

Test Program described in DFARS 219.702-70, if the subcontract is expected to exceed the applicable threshold specified in Federal Acquisition Regulation 19.702(a), and to have further subcontracting opportunities.

\* \* \* \* \*

- 8. Amend section 252.219-7004 by—
Revising the section heading;
■ a. Removing the clause date of “(APR 2018)” and adding “(MAY 2019)” in its place;
■ b. Revising paragraph (g) introductory text.
■ c. In paragraph (g)(1), removing “252.219-7003” and adding “Defense Federal Acquisition Regulation Supplement (DFARS) 252.219-7003” in its place;
■ d. In paragraph (g)(2), removing “252.219-7003” and adding “DFARS 252.219-7003” in its place; and
■ e. In paragraph (g)(3), removing “252.219-7004” and adding “DFARS 252.219-7004” in its place.

The revisions read as follows:

252.219-7004 Small Business Subcontracting Plan (Test Program).

\* \* \* \* \*

(g) Subcontracts. The Contractor shall include in subcontracts that offer subcontracting opportunities, are expected to exceed the applicable threshold specified in FAR 19.702(a) on the date of subcontract award, and are required to include the clause at FAR 52.219-8, Utilization of Small Business Concerns, the clauses at—

\* \* \* \* \*

- 9. Amend section 252.225-7004 by—
■ a. Removing the clause date of “(OCT 2015)” and adding “(MAY 2019)” in its place;
■ b. Revising paragraphs (a) and (b)(1).
The revisions read as follows:

252.225-7004 Report of Intended Performance Outside the United States and Canada—Submission after Award.

\* \* \* \* \*

(a) Definition. As used in this clause— United States means the 50 States, the District of Columbia, and outlying areas.

(b) \* \* \*

(1) Exceeds the threshold specified in Defense Federal Acquisition Regulation Supplement 225.870-4(c)(2)(i)(A)(1) on the date of award of this contract; and

\* \* \* \* \*

- 10. Amend section 252.249-7002 by—
■ a. Revising the section heading;
■ b. Removing the clause date of “(OCT 2015)” and adding “(MAY 2019)” in its place;
■ c. Revising paragraph (a); and
■ d. Revising paragraphs (d)(1) and (d)(2).

The revisions read as follows:

252.249-7002 Notification of Anticipated Contract Termination or Reduction.

\* \* \* \* \*

(a) Definition. As used in this clause— Major defense program means a program that is carried out to produce or acquire a major system (as defined in 10 U.S.C. 2302(5)).

\* \* \* \* \*

(d) \* \* \*

(1) Provide notice of the anticipated termination or reduction to each first-tier subcontractor with a subcontract that equals or exceeds the threshold specified in Defense Federal Acquisition Regulation Supplement (DFARS) 225.870-4(c)(2)(i)(A)(1) at the time of the notice; and

(2) Require that each such subcontractor—

(i) Provide notice to each of its subcontractors with a subcontract that equals or exceeds the threshold specified in DFARS 225.870-4(c)(2)(i)(C) at the time of the notice; and

(ii) Impose a similar notice and flowdown requirement to subcontractors with subcontracts that equal or exceed the threshold specified in DFARS 225.870-4(c)(2)(i)(C) at the time of the notice.

\* \* \* \* \*

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204, 212, 225, and 252

[Docket DARS-2018-0060]

RIN 0750-AJ82

Defense Federal Acquisition Regulation Supplement: Foreign Commercial Satellite Services and Certain Items on the Commerce Control List (DFARS Case 2018-D020)

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

ACTION: Final rule.

SUMMARY: DoD has adopted as final, without change, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Act for Fiscal Years 2017 and 2018. One section imposes additional prohibitions with regard to acquisition of certain foreign

commercial satellite services, such as cybersecurity risk and source of satellites and launch vehicles used to provide the foreign commercial satellite services, and expands the definition of “covered foreign country” to include Russia. Another section prohibits purchase of items originating in the People’s Republic of China that meet the definition of goods and services controlled as munitions items when moved to the Commerce Control List of the Export Administration Regulations of the Department of Commerce.

DATES: Effective May 31, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule in the Federal Register at 83 FR 66066 on December 21, 2018, to implement section 1603 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91) and section 1296 of the NDAA for FY 2017 (Pub. L. 114-328). Section 1603 amends 10 U.S.C. 2279 to impose additional prohibitions with regard to acquisition of certain foreign commercial satellite services, such as cybersecurity risk and source of satellites and launch vehicles used to provide the foreign commercial satellite services. Section 1603 also expands the definition of “Covered foreign country” to include Russia. Section 1296 prohibits purchase of items from a Communist Chinese military company. One respondent submitted a public comment in response to the interim rule.

II. Discussion and Analysis

DoD reviewed the public comment received. It was favorable to implementation of the rule. No changes from the interim rule are made in the final rule.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

A. The Interim Rule Amended the Applicability of Existing DFARS Solicitation Provisions and Contract Clauses and Added a New Clause as Follows

- To implement section 1603 of the NDAA for FY 2018, this rule amended the provision at DFARS 252.225-7049, Prohibition on Acquisition of Commercial Satellite Services from Certain Foreign Entities—Representation, and added a clause to

enforce compliance with the representations in the associated provisions. This provision and clause apply to acquisitions not greater than the simplified acquisition threshold (SAT) and acquisitions of commercial items.

- To implement section 1296 of the NDAA for FY 2017, this rule modified the clause at DFARS 252.225–7007, Prohibition on Acquisition of United States Munitions List Items from Communist Chinese Military Companies, to prohibit contractors or subcontractors from acquiring items listed on the 600 series of the CCL that are to be delivered under the contract from any Communist Chinese military company. The rule continues to prescribe the use of this clause for use in solicitations and contracts for items valued at or below the SAT. However, the clause now applies to the acquisition of commercial items, including Commercially Available Off-the-Shelf (COTS) items, if the items are 600 series items on the CCL, or USML items. Although most 600 series items are not commercial items, and USML items are even less likely to be commercial items, it is possible that some of these covered items will be commercial items and must not be purchased from a Communist Chinese military company.

#### B. Determinations

- Section 1603 of the NDAA for FY 2018.* A determination and finding was signed by the Director, Defense Procurement and Acquisition Policy, on June 23, 2014, that due to potential risk to national security it would not be in the best interest of the United States to exempt acquisitions not greater than the SAT and acquisitions of commercial items from the applicability of 10 U.S.C. 2279.

- Section 1296 of the NDAA for FY 2017.* A determination under 41 U.S.C. 1905 was not required to prescribe DFARS 252.225–7012 for use in solicitations and contracts valued at or below the SAT, because this is consistent with the current applicability of the clause DFARS 252.225–7007, which prohibits acquisitions of items on the USML from Communist Chinese Military Companies. The Principal Director, DPC, determined that it is in the best interest of the Government to apply the requirements of section 1296 to contracts for the acquisition of commercial items, including COTS items, to prevent insertion of malicious items into U.S. weapons platforms, information technology systems, and other areas, presenting a threat to our

warfighters and their ability to defend national security.

#### IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### V. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

The reason for this rule is to implement section 1603 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 and section 1296 of the NDAA for FY 2017. Section 1603 of the NDAA for FY 2018 amends 10 U.S.C. 2279, which prohibits acquisition of certain foreign commercial satellite services. Section 1296 of the NDAA for FY 2017 amends section 1211 of the NDAA for FY 2006 to prohibit purchase from any Communist Chinese military company, through a contract or subcontract (at any tier), of goods and services controlled as munitions items on the 600 series of the Commerce Control List (CCL) of the Export Administration Regulations of the Department of Commerce.

The objectives of the rule are as follows:

- Section 1603.* To prohibit award of contracts for commercial satellite services to a foreign entity if entering into such contract would create an unacceptable cybersecurity risk. In addition, the definition of covered foreign country is expanded to include Russia (other covered foreign countries are China, North Korea, Iran, Sudan, and Syria). New restrictions are also added with regard to the satellites and launch vehicles to be used to provide the satellite services, but these restrictions do not apply to launches that occur prior to December 31, 2022.
- Section 1296.* To prohibit purchase of items originating in the People's

Republic of China that meet the definition of goods and services controlled as munitions items when moved to the 600 series of the CCL of the Export Administration Regulations of the Department of Commerce.

There were no significant issues raised by the public comments in response to the initial regulatory flexibility analysis.

DoD estimates that this rule applies to small entities as follows:

- Section 1603.* This part of the rule applies to less than 86 small entities. According to Federal Procurement Data System (FPDS) data for FY 2016, 86 small entities were awarded contracts or orders for services under Product Service Code D304 (ADP Telecommunications and Transmission Services), of which commercial satellite services are a subset. Although the focus of the Regulatory Flexibility Act is protection of domestic small business entities that are eligible for assistance from the Small Business Administration, there may be domestic small business entities in the United States that offer the satellite services of a foreign entity that would be restricted by this rule.

- Section 1296.* This part of the rule applies to any small entities that intend to provide items on the 600 series of the Commerce Control List under a DoD contract or subcontract. The 600 series consists of items on the Commerce Control List that have an export control classification number of which the third character is a “6”. These items were transitioned from the United States Munitions List (USML) to the 600 series, because they have less than a critical military or intelligence capability than the items that remain on the USML, but they are not currently in normal commercial use. Data on the number of entities that can provide such items, and whether they are small or other than small entities, is not available in FPDS, because these items are not readily identifiable in FPDS and are often acquired through subcontracts.

Projected reporting or recordkeeping requirements of this rule are as follows:

- Section 1603.* In addition to the current annual representations as to whether the offeror is, or is not, a foreign entity subject to the prohibitions of the statute; or is, or is not, offering commercial satellite services provided by such a foreign entity, this rule adds five more annual representations as to whether the offeror—

- Is, or is not offering commercial satellite services using satellites, launched on or after December 31, 2022, that will be designed or manufactured in a covered foreign country;

○ Is, or is not offering commercial satellite services using satellites, launched on or after December 31, 2022, that will be designed or manufactured by an entity controlled in whole or in part by, or acting on behalf of, the government of a covered foreign country;

○ Is, or is not offering commercial satellite services using satellites, launched outside the United States on or after December 31, 2022, using a launch vehicle that is designed or manufactured in a covered foreign country;

○ Is, or is not offering commercial satellite services using satellites, launched outside the United States on or after December 31, 2022, using a launch vehicle that is provided by the government of a covered foreign country; and

○ Is, or is not offering commercial satellite services using satellites, launched outside the United States on or after December 31, 2022, using a launch vehicle that is provided by an entity controlled in whole or in part by, or acting on behalf of, the government of a covered foreign country.

Further information is required if the offeror provides an affirmative response to any of the representations, but such affirmative response and further submission is expected to be extremely rare because of the statutory prohibition and the expected rarity of a waiver by the Under Secretary of Defense for Acquisition and Sustainment or for Policy. Furthermore, this prohibition is only applicable to launches on or after December 31, 2022.

If the satellite service provider responded affirmatively to any of the new representations regarding launch vehicles, if such launches are covered in whole or in part by a contract or other agreement relating to launch services that, prior to June 10, 2018, was either fully paid by the satellite service provider or covered by a legally binding commitment of the satellite service provider to pay for such services, a de minimis amount of information is required with regard to such contract or agreement in order to establish an exception to the associated prohibitions.

- *Section 1296.* There are no projected reporting or recordkeeping requirements relating to implementation of section 1296. The only compliance requirements are to not purchase 600 series items that originate in the People's Republic of China.

This rule will not have a significant economic impact on any small entities, unless they are offering commercial satellite services subject to the restrictions of this rule or providing 600

series items that originate in the Peoples Republic of China. DoD was not able to identify any alternatives that would reduce the burden on small entities and meet the objectives of the rule.

## VI. Paperwork Reduction Act

The interim rule affected the information collection requirements in the provision at DFARS 252.225–7049, currently approved through March 31, 2021, under OMB Control Number 0704–0525, entitled Prohibition on Acquisition of Commercial Satellite Services from Certain Foreign Entities, in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35). The impact, however, is negligible at this time, because the prohibition on use of certain foreign satellites and launch vehicles only applies to launches outside the United States on or after December 31, 2022. The information collection will be updated to reflect these changes when renewed.

### List of Subjects in 48 CFR Parts 201, 212, 225, and 252

Government procurement.

■ Accordingly, the interim rule amending 48 CFR parts 201, 212, 225, and 252, which was published at 83 FR 66066 on December 21, 2018, is adopted as final without change.

**Jennifer Lee Hawes,**

*Regulatory Control Officer, Defense Acquisition Regulations System.*

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 206, 211, and 213

[Docket DARS–2018–0052]

RIN 0750–AJ50

#### Defense Federal Acquisition Regulation Supplement: Brand Name or Equal (DFARS Case 2017–D040)

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

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2017 that requires the use of brand name or equal descriptions, or proprietary specifications or standards,

in solicitations to be justified and approved.

**DATES:** Effective May 31, 2019.

**FOR FURTHER INFORMATION CONTACT:** Ms. Carrie Moore, telephone 571–372–6093.

**SUPPLEMENTARY INFORMATION:**

### I. Background

DoD published a proposed rule in the **Federal Register** at 83 FR 54696 on October 31, 2018, to implement section 888(a) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328), which requires that competition on DoD contracts not be limited through the use of brand name or equal descriptions, or proprietary specifications or standards, in solicitations, unless a justification for such specification is provided and approved in accordance with 10 U.S.C. 2304(f). Six respondents submitted public comments in response to the proposed rule.

### II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

#### A. Summary of Significant Changes From the Proposed Rule

The paragraphs at DFARS 211.104 and DFARS 211.170 have been updated to clarify that the use brand name or equal descriptions or proprietary specifications and standards shall be justified and approved when using sealed bidding procedures, negotiated procedures, or simplified procedures for certain commercial items.

#### B. Analysis of Public Comments

##### 1. Support for the Rule

*Comment:* Several respondents expressed support for the rule.

*Response:* DoD acknowledges the support for the rule.

##### 2. Restrictions on Brand Name or Equal Descriptions

*Comment:* A respondent expressed concern that subjecting brand name or equal descriptions to the justification and approval process will discourage the use of solicitations that signal a preference for, but do not require, a specific brand or product.

*Response:* The language in the rule meets the intent of the statute at section 888(a) of the NDAA for FY 2017. When contracting without providing for full and open competition (e.g., requiring a specific brand or product particular to one manufacturer, or requiring specifications or standards that are