

[Federal Register: January 15, 2009 (Volume 74, Number 10)]
[Rules and Regulations]
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From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr15ja09-27]

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203, 209, and 252

RIN 0750-AG07

Defense Federal Acquisition Regulation Supplement; Senior DoD
Officials Seeking Employment With Defense Contractors (DFARS Case 2008-
D007)

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

ACTION: Interim rule with request for comments.

SUMMARY: DoD has issued an interim rule amending the Defense Federal
Acquisition Regulation Supplement (DFARS) to implement Section 847 of
the National Defense Authorization Act for Fiscal Year 2008. Section
847 addresses requirements for senior DoD officials to obtain a post-
employment ethics opinion before accepting a position from a DoD
contractor within two years after leaving DoD service.

DATES: Effective date: January 15, 2009.

Comment date: Comments on the interim rule should be submitted in
writing to the address shown below on or before March 16, 2009, to be
considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2008-D007,
using any of the following methods:

[cir] Federal eRulemaking Portal: <http://www.regulations.gov>.

Follow the instructions for submitting comments.

[cir] E-mail: dfars@osd.mil. Include DFARS Case 2008-D007 in the
subject line of the message.

[cir] Fax: 703-602-7887.

[cir] Mail: Defense Acquisition Regulations System, Attn: Ms. Angie
Sawyer, OUSD(AT&L)DPAP(DARS), IMD 3D139, 3062 Defense Pentagon,
Washington, DC 20301-3062.

[cir] Hand Delivery/Courier: Defense Acquisition Regulations
System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA
22202-3402.

Comments received generally will be posted without change to [http://
www.regulations.gov](http://www.regulations.gov), including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Angie Sawyer, 703-602-8484.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule implements Section 847 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181). Section 847 requires that a DoD official, who has participated personally and substantially in a DoD acquisition exceeding \$10 million or who has held a key acquisition position, must obtain a written opinion from a DoD ethics counselor regarding the activities that the official may undertake on behalf of a DoD contractor within two years after leaving DoD service. In addition, Section 847 prohibits a DoD contractor from providing compensation to such a DoD official without first determining that the official has received or appropriately requested a post-employment ethics opinion.

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

B. Regulatory Flexibility Act

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the requirement to verify that a prospective employee has received or requested the appropriate DoD ethics opinion should involve minimal effort on the part of a contractor. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2008-D007.

C. Paperwork Reduction Act

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

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements Section 847 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181). Section 847 requires that DoD officials that have participated personally and substantially in a DoD acquisition exceeding \$10 million, or that have held certain key acquisition positions, must obtain a written opinion from the appropriate DoD ethics

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counselor before accepting compensation from a DoD contractor within two years after leaving DoD service. In addition, Section 847 prohibits a DoD contractor from providing compensation to such a DoD official without first determining that the official has received or appropriately requested a post-employment ethics opinion. Comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Parts 203, 209, and 252

Government procurement.

Michele P. Peterson,
Editor, Defense Acquisition Regulations System.

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Therefore, 48 CFR Parts 203, 209, and 252 are amended as follows:

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1. The authority citation for 48 CFR Parts 203, 209, and 252 continues to read as follows:

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

PART 203--IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

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2. Section 203.104-4 is added to read as follows:

203.104-4 Disclosure, protection, and marking of contractor bid or proposal information and source selection information.

(d)(3) For purposes of FAR 3.104-4(d)(3) only, DoD follows the notification procedures in FAR 27.404-5(a). However, FAR 27.404-5(a)(1) does not apply to DoD.

203.104-5 [Removed]

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3. Section 203.104-5 is removed.

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4. Sections 203.171 through 203.171-4 are added to read as follows:

203.171 Senior DoD officials seeking employment with defense contractors.

203.171-1 Scope.

This section implements Section 847 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110-181).

203.171-2 Definition.

Covered DoD official as used in this section, is defined in the clause at 252.203-7000, Requirements Relating to Compensation of Former DoD Officials.

203.171-3 Policy.

(a) A DoD official covered by the requirements of Section 847 of Public Law 110-181 (a ``covered DoD official'') who, within 2 years after leaving DoD service, expects to receive compensation from a DoD

contractor, shall, prior to accepting such compensation, request a written opinion from the appropriate DoD ethics counselor regarding the applicability of post-employment restrictions to activities that the official may undertake on behalf of a contractor.

(b) A DoD contractor may not knowingly provide compensation to a covered DoD official within 2 years after the official leaves DoD service unless the contractor first determines that the official has received, or has requested at least 30 days prior to receiving compensation from the contractor, the post-employment ethics opinion described in paragraph (a) of this section.

(c) If a DoD contractor knowingly fails to comply with the requirements of the clause at 252.203-7000, administrative and contractual actions may be taken, including cancellation of a procurement, rescission of a contract, or initiation of suspension or debarment proceedings.

203.171-4 Contract clause.

Use the clause at 252.203-7000, Requirements Relating to Compensation of Former DoD Officials, in all solicitations and contracts.

PART 209--CONTRACTOR QUALIFICATIONS

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5. Section 209.406-2 is amended as follows:

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a. By redesignating paragraph (a) as paragraph (1); and

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b. By adding paragraph (2) to read as follows:

209.406-2 Causes for debarment.

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(2) Any contractor that knowingly provides compensation to a former DoD official in violation of Section 847 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181) may face suspension and debarment proceedings in accordance with 41 U.S.C. 423(e)(3)(A)(iii).

PART 252--SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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6. Section 252.203-7000 is added to read as follows:

252.203-7000 Requirements Relating to Compensation of Former DoD Officials.

As prescribed in 203.171-4, use the following clause:

REQUIREMENTS RELATING TO COMPENSATION OF FORMER DOD OFFICIALS (JAN 2009)

(a) Definition. Covered DoD official, as used in this clause, means an individual that--

(1) Leaves or left DoD service on or after January 28, 2008; and

(2)(i) Participated personally and substantially in an acquisition as defined in 41 U.S.C. 403(16) with a value in excess of \$10 million, and serves or served--

(A) In an Executive Schedule position under subchapter II of chapter 53 of Title 5, United States Code;

(B) In a position in the Senior Executive Service under subchapter VIII of chapter 53 of Title 5, United States Code; or

(C) In a general or flag officer position compensated at a rate of pay for grade O-7 or above under section 201 of Title 37, United States Code; or

(ii) Serves or served in DoD in one of the following positions: Program manager, deputy program manager, procuring contracting officer, administrative contracting officer, source selection authority, member of the source selection evaluation board, or chief of a financial or technical evaluation team for a contract in an amount in excess of \$10 million.

(b) The Contractor shall not knowingly provide compensation to a covered DoD official within 2 years after the official leaves DoD service, without first determining that the official has sought and received, or has not received after 30 days of seeking, a written opinion from the appropriate DoD ethics counselor regarding the applicability of post-employment restrictions to the activities that the official is expected to undertake on behalf of the Contractor.

(c) Failure by the Contractor to comply with paragraph (b) of this clause may subject the Contractor to rescission of this contract, suspension, or debarment in accordance with 41 U.S.C. 423(e)(3).

(End of clause)

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7. Section 252.212-7001 is amended as follows:

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a. By revising the clause date to read ``(JAN 2009)'';

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b. By redesignating paragraphs (b)(1) through (21) as paragraphs (b)(2) through (22) respectively;

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c. By adding a new paragraph (b)(1);

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d. In newly designated paragraph (b)(5) by removing ``(JUN 2005)'' and adding in its place ``(JAN 2009)''; and

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e. In newly designated paragraph (b)(13)(i) by removing ``(MAR 2007)'' and adding in its place ``(JAN 2009)'''. The new paragraph (b)(1) reads as follows:

252.212-7001 Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items.

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(b) * * *

(1) -----252.203-7000, Requirements Relating to Compensation

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of Former DoD Officials (JAN 2009) (Section 847 of Pub. L. 110-181).

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[FR Doc. E9-679 Filed 1-14-09; 8:45 am]

BILLING CODE 5001-08-P