

sole method of incentive payment under the Program. Confusion has existed because the FAR and DFARS clauses have used the terms "incentive" and "adjustment" interchangeably. However, the statutes and the implementing clauses historically have permitted only one type of incentive payment per subcontract award. To clarify this point, DoD has replaced the term "adjustment" with the term "incentive" each place it appeared in the clause at 252.226-7001.

2. Comment: The requirement of DFARS 252.226-7001(d), that prohibits an incentive payment from being made within 50 working days of subcontract award, is arbitrary and should be deleted. The contracting officer should have the flexibility to make a case-by-case determination of when it is appropriate to make the incentive payment.

DoD Response: Concur. The interim rule eliminates the 50-day waiting period.

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

B. Regulatory Flexibility Act

This rule may 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.* DoD has prepared an initial regulatory flexibility analysis, which is summarized as follows:

This interim rule amends the DFARS to implement Section 8021 of the DoD Appropriations Act for Fiscal Year 2003. Section 8021 does the following: (1) Appropriates funds for implementation of the Indian Incentive Program; (2) establishes a threshold of \$500,000 for contracts and subcontracts under which incentives may be paid; (3) expands the Program to permit incentive payments for subcontract awards to Native Hawaiian small business concerns; and (4) adds contracts and subcontracts for commercial items to the Program, provided the commercial items are produced or manufactured in whole or in part by an Indian organization or enterprise or Native Hawaiian small business concern. The rule will apply to contractors and subcontractors that subcontract work under DoD contracts, and will pertain to subcontract awards to Indian organizations, Indian-owned economic enterprises, and Native Hawaiian small business concerns. The net effect on small entities is unknown at this time. DoD knows of no alternatives that would meet the

requirements of Section 8021 of the DoD Appropriations Act for Fiscal Year 2003.

A copy of the analysis may be obtained from the address specified herein. 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 2002-D033.

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 8021 of the DoD Appropriations Act for Fiscal Year 2003 (Pub. L. 107-248). Section 8021 revises the criteria for application of the Indian Incentive Program by establishing a \$500,000 threshold for contracts and subcontracts under which incentives may be paid; by authorizing incentive payments for subcontracts awarded to Native Hawaiian small business concerns; and by adding contracts and subcontracts for commercial items to the Program. Section 8021 became effective upon enactment, on October 23, 2002. 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 226 and 252

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

■ Therefore, 48 CFR parts 226 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 226 and 252 continues to read as follows:

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

PART 226—OTHER SOCIOECONOMIC PROGRAMS

■ 2. Sections 226.103 and 226.104 are revised to read as follows:

226.103 Procedures.

(f) The contracting officer shall—

(i) Submit a request for funding of the Indian incentive to the Office of Small and Disadvantaged Business Utilization, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics) (OUSD(AT&L)SADBU), 1777 North Kent Street, Suite 9100, Arlington, VA 22209; and

(ii) Upon receipt of funding from OUSD(AT&L)SADBU, issue a contract modification to add the Indian incentive funding for payment of the contractor's request for adjustment as described in the clause at 252.226-7001, Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns.

226.104 Contract clause.

Use the clause at 252.226-7001, Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns, in solicitations and contracts for supplies or services exceeding \$500,000 in value for which subcontracting opportunities may exist.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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

- a. By revising the clause date to read "(Oct 2003)"; and
- b. In paragraph (b) by adding, in numerical order, entry "252.226-7001" to read 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) * * *

252.226-7001 Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns (Oct 2003) (Section 8021 of Pub. L. 107-248).

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■ 4. Section 252.226-7001 is revised to read as follows:

252.226-7001 Utilization of Indian organizations, Indian-owned economic enterprises, and native Hawaiian small business concerns.

As prescribed in 226.104, use the following clause:

Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns (Oct 2003)

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