■ A. Adding a heading; and
■ B. Removing ''commercial items'' and adding ''commercial products'' in its place; and
■ f. In the Alternate II clause—
■ i. By revising the clause date;
■ ii. In paragraph (b)(2)(i) by removing ''Noncommercial items'' and adding ''Other than commercial products'' in its place;
■ iii. In paragraph (b)(2)(ii) introductory text by removing ''Commercial items'' and adding ''Commercial products'' in its place; and
■ iv. In paragraph (i) introductory text by—
■ A. Adding a heading; and
■ B. Removing ''commercial items'' and adding ''commercial products'' in its place.

The revisions and additions read as follows:

252.247–7023 Transportation of Supplies by Sea.

* * * * *

Transportation of Supplies by Sea—Basic (Jan 2023)

* * * * *
(i) *Subcontracts.* * * *
* * * * *

Transportation of Supplies by Sea—Alternate I (Jan 2023)

* * * * *
(i) *Subcontracts.* * * *
* * * * *

Transportation of Supplies By Sea—Alternate II (Jan 2023)

* * * * *
(i) *Subcontracts.* * * *
* * * * *

[FR Doc. 2023–01294 Filed 1–30–23; 8:45 am]
BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 225, 231, and 242

[Docket DARS–2019–0039]

RIN 0750–AJ27

Defense Federal Acquisition Regulation Supplement: Treatment of Incurred Independent Research and Development Costs (DFARS Case 2017–D018)

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 makes amendments regarding the treatment of independent research and development expenditures and requires the Defense Contract Audit Agency to provide an annual report to Congress on independent research and development and bid and proposal expenditures associated with awarded DoD contracts for the prior Government fiscal year.

DATES: Effective January 31, 2023.

FOR FURTHER INFORMATION CONTACT: Mr. David E. Johnson, telephone 202–913–5764.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 86 FR 53927 on September 29, 2021, to implement section 824 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328). Section 824 amends 10 U.S.C. 2372 (redesignated as 10 U.S.C. 3762) to require that regulations may not infringe on the independence of a contractor to choose which technologies to pursue in its independent research and development (IR&D) program if the chief executive officer (CEO) of the contractor determines that IR&D expenditures will advance the needs of the Department of Defense for future technology and advanced capability. Section 824 also decouples IR&D and bid and proposal (B&P) costs by moving the language pertaining to B&P costs out of 10 U.S.C. 2372 and placing it in the new 10 U.S.C. 2372a (redesignated as 10 U.S.C. 3763). This change ensures that regulations pertaining to B&P costs are separated from regulations pertaining to IR&D costs. Five 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

DoD removed the requirement to submit CEO determinations from the final rule, because the statute does not require this submission. DoD removed the proposed clause 252.242–70XX and its prescription from the final rule because they are unnecessary.

B. Analysis of Public Comments

1. Support for the rule.

Comment: One respondent expressed support for the rule.

Response: DoD acknowledges the respondent's support for the rule.

2. Requirement to make and submit CEO determinations.

Comment: Several respondents commented on the requirement in the proposed rule for certain contractors to submit a statement that the contractor's CEO determined that the company's IR&D expenditures will advance the needs of DoD for future technology and advanced capability. In particular, one respondent commented that the statute does not actually require CEOs to make IR&D determinations as stated in the proposed rule. Two respondents commented that the submission requirement would likely overburden small businesses or nontraditional defense contractors. One respondent commented that the proposed rule lacks submission guidance for contractors that are not major contractors. One respondent expressed concern that IR&D cost allowability under the proposed rule might arbitrarily hinge on the form and manner of submission of the CEO determination rather than its substance.

Response: DoD removed the requirement to submit a statement regarding CEO determinations from the final rule. DoD reviewed the statute and agreed that this requirement should be removed. Further, by removing the requirement to submit a statement regarding CEO determinations, the final rule does not tie cost allowability to submission of an affirmative statement regarding the CEO determination.

3. Criterion for IR&D cost allowability.

Comment: One respondent commented that the phrase ''advance the needs of DoD for future technology and advanced capability'' is undefined in the proposed rule despite being the criterion for IR&D cost allowability when reflected in a CEO determination. Several respondents commented variously that this criterion for cost allowability is impractical, ambiguous, subjective, or potentially restrictive.

Response: The statute explicitly relates the CEO determination to DoD's communication of areas of need. Therefore, the language is retained in the final rule.

4. Limiting applicability of the CEO determination within the rule to major contractors.

Comment: A few respondents commented that any requirement under the rule for a CEO determination should be limited to major contractors as defined at DFARS 231.205–18(a).

Response: The final rule clarifies that DFARS 231.205–18(c)(iii)(A) applies only to major contractors.

5. Proposed clause 252.242–70XX.

Comment: Several respondents commented on the clause at 252.242–70XX in the proposed rule as well as the clause prescription. In particular, a few respondents commented that the DCAA reporting requirement reflected in statute, which is the basis for the proposed clause, is unnecessary because the information is already available and reported to the Government in contractor annual Final Indirect Cost Rate Proposals when required by FAR 52.216–7. A few respondents commented that the clause prescription appears overly broad. Several respondents commented that the reporting period covered by the clause should reflect the contractor's fiscal year rather than the Government's fiscal year. One respondent expressed concern that information submitted as required by the clause might be used for improper purposes. One respondent commented that the clause does not provide guidance to contractors that did not expend any IR&D funds. One respondent commented that the clause does not provide guidance regarding submission of classified information.

Response: DoD removed the proposed clause at 252.242–70XX and its prescription from the final rule, because the proposed clause is not necessary for the Government to obtain the information required by statute.

6. Retroactive application of the rule.

Comment: A few respondents commented that the proposed rule as written would impermissibly entail retroactive application.

Response: DoD amended the final rule to avoid retroactive application. In particular, DoD deleted proposed-rule language that required contractor action for IR&D projects beginning on or after October 1, 2017.

7. CEO determination.

Comment: Several respondents suggested the CEO's authority to make determinations ''that expenditures will advance the needs of the Department of Defense for future technology and advanced capability'' should be explicitly delegable in the final rule. Other respondents raised concerns regarding companies that do not have a ''chief executive officer.''

Response: Regardless of formal title, the statute requires the determination to be made by the chief executive officer.

8. Connection to contractor business systems.

Comment: One respondent suggested that allowability of a contractor's IR&D costs could hinge on whether the contractor has an approved accounting system within the meaning of DFARS 252.242–7006, Accounting System Administration.

Response: The Government retains the responsibility for making appropriate inquiries into the reasonableness of the costs submitted, even if an approved accounting system would presumably satisfy the requirement for allowability of cost. Such inquiries must follow routine audit procedures. Therefore, there is no need for changes to the rule based on this comment.

9. Use of the word ''will'' in the rule.

Comment: One respondent commented that use of the word ''will'' in the proposed rule regarding the CEO determination is impractical because the word ''will'' connotes knowledge of future outcomes, which is necessarily uncertain. The respondent suggests the phrase ''are reasonably expected to'' in lieu of the word ''will.''

Response: DoD declines the suggestion because the word ''will'' aligns with the statutory requirement.

10. Public reporting burden.

Comment: One respondent commented that the Paperwork Reduction Act burden calculation for the proposed rule appears understated.

Response: DoD has revisited the public reporting burden in light of the final rule that, as written, results in no additional public reporting burden, except the burden OMB has already approved.

11. Deletion of the list of activities from DFARS 231.205–18(c)(iii)(B).

Comment: One respondent commented that the deletion in the proposed rule of the list at DFARS 231.205–18(c)(iii)(B) of activities of potential interest to DoD eliminates the need for the corresponding requirement in DFARS 242.771–3(a) for the administrative contracting officer to compare the IR&D projects uploaded into a Defense Technical Information Center (DTIC) website to the list. A few respondents commented that the list of activities, deleted by this rule, was useful and helpful to contractors.

Response: Both the proposed rule and the final rule include the removal of the requirement for the administrative contracting officer to determine whether IR&D projects are of potential interest to DoD, which was at 242.771–3(a)(2). Additionally, deletion of the list of activities at DFARS 231.205–18(c)(iii)(B) is tied to a statutory change.

12. Definition of ''major contractor.''

Comment: One respondent commented that the definition of ''major contractor'' at DFARS 231.205–18(a) should be changed such that the relevant calculation includes only IR&D costs rather than the sum of IR&D costs and B&P costs.

Response: This suggestion is outside the scope of this rule.

C. Other Changes

Other changes to the final rule that are not based on public comment consist of minor edits, such as updating statutory references and replacing the term ''IR&D/B&P costs'' with the term ''IR&D costs and B&P costs.''

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT), for Commercial Services, and for Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items

This rule does not create any new solicitation provisions or contract clauses. It does not impact any existing solicitation provisions or contract clauses or their applicability to contracts at or below the SAT, for commercial services, or for commercial products (including COTS items).

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.

V. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VI. Regulatory Flexibility Act

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

This rule implements section 824 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328). Section 824 amended 10 U.S.C. 2372 (redesignated as 10 U.S.C. 3762) to require that regulations may not infringe on the independence of a contractor to choose which technologies to pursue in its independent research and development (IR&D) program if the chief executive officer (CEO) of the contractor determines that IR&D expenditures will advance the needs of the Department of Defense for future technology and advanced capability. Section 824 also decouples IR&D and bid and proposal (B&P) costs by moving the language pertaining to B&P costs out of 10 U.S.C. 2372 and placing it in the new 10 U.S.C. 2372a (redesignated as 10 U.S.C. 3763). This change ensures that regulations pertaining to B&P costs are separated from regulations pertaining to IR&D costs.

One respondent challenged the statement in the initial regulatory flexibility analysis that ''DoD expects a minimal number of the contractors [required to submit statements regarding CEO determinations] to be small entities'' given that ''DoD does not have a list of other than major contractors or small entities that have IR&D programs.'' The requirement is removed from the final rule for major contractors to include a statement in the Defense Technical Information Center (DTIC) submission that the CEO of the contractor made the determination required by 10 U.S.C. 2372.

The final rule will only apply to small businesses that have incurred IR&D costs or B&P costs associated with noncommercial DoD awards exceeding the simplified acquisition threshold or small businesses that have an IR&D program and are considered to be a major contractor, which is defined as having annual expenditures of $11 million in combined IR&D and B&P expenditures.

DoD does not maintain a list of other than major contractors or small businesses that have IR&D programs. Based on an internal DoD website, 31 contractors have historically made 99 percent of the submissions of IR&D activities into the relevant DTIC website. DoD therefore expects the final rule will have minimal impact on small businesses.

This rule includes no new projected reporting, recordkeeping, or other compliance requirements.

There are no known significant alternative approaches to the final rule that would meet the requirements of the statute.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies to this rule. However, these changes to the DFARS do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 0704–0483, titled ''Independent Research and Development Technical Descriptions.''

List of Subjects in 48 CFR Parts 225, 231, and 242

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 225, 231, and 242 are amended as follows:

■ 1. The authority citation for parts 225, 231, and 242 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 225—FOREIGN ACQUISITION

■ 2. Amend section 225.7303–2—

■ a. In paragraph (b) by removing ''FAR Part'' and ''subsection'' and adding ''FAR part'' and ''section'' in their places, respectively; and

■ b. By revising paragraph (c) introductory text.

The revision reads as follows:

225.7303–2 Cost of doing business with a foreign government or an international organization.

* * * * *

(c) The limitations for all contractors described in 231.205–18(c)(iii) and (iv) do not apply to FMS contracts, except as provided in 225.7303–5. The allowability of independent research and development (IR&D) costs and bid and proposal (B&P) costs on contracts for FMS not wholly paid for from funds made available on a nonrepayable basis is limited to the contract's allocable share of the contractor's total IR&D expenditures and total B&P expenditures. In pricing contracts for such FMS—

* * * * *

PART 231—CONTRACT COST PRINCIPLES AND PROCEDURES

■ 3. Revise section 231.205–18 to read as follows:

231.205–18 Independent research and development and bid and proposal costs.

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

Covered contract means a DoD prime contract for an amount exceeding the simplified acquisition threshold, except for a fixed-price contract without cost incentives. The term also includes a subcontract for an amount exceeding the simplified acquisition threshold, except for a fixed-price subcontract without cost incentives under such a prime contract.

Covered segment means a product division of the contractor that allocated more than $1,100,000 in independent research and development (IR&D) costs and bid and proposal (B&P) costs to covered contracts during the preceding fiscal year. In the case of a contractor that has no product divisions, the term means that contractor as a whole. A product division of the contractor that allocated less than $1,100,000 in IR&D costs and B&P costs to covered contracts during the preceding fiscal year is not subject to the limitations in paragraph (c) of this section.

Major contractor means any contractor whose covered segments allocated a total of more than $11 million in IR&D costs and B&P costs to covered contracts during the preceding fiscal year. For purposes of calculating the dollar threshold amounts to determine whether a contractor meets the definition of ''major contractor,'' do not include contractor segments allocating less than $1,100,000 of IR&D and B&P costs to covered contracts during the preceding fiscal year.

(c) *Allowability.* (i) Departments/agencies shall not supplement this regulation in any way that limits IR&D cost allowability and B&P cost allowability.

(ii) See 225.7303–2(c) for allowability provisions affecting foreign military sale contracts.

(iii)(A) For IR&D costs major contractors incurred on covered contracts to be allowable—

(*1*) The contractor is required to report IR&D projects generating the IR&D costs to the Defense Technical Information Center (DTIC) using the DTIC's online input form and instructions at *https://defenseinnovationmarketplace.dtic.mil/industry-portal/;* and

(*2*) The contractor is required to update its DTIC inputs at least annually, no later than 3 months after the end of the contractor's fiscal year, and when the project is completed.

(B) The amount of IR&D costs allowable under DoD contracts shall not exceed the lesser of—

(*1*) Such contracts' allocable share of total incurred IR&D costs; or

(*2*) The total amount of incurred IR&D costs that the chief executive officer of the contractor has determined will advance the needs of DoD for future technology and advanced capability as DoD describes such needs in communications referenced at 242.771–3(c)(1)(i).

(C) Contractors that are not major contractors are encouraged to use the DTIC online input form and instructions at *https://defenseinnovationmarketplace.dtic.mil/industry-portal/* to report IR&D projects in order to provide DoD with visibility into the technical content of the contractors' IR&D projects.

(iv) Contractors are required to report incurred IR&D costs separately from indirect costs.

(v) Contractors are required to report incurred B&P costs separately from other indirect costs.

PART 242—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 4. Amend section 242.302 by revising paragraph (a)(9) to read as follows:

242.302 Contract administration functions.

(a) * * *

(9) For additional contract administration functions related to IR&D projects and B&P projects performed by major contractors, see 242.771–3(a).

* * * * *

■ 5. Revise sections 242.771–1, 242.771–2, and 242.771–3 to read as follows:

Sec.

242.771–1 Scope.

This section implements 10 U.S.C. 3762, Independent research and development costs: allowable costs; 10 U.S.C. 3763, Bid and proposal costs: allowable costs; and 10 U.S.C. 3847, Defense Contract Audit Agency: annual report.

242.771–2 Policy.

Defense contractors are encouraged to engage in independent research and development (IR&D) projects that will advance the needs of DoD for future technology and advanced capability (see 231.205–18(c)(iii)).

242.771–3 Responsibilities.

(a) The cognizant administrative contracting officer (ACO) or corporate ACO shall determine cost allowability of IR&D costs and bid and proposal (B&P) costs as set forth in 231.205–18 and FAR 31.205–18.

(b) The Defense Contract Audit Agency (DCAA) shall—

(1) For the DoD-wide B&P program, submit an annual report to the Principal Director, Defense Pricing and Contracting, Office of the Under Secretary of Defense for Acquisition and Sustainment, in connection with 10 U.S.C. 3763(c); the Defense Contract Management Agency or the military department responsible for performing contract administration functions is responsible for providing DCAA with statistical information, as necessary; and

(2) For IR&D costs and B&P costs incurred under any DoD contract in the previous Government fiscal year, submit an annual report to the congressional defense committees as required by 10 U.S.C. 3847.

(c) The Office of the Under Secretary of Defense for Research and Engineering (OUSD(R&E)), is responsible for establishing a regular method for communication—

(1)(i) From DoD to contractors, of timely and comprehensive information regarding planned or expected needs of DoD for future technology and advanced capability, by posting information on communities of interest and upcoming meetings on the Defense Technical Information Center (DTIC) website at *https://defenseinnovationmarketplace.dtic.mil/communities-of-interest;* and

(ii) From contractors to DoD, of brief technical descriptions of contractor IR&D projects; and

(2) By providing OUSD(R&E) contact information: *osd.pentagon.ousd-re.mbx.communications@mail.mil.*

[FR Doc. 2023–01293 Filed 1–30–23; 8:45 am]

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 225, and 252

[Docket DARS–2023–0003]

RIN 0750–AL60

Defense Federal Acquisition Regulation Supplement: Restriction on Acquisition of Personal Protective Equipment and Certain Items From Non-Allied Foreign Nations (DFARS Case 2022–D009)

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

ACTION: Interim rule.

SUMMARY: DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2022 that restricts the acquisition of personal protective equipment and certain other items from the Democratic People's Republic of North Korea, the People's Republic of China, the Russian Federation, and the Islamic Republic of Iran.

DATES: Effective January 31, 2023.

Comments on the interim rule should be submitted in writing to the address shown below on or before April 3, 2023, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2022–D009, using any of the following methods:

○ *Federal eRulemaking Portal: https://www.regulations.gov.* Search for ''DFARS Case 2022–D009.'' Select ''Comment'' and follow the instructions to submit a comment. Please include your name, company name (if any), and ''DFARS Case 2022–D009'' on any attached documents.

○ *Email: osd.dfars@mail.mil.* Include DFARS Case 2022–D009 in the subject line of the message.

Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *https://www.regulations.gov,* approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly Bass, telephone 703–717–3446.

SUPPLEMENTARY INFORMATION:

I. Background

This interim rule revises the DFARS to implement section 802 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2022 (Pub. L. 117–81) (10 U.S.C. 2533e) and section 881 of the NDAA for FY 2023 (Pub. L. 117–263). Section 802 adds the restriction to 10 U.S.C. 2533e (transferred to 10 U.S.C. 4875) that limits the acquisition of ''covered items'' (personal protective equipment and certain other items) from any of the following ''covered countries'': the Democratic People's Republic of North Korea, the People's Republic of China, the Russian Federation, and the Islamic Republic of Iran, subject to exceptions. ''Covered item'' is defined as an article or item of—