

U.S. ARMY

PROCUREMENT POLICY

ALERT BULLETIN

NO. 96-004

May 8, 1996

The enclosed documents are forwarded for your information and any necessary implementation in advance of formal publication of a Federal Acquisition Circular (FAC) or Defense Acquisition Circular (DAC). There will be no Department of the Army-level supplementation or implementing instructions.

ENCLOSURES:

1. Departmental Letter No. 96-006 (Memorandum DP(DAR), Subject: Restructuring Costs Under Defense Contracts, dated April 18, 1996)
2. Departmental Letter No. 92-007 (Memorandum DP(DAR), Subject: Leasing of Commercial Vehicles and Equipment, dated April 18, 1996)
3. Departmental Letter No. 96-008 (Memorandum DP(DAR), Subject: Designation of Singapore, dated April 18, 1996)

This bulletin is issued by the U.S. Army Contracting Support Agency. Comments or questions should be referred to the Policy and Procedures Division, SFAE-CSA-PP, 5109 Leesburg Pike, Suite 916, Falls Church, Virginia 22041

Telephone: (703) 681-7563/DSN 761-7563

Fax: (703) 681-7580/DSN 761-7580

Email: lilleyr@sarda.army.mil

cc: colanget@sarda.army.mil

Bulletin 96-002 consists of 19 pages.

Release Approved By: TWC



OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON DC 20310-3000



18 APRIL 1996

In reply refer to
DFARS Case: 94-D316
D.L. 96-006

MEMORANDUM FOR DIRECTORS OF DEFENSE AGENCIES
DEPUTY FOR ACQUISITION AND BUSINESS MANAGEMENT,
ASN (RD&A) /ABM
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING), SAF/AQC
DIRECTOR, PROCUREMENT POLICY ASA (RD&A) / SARD-PP
DEPUTY DIRECTOR (ACQUISITION), DEFENSE LOGISTICS AGENCY

SUBJECT: Restructuring Costs Under Defense Contracts

We have amended Parts 231 and 242 of the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 818 of the FY 1995 Defense Authorization Act (Pub. L. 103-337). Section 818 restricts DoD from reimbursing external restructuring costs associated with a business combination undertaken by a defense contractor unless certain conditions are met.

The attached DFARS rule revises and finalizes the interim rule which was published as Item XXIII of DAC 91-7.

This final DEARS rule is effective immediately and will be published in a future Defense Acquisition Circular.

Eleanor R. Spector
Director, Defense Procurement

Attachment

cc: DSMC, Ft. Belvoir

**DFARS CASE 94-D316, RESTRUCTURING COSTS UNDER DEFENSE CONTRACTS
FINAL RULE**

PART 231--CONTRACT COST PRINCIPLES AND PROCEDURES

* * * * *

SUBPART 231.2-CONTRACTS WITH COMMERCIAL ORGANIZATIONS

231.205-70 [External] [r]Restructuring costs.

(a) *Scope* .

This subsection prescribes policies and procedures for allowing appropriate contractor **[external]** restructuring costs when **[net saving]** ~~allowing such costs~~ would result in net savings for DoD. This subsection also implements Section 818 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337).

(b) *Definitions*.

As used in this subsection:

(1) "Business combination. means a transaction whereby assets or operations of two **[or more]** ~~previously separate~~ companies **[not previously under common ownership or control]** are combined, whether by merger, acquisition, or sale/purchase of assets.

(2) "External restructuring activities" means restructuring activities occurring after a business combination that **[affect the operations of]** ~~involve facilities or workforce from both of the previously separate companies~~ **[not previously under common ownership or control. They do not include restructuring activities occurring after a business combination that affect the operations of only one of the companies not previously under common ownership or control, or, when there has been no business combination, restructuring activities undertaken within one company. External restructuring activities are a direct outgrowth of a business combination. They normally will be initiated within 3 years of the business combination.]**

~~(3) "Internal restructuring activities" means restructuring activities occurring after a business combination that involve facilities or workforce from only one of the previously separate companies, or, when there has been no business combination, restructuring activities undertaken within one company.~~

(3) "Restructuring activities" means nonroutine, nonrecurring, or extraordinary activities **[to combine]** ~~associated with the reduction of facilities~~ **[operations,]** or workforce, ~~or consolidation of facilities or operations (including disposal or~~

~~abandonment undertaken to effect such consolidation), in an effort to~~ **[in order to eliminate redundant capabilities,]** improve further operations [,] and reduce overall costs. Restructuring activities do not include routine or ongoing repositionings and redeployments of a contractor's productive facilities or workforce (e.g., normal plant rearrangement or employee relocation) [, **nor do they include other routine or ordinary activities charged as indirect costs that would otherwise have been incurred (e.g., planning and analysis, contract administration and oversight, or recurring financial and administrative support)]**].

(4) "Restructuring costs" means the costs, including both direct and indirect, **[of]** ~~associated with~~ restructuring activities. Restructuring costs that may be allowed include, but are not limited to, severance pay for employees, early retirement incentive payments for employees, employee retraining costs, relocation expense for retained employees, and relocation and rearrangement of plant and equipment. **[For purposes of this definition, if restructuring costs associated with external restructuring activities allocated to DoD contracts are less than \$2.5 million, the costs shall not be subject to the audit, review, and certification requirements of 231.205-70(c)(1); instead, the normal rules for determining cost allowability in accordance with FAR Part 31 shall apply.]**

(5) "Restructuring savings" means cost reductions, including both direct and indirect cost reductions, that ~~are directly associated with or result directly~~ from restructuring activities. Reassignments of cost to future periods are not restructuring savings.

(c) *Limitations on cost allowability.*

(1) Restructuring costs associated with external restructuring activities shall not be allowed unless-

(i) Such costs are allowable in accordance with FAR Part 31 and DFARS Part 231;

(ii) An audit of projected restructuring costs and restructuring savings is performed;

(iii) The cognizant administrative contracting officer (ACO) reviews the audit report and the projected costs and projected savings, determines that overall reduced costs should result for DoD, and negotiates an advance agreement in accordance with 231.205-70(d)(8); and

(iv) A certification is made by the Under Secretary of Defense (Acquisition & Technology), his Principal Deputy or designee (in all cases, an individual appointed by the President and confirmed by the Senate), that projections of future restructuring savings resulting for DoD from the business combination are based on audited cost data and should result in overall reduced costs for DoD.

(2) The **[audit, review, and]** certification required by 231.205-70(c) (1) ~~(iv)~~ shall not apply to any business combination for which payments for restructuring costs were made before August 15, 1994, or for which the cognizant ACO executed an advance agreement establishing cost ceilings based on audit/negotiation of detailed cost proposals for individual restructuring projects before August 15, 1994.

~~(3) Costs that may be incurred after a business combination but are not allowed in accordance with FAR Part 31 and DFARS Part 231 include, but are not limited to:~~

~~(i) Incorporation fees, costs of attorneys, accountants, brokers, promoters, organizers, management consultants, and investment counselors (see FAR 31.205-27).~~

~~(ii) The cost of any change in the contractor's financial structure (see FAR 31.205-27).~~

~~(iii) Interest or other costs of borrowing to finance the acquisition or merger (however represented) (see FAR 31.205-20).~~

~~(iv) When the purchase method of accounting for a business combination is used, increased depreciation, amortization, or cost of money attributable to increases in the book value of plant, equipment, and other tangible assets of the acquired company above the amount that would have been allowed if the business combination had not taken place (see FAR 31.205-52).~~

~~(v) Any costs for amortization, expensing, write off, or write down of goodwill (however represented) (see FAR 31.205-49).~~

~~(vi) Payments to employees of special compensation in excess of the contractor's normal severance pay practice if their employment terminates following a change in the management control over, or ownership of, the company or a substantial portion of its assets (see FAR 31.205-6(1) (2)).~~

~~(vii) Payments to employees of special compensation which is contingent upon the employee remaining with a contractor for a specified period of time following a change in the management control over, or ownership of, the company or a substantial portion of its assets (see FAR 31.205-6 (1) (2)).~~

(d) *Procedures and ACO responsibilities*

As soon as it is known that the contractor will incur restructuring costs **associated with [for]** external restructuring activities, the cognizant ACO shall:

[(1) Promptly execute a novation agreement, if one is required, in accordance with FAR Subpart 42.12 and DFARS Subpart 242.12 and include the provision at DFARS 242.1204(e).]

~~(2)~~ Direct the contractor to segregate restructuring costs and to suspend these amounts from any billings, final contract price settlements and overhead settlements until the certification in (c)(1)(iv) is obtained.

~~(3)~~ Require the contractor to submit an overall plan of restructuring activities and an adequately supported proposal for planned restructuring projects. The proposal must include a ~~detailed~~ breakout by year by cost element, showing the projected restructuring costs, ~~both direct and indirect,~~ and projected restructuring savings ~~both direct and indirect.~~

~~(3) Negotiate a Memorandum of Understanding with the contractor setting forth, at a minimum, the types and treatments of restructuring costs and the methodology to be used to demonstrate reduced costs to DoD.~~

(4) Notify major buying activities of contractor restructuring actions and inform them about any potential monetary impacts on major weapons programs, when known.

(5) Upon receipt of the contractor's proposal, ~~immediately~~ **[as soon as practicable,]** adjust forward pricing rates to reflect the impact of projected restructuring savings. **[If restructuring costs are included in forward pricing rates prior to]** Pending execution of an advance agreement in accordance with 231.205-70 (d) (8), **[the contracting officer shall include]** ~~restructuring costs may be included in forward pricing rates if a repricing clause is included~~ in each fixed-price action that is priced based on the rates. The repricing clause must provide for a downward price adjustment to remove restructuring costs if the certification required by 231.205-70(c)(1)(iv) is not obtained.

(6) Upon receipt of the contractor's proposal, immediately request an audit review of the contractor's proposal.

(7) Upon receipt of the audit report, determine if restructuring savings will exceed restructuring costs on a present value basis.

(8) Negotiate an advance agreement with the contractor setting forth, at a minimum, **[a cumulative]** cost ceiling **[for]** ~~amounts on~~ restructuring projects and, when necessary, a cost amortization schedule. **[The]** ~~Cost ceilings~~ may not exceed the amount of projected restructuring savings on a present value basis. The advance agreement shall not be executed until the certification required by 231.205-70(c)(1)(iv) is obtained.

(9) Submit to the Director of Defense Procurement, Office of the Under Secretary of Defense (Acquisition & Technology), ATTN:

OUSD(A&T)DP/CPF, a recommendation for certification of net benefit.
Include the information described in 231.205-70 (e).

(e) *Information needed to obtain certification of net benefit.*

(1) The novation agreement (if one is required)

(2) The contractor's restructuring proposal.

(3) The proposed advance agreement.

(4) The audit report.

(5) Any other pertinent information.

(6) The cognizant ACO's recommendation for certification. This recommendation must clearly indicate that contractor projections of future cost savings resulting for DoD from the business combination are based on audited cost data and should result in overall reduced costs for the Department.

SUBPART 242.12-- NOVATION AND CHANGE-OF-NAME AGREEMENTS

* * * * *

242.1204 Agreement to recognize a successor in interest (novation agreement).

(e) When a novation agreement is required and the transferee intends to incur restructuring costs as defined at 231.205-70, the cognizant contracting officer shall include the following provision as paragraph (b)(7) of the novation agreement instead of the paragraph (b)(7) provided in the sample format at FAR 42.1204(e):

"(7)(i) Except as set forth in subparagraph (7)(ii) below, the Transferor and the Transferee agree that the Government is not obligated to pay or reimburse either of them for, or otherwise give effect to, any costs, taxes, or other expenses, or any related increases, directly or indirectly arising out of or resulting from the transfer or this Agreement, other than those that the Government in the absence of this transfer or Agreement would have been obligated to pay or reimburse under the terms of the contracts.

(ii) The Government recognizes that restructuring by the Transferee incidental to the acquisition merger may be in the best interests of the Government. Restructuring costs that are allowable under Part 31 of the Federal Acquisition Regulation (FAR) or Part 231 of the Defense Federal Acquisition Regulation Supplement (DFARS) may be reimbursed under flexibly-priced novated contracts, provided the *Transferee* demonstrates that the restructuring will reduce overall costs to the Department of Defense (DoD) **[(and to the National Administrative and Space Administration (NASA), where there is a mix of DoD and NASA contracts)]** ~~and/or the National Administrative and Space Administration (NASA)~~, and the requirements included in DFARS 231.205-70 are met. ~~These costs and the contracting parties' responsibilities shall be address in a Memorandum of Understanding to be negotiated between the cognizant contracting officer and the~~

~~Transferee. The Memorandum of Understanding will specify the types and treatment of restructuring costs and the methodology to be used to demonstrate reduced costs to DoD and/or NASA. Restructuring costs shall not be allowed on novated contracts unless there is an audit of the restructuring proposal; a determination by the contracting officer of overall reduced costs to DoD/NASA; and an Advance Agreement setting forth [a cumulative] cost ceiling [for] amounts on restructuring projects and the period to which such costs shall be assigned."~~



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18 APRIL 1996

DP DAR

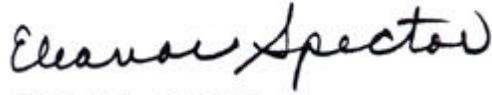
In reply refer to
DFARS Case: 96-D302
D.L. 96-007

MEMORANDUM FOR DIRECTORS OF DEFENSE AGENCIES
DEPUTY FOR ACQUISITION AND BUSINESS MANAGEMENT,
ASN (RD&A) /ABM
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING), SAF/AQC
DIRECTOR, PROCUREMENT POLICY ASA (RD&A) / SARD-PP
DEPUTY DIRECTOR (ACQUISITION), DEFENSE LOGISTICS AGENCY

SUBJECT: Leasing of Commercial Vehicles and Equipment

We have amended the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 807 of the FY96 Defense Authorization Act (Pub. L. 104-106), which revises 10 U.S.C. 2401a to permit the use of leasing in the acquisition of commercial vehicles and equipment.

The attached interim DEARS rule is effective immediately and will be included in a future Defense Acquisition Circular.



Eleanor R. Spector
Director, Defense Procurement

Attachment

cc: DSMC, Ft. Belvoir

Enclosure 2

SUBPART 207.4-EQUIPMENT LEASE OR PURCHASE

* * * * *

207.470 Statutory requirement[s].

[(a) Limitation on contracts with terms of 18 months or more.]

As required by 10 U.S.C. 2401a, the contracting officer shall not enter into any contract for any vessel, aircraft, or vehicle, through a lease, charter, or similar agreement with a term of 18 months or more, or extend or renew any such contract for a term of 18 months or more, unless the head of the contracting activity has-

~~(a)~~ [(1)] Considered all costs of such a contract (including estimated termination liability); and

~~(b)~~ [(2)] Determined in writing that the contract is in the best interest of the Government.

[(b) Leasing of commercial vehicles and equipment.

Except as provided in paragraph (a) of this section, the contracting officer may use leasing in the acquisition of commercial vehicles and equipment whenever the contracting officer determines that leasing of such vehicles is practicable and efficient (10 U.S.C. 2401a).]



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18 APRIL 1996

DP (DAR)

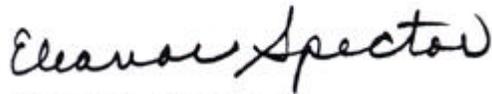
In reply refer to
DFARS Case: 96-D308
DAR Tracking No.: 96-000004
D.L. 96-008

MEMORANDUM FOR DIRECTORS OF DEFENSE AGENCIES
DEPUTY FOR ACQUISITION AND BUSINESS MANAGEMENT,
ASN (RD&A) /ABM
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING), SAF/AQC
DIRECTOR, PROCUREMENT POLICY ASA (RD&A) / SARD-PP
DEPUTY DIRECTOR (ACQUISITION), DEFENSE LOGISTICS AGENCY

SUBJECT: Designation of Singapore

We have amended the Defense Federal Acquisition Regulation Supplement (DFARS) (Atch 1) and issued a class deviation to the Federal Acquisition Regulation (FAR) (Atch 2) to add Singapore as a designated country under the Trade Agreements Act of 1979, as directed by the United States Trade Representative (USTR) (61 FR 11233, March 19, 1996) (Atch 3). The class deviation does not apply to procurements by the Army Corps of Engineers. The USTR may revoke this designation if Singapore has not completed negotiations on its accession to the World Trade organization Government Procurement Agreement by July 31, 1996.

The attached final DFARS rule and FAR class deviation are effective immediately. Unless I rescind them, due to revocation by the USTR of Singapore's designation, the DFARS rule will be included in a future Defense Acquisition Circular and the FAR deviation will remain in effect until the FAR is revised.



Eleanor R. Spector
Director, Defense Procurement

Attachments

cc: DSMC, Ft. Belvoir

**DEARS Case 96-D308
Final Rule**

PART 225-FOREIGN ACQUISITION

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SUBPART 225.4--TRADE AGREEMENTS

* * * * *

225.408 Solicitation provision(s) and contract clauses.

* * * * *

(a)(2) Use the clause at 252.225-7007, Trade Agreements, instead of the clause at FAR 52.225-9, Buy American Act-Trade Agreements-Balance of Payments Program. The clause need not be used where purchase from foreign sources is restricted (see 225.403 (d)(1)(B)). The clause may be used where the contracting officer anticipates a waiver of the restriction. **[For procurements by the U.S. Army Corps of Engineers, use the clause with its Alternate I.]**

* * * * *

PART 252-SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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SUBPART 252.2--TEXTS OF PROVISIONS AND CLAUSES

* * * * *

252.225-7007 Trade Agreements.

As prescribed in 225.408(a)(2), use the following clause:

TRADE AGREEMENTS (~~ACT 1996~~ [APR 1996])

(a) Definitions

* * * * *

(3) "Designated country" means ~~a country or instrumentality designated under the Trade Agreements Act of 1979 and listed in Section 25.401 of the Federal Acquisition Regulation (FAR):~~[:]

[Aruba	Japan
Bangladesh	Lesotho
Belgium	Liechtenstein
Benin	Luxembourg
Bhutan	Malawi
Botswana	Maldives
Burkina Faso	Mali
Burundi	Nepal
Canada	Netherlands
Cape Verde	Niger
Central African Republic	Norway
Chad	Portugal
Comoros	Republic of Korea
Denmark	Rwanda
Finland	Singapore
France	Somalia
Gambia	Spain
Germany	Sudan
Greece	Sweden
Guinea	Switzerland
Haiti	Tanzania UR.
Ireland	Uganda
Israel	United Kingdom
Italy	Western Samoa
	Yemen]

* * * * *

[*Alternate I* (APR 1996). As prescribed in 225.408(a)(2), delete Singapore from the list of designated countries in paragraph (a)(3) of the basic clause.]

FAR DEVIATION 96-00004

PART 25-FOREIGN ACQUISITION

* * * * *

SUBPART 25.4--TRADE AGREEMENTS

* * * * *

25.401 Definitions

* * * * *

"Designated country," as used in this subpart, means a country or instrumentality designated under the Trade Agreements Act of 1979 and listed below:

Aruba	Japan
Bangladesh	Lesotho
Belgium	Liechtenstein
Benin	Luxembourg
Bhutan	Malawi
Botswana	Maldives
Burkina Faso	Mali
Burundi	Nepal
Canada	Netherlands
Cape Verde	Niger
Central African Republic	Norway
Chad	Portugal
Comoros	Republic of Korea
Denmark	Rwanda
Finland	[Singapore]
France	Somalia
Gambia	Spain
Germany	Sudan
Greece	Sweden
Guinea	Switzerland
Haiti	Tanzania UR.
Ireland	Uganda
Israel	United Kingdom
Italy	Western Samoa
	Yemen]

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PART 52--SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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SUBPART 52.2--TEXTS OF PROVISIONS AND CLAUSES

* * * * *

52.225-15 Buy American Act -Construction Materials under Trade Agreements Act and North American Free Trade Agreement.

As prescribed in 25.205(b)(1), insert the following clause:

BUY AMERICAN ACT-CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS ACT
AND NORTH AMERICAN FREE TRADE AGREEMENT

(JAN 1996) **[(DEVIATION)]**

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

* * * * *

["Designated country" means:

Aruba	Japan
Bangladesh	Lesotho
Belgium	Liechtenstein
Benin	Luxembourg
Bhutan	Malawi
Botswana	Maldives
Burkina Faso	Mali
Burundi	Nepal
Canada	Netherlands
Cape Verde	Niger
Central African Republic	Norway
Chad	Portugal
Comoros	Republic of Korea
Denmark	Rwanda
Finland	Singapore
France	Somalia
Gambia	Spain
Germany	Sudan
Greece	Sweden
Guinea	Switzerland
Haiti	Tanzania UR.
Ireland	Uganda
Israel	United Kingdom
Italy	Western Samoa
	Yemen]

"Designated country construction material" means a construction material that (a) is wholly the growth, product, or manufacture of a designated country (~~as defined at FAR 25.401~~), or (b) in the case of a construction material which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed in a designated country into a new and different construction material distinct from the materials from which it was transformed

* * * * *

Taken from:

Federal Register / Vol. 61, No. 54 / Tuesday March 19, 1996 / Notices 11233

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Designation of Singapore Under 19 U.S.C.2511(b)(3)

Under the authority delegated to me by the President in section 1-201 of Executive Order 12260 of December 31, 1980, I hereby direct that products of Singapore be treated as eligible products for purposes of section I - 101 of Executive Order 12260. Such treatment shall not apply to procurements by the Department of Energy, the Department of Transportation, the Army Corps of Engineers, the Tennessee Valley Authority and the Bureau of Reclamation. If Singapore has not completed negotiations on its accession to the WTO Government Procurement Agreement by July 31, 1996. this designation may be revoked.

Michael Kantor

United States Trade Representative

[FR Doc. 96-6514 Filed 3-18-96; 8:45 am]

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