions and clauses.

* * * * *

(c)**[(1)]** Use the provision at 252.236-7010, Overseas Military Construction--Preference for United States Firms, in solicitations for military construction contracts**[, funded with military construction appropriations,]** that are estimated to exceed $1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf.
[(2) Use the provision with its Alternate I if the solicitation is for construction on Kwajalein Atoll.]

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

* * * * *

252.236-7010 Overseas Military Construction--Preference for United States Firms.
As prescribed in 236.570(c)**[(1)]**, use the following provision:

OVERSEAS MILITARY CONSTRUCTION--PREFERENCE FOR UNITED STATES FIRMS (JAN 1997)

(a) *Definition.*

"United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

(1) The corporate headquarters are in the United States;

(2) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(3) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms will be evaluated by adding 20 percent to the offer.

(c) *Status.* The offeror _____ is, _____ is not a United States firm.

(End of provision)

[Alternate I (DATE)

As prescribed in 236.570(c)(2), substitute the following paragraphs (a), (b), and (c) in place of paragraphs (a), (b), and (c) of the basic clause:

(a)(1) "Marshallese firm," as used in this provision, means a local firm incorporated in the Marshall Islands, or otherwise legally organized under the laws of the Marshall Islands, that is more than 50 percent owned by citizens of the Marshall Islands, or, if the firm is foreign-owned, complies with the following:

(i) The firm has done business in the Marshall Islands on a continuing basis for not less than three years prior to the issuance date of the solicitation;

(ii) Substantially all of the firm's directors of local operations, senior staff and operating personnel are resident in the Marshall Islands or are U.S. citizens; and

(iii) Most of the operating equipment and physical plant are in the Marshall Islands.

(2) "United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

(i) The corporate headquarters are in the United States;

(ii) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(iii) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms or Marshallese firms will be evaluated by adding 20 percent to the offer, unless application of the factor would not result in award to a United States firm.

(c) *Status.* The offeror is _____ a United States firm; _____ a Marshallese firm; _____Other.]

FAX

TO: DAR Council FAX NR. _____

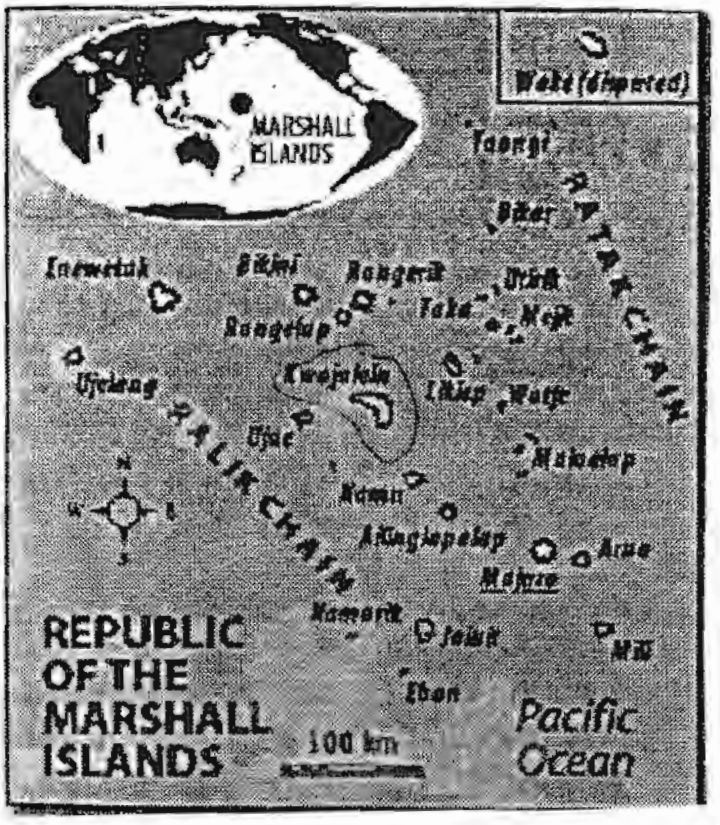
PHONE NR. _____

DATE: 10-4-97

6 Pages including this transmittal sheet

SUBJECT: 97-D307 - Construction in Foreign Countries

MESSAGE: Revised definition of "Marshall Islands"



FROM: (b)(6) Defense Acquisition Regulations Directorate, PDUSD(A&T)DP/DAR, (b)(2) FAX (b)(2) (b)(2)

PLEASE DELIVER IMMEDIATELY

Case Management Record

Discussion Handout

DFARS Case 97-D307	**Date** November 4, 1997	
Title Construction in Foreign Countries		
Priority 1	**Submitted By** (b)(6)	**Origination Code** A
Case Manager (b)(6)	**Case References**	
FAR Cites	**DFARS Cites** 236.102, 236.274, 236.570, and 252.236-7010.	
Cognizant Committees Construction		
Coordination FC		
Recommendation Discuss with case on November 5, 1997.		

The attached draft (TAB A) supersedes the drafts faxed on October 30 and 31. The definition of Marshallese contractor has been revised, based on guidelines at 22 CFR 228 used by the Agency for International Development to determine the nationality of suppliers of construction services (TAB B).

DFARS Case 97-D307
Construction in Foreign Countries
Draft Interim Rule - (Revised definition of Marshallese firm)

* * * * *

PART 225—FOREIGN ACQUISITION

* * * * *

225.7003 Restriction on overseas military construction.
For restriction on award of military construction contracts to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, see 236.274(a).

* * * * *

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

* * * * *

236.102 Definitions.

* * * * *

[(3) "Marshallese firm" is defined in Alternate I of the provision at 252.236-7010, Overseas Military Construction—Preference for United States Firms.]

(~~3~~**[4]**)"Network analysis system" means recognized scheduling systems that show the duration, sequential relationship, and interdependence of various work activities, e.g., critical path method.

(4**[5]**)"United States firm" is defined in the provisions at 252.236-7010, Overseas Military Construction--Preference for United States Firms, and 252.236-7011, Overseas Architect-Engineer Services--Restriction to United States Firms.

* * * * *

236.274 Construction in foreign countries.

(a) In accordance with Section 112 of Pub. L. ~~104-32~~ **[105-45]** ~~and similar sections in subsequent military construction appropriations acts~~, military construction contracts**[, funded with military construction appropriations,]** that are estimated to exceed $1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, shall be awarded only to United States firms, unless[—

TAB A

(1) Tthe lowest responsive and responsible offer of a United States firm exceeds the lowest responsive and responsible offer of a foreign firm by more than 20 percent**[, or**

(2) The contract is for military construction on Kwajalein Atoll and the lowest responsive and responsible offer is submitted by a Marshallese firm].

* * * * *

236.570 Additional provisions and clauses.

* * * * *

(c)**[(1)]** Use the provision at 252.236-7010, Overseas Military Construction--Preference for United States Firms, in solicitations for military construction contracts**[, funded with military construction appropriations,]** that are estimated to exceed $1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf.

[(2) Use the provision with its Alternate I if the solicitation is for construction on Kwajalein Atoll.]

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

* * * * *

252.236-7010 Overseas Military Construction--Preference for United States Firms.
As prescribed in 236.570(c)**[(1)]**, use the following provision:

OVERSEAS MILITARY CONSTRUCTION--PREFERENCE FOR UNITED STATES FIRMS (JAN 1997)

(a) *Definition.*

"United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

(1) The corporate headquarters are in the United States;

(2) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(3) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms will be evaluated by adding 20 percent to the offer.

(c) *Status.* The offeror _____ is, _____ is not a United States firm.

(End of provision)

[Alternate I (DATE)

As prescribed in 236.570(c)(2), substitute the following paragraphs (a), (b), and (c) in place of paragraphs (a), (b), and (c) of the basic clause:

(a)(1) "Marshallese firm," as used in this provision, means a local firm incorporated in the Marshall Islands, or otherwise legally organized under the laws of the Marshall Islands, that is more than 50 percent owned by citizens of the Marshall Islands, or, if the firm is foreign-owned, complies with the following:

(i) The firm has done business in the Marshall Islands on a continuing basis for not less than three years prior to the issuance date of the solicitation;

(ii) Substantially all of the firm's directors of local operations, senior staff and operating personnel are resident in the Marshall Islands; and

(iii) Most of the operating equipment and physical plant are in the Marshall Islands.

(2) "United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

(i) The corporate headquarters are in the United States;

(ii) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(iii) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms or Marshallese firms will be evaluated by adding 20 percent to the offer, unless application of the factor would not result in award to a United States firm.

(c) *Status.* The offeror is _____ a United States firm; _____ a Marshallese firm; _____Other.]

Subpart D—Conditions Governing the Nationality of Suppliers of Services for USAID Financing

§ 228.30 Purpose.

Sections 228.31 through 228.37 set forth the nationality rules governing the eligibility for USAID financing of suppliers of services which are not commodity-related. These rules may be waived in accordance with the provisions in subpart F of this part.

§ 228.31 Individuals and privately owned commercial firms.

(a) In order to be eligible for USAID financing as a supplier of services, whether as a contractor or subcontractor at any tier, an individual must meet the requirements of paragraph (a)(1) of this section (except that individual personal services contractors are not subject to this requirement), and a privately owned commercial firm must meet the requirements in paragraph (a)(2) of this section. In the case of the categories described in paragraphs (a)(2) (i) and (ii) of this section, the certification requirements in paragraph (b) of this section must be met.

(1) An individual must be a citizen of and have a principal place of business in a country or area included in the authorized geographic code, or a non-U.S. citizen lawfully admitted for permanent residence in the United States whose principal place of business is in the United States;

(2) A privately owned commercial (i.e., for profit) corporation or partnership must be incorporated or legally organized under the laws of a country or area included in the authorized geographic code, have its principal place of business in a country or area included in the authorized geographic code, and meet the criteria set forth in either paragraph (a)(2)(i) or (ii) of this section:

(i) The corporation or partnership is more than 50 percent beneficially owned by individuals who are citizens of a country or area included in the authorized geographic code or non-U.S. citizens lawfully admitted for permanent residence in the United States. In the case of corporations, "more than 50 percent beneficially owned" means that more than 50 percent of each class of stock is owned by such individuals; in the case of partnerships, "more than 50 percent beneficially owned" means that more than 50 percent of each category of partnership interest (e.g., general, limited) is owned by such individuals.

(With respect to stock or interest held by companies, funds or institutions, the ultimate beneficial ownership by individuals is controlling.)

(ii) The corporation or partnership:

(A) Has been incorporated or legally organized in the United States for more than 3 years prior to the issuance date of the invitation for bids or requests for proposals,

(B) Has performed within the United States administrative and technical, professional, or construction services, similar in complexity, type and value to the services being contracted (under a contract, or contracts, for services) and derived revenue therefrom in each of the 3 years prior to the date described in paragraph (a)(2)(ii)(A) of this section,

(C) Employs United States citizens and non-U.S. citizens lawfully admitted for permanent residence in the United States in more than half its permanent full-time positions in the United States and more than half of its principal management positions, and

(D) Has the existing technical and financial capability in the United States to perform the contract.

(b) A duly authorized officer of a firm or nonprofit organization shall certify that the participating firm or nonprofit organization meets either the requirements of paragraph (a)(2) (i) or (ii) of this section or § 228.32. In the case of corporations, the certifying officer shall be the corporate secretary. With respect to the requirements of paragraph (a)(2)(i) of this section, the certifying officer may presume citizenship on the basis of the stockholders' record address, provided the certifying officer certifies, regarding any stockholder (including any corporate fund or institutional stockholder) whose holdings are material to the corporation's eligibility, that the certifying officer knows of no fact which might rebut that presumption.

§ 228.32 Nonprofit organizations.

(a) Nonprofit organizations, such as educational institutions, foundations, and associations, must meet the criteria listed in this section and the certification requirement in § 228.31(b) to be eligible as suppliers of services, whether as contractors or subcontractors at any tier. Any such institution must:

(1) Be organized under the laws of a country or area included in the authorized geographic code;

(2) Be controlled and managed by a governing body, a majority of whose members are citizens of countries or areas included in the authorized geographic code; and

(3) Have its principal facilities and offices in a country or area included in the authorized geographic code.

(b) International agricultural research centers and such other international research centers as may be, from time to time, formally listed as such by the USAID Assistant Administrator, Global Bureau, are considered to be of U.S. nationality.

§ 228.33 Foreign government-owned organizations.

Firms operated as commercial companies or other organizations (including nonprofit organizations other than public educational institutions) which are wholly or partially owned by foreign governments or agencies thereof are not eligible for financing by USAID as contractors or subcontractors, except if their eligibility has been established by a waiver approved by USAID in accordance with § 228.54. This does not apply to foreign government ministries or agencies.

§ 228.34 Joint ventures.

A joint venture or unincorporated association is eligible only if each of its members is eligible in accordance with §§ 228.31, 228.32, or 228.33.

§ 228.35 Construction services from foreign-owned local firms.

(a) When the estimated cost of a contract for construction services is $5 million or less and only local firms will be solicited, a local corporation or partnership which does not meet the test in § 228.31(a)(2)(i) for eligibility based on ownership by citizens of the cooperating country (i.e., it is a foreign-owned local firm) will be eligible if it is determined by USAID to be an integral part of the local economy. However, such a determination is contingent on first ascertaining that no United States construction company with the required capability is currently operating in the cooperating country or, if there is such a company, that it is not interested in bidding for the proposed contract.

(b) A foreign-owned local firm is an integral part of the local economy provided:

(1) It has done business in the cooperating country on a continuing basis for not less than three years prior to the issuance date of invitations for bids or requests for proposals to be financed by USAID;

(2) It has a demonstrated capability to undertake the proposed activity;

(3) All, or substantially all, of its directors of local operations, senior staff and operating personnel are resident in the cooperating country;

(4) Most of its operating equipment and physical plant are in the cooperating country.

§ 228.36 Ineligible suppliers.

Citizens of any country or area not included in Geographic Code 935, and firms and organizations located in, organized under the laws of, or owned in any part by citizens or organizations of any country or area not included in Geographic Code 935 are ineligible for financing by USAID as suppliers of services, or as agents in connection with the supply of services. The limited exceptions to this rule are:

(a) Individuals lawfully admitted for permanent residence in the United States are eligible, as individuals or owners, regardless of their citizenship, and

(b) The Procurement Executive may authorize the eligibility of organizations having minimal ownership by citizens or organizations of non-Geographic Code 935 countries.

INTEROFFICE MEMORANDUM

Sensitivity: COMPANY CONFIDENTIAL

Date: 03-Nov-1997 01:44pm
From: Pete Bryan
Dept: Pentagon 3C762
Tel No: (b)(2)

To: (b)(6)

Subject: DFARS Case 97-D307, Construction in Foreign Countries

Amy, I think the definition of a "Marshallese firm" should include a requirement that at least 51 percent of the firm should be owned by Marshallese. This is similar to the requirement that a small disadvantaged business concern must have at least 51 percent ownership by individuals that are both socially and economically disadvantaged. If this ownership provision is not included in the definition, it may be possible for persons other than Marshallese to own these companies and benefit from the 20 percent preference. I do not have any other comments. Pete Bryan

INTEROFFICE MEMORANDUM
(Draft)

Date:
From: (b)(6)
Dept:
Tel No:

To: Pete Bryan (bryanpa@AM@ZEUS)

Subject: Re: DFARS Case 97-D307, Construction in Foreign Countries

Pete: The Army is probably going to request that the DAR Council stay out of this, and let the Army implement it, since only the Army does construction on Kwajalein Atoll. However, since we already have a clause implementing the rest of the section in the DFARS, there is some precedent for dealing with this variation for Kwajalein Atoll in the DFARS, even though it affects only the Army.

Apparently the firm which this law was intedned to benefit is not owned or operated by Marshallese citizens.

If we deci$de to go ahead with DFARS coverage, I have done further research and propose the attached revised definition, based on the regulations at 22 CFR 228, relating to the nationality rule for suppliers of services of the Agency for International Development (referenced in 48 U.S.C. 1906, Construction contract assistance, relating to assitance for the Governemnts of the Federated States of Micronesia and of the Marshall Islands). Any comments?

(b)(6)

DFARS Case 97-D307
Construction in Foreign Countries
Draft Interim Rule - (Revised definition of Marshallese firm)

(a)(1) "Marshallese firm," as used in this provision, means a local firm incorporated in the Marshall Islands, or otherwise legally organized under the laws of the Marshall Islands, that is more than 50 percent owned by citizens of the Marshall Islands, or, if the firm is foreign-owned, complies with the following:

(i) The firm has done business in the Marshall Islands on a continuing basis for not less than three years prior to the issuance date of the solicitation;

(ii) Substantially all of the firm's directors of local operations, senior staff and operating personnel are resident in the Marshall Islands; and

(iii) Most of the operating equipment and physical plant are in the Marshall Islands.]

INTEROFFICE MEMORANDUM

Sensitivity: COMPANY CONFIDENTIAL

Date: 03-Nov-1997 03:16pm
From: Pete Bryan
Dept: Pentagon 3C762
Tel No: (b)(2)

To: (b)(6)

Subject: Re: DFARS Case 97-D307, Construction in Foreign Countries

Amy, as always your work looks good. I have no other comments. Pete

INTEROFFICE MEMORANDUM

Date: 31-Oct-1997 03:24pm
From: (b)(6)
Dept:
Tel No:

To: (b)(2)

Subject: construction in foreign countries

(b)(6)

I think you may be getting carried away with defining Marshallese firms. Did you substitute Marshallese for US? I don't think we can do that. I've contacted our folks on Kwajalein to find out what definition they use--if any. They are researching the matter. It looks like a Marshallese firm is whomever the President of the Marshall Islands says is one.

FAX

TO: DAR Council FAX NR. _____

PHONE NR. _____

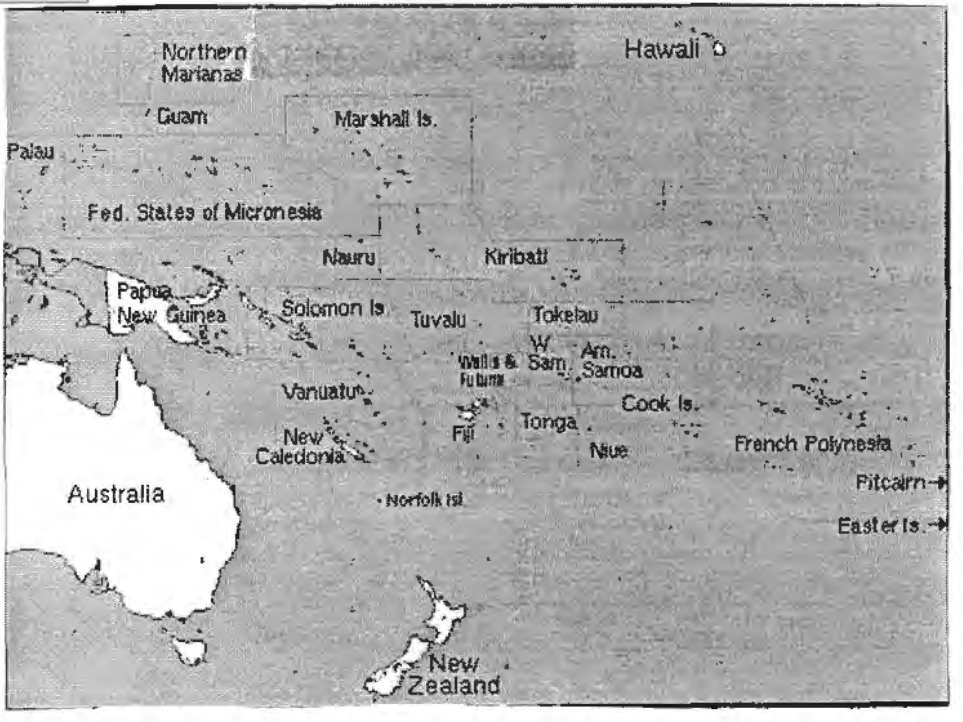
DATE: 10-31-97

5 Pages including this transmittal sheet

SUBJECT: 97-0307, Construction in Foreign Countries

MESSAGE: Revised draft.

FROM: (b)(6) Defense Acquisition Regulations Directorate, PDUSD(A&T)DP/DAR, (b)(2), FAX (b)(2)
(b)(2)



Case Management Record

Discussion Handout

DFARS Case 97-D307	**Date** October 31 1997	
Title Construction in Foreign Countries		
Priority 1	**Submitted By** (b)(6)	**Origination Code** A
Case Manager (b)(6)	**Case References**	
FAR Cites	**DFARS Cites** 236.102, 236.274, 236.570, and 252.236-7010.	
Cognizant Committees Construction		
Coordination FC		
Recommendation Discuss with case on November 5, 1997.		

The attached draft supersedes the draft faxed to you yesterday. Changes from yesterday are underlined. Upon further consideration of Section 112, we have concluded that the new exception for Marshallese firms applies to any new contract award funded by military construction appropriations, regardless of the year of the funds.

DFARS Case 97-D307
Construction in Foreign Countries
Draft Interim Rule
{Changes from the draft of 10-30-97 are underlined}

* * * * *

PART 225—FOREIGN ACQUISITION

* * * * *

225.7003 Restriction on overseas military construction.
For restriction on award of military construction contracts to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, see 236.274(a).

* * * * *

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

* * * * *

236.102 Definitions.

* * * * *

[(3) "Marshallese firm" is defined in Alternate I of the provision at 252.236-7010, Overseas Military Construction—Preference for United States Firms.]

(~~3~~**[4]**)"Network analysis system" means recognized scheduling systems that show the duration, sequential relationship, and interdependence of various work activities, e.g., critical path method.

(4**[5]**)"United States firm" is defined in the provisions at 252.236-7010, Overseas Military Construction--Preference for United States Firms, and 252.236-7011, Overseas Architect-Engineer Services--Restriction to United States Firms.

* * * * *

236.274 Construction in foreign countries.

(a) In accordance with Section 112 of Pub. L. ~~104-32~~ **[105-45]** ~~and similar sections in subsequent military construction appropriations acts~~, military construction contracts**[, funded with military construction appropriations,]** that are estimated to exceed $1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, shall be awarded only to United States firms, unless**[**—

(1) T~~t~~he lowest responsive and responsible offer of a United States firm exceeds the lowest responsive and responsible offer of a foreign firm by more than 20 percent**[, or**

(2) The ~~acquisition uses FY 1998 or subsequent military construction appropriations~~ contract is[1] for military construction on Kwajalein Atoll and the lowest responsive and responsible offer is submitted by a Marshallese firm].

* * * * *

236.570 Additional provisions and clauses.

* * * * *

(c)**[(1)]** Use the provision at 252.236-7010, Overseas Military Construction--Preference for United States Firms, in solicitations for military construction contracts**[, funded with military construction appropriations,]** that are estimated to exceed $1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf.

[(2) Use the provision with its Alternate I if ~~FY 1998 or subsequent military construction appropriations are used~~ the solicitation is[2] for construction on Kwajalein Atoll.]

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

* * * * *

252.236-7010 Overseas Military Construction--Preference for United States Firms. As prescribed in 236.570(c)**[(1)]**, use the following provision:

OVERSEAS MILITARY CONSTRUCTION--PREFERENCE FOR UNITED STATES FIRMS (JAN 1997)

(a) *Definition.*

"United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

(1) The corporate headquarters are in the United States;

(2) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax

---

[1] Section 112 restricts the use of "funds appropriated in Military Construction Appropriations Acts," whereas some of the other sections restrict "funds appropriated in this Act." Therefore, we conclude that this condition relating to Marshallese contractors applies to any new contract award funded by military construction appropriations.

[2] See prior footnote.

returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(3) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms will be evaluated by adding 20 percent to the offer.

(c) *Status.* The offeror _____ is, _____ is not a United States firm.

(End of provision)

[Alternate I (DATE)

As prescribed in 236.570(c)(2), substitute the following paragraphs (a), (b), and (c) in place of paragraphs (a), (b), and (c) of the basic clause:

(a)(1) "Marshallese firm," as used in this provision, means a firm incorporated in the Marshall Islands, or otherwise organized under the laws of the Marshall Islands, that complies with the following:

(i) The headquarters are in the Marshall Islands;

(ii) The firm has filed corporate and employment tax returns in the Marshall Islands for a minimum of 2 years (if required), has filed income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(iii) The firm employs Marshallese citizens in key management positions.]

(2) "United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

(i) The corporate headquarters are in the United States;

(ii) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(iii) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms or Marshallese firms will be evaluated by adding 20 percent to the offer, unless application of the factor would not result in award to a United States firm.

(c) *Status.* The offeror is _____ a United States firm; _____ a Marshallese firm; _____Other.]

Defense Acquisition Regulations Directorate
Memo

October 31, 1997

To: Mr. Pete Bryan (FC)
Mr. David Drabkin (AR)

Subject: Construction in Foreign Countries, DFARS Case 97-D307

We initiated this case to implement Section 112 of the FY 1998 Military Construction Appropriations Act (Atch 1). The Construction Committee provided a report (Atch 2) with a draft interim rule. After reviewing the statute and associated issues, the case manager has prepared an alternative interim rule for consideration (Atch 3).

We plan to discuss this case at the DAR Council on November 5, 1997. Please provide any comments you may have by November 4, so that we can consider them in our discussion. Our case manager is Ms. Amy Williams, 602-0131.

Please note that DAR Council Committee reports and draft rules under open DAR System cases are generally considered pre-decisional and deliberative and may, if released, cause harm. Therefore, please do not release the committee report outside your office, and refer any requests for the document to our staff.

D. S. Parry
CAPT, SC, USN
Director, Defense
Acquisition Regulations Council

Attachments

UNITED STATES PUBLIC LAWS, 105th Congress -- 1st Session

Public Law 105-45, FY 1998 Military Construction Appropriations Act,
111 Stat. 1142, September 30, 1997 [H.R. 2016]

An Act

Making appropriations for military construction, family housing, and base realignment and closure for the Department of Defense for the fiscal year ending September 30, 1998, and for other purposes.

* * * *

SEC. 112. None of the funds appropriated in Military Construction Appropriations Acts for military construction in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, may be used to award any contract estimated by the Government to exceed $ 1,000,000 to a foreign contractor: Provided , That this section shall not be applicable to contract awards for which the lowest responsive and responsible bid of a United States contractor exceeds the lowest responsive and responsible bid of a foreign contractor by greater than 20 per centum: Provided further , That this section shall not apply to contract awards for military construction on Kwajalein Atoll for which the lowest responsive and responsible bid is submitted by a Marshallese contractor.

Atch 1

DFARS Case 97-D307
Construction in Foreign Countries
Draft Interim Rule

* * * * *

PART 225—FOREIGN ACQUISITION

* * * * *

225.7003 Restriction on overseas military construction.
For restriction on award of military construction contracts to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, see 236.274(a).

* * * * *

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

* * * * *

236.102 Definitions.

* * * * *

[(3) "Marshallese firm" is defined in Alternate I of the provision at 252.236-7010, Overseas Military Construction—Preference for United States Firms.]

(~~3~~**[4]**)"Network analysis system" means recognized scheduling systems that show the duration, sequential relationship, and interdependence of various work activities, e.g., critical path method.

(4**[5]**)"United States firm" is defined in the provisions at 252.236-7010, Overseas Military Construction--Preference for United States Firms, and 252.236-7011, Overseas Architect-Engineer Services--Restriction to United States Firms.

* * * * *

236.274 Construction in foreign countries.

(a) In accordance with Section 112 of Pub. L. ~~104-32~~ **[105-45]** ~~and similar sections in subsequent military construction appropriations acts~~, military construction contracts**[, funded with military construction appropriations,]** that are estimated to exceed $1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, shall be awarded only to United States firms, unless**[**—
(1) T~~t~~he lowest responsive and responsible offer of a United States firm exceeds the lowest responsive and responsible offer of a foreign firm by more than 20 percent**[, or**

Atch 3

(2) The ~~acquisition uses FY 1998 or subsequent military construction appropriations~~ contract is[1] for military construction on Kwajalein Atoll and the lowest responsive and responsible offer is submitted by a Marshallese firm].

* * * * *

236.570 Additional provisions and clauses.

* * * * *

(c)**[(1)]** Use the provision at 252.236-7010, Overseas Military Construction--Preference for United States Firms, in solicitations for military construction contracts**[, funded with military construction appropriations,]** that are estimated to exceed $1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf.

[(2) Use the provision with its Alternate I if ~~FY 1998 or subsequent military construction appropriations are used~~ the solicitation is for construction on Kwajalein Atoll.[2]]

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

* * * * *

252.236-7010 Overseas Military Construction--Preference for United States Firms. As prescribed in 236.570(c)**[(1)]**, use the following provision:

OVERSEAS MILITARY CONSTRUCTION--PREFERENCE FOR UNITED STATES FIRMS (JAN 1997)

(a) *Definition.*

"United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

(1) The corporate headquarters are in the United States;

(2) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(3) The firm employs United States citizens in key management positions.

---

[1] Section 112 restricts the use of "funds appropriated in Military Construction Appropriations Acts," whereas some of the other sections restrict "funds appropriated in this Act." Therefore, we conclude that this condition relating to Marshallese contractors applies to any new contract award funded by military construction appropriations.

[2] See prior footnote.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms will be evaluated by adding 20 percent to the offer.

(c) *Status.* The offeror _____ is, _____ is not a United States firm.

(End of provision)

[Alternate I (DATE)

As prescribed in 236.570(c)(2), substitute the following paragraphs (a), (b), and (c) in place of paragraphs (a), (b), and (c) of the basic clause:

(a)(1) "Marshallese firm," as used in this provision, means a firm incorporated in the Marshall Islands, or otherwise organized under the laws of the Marshall Islands, that complies with the following:

(i) The headquarters are in the Marshall Islands;

(ii) The firm has filed corporate and employment tax returns in the Marshall Islands for a minimum of 2 years (if required), has filed income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(iii) The firm employs Marshallese citizens in key management positions.]

(2) "United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

(i) The corporate headquarters are in the United States;

(ii) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(iii) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms or Marshallese firms will be evaluated by adding 20 percent to the offer, unless application of the factor would not result in award to a United States firm.

(c) *Status.* The offeror is _____ a United States firm; _____ a Marshallese firm; _____Other.]

FAX

TO: DAR Council FAX NR. _____

PHONE NR. _____

DATE: 10-30-97

5 Pages including this transmittal sheet

SUBJECT: 97-D307, Construction in Foreign Countries

MESSAGE:

FROM: (b)(6) Defense Acquisition Regulations Directorate, PDUSD(A&T)DP/DAR, (b)(2) FAX (b)(2) (b)(2)

PLEASE DELIVER IMMEDIATELY

Case Management Record

Discussion Handout

DFARS Case 97-D307	**Date** October 30 1997	
Title Construction in Foreign Countries		
Priority 1	**Submitted By** (b)(6)	**Origination Code** A
Case Manager (b)(6)	**Case References**	
FAR Cites	**DFARS Cites** 236.102, 236.274, 236.570, and 252.236-7010.	
Cognizant Committees Construction		
Coordination FC		
Recommendation Discuss with case on November 5, 1997.		

This case implements Section 112 of the FY 1998 Military Construction Appropriations Act. The Construction Committee report was provided to the DAR Council on October 28, 1997. The case manager has prepared the attached draft for consideration with the case.

- Section 112 of Pub. L. 104-32 was the restriction in the FY 1996 MILCON Appropriations Act. The same restriction was also in the FY 1997 MILCON Appropriations Act (Pub. L. 104-196). The current restriction is the same, except for military construction on Kwajalein Atoll.
- Should the definition of "Marshallese firm" more closely parallel the definition of "U.S. firm"?
- The law does not provide a preference for Marshallese firms. Therefore, unless a U.S. firm will be the awardee, the 20 percent factor should not be applied to other foreign firms.
- The status request should be phrased to avoid any increase in information collection burden, by requesting status as U.S. firm, Marshallese firm, or other. If an offeror has already indicated that it is a U.S. firm, it should not have to indicate that it is not a Marshallese firm.

DFARS Case 97-D307
Construction in Foreign Countries
Draft Interim Rule

* * * * *

PART 225—FOREIGN ACQUISITION

* * * * *

225.7003 Restriction on overseas military construction.
For restriction on award of military construction contracts to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, see 236.274(a).

* * * * *

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

* * * * *

236.102 Definitions.

* * * * *

[(3) "Marshallese firm" is defined in Alternate I of the provision at 252.236-7010, Overseas Military Construction—Preference for United States Firms.]

(~~3~~**[4]**)"Network analysis system" means recognized scheduling systems that show the duration, sequential relationship, and interdependence of various work activities, e.g., critical path method.

(4**[5]**)"United States firm" is defined in the provisions at 252.236-7010, Overseas Military Construction--Preference for United States Firms, and 252.236-7011, Overseas Architect-Engineer Services--Restriction to United States Firms.

* * * * *

236.274 Construction in foreign countries.

(a) In accordance with Section 112 of Pub. L. 104-32 and similar sections in subsequent military construction appropriations acts, military construction contracts that are estimated to exceed $1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, shall be awarded only to United States firms, unless**[**—
(1) T~~t~~he lowest responsive and responsible offer of a United States firm exceeds the lowest responsive and responsible offer of a foreign firm by more than 20 percent**[, or**

(2) The acquisition uses FY 1998 or subsequent military construction appropriations for military construction on Kwajalein Atoll and the lowest responsive and responsible offer is submitted by a Marshallese firm].

* * * * *

236.570 Additional provisions and clauses.

* * * * *

(c)**[(1)]** Use the provision at 252.236-7010, Overseas Military Construction--Preference for United States Firms, in solicitations for military construction contracts that are estimated to exceed $1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf.
[(2) Use the provision with its Alternate I if FY 1998 or subsequent military construction appropriations are used for construction on Kwajalein Atoll.]

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

* * * * *

252.236-7010 Overseas Military Construction--Preference for United States Firms.
As prescribed in 236.570(c)**[(1)]**, use the following provision:

OVERSEAS MILITARY CONSTRUCTION--PREFERENCE FOR UNITED STATES FIRMS (JAN 1997)

(a) *Definition.*

"United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

(1) The corporate headquarters are in the United States;

(2) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(3) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms will be evaluated by adding 20 percent to the offer.

(c) *Status.* The offeror _____ is, _____ is not a United States firm.

(End of provision)

[Alternate I (DATE)

As prescribed in 236.570(c)(2), substitute the following paragraphs (a), (b), and (c) in place of paragraphs (a), (b), and (c) of the basic clause:

(a)(1) "Marshallese firm," as used in this provision, means a firm incorporated in the Marshall Islands, or otherwise organized under the laws of the Marshall Islands, that complies with the following:

(i) The headquarters are in the Marshall Islands;

(ii) The firm has filed corporate and employment tax returns in the Marshall Islands for a minimum of 2 years (if required), has filed income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(iii) The firm employs Marshallese citizens in key management positions.]

(2) "United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

(i) The corporate headquarters are in the United States;

(ii) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(iii) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms or Marshallese firms will be evaluated by adding 20 percent to the offer, unless application of the factor would not result in award to a United States firm.

(c) *Status.* The offeror is _____ a United States firm; _____ a Marshallese firm; _____Other.]

Case Management Record

Discussion Handout

DFARS Case 97-D307	**Date** November 4, 1997	
Title Construction in Foreign Countries		
Priority 1	**Submitted By** (b)(6)	**Origination Code** A
Case Manager (b)(6)	**Case References**	
FAR Cites	**DFARS Cites** 236.102, 236.274, 236.570, and 252.236-7010.	
Cognizant Committees Construction		
Coordination FC		
Recommendation Discuss with case on November 5, 1997.		

The attached draft (TAB A) supersedes the drafts faxed on October 30 and 31. The definition of Marshallese contractor has been revised, based on guidelines at 22 CFR 228 used by the Agency for International Development to determine the nationality of suppliers of construction services (TAB B).

DFARS Case 97-D307
Construction in Foreign Countries
Draft Interim Rule - (Revised definition of Marshallese firm)

* * * * *

PART 225—FOREIGN ACQUISITION

* * * * *

225.7003 Restriction on overseas military construction.
For restriction on award of military construction contracts to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, see 236.274(a).

* * * * *

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

* * * * *

236.102 Definitions.

* * * * *

[(3) "Marshallese firm" is defined in Alternate I of the provision at 252.236-7010, Overseas Military Construction—Preference for United States Firms.]

(~~3~~[4])"Network analysis system" means recognized scheduling systems that show the duration, sequential relationship, and interdependence of various work activities, e.g., critical path method.

(4[5])"United States firm" is defined in the provisions at 252.236-7010, Overseas Military Construction--Preference for United States Firms, and 252.236-7011, Overseas Architect-Engineer Services--Restriction to United States Firms.

* * * * *

236.274 Construction in foreign countries.

(a) In accordance with Section 112 of Pub. L. ~~104-32~~ **[105-45]** ~~and similar sections in subsequent military construction appropriations acts~~, military construction contracts**[, funded with military construction appropriations,]** that are estimated to exceed $1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, shall be awarded only to United States firms, unless[—

TAB A

(1) Tthe lowest responsive and responsible offer of a United States firm exceeds the lowest responsive and responsible offer of a foreign firm by more than 20 percent[, **or**

(2) The contract is for military construction on Kwajalein Atoll and the lowest responsive and responsible offer is submitted by a Marshallese firm].

* * * * *

236.570 Additional provisions and clauses.

* * * * *

(c)[**(1)**] Use the provision at 252.236-7010, Overseas Military Construction--Preference for United States Firms, in solicitations for military construction contracts[**, funded with military construction appropriations,**] that are estimated to exceed $1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf.

[**(2) Use the provision with its Alternate I if the solicitation is for construction on Kwajalein Atoll.**]

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

* * * * *

252.236-7010 Overseas Military Construction--Preference for United States Firms. As prescribed in 236.570(c)[**(1)**], use the following provision:

OVERSEAS MILITARY CONSTRUCTION--PREFERENCE FOR UNITED STATES FIRMS (JAN 1997)

(a) *Definition.*

"United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

(1) The corporate headquarters are in the United States;

(2) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(3) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms will be evaluated by adding 20 percent to the offer.

(c) *Status.* The offeror _____ is, _____ is not a United States firm.

(End of provision)

[Alternate I (DATE)

As prescribed in 236.570(c)(2), substitute the following paragraphs (a), (b), and (c) in place of paragraphs (a), (b), and (c) of the basic clause:

(a)(1) "Marshallese firm," as used in this provision, means a local firm incorporated in the Marshall Islands, or otherwise legally organized under the laws of the Marshall Islands, that is more than 50 percent owned by citizens of the Marshall Islands, or, if the firm is foreign-owned, complies with the following:

(i) The firm has done business in the Marshall Islands on a continuing basis for not less than three years prior to the issuance date of the solicitation;

(ii) Substantially all of the firm's directors of local operations, senior staff and operating personnel are resident in the Marshall Islands; and

(iii) Most of the operating equipment and physical plant are in the Marshall Islands.

(2) "United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

(i) The corporate headquarters are in the United States;

(ii) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(iii) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms or Marshallese firms will be evaluated by adding 20 percent to the offer, unless application of the factor would not result in award to a United States firm.

(c) *Status.* The offeror is _____ a United States firm; _____ a Marshallese firm; _____Other.]

Subpart D—Conditions Governing the Nationality of Suppliers of Services for USAID Financing

§ 228.30 Purpose.

Sections 228.31 through 228.37 set forth the nationality rules governing the eligibility for USAID financing of suppliers of services which are not commodity-related. These rules may be waived in accordance with the provisions in subpart F of this part.

§ 228.31 Individuals and privately owned commercial firms.

(a) In order to be eligible for USAID financing as a supplier of services, whether as a contractor or subcontractor at any tier, an individual must meet the requirements of paragraph (a)(1) of this section (except that individual personal services contractors are not subject to this requirement), and a privately owned commercial firm must meet the requirements in paragraph (a)(2) of this section. In the case of the categories described in paragraphs (a)(2) (i) and (ii) of this section, the certification requirements in paragraph (b) of this section must be met.

(1) An individual must be a citizen of and have a principal place of business in a country or area included in the authorized geographic code, or a non-U.S. citizen lawfully admitted for permanent residence in the United States whose principal place of business is in the United States;

(2) A privately owned commercial (i.e., for profit) corporation or partnership must be incorporated or legally organized under the laws of a country or area included in the authorized geographic code, have its principal place of business in a country or area included in the authorized geographic code, and meet the criteria set forth in either paragraph (a)(2)(i) or (ii) of this section:

(i) The corporation or partnership is more than 50 percent beneficially owned by individuals who are citizens of a country or area included in the authorized geographic code or non-U.S. citizens lawfully admitted for permanent residence in the United States. In the case of corporations, "more than 50 percent beneficially owned" means that more than 50 percent of each class of stock is owned by such individuals; in the case of partnerships, "more than 50 percent beneficially owned" means that more than 50 percent of each category of partnership interest (e.g., general, limited) is owned by such individuals.

(With respect to stock or interest held by companies, funds or institutions, the ultimate beneficial ownership by individuals is controlling.)

(ii) The corporation or partnership:

(A) Has been incorporated or legally organized in the United States for more than 3 years prior to the issuance date of the invitation for bids or requests for proposals,

(B) Has performed within the United States administrative and technical, professional, or construction services, similar in complexity, type and value to the services being contracted (under a contract, or contracts, for services) and derived revenue therefrom in each of the 3 years prior to the date described in paragraph (a)(2)(ii)(A) of this section,

(C) Employs United States citizens and non-U.S. citizens lawfully admitted for permanent residence in the United States in more than half its permanent full-time positions in the United States and more than half of its principal management positions, and

(D) Has the existing technical and financial capability in the United States to perform the contract.

(b) A duly authorized officer of a firm or nonprofit organization shall certify that the participating firm or nonprofit organization meets either the requirements of paragraph (a)(2) (i) or (ii) of this section or § 228.32. In the case of corporations, the certifying officer shall be the corporate secretary. With respect to the requirements of paragraph (a)(2)(i) of this section, the certifying officer may presume citizenship on the basis of the stockholders' record address, provided the certifying officer certifies, regarding any stockholder (including any corporate fund or institutional stockholder) whose holdings are material to the corporation's eligibility, that the certifying officer knows of no fact which might rebut that presumption.

§ 228.32 Nonprofit organizations.

(a) Nonprofit organizations, such as educational institutions, foundations, and associations, must meet the criteria listed in this section and the certification requirement in § 228.31(b) to be eligible as suppliers of services, whether as contractors or subcontractors at any tier. Any such institution must:

(1) Be organized under the laws of a country or area included in the authorized geographic code;

(2) Be controlled and managed by a governing body, a majority of whose members are citizens of countries or areas included in the authorized geographic code; and

(3) Have its principal facilities and offices in a country or area included in the authorized geographic code.

(b) International agricultural research centers and such other international research centers as may be, from time to time, formally listed as such by the USAID Assistant Administrator, Global Bureau, are considered to be of U.S. nationality.

§ 228.33 Foreign government-owned organizations.

Firms operated as commercial companies or other organizations (including nonprofit organizations other than public educational institutions) which are wholly or partially owned by foreign governments or agencies thereof are not eligible for financing by USAID as contractors or subcontractors, except if their eligibility has been established by a waiver approved by USAID in accordance with § 228.54. This does not apply to foreign government ministries or agencies.

§ 228.34 Joint ventures.

A joint venture or unincorporated association is eligible only if each of its members is eligible in accordance with §§ 228.31, 228.32, or 228.33.

§ 228.35 Construction services from foreign-owned local firms.

(a) When the estimated cost of a contract for construction services is $5 million or less and only local firms will be solicited, a local corporation or partnership which does not meet the test in § 228.31(a)(2)(i) for eligibility based on ownership by citizens of the cooperating country (i.e., it is a foreign-owned local firm) will be eligible if it is determined by USAID to be an integral part of the local economy. However, such a determination is contingent on first ascertaining that no United States construction company with the required capability is currently operating in the cooperating country or, if there is such a company, that it is not interested in bidding for the proposed contract.

(b) A foreign-owned local firm is an integral part of the local economy provided:

(1) It has done business in the cooperating country on a continuing basis for not less than three years prior to the issuance date of invitations for bids or requests for proposals to be financed by USAID;

(2) It has a demonstrated capability to undertake the proposed activity;

(3) All, or substantially all, of its directors of local operations, senior staff and operating personnel are resident in the cooperating country;

(4) Most of its operating equipment and physical plant are in the cooperating country.

§ 228.36 Ineligible suppliers.

Citizens of any country or area not included in Geographic Code 935, and firms and organizations located in, organized under the laws of, or owned in any part by citizens or organizations of any country or area not included in Geographic Code 935 are ineligible for financing by USAID as suppliers of services, or as agents in connection with the supply of services. The limited exceptions to this rule are:

(a) Individuals lawfully admitted for permanent residence in the United States are eligible, as individuals or owners, regardless of their citizenship, and

(b) The Procurement Executive may authorize the eligibility of organizations having minimal ownership by citizens or organizations of non-Geographic Code 935 countries.

Case Management Record

discussion

Case: 97-D307	*Date*: 28-Oct-97	
Title: Construction in Foreign Countries		
Priority:	*Submitted By*: Army Policy	*Originator Code:* L
Case Manager: (b)(6)	*Case References*:	
FAR Cites:	*DFARS Cites*: 236.274	
Cognizant Committees: Construction		
Coordination: 5		
Recommendation: Discuss 13 November		

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CECC-C

MEMORANDUM FOR DIRECTOR, DAR COUNCIL

SUBJECT: DAR Case 97-D307, Construction in Foreign Countries

I. PROBLEM:

Section 112 of the FY 1998 Military Construction Appropriations Act enacts a 20 percent price evaluation preference for U.S. contractors for projects funded with appropriations under the act for military construction in U.S. territories and possessions in the Pacific, on Kwajalein Atoll, or in counties bordering the Arabian Gulf. There is an exception for Marshallese contractors. (See Tab B.) The 1997 Military Construction Appropriations Act contained a somewhat similar restriction.

II. RECOMMENDATION:

Publish for public comment and adopt an interim rule as set forth at Tab A.

III. DISCUSSION:

The statute is not discretionary; we are required to comply. It is, however generally agreed that requirements in appropriations acts apply only to the funds appropriated in that particular act – unless the specific restriction reappears in subsequent appropriations acts. See, for example, DFARS Subpart 225.7000 and DFARS 225.7002-1(a). As stated above, this is similar to a restriction in the FY 1997 Military Construction (MILCON) Appropriations Act, which, however, did not include the exception for Marshallese contractors. Accordingly, the new coverage limits its applicability to FY 1998 MILCON funds.

No new information is needed by the Government to apply this restriction. The requirement applies only to contracts "estimated by the Government to exceed $1,000,000." In accordance with FAR 36.204, Disclosure of the magnitude of construction projects, the Government already discloses in the solicitation the

Government's estimate of the "price range" of the contract. "Price ranges" are stated in 8 increments that include a break at $1,000,000 --

> * * * (e) Between $ 500,000 and $ 1,000,000.
> (f) Between $ 1,000,000 and $ 5,000,000. * * *

Awards to "foreign [non-U.S.] contractors" are restricted. The definition of "United States firm" already appears in DFARS 252.236-7010. A definition of "Marshallese contractor" is added.

IV. COLLATERALS:

Federal Register Notice: This rule would have significant effect beyond agency internal operating procedures. Public comments concerning this rule should be invited through a Federal Register notice in accordance with 41 U.S.C. 418b and FAR 1.301(b). A determination should be made that urgent and compelling reasons exist to publish this interim rule prior to affording the public an opportunity to comment. This interim rule implements Section 112 of the FY 1998 Military Construction Appropriations Act.

Regulatory Flexibility Act: This rule is not expected 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., because MILCON prime contract awards over $1,000,000 to small business for work in the Pacific and in the Arabian Gulf are not substantial. It is estimated that only 12 such contracts are awarded each year. An initial regulatory flexibility analysis has not, therefore, been performed. Comments as to the economic impact are invited from small businesses and other interested parties. Comments from small entities concerning the interim rule will also be considered in accordance with Section 610 of the Act. Such comments must be submitted separately and cite DAR Case 97-D307.

Paperwork Reduction Act: The Paperwork Reduction Act applies. It is estimated that the new provision at DFARS 252.236-7010 will increase, by 5 hours, the annual paperwork burden associated with DFARS Part 236 and related provisions/clauses. Office of Management and Budget (OMB) approval is needed.

V. COORDINATION:

The DoD members of the committee indicated below participated and concur in this report.

FOR THE CONSTRUCTION, A-E
AND BONDS COMMITTEE:

Laura K. Meeker, Chair
Joe Schneider, Navy
Doris Gibson, Air Force

DFARS 236.574 Construction in foreign countries.

Renumber present 236.574(a) as 236.574(a)(1) and add a new 236.574(a)(2).

(a)(1) In accordance with Section 112 of Public Law 104-32 ~~and similar sections in subsequent military construction appropriations acts~~, military construction contracts that are estimated to exceed $ 1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, shall be awarded only to United States firms, unless the lowest responsive and responsible offer of a United States firm exceeds the lowest responsive and responsible offer of a foreign firm by more than 20 percent.

(2) In accordance with Section 112 of the FY 1998 Military Construction Appropriations Act (Public Law 105-45, 111 Stat. 1142), military construction contracts that are estimated to exceed $ 1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, shall be awarded only to United States firms, unless the lowest responsive and responsible offer of a United States firm exceeds the lowest responsive and responsible offer of a foreign firm by more than 20 percent. This restriction does not apply to contract awards for military construction on Kwajalein Atoll for which the lowest responsive and responsible bid is submitted by a Marshallese contractor.

(b) [remaining unchanged]

236.570 -- Additional provisions and clauses.

* * * * *

(c)(1) Use the provision at 252.236-7010, Overseas Military Construction-Preference for United States Firms, in solicitations for military construction contracts that are (i) funded by appropriations ~~under the FY 1997 Military Construction Appropriations Act (Public Law 104-196)~~, (ii) located in U.S. territories and possessions in the Pacific, on Kwajalein Atoll, or in counties bordering the Arabian Gulf and (iii) estimated by the Government to have a price exceeding $1,000,000. ~~that are estimated to exceed $ 1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf.~~ **Tab A**

(2) Use the provision at 252.236-7010, Overseas Military Construction -- Preference for United States Firms, **with Alternate I**, in solicitations and contracts for military construction that is (i) funded by appropriations under the FY 1998 Military Construction Appropriations Act ~~(Public Law 105-45, 111 Stat. 1142), (ii)~~ located ~~in U.S. territories and possessions in the Pacific~~, on Kwajalein Atoll, ~~or in counties bordering the Arabian Gulf and (iii) estimated by the Government to have a price exceeding $1,000,000.~~

252.236-7010 -- Overseas Military Construction--Preference for United States Firms.

As prescribed in 236.570(c)(1) and (2), use the following provision:

OVERSEAS MILITARY CONSTRUCTION-PREFERENCE FOR UNITED STATES FIRMS (JAN 1997)

(a) Definition.

"United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

(1) The corporate headquarters are in the United States;

(2) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(3) The firm employs United States citizens in key management positions.

(b) Evaluation. Offers from firms that do not qualify as United States firms will be evaluated by adding 20 percent to the offer.

(c) Status. The offeror --- is, --- is not a United States firm.

(End of provision)

ALTERNATE I

As prescribed in 236.570(c)(2), add the following definition to paragraph (a) and substitute paragraphs (b) and (d) when the contract is for work on Kwajalein Atoll :

(a) "Marshallese firm," as used in this provision, means a firm organized or existing under the laws of the Marshall Islands.

(b) Evaluation. Offers from firms that do not qualify as United States firms or as Marshallese firms will be evaluated by adding 20 percent to the offer.

(c) Status. The offeror --- is, --- is not a United States firm. The offeror --- is, --- is not a Marshallese firm.

(End of provision)

UNITED STATES PUBLIC LAWS, 105th Congress -- 1st Session

Public Law 105-45, FY 1998 Military Construction Appropriations Act,
111 Stat. 1142, September 30, 1997 [H.R. 2016]

An Act

Making appropriations for military construction, family housing, and base realignment and closure for the Department of Defense for the fiscal year ending September 30, 1998, and for other purposes.

* * * *

SEC. 112. None of the funds appropriated in Military Construction Appropriations Acts for military construction in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, may be used to award any contract estimated by the Government to exceed $ 1,000,000 to a foreign contractor: Provided , That this section shall not be applicable to contract awards for which the lowest responsive and responsible bid of a United States contractor exceeds the lowest responsive and responsible bid of a foreign contractor by greater than 20 per centum: Provided further , That this section shall not apply to contract awards for military construction on Kwajalein Atoll for which the lowest responsive and responsible bid is submitted by a Marshallese contractor.

Tab B

Case Management Record

Discussion Handout

DFARS Case 97-D307	**Date** May 13, 1998	
Title Construction in Foreign Countries		
Priority 1	**Submitted By** (b)(6)	**Origination Code** A
Case Manager (b)(6)	**Case References**	
FAR Cites	**DFARS Cites** 236.102, 236.274, 236.570, and 252.236-7010.	
Cognizant Committees Construction		
Coordination FC		
Recommendation Convert to final rule without change.		

An interim rule was published on March 9, 1998 as Item XXIII of DAC 91-13 (63 FR 11522). Public comment were requested on or before May 8, 1998. No public comments were received.

MAY 13 1998

DEPARTMENT OF DEFENSE

48 CFR Parts 201, 202, 204, 209, 212, 214, 215, 216, 217, 219, 223, 225, 226, 227, 229, 231, 232, 233, 234, 235, 236, 237, 239, 241, 242, 243, 250, 252, 253, and Appendices G and I to Chapter 2

[Defense Acquisition Circular 91-13]

Defense Federal Acquisition Regulation Supplement; Miscellaneous Amendments

AGENCY: Department of Defense (DoD).

ACTION: Interim and final rules.

SUMMARY: Defense Acquisition Circular 91-13 amends the Defense Federal Acquisition Regulation Supplement (DFARS) to revise, finalize, or add language on the Defense Acquisition Regulations System, acquisition of commercial items, multiyear contracting, interagency acquisitions under the Economy Act, small business programs, the environment, foreign acquisition, utilization of Indian organizations, foreign patent interchange agreements, taxes, contract cost principles and procedures, contract financing, disputes and appeals, major system acquisition, research and development contracting, construction and architect-engineer contracts, service contracting, acquisition of information technology, acquisition of utility services, contract administration, extraordinary contractual actions, and contract reporting.

DATES: Effective date: March 9, 1998.

Comment date: Comments on the interim rule (Item XXIII: Sections 236.102, 236.274, 236.570, 252.236-7010, and 252.236-7012) should be submitted in writing to the address shown below on or before May 8, 1998 to be considered in the formulation of the final rule.

ADDRESSES: Interested parties should submit written comments on the interim rule (Item XXII) to: Defense Acquisition Regulations Council, Attn: Ms. Amy Williams PDUSD(A&T)DP(DAR), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062. Telefax number (703) 602-0350. E-mail comments submitted over the Internet should be addressed to: dfars@acq.osd.mil. Please cite DFARS Case 97-D307 in all correspondence related to this rule. E-mail comments should cite DFARS Case 97-D307 in the subject line.

FOR FURTHER INFORMATION CONTACT: Item XXIII—Ms. Amy Williams, (703) 602-0131.

All other items—Ms. Susan Buckmaster, (703) 602-0131.

SUPPLEMENTARY INFORMATION:

A. Background

Defense Acquisition Circular (DAC 91-13) includes 31 rules and miscellaneous editorial amendments. Eight of the rules (Items II, III, IV, V, XIII, XVI, XVII, and XXIX) were published previously in the **Federal Register** and thus are not included as part of this notice of amendments to the Code of Federal Regulations. These eight rules are included in the DAC to incorporate the previously published amendments into the loose-leaf edition of the DFARS.

B. Determination to Issue an Interim Rule

DAC 91-13, Item XXIII

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish this interim rule prior to affording the public an opportunity to comment. This rule amends the DFARS to implement Section 112 of the Military Construction Appropriations Act for Fiscal Year 1998 (Public Law 105-45). Section 112 provides that no military construction appropriations may be used to award, to a foreign contractor, any contract estimated to exceed $1,000,000 for military construction in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf; except for contract awards for which the lowest responsive and responsible bid of a United States firm exceeds the lowest responsive and responsible bid of a foreign firm by greater than 20 percent; and except for contract awards for military construction on Kwajalein Atoll for which the lowest responsive and responsible bid is submitted by a Marshallese firm. Section 112 was effective upon enactment on September 30, 1997. Comments received in response to the publication of this interim rule will be considered in formulating the final rule.

C. Regulatory Flexibility Act

DAC 91-13, Items I, VII, VIII, IX, XII, XV, XXI, XXII, XXV, XXVI, and XXVII

These final rules do not constitute significant revisions within the meaning of Federal Acquisition Regulation 1.501 and Public Law 98-577, and publication for public comment is not required. However, comments from small entities concerning the affected DFARS subparts will be considered in accordance with Section 610 of the Regulatory Flexibility Act (5 U.S.C. 610). Please cite the applicable DFARS case number in correspondence.

DAC 91-13, Items VI, XI, XIV, XVIII, XX, XXIV, and XXXI

DoD certifies that these rules 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.*, because:

Item VI, Multiyear Contracting and Other Miscellaneous Provisions—The rule primarily reorganizes and clarifies existing DFARS guidance pertaining to multiyear contracting, updates internal Government operating procedures for processing Economy Act orders, and makes minor amendments to reflect existing statutory and regulatory requirements.

Item XI, Duty-Free Entry—The rule does not constitute a change in policy but is a clarification of implementing procedures pertaining to duty-free entry of supplies and the North American Free Trade Agreement.

Item XIV, Contingent Fees—Foreign Military Sales—Most firms that pay or receive contingent fees on foreign military sales are not small business concerns.

Item XVIII, Cost Reimbursement Rules for Indirect Costs—Most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive, fixed-price basis and do not require application of the FAR or DFARS cost principles.

Item XX, Earned Value Management Systems—The rule only applies to contractors for certain major defense programs, and eliminates the requirement that such contractors use a unique management control system for DoD contracts.

Item XXIV, Architect-Engineer Selection Process—The rule streamlines, but does not significantly alter, the process for selection of firms for architect-engineer contracts.

Item XXXI, Reporting of Contract Performance Outside the United States—Most contractors that submit reports of contract performance outside the United States are not small business concerns.

DAC 91-13, Item XXIII

This interim rule is not expected 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.*, because the DFARS changes contained in this rule apply only to contracts for military construction on Kwajalein Atoll that are estimated to exceed $1,000,000; DoD awards approximately two such

contracts annually. An initial regulatory flexibility analysis has therefore not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected DFARS subparts also will be considered in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 97–D307 in correspondence.

DAC 91–13, Items X, XIX, XXVIII, and XXX

A final regulatory flexibility analysis has been performed for each of these rules. A copy of the analyses may be obtained from the address specified herein. Please cite the applicable DFARS case number in correspondence. The analyses are summarized as follows:

Item X, Buy American Act Exception for Information Technology Products (DFARS Case 97–D022)

This final rule implements the determination by the Under Secretary of Defense (Acquisition and Technology) (USD(A&T)) that it is not in the public interest to apply the restrictions of the Buy American Act to U.S. made information technology products, in acquisitions subject to the Trade Agreements Act. The legal basis for the rule is 41 U.S.C. 10a, which provides an exception to the requirements of the Buy American Act if the head of the agency determines that application of the restrictions is not in the public interest. The objective of the rule is to reduce burdensome recordkeeping and tracking requirements imposed on U.S. manufacturers of information technology products and to remove the competitive disadvantage imposed on some U.S. manufacturers of information technology products, when competing with foreign offerors of eligible information technology products against an offeror of an information technology product that qualifies as a domestic product under the Buy American Act. In acquisitions subject to the Trade Agreements Act, the rule provides that offers of U.S. made information technology products in Federal Supply Group 70 or 74 will be evaluated without regard to whether the product qualifies as a domestic product. The different rules of origin under the Buy American Act and the Trade Agreements Act result in disproportionately burdensome recordkeeping requirements on firms offering information technology products, because eligible offers under the Trade Agreements Act are exempt from the Buy American Act, but offers of U.S. made products are not exempt. This rule will relieve U.S. manufacturers of information technology products from the burden of researching and documenting the origin of components for information technology products, because the Buy American Act component test no longer applies. The rule will also simplify the evaluation of offers because, for acquisitions subject to the determination, there is only one class of U.S. made products, and no preference for domestic products. There were no public comments in response to the initial regulatory flexibility analysis prepared for the proposed rule published in the **Federal Register** at 62 FR 47407 on September 9, 1997. The rule will apply to all offerors/contractors offering information technology products in Federal Supply Group 70 or 74 to DoD, in acquisitions valued at $190,000 or more. Based on DD Form 350 data from the Washington Headquarters Services, in fiscal year 1996, DoD awarded 735 contracts meeting these criteria to 612 contractors, of which 214 were small businesses. The final rule does not impose any new reporting or recordkeeping requirements. The rule will result in a reduction of paperwork burden on offerors. There are no significant alternatives to the rule that would accomplish the stated objectives yet reduce any negative impact on small entities. This rule is expected to have a generally positive impact on small entities, because USD(A&T) has determined that removal of the competitive disadvantage for some U.S. made information technology end products, and the removal of burdensome requirements on U.S. manufacturers to separately track domestic and foreign components, outweighs the possible increase in use of foreign components.

Item XIX, Finance (DFARS Case 95–D710)

This final rule supplements the FAR rules published as Item VII of Federal Acquisition Circular 90–32 on September 18, 1995 (60 FR 48272), and Items I and IV of Federal Acquisition Circular 90–33 on September 26, 1995 (60 FR 49707 and 60 FR 49728). These DFARS revisions include the addition of 232.2, Commercial Item Purchase Financing, and 232.10, Performance-Based Payments; the deletion of 232.173, Reduction or Suspension of Contract Payments Upon Finding of Fraud, and 232.970, Payment of Subcontractors, since equivalent coverage is now provided in the FAR; and a number of editorial changes to reflect revisions made in the FAR. One of the issues raised by several respondents relates to the prompt payment periods specified in the rule: 30 days for commercial advance payments, and 14 days for commercial interim and performance-based payments. The respondents advocate the 7 days now allowed for progress payments. The DoD Contract Finance Committee made an assessment that no changes should be made to the prompt payment times in the DFARS rule. The payment period (14 days) for performance-based payments reflects the likely additional time required for verification of the contractor's claimed performance and analysis of what often will be a relatively extensive compilation of performance events. Thus, more time is allowed than for cost-based progress payments (7 days). The commercial advance payments period reflects the anticipated timing of most such requests. These requests for payment are expected to occur at the beginning of the contract, possibly being keyed to the actual contract signing date. Thus, a 30-day period has been allowed to enable the payment office to receive the contract, enter it into the payment office computer system, and process the contractor's request for payment. The commercial interim payment normally is expected to be submitted during the life of the contract, and after the payment office is prepared to process payment of such requests. A 14-day payment period has been adopted as a payment time reasonably capable of accommodating the wide diversity anticipated for commercial payment terms. The prompt payment periods established in the DFARS are shorter than the equivalent standard prompt payment periods (30 days) in FAR 32.906, and, thus, are more beneficial for small entities than the existing FAR policy. A second issue raised by several respondents concerns the provisions relating to the list of financial and other information that the Government must obtain to determine the financial responsibility of contractors. One respondent indicated its "concern with the substantial burdens that will be placed on the contracting officer and offeror." The requirement, stated in section 232.072 of the rule, was transferred verbatim from DFARS 232.172. This DFARS rule makes no policy change, only an editorial change to move the DFARS language to correspond to certain changes made to the FAR. In addition, the contracting officer is only required to obtain information sufficient to make a determination of the contractor's

financial responsibility. The changes made to the DFARS by this rule will apply to large and small entities whose DoD contracts include performance-based or commercial (advance or interim) type of financing. For the 11 months of available fiscal year 1997 DD Form 350 data (October 1996 through August 1997), less than 0.5 percent of small business contracts (98 out of a total of 40,102) used commercial or performance-based financing. Accordingly, the final rule does not impact a significant number of small entities. The rule imposes no reporting, recordkeeping, or other compliance requirements. Various alternatives involving shorter prompt payment periods were considered, but, as previously explained, were rejected since their implementation would be exceptionally costly and burdensome on payment offices.

Item XXVIII, Certification of Requests for Equitable Adjustment (DFARS Case 97-D302)

This rule finalizes, with changes, the interim rule published in the **Federal Register** on July 11, 1997 (62 FR 37146). The interim rule amended the DFARS to implement 10 U.S.C. 2410(a), which requires contractors to certify that requests for equitable adjustment that exceed the simplified acquisition threshold are made in good faith and that the supporting data are accurate and complete. There were no comments in response to the initial regulatory flexibility analysis prepared for the interim rule. The primary impact of the rule relates to requests in the range of $100,000 to $500,000, because requests in excess of $500,000 generally require submission of cost or pricing data and certification thereof. Many of the firms requesting equitable adjustment in amounts of $100,000 to $500,000 are construction contractors. It is estimated that the rule will affect approximately 330 small entities annually. Accounting skills will be necessary to provide the cost data to support the certification. The rule minimizes the economic impact on small entities, because the certification requirements of the rule apply only to requests exceeding the simplified acquisition threshold, and because the certification is limited to only that which is specifically required by 10 U.S.C. 2410(a). There is no other known alternative that would be consistent with the stated objective yet further reduce the burden on small entities.

Item XXX, Specialty Metals—Agreements With Qualifying Countries (DFARS Case 97-D007)

This final rule amends the clause at DFARS 252.225-7014 to make the exception in the clause consistent with the Berry Amendment (10 U.S.C. 2241 Note) and with the existing DFARS text at 225.7001-2(i). The objective of the rule is to clearly and accurately implement the Berry Amendment, which provides an exception to domestic source restrictions for the procurement of specialty metals, where such procurement is necessary in furtherance of agreements with foreign governments in which both governments agree to remove barriers to purchase of supplies produced in the other country. There were no public comments in response to the initial regulatory flexibility analysis or the proposed rule published in the **Federal Register** at 62 FR 23741 on May 1, 1997. The clause at DFARS 252.225-7014, Preference for Domestic Specialty Metals, is prescribed for use in all solicitations and contracts exceeding the simplified acquisition threshold that require delivery of an article containing specialty metals. The clause is prescribed for use with its Alternate I if the article containing specialty metals is for one of certain major programs. The basic clause only restricts the direct acquisition of specialty metals by the prime contractor, whereas Alternate I flows down the restriction to subcontractors at any tier. The rule does not affect the already unrestricted sources of specialty metals when acquiring qualifying country end products or when acquiring components including specialty metals for use in an end product for other than a major program. The rule does loosen the restriction on domestic specialty metals for prime contractors providing domestic or nonqualifying country end products, permitting them to incorporate specialty metals melted in a qualifying country (for both major and nonmajor programs); or qualifying country components containing specialty metals of unrestricted source for use in end products for major programs. Because the components subject to increased foreign competition are at a subcontract level, it is not possible to more specifically identify the items or whether they are produced by small business concerns. The rule imposes no new reporting, recordkeeping, or compliance requirements on offerors or contractors. One alternative considered was to require that the specialty metals incorporated in articles manufactured in a qualifying country also be melted in a qualifying country. This approach could slightly reduce the extent of foreign competition facing domestic entities. However, this approach appeared to go beyond the requirements of the statute being implemented.

D. Paperwork Reduction Act

DAC 91-13, Items I, VI, VII, VIII, IX, XII, XIV, XV, XVIII, XIX, XX, XXI, XXII, XXIV, XXV, XXVI, XXVII, and XXX

The Paperwork Reduction Act does not apply, because these rules contain no information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

DAC 91-13, Items X, XI, XXIII, XXVIII, and XXXI

The Paperwork Reduction Act applies. The Office of Management and Budget (OMB) has approved the information collection requirements as follows:

Item	OMB Control No.
X	0704-0187; 0704-0259
XI	0704-0229
XXIII	0704-0255
XXVIII	0704-0397
XXXI	0704-0229

E. Summary of Amendments

Defense Acquisition Circular (DAC) 91-13 amends the Defense Federal Acquisition Regulation Supplement (DFARS) 1991 edition. The amendments are summarized as follows:

Item I—Approval of Nonstatutory Certification Requirements (DFARS Case 97-D301)

This final rule adds a new section at DFARS 201.107 and amends 201.304 to implement Section 29 of the Office of Federal Procurement Policy Act (41 U.S.C. 425), as amended by Section 4301 of the Clinger-Cohen Act of 1996 (Public Law 104-106). Section 29 provides that a requirement for a certification by a contractor or offeror may not be included in a procurement regulation of an executive agency unless the certification requirement is specifically imposed by statute or approved in writing by the head of the executive agency.

Item II—Contract Action Reporting (DFARS Case 97-D013)

This final rule was issued by Departmental Letter 97-016, effective October 1, 1997 (62 FR 44221, August 20, 1997). The rule amends DFARS 204.670-2, 253.204-70 and 253.204-71 to revise DD Form 350 and DD Form

252.225-7027 to permit payment of contingent fees exceeding $50,000 under foreign military sales contracts if the foreign customer agrees to such fees in writing before contract award.

Item XV—Subcontracting Plans—Indian Incentives (DFARS Case 97-D309)

This final rule amends DFARS Subpart 226.1 to implement Section 8024 of the National Defense Appropriations Act for Fiscal Year 1998 (Public Law 105-56). Section 8024 provides that incentive payments under the Indian Incentive Program shall be available only to contractors that have submitted subcontracting plans pursuant to 15 U.S.C. 637, including comprehensive subcontracting plans submitted in accordance with the DoD test program.

Item XVI—Cost Principles (DFARS Case 95-D714)

This final rule was issued by Departmental Letter 97-019, effective September 8, 1997 (62 FR 47154, September 8, 1997). The rule amends DFARS Part 231 to implement Section 7202 of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355). Section 7202 prohibits the expenditure of funds to assist any DoD contractor in preparing any material, report, list, or analysis with respect to the actual or projected economic or employment impact in a particular State or congressional district of an acquisition program for which all research, development, testing, and evaluation has not been completed.

Item XVII—Allowability of Costs for Restructuring Bonuses (DFARS Case 97-D312)

This interim rule was issued by Departmental Letter 97-021, effective November 26, 1997 (62 FR 63035, November 26, 1997). The rule amends DFARS 231.205-6 to implement Section 8083 of the National Defense Appropriations Act for Fiscal Year 1998 (Public Law 105-56). Section 8083 prohibits the use of fiscal year 1998 funds to reimburse a contractor for costs paid by the contractor to an employee for a bonus or other payment in excess of the normal salary paid by the contractor to the employee, when such payment is part of restructuring costs associated with a business combination.

Item XVIII—Cost Reimbursement Rules for Indirect Costs (DFARS Case 96-D303)

This final rule removes the cost principle at DFARS 231.205-71 pertaining to defense capability preservation agreements. Section 1027 of the National Defense Authorization Act for Fiscal Year 1998 (Public Law 105-85) repealed the statute upon which this cost principle was based (Section 808 of Public Law 104-106).

Item XIX—Finance (DFARS Case 95-D710)

This final rule amends DFARS Part 232 to conform to the FAR revisions published as Item VII of FAC 90-32 and Items I and IV of FAC 90-33, which implemented provisions of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355). The rule adds a new subpart 232.2, Commercial Item Purchase Financing, and a new subpart 232.10, Performance-Based Payments; removes 232.173, Reduction or Suspension of Contract Payments Upon Finding of Fraud, and 232.970, Payment of Subcontractors, as equivalent guidance is now provided in FAR Part 32; and moves guidance pertaining to responsibility of contractors from 232.172 to 232.072, with no change in policy.

Item XX—Earned Value Management Systems (DFARS Case 96-D024)

The interim rule published in Item XXXIII of DAC 91-12 is revised and finalized. The rule amends DFARS Parts 234, 242, and 252 to recognize industry-standard guidelines for earned value management systems as an alternative to DoD-unique cost/schedule control systems under DoD contracts. The final rule differs from the interim rule in that it makes minor clarifying amendments at 234.005-70, 242.1107-70, and 252.234-7000; amends 252.234-7001 to clarify the timing of the initial application of the earned value management system and the integrated baseline reviews; and amends 252.242-7005 for consistency with the industry standard, Guidelines for Earned Value Management Systems.

Item XXI—Research and Development Definitions (DFARS Case 97-D021)

This final rule revises DFARS 235.001 to update the definitions pertaining to research and development, for consistency with the terms defined in DoD 7000.14-R, Financial Management Regulation.

Item XXII—Report of 10-Year Term Contracts (DFARS Case 97-D303)

This final rule removes DFARS 235.002, which required departments and agencies to notify Congress of any research and development contract with a period of performance exceeding 10 years. Section 1062(c) of the National Defense Authorization Act for Fiscal Year 1996 (Public Law 104-106) repealed the statute upon which this requirement was based (10 U.S.C. 2352).

Item XXIII—Construction in Foreign Countries (DFARS Case 97-D307)

This interim rule amends DFARS Part 236 and adds a new provision at 252.236-7012 to implement Section 112 of the Military Construction Appropriations Act for Fiscal Year 1998 (Public Law 105-45). Section 112 provides that no military construction appropriations may be used to award, to a foreign contractor, any contract estimated to exceed $1,000,000 for military construction in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, except for: (1) Contract awards for which the lowest responsive and responsible bid of a United States firm exceeds the lowest responsive and responsible bid of a foreign firm by more than 20 percent, and (2) contract awards for military construction on Kwajalein Atoll for which the lowest responsive and responsible bid is submitted by a Marshallese firm.

Item XXIV—Architect-Engineer Selection Process (DFARS Case 97-D015)

This final rule revises DFARS 236.602 to streamline the process for selection of firms for architect-engineer contracts. The rule eliminates requirements for formal constitution and minimum size of preselection boards; eliminates special approval requirements for selection of firms for contracts exceeding $500,000; and changes the criteria for inclusion of firms on a preselection list from "the maximum practicable number of qualified firms" to "the qualified firms that have a reasonable chance of being considered as most highly qualified by the selection board."

Item XXV—Overseas Architect-Engineer Services (DFARS Case 97-D034)

This final rule amends DFARS 236.609-70 to clarify the prescription for use of the provision at 252.236-7011, Overseas Architect-Engineer Services—Restriction to United States Firms. The provision is used in solicitations for architect-engineer contracts that are funded with military construction appropriations; estimated to exceed $500,000; and to be performed in Japan, in any North Atlantic Treaty Organization member country, or in countries bordering the Arabian Gulf.

energy conversion, materials and structures, and personnel support.

(b) *Applied research* (Category 6.2) means effort that translates promising basic research into solutions for broadly defined military needs, short or major development projects. This type of effort may vary from fairly fundamental applied research to sophisticated bread-broad hardware, study, programming, and planning efforts that establish the initial feasibly and practicality of proposed solutions to technologies challenges. It includes studies, investigations, and nonsystem specific development efforts. The dominant characteristic of this category of effort is that it be pointed toward specific military needs with a view toward developing and evaluating the feasibility and practicability of proposed solutions and determining their parameters.

(c) *Advanced technology development* (Category 6.3A) means all efforts that have moved into the development and integration of hardware for field experiments and tests. The results of this type of effort are proof of technological feasibility and assessment of operability and producibility rather than the development of hardware for Service use. Projects in this category have a direct relevance to identified military needs. Advanced technology development is system specific (particularly for major platforms, i.e., aircraft, ships, missiles, and tanks, etc.) and includes advanced technology development that is used to demonstrate the general military utility or cost reduction potential of technology when applied to different types of military equipment or techniques. Advanced technology developments also includes evaluation and synthetic environment and proof-of-principle demonstrations in field exercises to evaluate system upgrades or provide new operational capabilities.

(d) *Demonstration and validation* (Category 6.3B) means all efforts necessary to evaluate integrated technologies in as realistic an operating environment as possible to assess the performance or cost reduction potential of advanced technology. The demonstration and validation phase is system specific and also includes advanced technology demonstrations that help expedite technology transition from the laboratory to operational use.

(e) *Engineering and manufacturing development* (Category 6.4) means those projects in engineering and manufacturing development for Service use but that have not received approval for full-rate production. This area is characterized by major line item projects, and program control will be exercised by review of individual projects. Engineering development includes engineering and manufacturing development projects consistent with the definitions within DoDD 5000.1.

(f) *Management support* (Category 6.5) means research and development effort directed toward support of installations or operations required for general research and development use. Included would be test ranges, military construction, maintenance support of laboratories, operation and maintenance of test aircraft and ships, and studies and analyses in support of the research and development program. Costs of laboratory personnel, either in-house or contractor-operated, would be assigned to appropriate projects or as a line item in the basic research, applied research, or advanced technology development program areas, as appropriate.

(g) *Operational system development* (Category 6.6) means those development projects, in support of development acquisition programs or upgrades, still in engineering and manufacturing development (DoDD 5000.1) but that have received approval for production through Defense Acquisition Board or other action, or for which production funds have been included in the DoD budget submission for the budget or subsequent fiscal year. All items in this area are major line item projects that appear as research, development, test, and evaluation costs of weapon system elements in other programs. Program control will be exercised by review of individual projects.

(h) *Research and development* ordinarily covers only the following categories:

(1) Basic research.

(2) Applied research.

(3) Technology development.

(4) Demonstration/validation.

(5) Engineering and manufacturing development.

(6) Operational system development.

235.002 [Removed]

55. Section 235.002 is removed.

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

56. Section 236.102 is amended by redesignating paragraphs (3) and (4) as paragraphs (4) and (5), respectively, and by adding a new paragraph (3) to read as follows:

236.102 Definitions.

* * * * *

(3) *Marshallese firm* is defined in the provision at 252.236-7012, Military Construction on Kwajalein Atoll—Evaluation Preference.

* * * * *

57. Section 236.274 is amended by revising paragraph (a) to read as follows:

236.274 Construction in foreign countries.

(a) In accordance with Section 112 of Pub. L. 105-45, military construction contracts funded with military construction appropriations, that are estimated to exceed $1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, shall be awarded only to United States firms, unless—

(1) The lowest responsive and responsible offer of a United States firm exceeds the lowest responsive and responsible offer of a foreign firm by more than 20 percent; or

(2) The contract is for military construction on Kwajalein Atoll and the lowest responsive and responsible offer is submitted by a Marshallese firm.

* * * * *

58. Section 236.570 is amended by revising paragraph (c) to read as follows:

236.570 Additional provisions and clauses.

* * * * *

(c) Use the following provisions in solicitations for military construction contracts that are funded with military construction appropriations and are estimated to exceed $1,000,000:

(1) 252.236-7010, Overseas Military Construction—Preference for United States Firms, when contract performance will be in a United States territory or possession in the Pacific or in a country bordering the Arabian Gulf.

(2) 252.236-7012, Military Construction on Kwajalein Atoll—Evaluation Preference, when contract performance will be on Kwajalein Atoll.

* * * * *

59. Sections 236.602-2 and 236.602-4 are revised to read as follows:

236.602-2 Evaluation boards.

(a) Preselection boards may be used to identify to the section board the qualified firms that have a reasonable chance of being considered as most highly qualified by the selection board.

236.602-4 Selection authority.

(a) The selection authority shall be at a level appropriate for the dollar value and nature of the proposed contract.

(c) A finding that some of the firms on the selection report are unqualified does not preclude approval of the report, provided that a minimum of three most highly qualified firms remains. The

Earned Value Management System (Mar 1998)

(a) In the performance of this contract, the Contractor shall use an earned value management system (EVMS) that has been recognized by the cognizant Administrative Contracting Officer (ACO) as complying with the criteria provided in DoD 5000.2-R, Mandatory Procedures for Major Defense Acquisition Programs (MDAPs) and Major Automated Information System (MAIS) Acquisition Programs.

(b) If, at the time of award, the Contractor's EVMS has not been recognized by the cognizant ACO as complying with EVMS criteria (or the Contractor does not have an existing cost/schedule control system that has been accepted by the Department of Defense), the Contractor shall apply the system to the contract and shall be prepared to demonstrate to the ACO that the EVMS complies with the EVMS criteria referenced in paragraph (a) of this clause.

(c) The Government may require integrated baseline reviews. Such reviews shall be scheduled as early as practicable and should be conducted within 180 calendar days after (1) contract award, (2) the exercise of significant contract options, or (3) the incorporation of major modifications. The objective of the integrated baseline review is for the Government and the Contractor to jointly assess areas, such as the Contractor's planning, to ensure complete coverage of the statement of work, logical scheduling of the work activities, adequate resourcing, and identification of inherent risks.

(d) Unless a waiver is granted by the ACO, Contractor-proposed EVMS changes require approval of the ACO prior to implementation. The ACO shall advise the Contractor of the acceptability of such changes within 30 calendar days after receipt of the notice of proposed changes from the Contractor. If the advance approval requirements are waived by the ACO, the Contractor shall disclose EVMS changes to the ACO at least 14 calendar days prior to the effective date of implementation.

(e) The Contractor agrees to provide access to all pertinent records and data requested by the ACO or duly authorized representative. Access is to permit Government surveillance to ensure that the EVMS complies, and continues to comply, with the criteria referenced in paragraph (a) of this clause.

(f) The Contractor shall require the following subcontractors to comply with the requirements of this clause:

(Contracting Officer to insert names of subcontractors selected for application of EVMS criteria in accordance with 252.234-7000(c).)

_____

_____

_____

_____

(End of clause)

252.236-7010 [Amended]

92. Section 252.236-7010 is amended in the introductory text by revising the reference "236.570(c)" to read "236.570(c)(1)".

93. Section 252.236-7012 is added to read as follows:

252.236-7012 Military construction on Kwajalein Atoll—evaluation preference.

As prescribed in 236.570(c)(2), use the following provision:

Military Construction on Kwajalein Atoll—Evaluation Preference (Mar 1998)

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

(1) *Marshallese firm* means a local firm incorporated in the Marshall Islands, or otherwise legally organized under the laws of the Marshall Islands, that—

(i) Is more than 50 percent owned by citizens of the Marshall Islands; or

(ii) Complies with the following:

(A) The firm has done business in the Marshall Islands on a continuing basis for not less than 3 years prior to the date of issuance of this solicitation;

(B) Substantially all of the firm's directors of local operations, senior staff, and operating personnel are resident in the Marshall Islands or are U.S. citizens; and

(C) Most of the operating equipment and physical plant are in the Marshall Islands.

(2) *United States firm* means a firm incorporated in the United States that complies with the following:

(i) The corporate headquarters are in the United States;

(ii) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(iii) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms or Marshallese firms will be evaluated by adding 20 percent to the offer, unless application of the factor would not result in award to a United States firm.

(c) *Status.* The offeror is _____ a United States firm; _____ a Marshallese firm; _____ Other.

(End of provision)

252.237-7019 [Removed and Reserved]

94. Section 252.237-7019 is removed and reserved.

252.241-7000 [Amended]

95. Section 252.241-7000 is amended in the introductory text by revising the reference "241.007-70(a)" to read "241.501-70(a)".

252.241-7001 [Amended]

96. Section 252.241-7001 is amended in the introductory text by revising the reference "241.007-70(b)" to read "241.501-70(b)".

97. Section 252.242-7005 is amended by revising the clause date and paragraphs (b)(4) and (d) to read as follows:

252.242-7005 Cost/Schedule Status Report.

* * * * *

Cost/Schedule Status Report (Mar 1998)

* * * * *

(b) * * *

(4) Establishing constraints to preclude subjective adjustment of data to ensure that performance measurement remains realistic. The total allocated budget may exceed the contract budget base only after consultation with the Contracting Officer. For cost-reimbursement contracts, the contract budget base shall exclude changes for cost growth increase, other than for authorized changes to the contract scope; and

* * * * *

(d) The Government may require integrated baseline reviews. Such reviews shall be scheduled as early as practicable and should be conducted within 180 calendar days after (1) contract award, (2) the exercise of significant contract options, or (3) the incorporation of major modifications. The objective of the integrated baseline review is for the Government and the Contractor to jointly assess areas, such as the Contractor's planning, to ensure complete coverage of the statement of work, logical scheduling of the work activities, adequate resourcing, and identification of inherent risks.

* * * * *

98. Section 252.243-7002 is revised to read as follows:

252.243-7002 Requests for equitable adjustment.

As prescribed in 243.205-72, use the following clause:

Requests for Equitable Adjustment (Mar 1998)

(a) The amount of any request for equitable adjustment to contract terms shall accurately reflect the contract adjustment for which the Contractor believes the Government is liable. The request shall include only costs for performing the change, and shall not include any costs that already have been reimbursed or that have been separately claimed. All indirect costs included in the request shall be properly allocable to the change in accordance with applicable acquisition regulations.

(b) In accordance with 10 U.S.C. 2410(a), any request for equitable adjustment to contract terms that exceeds the simplified acquisition threshold shall bear, at the time of submission, the following certificate executed by an individual authorized to certify the request on behalf of the Contractor:

I certify that the request is made in good faith, and that the supporting data are accurate and complete to the best of my knowledge and belief.

_____

(Official's Name)

_____

(Title)

(c) The certification in paragraph (b) of this clause requires full disclosure of all relevant facts, including—

(1) Cost or pricing data if required in accordance with subsection 15.403-4 of the Federal Acquisition Regulation (FAR); and

(2) Information other than cost or pricing data, in accordance with subsection 15.403-3 of the FAR, including actual cost data and data to support any estimated costs, even if cost or pricing data are not required.

Official Case Record

Date: November 19, 1997	**DFARS Case:** 97-D307

Case Title: Construction in Foreign Countries

Origination: A	**Sponsor:** A	**Committee:** Construction

Case Manager: (b)(6)	**DFARS:** 236.102, 236.274, 236.570, and 252.236-7010.

Statute: Pub. L. 105-45, Section 112	**Statutory Date:**

Outside Interest (Circle): IG OFPP OMB DCAA GAO Industry Other _____

Coordination/Comments (Circle): DDP MPI CPA **CPF** DSPS FC GC Other **AR**

Action Scheduled Today: Discuss revisions to the DFARS recommended by committee and case manager.

OSD Position:

Recommend agreement with draft interim DFARS rule at TAB A.

Discussions/Actions Taken:

CAM Update: Agree to interim rule as edited

returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(3) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms will be evaluated by adding 20 percent to the offer.

(c) *Status.* The offeror _____ is, _____ is not a United States firm.

(End of provision)

[Alternate I (DATE)

As prescribed in 236.570(c)(2), substitute the following paragraphs (a), (b), and (c) in place of paragraphs (a), (b), and (c) of the basic clause:

(a)(1) "Marshallese firm," as used in this provision, means a local firm incorporated in the Marshall Islands, or otherwise legally organized under the laws of the Marshall Islands, that is more than 50 percent owned by citizens of the Marshall Islands, or, if the firm is foreign-owned, complies with the following:

(i) The firm has done business in the Marshall Islands on a continuing basis for not less than three years prior to the issuance date of the solicitation;

(ii) Substantially all of the firm's directors of local operations, senior staff and operating personnel are resident in the Marshall Islands; and

or are United States citizens

(iii) Most of the operating equipment and physical plant are in the Marshall Islands.]

(2) "United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

(i) The corporate headquarters are in the United States;

(ii) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(iii) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms or Marshallese firms will be evaluated by adding 20 percent to the offer, unless application of the factor would not result in award to a United States firm.

(c) *Status.* The offeror is _____ a United States firm; _____ a Marshallese firm; _____Other.]

Official Case Record

Date: November 5, 1997	**DFARS Case:** 97-D307

Case Title: Construction in Foreign Countries

Origination: A	**Sponsor:** A	**Committee:** Construction

Case Manager: (b)(6)	**DFARS:** 236.102, 236.274, 236.570, and 252.236-7010.

Statute: Pub. L. 105-45, Section 112	**Statutory Date:**

Outside Interest (Circle): IG OFPP OMB DCAA GAO Industry Other _____

Coordination/Comments (Circle): DDP MPI CPA **CPF** DSPS FC GC Other **AR**

Action Scheduled Today: Discuss revisions to the DFARS recommended by committee and case manager. TAB A - Draft DFARS interim rule (case manager); TAB B - Committee Report; TAB C - FC coordination.

OSD Position:

Recommend agreement with draft interim DFARS rule at TAB A.

Discussions/Actions Taken:

CAM Update: Defer discussion until 11/19

DFARS Case 97-D307
Construction in Foreign Countries
Draft Interim Rule - (Revised definition of Marshallese firm)

* * * * *

PART 225—FOREIGN ACQUISITION

* * * * *

225.7003 Restriction on overseas military construction.
For restriction on award of military construction contracts to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, see 236.274(a).

* * * * *

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

* * * * *

236.102 Definitions.

* * * * *

[(3) "Marshallese firm" is defined in Alternate I of the provision at 252.236-7010, Overseas Military Construction—Preference for United States Firms.]

(~~3~~**[4]**)"Network analysis system" means recognized scheduling systems that show the duration, sequential relationship, and interdependence of various work activities, e.g., critical path method.

(4**[5]**)"United States firm" is defined in the provisions at 252.236-7010, Overseas Military Construction--Preference for United States Firms, and 252.236-7011, Overseas Architect-Engineer Services--Restriction to United States Firms.

* * * * *

236.274 Construction in foreign countries.

(a) In accordance with Section 112 of Pub. L. ~~104-32~~ **[105-45]** ~~and similar sections in subsequent military construction appropriations acts~~, military construction contracts**[, funded with military construction appropriations,]** that are estimated to exceed $1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, shall be awarded only to United States firms, unless[—

(1) T~~t~~he lowest responsive and responsible offer of a United States firm exceeds the lowest responsive and responsible offer of a foreign firm by more than 20 percent**[, or**

(2) The ~~acquisition uses FY 1998 or subsequent military construction appropriations~~ contract is[1] for military construction on Kwajalein Atoll and the lowest responsive and responsible offer is submitted by a Marshallese firm].

* * * * *

236.570 Additional provisions and clauses.

* * * * *

(c)**[(1)]** Use the provision at 252.236-7010, Overseas Military Construction--Preference for United States Firms, in solicitations for military construction contracts**[, funded with military construction appropriations,]** that are estimated to exceed $1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf.

[(2) Use the provision with its Alternate I if ~~FY 1998 or subsequent military construction appropriations are used~~ the solicitation is[2] for construction on Kwajalein Atoll.]

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

* * * * *

252.236-7010 Overseas Military Construction--Preference for United States Firms. As prescribed in 236.570(c)**[(1)]**, use the following provision:

OVERSEAS MILITARY CONSTRUCTION--PREFERENCE FOR UNITED STATES FIRMS (JAN 1997)

(a) *Definition.*

"United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

(1) The corporate headquarters are in the United States;

(2) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax

---

[1] Section 112 restricts the use of "funds appropriated in Military Construction Appropriations Acts," whereas some of the other sections restrict "funds appropriated in this Act." Therefore, we conclude that this condition relating to Marshallese contractors applies to any new contract award funded by military construction appropriations.

[2] See prior footnote.

returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(3) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms will be evaluated by adding 20 percent to the offer.

(c) *Status.* The offeror _____ is, _____ is not a United States firm.

(End of provision)

[Alternate I (DATE)

As prescribed in 236.570(c)(2), substitute the following paragraphs (a), (b), and (c) in place of paragraphs (a), (b), and (c) of the basic clause:

(a)(1) "Marshallese firm," as used in this provision, means a local firm incorporated in the Marshall Islands, or otherwise legally organized under the laws of the Marshall Islands, that is more than 50 percent owned by citizens of the Marshall Islands, or, if the firm is foreign-owned, complies with the following:

(i) The firm has done business in the Marshall Islands on a continuing basis for not less than three years prior to the issuance date of the solicitation;

(ii) Substantially all of the firm's directors of local operations, senior staff and operating personnel are resident in the Marshall Islands; and

or are United States citizens

(iii) Most of the operating equipment and physical plant are in the Marshall Islands.]

(2) "United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

(i) The corporate headquarters are in the United States;

(ii) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(iii) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms or Marshallese firms will be evaluated by adding 20 percent to the offer, unless application of the factor would not result in award to a United States firm.

(c) *Status.* The offeror is _____ a United States firm; _____ a Marshallese firm; _____Other.]

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CECC-C

MEMORANDUM FOR DIRECTOR, DAR COUNCIL

SUBJECT: DAR Case 97-D307, Construction in Foreign Countries

I. PROBLEM:

Section 112 of the FY 1998 Military Construction Appropriations Act enacts a 20 percent price evaluation preference for U.S. contractors for projects funded with appropriations under the act for military construction in U.S. territories and possessions in the Pacific, on Kwajalein Atoll, or in counties bordering the Arabian Gulf. There is an exception for Marshallese contractors. (See Tab B.) The 1997 Military Construction Appropriations Act contained a somewhat similar restriction.

II. RECOMMENDATION:

Publish for public comment and adopt an interim rule as set forth at Tab A.

III. DISCUSSION:

The statute is not discretionary; we are required to comply. It is, however generally agreed that requirements in appropriations acts apply only to the funds appropriated in that particular act – unless the specific restriction reappears in subsequent appropriations acts. See, for example, DFARS Subpart 225.7000 and DFARS 225.7002-1(a). As stated above, this is similar to a restriction in the FY 1997 Military Construction (MILCON) Appropriations Act, which, however, did not include the exception for Marshallese contractors. Accordingly, the new coverage limits its applicability to FY 1988 MILCON funds.

No new information is needed by the Government to apply this restriction. The requirement applies only to contracts "estimated by the Government to exceed $1,000,000." In accordance with FAR 36.204, Disclosure of the magnitude of construction projects, the Government already discloses in the solicitation the

Atch. 2

Government's estimate of the "price range" of the contract. "Price ranges" are stated in 8 increments that include a break at $1,000,000 –

> * * * (e) Between $ 500,000 and $ 1,000,000.
> (f) Between $ 1,000,000 and $ 5,000,000. * * *

Awards to "foreign [non-U.S.] contractors" are restricted. The definition of "United States firm" already appears in DFARS 252.236-7010. A definition of "Marshallese contractor" is added.

IV. COLLATERALS:

Federal Register Notice: This rule would have significant effect beyond agency internal operating procedures. Public comments concerning this rule should be invited through a Federal Register notice in accordance with 41 U.S.C. 418b and FAR 1.301(b). A determination should be made that urgent and compelling reasons exist to publish this interim rule prior to affording the public an opportunity to comment. This interim rule implements Section 112 of the FY 1998 Military Construction Appropriations Act.

Regulatory Flexibility Act: This rule is not expected 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., because MILCON prime contract awards over $1,000,000 to small business for work in the Pacific and in the Arabian Gulf are not substantial. It is estimated that only 12 such contracts are awarded each year. An initial regulatory flexibility analysis has not, therefore, been performed. Comments as to the economic impact are invited from small businesses and other interested parties. Comments from small entities concerning the interim rule will also be considered in accordance with Section 610 of the Act. Such comments must be submitted separately and cite DAR Case 97-D307.

Paperwork Reduction Act: The Paperwork Reduction Act applies. It is estimated that the new provision at DFARS 252.236-7010 will increase, by 5 hours, the annual paperwork burden associated with DFARS Part 236 and related provisions/clauses. Office of Management and Budget (OMB) approval is needed.

V. COORDINATION:

The DoD members of the committee indicated below participated and concur in this report.

FOR THE CONSTRUCTION, A-E
AND BONDS COMMITTEE:

Laura K. Meeker, Chair
Joe Schneider, Navy
Doris Gibson, Air Force

DFARS 236.574 Construction in foreign countries.

Renumber present 236.574(a) as 236.574(a)(1) and add a new 236.574(a)(2).

(a)(1) In accordance with Section 112 of Public Law 104-32 ~~and similar sections in subsequent military construction appropriations acts~~, military construction contracts that are estimated to exceed $ 1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, shall be awarded only to United States firms, unless the lowest responsive and responsible offer of a United States firm exceeds the lowest responsive and responsible offer of a foreign firm by more than 20 percent.

(2) In accordance with Section 112 of the FY 1998 Military Construction Appropriations Act (Public Law 105-45, 111 Stat. 1142), military construction contracts that are estimated to exceed $ 1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, shall be awarded only to United States firms, unless the lowest responsive and responsible offer of a United States firm exceeds the lowest responsive and responsible offer of a foreign firm by more than 20 percent. This restriction does not apply to contract awards for military construction on Kwajalein Atoll for which the lowest responsive and responsible bid is submitted by a Marshallese contractor.

(b) [remaining unchanged]

236.570 -- Additional provisions and clauses.

* * * * *

(c)(1) Use the provision at 252.236-7010, Overseas Military Construction-Preference for United States Firms, in solicitations for military construction contracts that are (i) funded by appropriations under the FY 1997 Military Construction Appropriations Act (Public Law 104-196), (ii) located in U.S. territories and possessions in the Pacific, on Kwajalein Atoll, or in counties bordering the Arabian Gulf and (iii) estimated by the Government to have a price exceeding $1,000,000. ~~that are estimated to exceed $ 1,000,000 andare to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf.~~ **Tab A**

(2) Use the provision at 252.236-7010, Overseas Military Construction -- Preference for United States Firms, **with Alternate I**, in solicitations and contracts for military construction that is (i) funded by appropriations under the FY 1998 Military Construction Appropriations Act (Public Law 105-45, 111 Stat. 1142), (ii) located in U.S. territories and possessions in the Pacific, on Kwajalein Atoll, or in counties bordering the Arabian Gulf and (iii) estimated by the Government to have a price exceeding $1,000,000.

252.236-7010 -- Overseas Military Construction--Preference for United States Firms.

As prescribed in 236.570(c)(1) and (2), use the following provision:

OVERSEAS MILITARY CONSTRUCTION-PREFERENCE FOR UNITED STATES FIRMS (JAN 1997)

(a) Definition.

"United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

(1) The corporate headquarters are in the United States;

(2) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(3) The firm employs United States citizens in key management positions.

(b) Evaluation. Offers from firms that do not qualify as United States firms will be evaluated by adding 20 percent to the offer.

(c) Status. The offeror --- is, --- is not a United States firm.

(End of provision)

ALTERNATE I

As prescribed in 236.570(c)(2), add the following definition to paragraph (a) and substitute paragraphs © and (d) when the contract is for work on Kwajalein Atoll :

(a) "Marshallese firm," as used in this provision, means a firm organized or existing under the laws of the Marshall Islands.

(b) Evaluation. Offers from firms that do not qualify as United States firms or as Marshallese firms will be evaluated by adding 20 percent to the offer.

(c) Status. The offeror --- is, --- is not a United States firm. The offeror --- is, --- is not a Marshallese firm.

(End of provision)

UNITED STATES PUBLIC LAWS, 105th Congress -- 1st Session

Public Law 105-45, FY 1998 Military Construction Appropriations Act,
111 Stat. 1142, September 30, 1997 [H.R. 2016]

An Act

Making appropriations for military construction, family housing, and base realignment and closure for the Department of Defense for the fiscal year ending September 30, 1998, and for other purposes.

* * * *

SEC. 112. None of the funds appropriated in Military Construction Appropriations Acts for military construction in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, may be used to award any contract estimated by the Government to exceed $ 1,000,000 to a foreign contractor: Provided , That this section shall not be applicable to contract awards for which the lowest responsive and responsible bid of a United States contractor exceeds the lowest responsive and responsible bid of a foreign contractor by greater than 20 per centum: Provided further , That this section shall not apply to contract awards for military construction on Kwajalein Atoll for which the lowest responsive and responsible bid is submitted by a Marshallese contractor.

Atch 1
~~Tab B~~

INTEROFFICE MEMORANDUM

Sensitivity: COMPANY CONFIDENTIAL

Date: 03-Nov-1997 01:44pm
From: Pete Bryan
Dept: Pentagon 3C762
Tel No: (b)(2)

To: (b)(6)

Subject: DFARS Case 97-D307, Construction in Foreign Countries

Amy, I think the definition of a "Marshallese firm" should include a requirement that at least 51 percent of the firm should be owned by Marshallese. This is similar to the requirement that a small disadvantaged business concern must have at least 51 percent ownership by individuals that are both socially and economically disadvantaged. If this ownership provision is not included in the definition, it may be possible for persons other than Marshallese to own these companies and benefit from the 20 percent preference. I do not have any other comments. Pete Bryan

INTEROFFICE MEMORANDUM
(Draft)

Date:
From: (b)(2)
Dept:
Tel No:

To: Pete Bryan (b)(2)

Subject: Re: DFARS Case 97-D307, Construction in Foreign Countries

Pete: The Army is probably going to request that the DAR Council stay out of this, and let the Army implement it, since only the Army does construction on Kwajalein Atoll. However, since we already have a clause implementing the rest of the section in the DFARS, there is some precedent for dealing with this variation for Kwajalein Atoll in the DFARS, even though it affects only the Army.

Apparently the firm which this law was intended to benefit is not owned or operated by Marshallese citizens.

If we decide to go ahead with DFARS coverage, I have done further research and propose the attached revised definition, based on the regulations at 22 CFR 228, relating to the nationality rule for suppliers of services of the Agency for International Development (referenced in 48 U.S.C. 1906, Construction contract assistance, relating to assitance for the Governemnts of the Federated States of Micronesia and of the Marshall Islands). Any comments?
(b)(6)

DFARS Case 97-D307
Construction in Foreign Countries
Draft Interim Rule - (Revised definition of Marshallese firm)

(a)(1) "Marshallese firm," as used in this provision, means a local firm incorporated in the Marshall Islands, or otherwise legally organized under the laws of the Marshall Islands, that is more than 50 percent owned by citizens of the Marshall Islands, or, if the firm is foreign-owned, complies with the following:

(i) The firm has done business in the Marshall Islands on a continuing basis for not less than three years prior to the issuance date of the solicitation;

(ii) Substantially all of the firm's directors of local operations, senior staff and operating personnel are resident in the Marshall Islands; and

(iii) Most of the operating equipment and physical plant are in the Marshall Islands.]

INTEROFFICE MEMORANDUM

Sensitivity: COMPANY CONFIDENTIAL

Date: 03-Nov-1997 03:16pm
From: Pete Bryan
Dept: Pentagon 3C762
Tel No: (b)(2)

To: (b)(6)

Subject: Re: DFARS Case 97-D307, Construction in Foreign Countries

Amy, as always your work looks good. I have no other comments. Pete