

Indian means any person who is a member of any Indian tribe, band, group, pueblo, or community that is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs (BIA) in accordance with 25 U.S.C. 1452(c) and any "Native" as defined in the Alaska Native Claims Settlement Act (43 U.S.C. 1601).

Indian organization means the governing body of any Indian tribe or entity established or recognized by the governing body of an Indian tribe for the purposes of 25 U.S.C. chapter 17.

Indian-owned economic enterprise means any Indian-owned (as determined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit, provided that Indian ownership constitutes not less than 51 percent of the enterprise.

Indian tribe means any Indian tribe, band, group, pueblo, or community, including native villages and native groups (including corporations organized by Kenai, Juneau, Sitka, and Kodiak) as defined in the Alaska Native Claims Settlement Act, that is recognized by the Federal Government as eligible for services from BIA in accordance with 25 U.S.C. 1452(c).

Interested party means a contractor or an actual or prospective offeror whose direct economic interest would be affected by the award of a subcontract or by the failure to award a subcontract.

Native Hawaiian small business concern means an entity that is—

(1) A small business concern as defined in section 3 of the Small Business Act (15 U.S.C. 632) and relevant implementing regulations; and

(2) Owned and controlled by a Native Hawaiian as defined in 25 U.S.C. 4221(9).

(b) The Contractor shall use its best efforts to give Indian organizations, Indian-owned economic enterprises, and Native Hawaiian small business concerns the maximum practicable opportunity to participate in the subcontracts it awards, to the fullest extent consistent with efficient performance of the contract.

(c) The Contracting Officer and the Contractor, acting in good faith, may rely on the representation of an Indian organization, Indian-owned economic enterprise, or Native Hawaiian small business concern as to its eligibility, unless an interested party challenges its status or the Contracting Officer has independent reason to question that status.

(d) In the event of a challenge to the representation of a subcontractor, the Contracting Officer will refer the matter to—

(1) For matters relating to Indian organizations or Indian-owned economic enterprises: U.S. Department of the Interior, Bureau of Indian Affairs, Attn: Chief, Division of Contracting and Grants Administration, 1849 C Street NW, MS-2626-MIB, Washington, DC 20240-4000. The BIA will determine the eligibility and will notify the Contracting Officer.

(2) For matters relating to Native Hawaiian small business concerns: Department of Hawaiian Home Lands, PO Box 1879, Honolulu, HI 96805. The Department of Hawaiian Home Lands will determine the

eligibility and will notify the Contracting Officer.

(e) No incentive payment will be made—

(1) While a challenge is pending; or

(2) If a subcontractor is determined to be an ineligible participant.

(f)(1) The Contractor, on its own behalf or on behalf of a subcontractor at any tier, may request an incentive payment in accordance with this clause.

(2) The incentive amount that may be requested is 5 percent of the estimated cost, target cost, or fixed price included in the subcontract at the time of award to the Indian organization, Indian-owned economic enterprise, or Native Hawaiian small business concern.

(3) In the case of a subcontract for commercial items, the Contractor may receive an incentive payment only if the subcontracted items are produced or manufactured in whole or in part by an Indian organization, Indian-owned economic enterprise, or Native Hawaiian small business concern.

(4) The Contractor has the burden of proving the amount claimed and shall assert its request for an incentive payment prior to completion of contract performance.

(5) The Contracting Officer, subject to the terms and conditions of the contract and the availability of funds, will authorize an incentive payment of 5 percent of the estimated cost, target cost, or fixed price included in the subcontract awarded to the Indian organization, Indian-owned economic enterprise, or Native Hawaiian small business concern.

(6) If the Contractor requests and receives an incentive payment on behalf of a subcontractor, the Contractor is obligated to pay the subcontractor the incentive amount.

(g) The Contractor shall insert the substance of this clause, including this paragraph (g), in all subcontracts exceeding \$500,000 for which further subcontracting opportunities may exist.

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DEPARTMENT OF DEFENSE

48 CFR Part 237

[DFARS Case 2002-D024]

Defense Federal Acquisition Regulation Supplement; Approval of Service Contracts and Task Orders

AGENCY: 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 801(b) of the National Defense Authorization Act for Fiscal Year 2002. Section 801(b) requires DoD to establish and implement a management structure for the procurement of services.

DATES: Effective date: October 1, 2003.

Comment date: Comments on the interim rule should be submitted to the address shown below on or before December 1, 2003, to be considered in the formation of the final rule.

ADDRESSES: Respondents may submit comments directly on the World Wide Web at <http://emissary.acq.osd.mil/dar/dfars.nsf/pubcomm>. As an alternative, respondents may e-mail comments to: dfars@acq.osd.mil. Please cite DFARS Case 2002-D024 in the subject line of e-mailed comments.

Respondents that cannot submit comments using either of the above methods may submit comments to: Defense Acquisition Regulations Council, Attn: Mr. Steven Cohen, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062; facsimile (703) 602-0350. Please cite DFARS Case 2002-D024.

At the end of the comment period, interested parties may view public comments on the World Wide Web at <http://emissary.acq.osd.mil/dar/dfars.nsf>.

FOR FURTHER INFORMATION CONTACT: Mr. Steven Cohen, (703) 602-0293.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule adds DFARS section 237.170, Approval of contracts and task orders for services, to implement Section 801(b) of the National Defense Authorization Act for Fiscal Year 2002 (Public Law 107-107).

Section 801 of Public Law 107-107 established a series of requirements impacting the acquisition of services in DoD. On May 31, 2002, the Under Secretary of Defense (Acquisition, Technology, and Logistics) issued a policy memorandum that established a review structure and process for the acquisition of services in accordance with section 801(d). The policy memorandum is available on the World Wide Web at <http://www.acq.osd.mil/dpap>.

This interim DFARS rule implements section 801(b) of Public Law 107-107 by establishing approval requirements for contracts and task orders for services. The rule prohibits the acquisition of services through use of a DoD contract or task order that is not performance based, or through any contract or task order that is awarded by an agency other than DoD, unless certain approval requirements are met. With respect to services acquisitions through a contract or task order awarded by an agency other than DoD, the rule requires approval in accordance with department or agency procedures. Each of the three

military departments has developed a "Management and Oversight of Acquisition of Services Process" to provide a review structure for services acquisitions, as required by the May 31, 2002, memorandum. The military departments are working to implement this infrastructure, which will include approval levels for services acquired through another agency's contract.

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 FAR part 37 already requires the use of performance-based contracting to the maximum extent practicable. This DFARS rule establishes internal DoD approval requirements to manage compliance with the existing FAR requirements. 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 subpart in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2002-D024.

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 801(b) of the National Defense Authorization Act for Fiscal Year 2002, which requires DoD to establish and implement a management structure for the procurement of services. Section 801(b) became effective upon enactment on December 28, 2001. Comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Part 237

Government procurement.

Michele P. Peterson,
Executive Editor, Defense Acquisition Regulations Council.

■ Therefore, 48 CFR part 237 is amended as follows:

■ 1. The authority citation for 48 CFR Part 237 continues to read as follows:

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

PART 237—SERVICE CONTRACTING

■ 2. Sections 237.170 through 237.170–3 are added to read as follows:

237.170 Approval of contracts and task orders for services.

237.1701–1 Scope.

This section—

- (a) Implements 10 U.S.C. 2330; and
- (b) Applies to services acquired for DoD, regardless of whether the services are acquired through—

- (1) A DoD contract or task order; or
- (2) A contract or task order awarded by an agency other than DoD.

237.170–2 Prohibition on acquisition of services.

Unless approval is obtained in accordance with 237.170–3, do not acquire services through use of a contract or task order that

- (a) Is not performance based; or
- (b) Is awarded by an agency other than DoD.

237.170–3 Approval requirements.

(a) Acquisition of services through a DoD contract or task order that is not performance based.

(1) For acquisitions at or below \$50,000,000, obtain the approval of the official designated by the department or agency.

(2) For acquisitions exceeding \$50,000,000, obtain the approval of the senior procurement executive.

(b) Acquisition of services through any contract or task order awarded by an agency other than DoD. Obtain approval in accordance with department or agency procedures.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AH47

Endangered and Threatened Wildlife and Plants; Delisting of the *Berberis* (= *Mahonia*) *sonnei* (Truckee barberry)

AGENCY: Fish and Wildlife Service Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service) have determined that it is appropriate to delist or remove *Berberis* (= *Mahonia*) *sonnei* (Truckee barberry) from the List of Endangered and Threatened Plants. This determination is based on a thorough review of all available data, which indicate that this plant is not a discrete taxonomic entity and does not meet the definition of a species (which includes subspecies and varieties of plants) under the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*). *Berberis sonnei* has been synonymized with *B. repens*, a common and wide-ranging taxon with a distribution from California northward to British Columbia and Alberta, and eastward to the Great Plains. This rule eliminates Federal protection for *Berberis sonnei* under the Act.

DATES: This rule is effective October 1, 2003.

ADDRESSES: The administrative record for this rule is available for inspection, by appointment, during normal business hours at the Sacramento Fish and Wildlife Office of the U.S. Fish and Wildlife Service, 2800 Cottage Way, Suite W–2605, Sacramento, California 95825–1888 (telephone: 916–414–6600).

FOR FURTHER INFORMATION CONTACT: Kirsten Tarp or Susan Moore, at the above address (telephone: 916–414–6600; facsimile: 916–414–6713).

SUPPLEMENTARY INFORMATION:

Background

Berberis (= *Mahonia*) *sonnei* is a small colonial evergreen shrub known only from a 280-yard (250-meter) section of the Truckee River floodplain in the town of Truckee, Nevada County, CA. LeRoy Abrams described *Berberis sonnei* as *Mahonia sonnei* in 1934. McMinn (1939) transferred *Mahonia sonnei* to the genus *Berberis*. Separation of *Berberis* and *Mahonia* at the generic level is in dispute among taxonomists. The generic name *Berberis* will be used throughout this discussion following Yoder-Williams (1985, 1986, 1987).