

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 212, 213, 223, and 252**

[Docket DARS–2023–0028]

RIN 0750–AK98

Defense Federal Acquisition Regulation Supplement: Replacement of Fluorinated Aqueous Film Forming Foam (DFARS Case 2020–D011)**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 2020.**DATES:** Effective October 1, 2023.

Comments on the interim rule should be submitted in writing to the address shown below on or before November 28, 2023, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2020–D011, using any of the following methods:
○ *Federal eRulemaking Portal:* <https://www.regulations.gov>. Search for “DFARS Case 2020–D011.” Select “Comment” and follow the instructions to submit a comment. Please include your name, company name (if any), and “DFARS Case 2020–D011” on any attached documents.○ *Email:* osd.dfars@mail.mil. Include DFARS Case 2020–D011 in the subject line of the message.Comments received will generally 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:** David Johnson, telephone 202–913–5764.**SUPPLEMENTARY INFORMATION:****I. Background**

This interim rule revises the DFARS to implement section 322(b), (c), and (d) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Pub. L. 116–92). Section 322 prohibits DoD procurement of fluorinated aqueous film-forming foam (AFFF)

containing in excess of one part per billion of perfluoroalkyl and polyfluoroalkyl substances (PFAS) after October 1, 2023, unless an exemption applies. Section 322 also requires publication not later than January 31, 2023, of a military specification for a fluorine-free fire-fighting agent for use at all military installations and availability of such agent for use not later than October 1, 2023. After October 1, 2024, fluorinated AFFF may not be used at any military installation, unless the Secretary of Defense waives the prohibition on use.

AFFF is used by DoD to rapidly extinguish fuel fires and protect against catastrophic loss of life and property; however, AFFF has been found to contain PFAS. In May 2016, the U.S. Environmental Protection Agency issued a lifetime drinking water health advisory for perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA) of 70 parts per trillion. PFOS and PFOA are only two of the hundreds of PFAS chemicals widely used throughout the United States. DoD ended land-based use of fluorinated AFFF except in emergencies in January 2016 and more recently ceased its use in fire-fighting training. When emergencies occur that necessitate the use of fluorinated AFFF, DoD treats the fluorinated AFFF release as a spill and therefore conducts clean-up efforts to protect ground water from being impacted. Additionally, DoD updated the military specification (MILSPEC) for AFFF to ensure that new supplies available for emergency firefighting responses do not contain detectable levels of PFOS or PFOA. This new MILSPEC, MIL–PRF–24385, for PFAS-free fire suppression went into effect January 31, 2023.

II. Discussion and Analysis

To implement section 322, this interim rule adds a new subpart at DFARS 223.74, Prohibition on Procurement of Certain Items Containing Perfluoroalkyl or Polyfluoroalkyl Substances, to ensure contracting officers do not procure AFFF having more than one part per billion of PFAS after October 1, 2023, unless an exception applies. The statute provides an exemption for shipboard use, specifically use onboard ocean-going vessels. The interim rule includes a new definition of “ocean-going vessels” to ensure a standard application of the exemption authority throughout the DoD contracting workforce.

This interim rule adds a new clause at DFARS 252.223–7009, Prohibition of Procurement of Fluorinated Aqueous

Film-Forming Foam Fire-Fighting Agent for Use on Military Installations, which prohibits contractors from providing any fire-fighting agent after October 1, 2023, that contains PFAS in excess of one part per billion. The clause will flow down to subcontracts for fire-fighting agent for use on a military installation to prevent unintentional procurement of the prohibited fire-fighting agent through the supply chain.

Conforming changes are made at DFARS 212.301 to add the new DFARS clause 252.223–7009 to the listing of solicitation provisions and contract clauses for the acquisition of commercial products and commercial services. DFARS 213.201(f) is added to apply the prohibition at 223.7402 to purchases at or below the micro-purchase threshold.

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

This interim rule creates a new clause at DFARS 252.223–7009, Prohibition of Procurement of Fluorinated Aqueous Film-Forming Foam Fire-Fighting Agent for Use on Military Installations. The clause is prescribed for use in solicitations and contracts that include fire-fighting foam supplies and services that include aqueous film-forming foam for use on a military installation. DoD is applying the requirements of section 322 of the NDAA for FY 2020 to contracts at or below the SAT and to contracts for the acquisition of commercial services and commercial products, including COTS items.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the Federal Acquisition Regulation system of regulations. DoD has made

that determination. Therefore, this rule applies at or below the simplified acquisition threshold.

B. Applicability to Contracts for the Acquisition of Commercial Products Including COTS Items and for the Acquisition of Commercial Services

10 U.S.C. 3452 exempts contracts for the acquisition of commercial products, including COTS items, and commercial services from provisions of law enacted after October 13, 1994, unless the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) makes a written determination that it would not be in the best interest of DoD to exempt contracts for the procurement of commercial products and commercial services from the applicability of the provision or contract requirement, except for a provision of law that—

- Provides for criminal or civil penalties;
- Requires that certain articles be bought from American sources pursuant to 10 U.S.C. 4862 (previously 10 U.S.C. 2533c), or that strategic materials critical to national security be bought from American sources pursuant to 10 U.S.C. 4863 (previously 10 U.S.C. 2533b); or
- Specifically refers to 10 U.S.C. 3452 and states that it shall apply to contracts and subcontracts for the acquisition of commercial products (including COTS items) and commercial services.

The statute implemented in this rule does not impose criminal or civil penalties, does not require purchase pursuant to 10 U.S.C. 4862 or 4863, and does not refer to 10 U.S.C. 3452. Therefore, section 322 will not apply to the acquisition of commercial services or commercial products including COTS items unless a written determination is made. Due to delegations of authority, the Principal Director, DPC is the appropriate authority to make this determination. DoD has made that determination. Therefore, this rule applies to the acquisition of commercial products including COTS items and to the acquisition of commercial services.

C. Determination

Given that the requirements of section 322 of the NDAA for FY 2020 were enacted to prohibit the purchase and use of fluorinated AFFF, and the product is procured commercially as a supply or is included in contracts for certain services, DoD has determined that it is in the best interest of the Federal Government to apply the rule to contracts for the acquisition of commercial services and commercial products including COTS items, as defined at FAR 2.101. An exception for

contracts for the acquisition of commercial services and commercial products, including COTS items, would exclude contracts intended to be covered by the law, thereby undermining the overarching purpose of the law.

IV. Expected Impact of the Rule

This rule is not expected to have a significant economic impact on contractors. Businesses have been selling fluorine-free fire-fighting foams in various formulations alongside PFAS-containing AFFF in the commercial marketplace for several years. Some or most of the businesses that have supplied PFAS-containing AFFF to DoD will likely supply fluorine-free foams to DoD. Moreover, DoD has already significantly reduced the use of AFFF since ending both land-based use and use in training exercises in the past several years.

By limiting DoD procurement of AFFF containing detectable amounts of PFAS, this rule both protects DoD personnel from PFAS exposure and limits the possibility of AFFF-related PFAS releases into the environment.

V. 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.

VI. 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.

VII. 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 DoD has significantly reduced the procurement and use of AFFF. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This interim rule amends the DFARS to implement section 322 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Pub. L. 116–92). Section 322 prohibits DoD procurement of fluorinated aqueous film-forming foam (AFFF), which is used to fight fires, containing in excess of one part per billion of perfluoroalkyl and polyfluoroalkyl substances (PFAS) after October 1, 2023, unless an exemption applies. Section 322 provides an exemption for use onboard ocean-going vessels.

The objective of the rule is to ensure contracting officers do not procure and contractors do not provide or use the prohibited fluorinated AFFF unless an exemption applies. The legal basis of the rule is section 322 of the NDAA for FY 2020.

This rule is not expected to affect significant numbers of small entities, because DoD has significantly reduced the use of AFFF since ending both use in training exercises and land-based use in the past several years. Data generated from the Federal Procurement Data System for fiscal years 2019 through 2022 indicates that DoD has awarded an average of 32,326 contracts for specific product and service codes related to firefighting supplies, equipment, and services to approximately 643 unique small entities during the three-year period. While DoD is unable to identify how many unique small entities of the 643 currently supply fire-fighting agent to DoD, to the extent they do supply fire-fighting agent, they will most likely continue to do so, assuming the use is exempt, or a waiver has been granted. Further, any PFAS-free replacement product will most likely follow existing supply channels.

The rule does not impose any new reporting, recordkeeping, or compliance requirements.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no practical alternatives that will accomplish the objectives of the statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2020–D011), in correspondence.

VIII. Paperwork Reduction Act

This interim rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

IX. Determination To Issue an Interim Rule Effective in Less Than 30 Days

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to promulgate this interim rule, effective in less than 30 days, without prior opportunity for public comment. This action must be effective in less than 30 days to implement section 322 of the NDAA for FY 2020 before its statutory prohibition on procurement of PFAS-containing AFFF takes effect on October 1, 2023. This rule both protects DoD personnel from PFAS exposure and limits the possibility of AFFF-related PFAS releases into the environment. In addition, the rule provides advance notice to contracting officers to reduce the risk of obligating funds for the purchase of PFAS-containing AFFF in violation of section 322. Therefore, its timely implementation is imperative.

However, pursuant to 41 U.S.C. 1707 and FAR 1.501–3(b), DoD will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 212, 213, 223, and 252

Government procurement.

Jennifer D. Johnson,
Editor/Publisher, Defense Acquisition
Regulations System.

Therefore, 48 CFR parts 212, 213, 223, and 252 are amended as follows:

■ 1. The authority citation for parts 212, 213, 223, and 252 continues to read as follows:

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

PART 212—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

■ 2. Amend section 212.301—

■ a. By designating paragraph (f)(viii) as (f)(viii)(A) and

■ b. By adding a new paragraph (f)(viii)(B).

The addition reads as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial products and commercial services.

* * * * *

(f) * * *

(viii) * * *

(B) Use the clause at 252.223–7009, Prohibition of Procurement of Fluorinated Aqueous Film-Forming Foam Fire-Fighting Agent for Use on Military Installations, as prescribed at 223.7404 to comply with section 322(b), (c), and (d) of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92).

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PART 213—SIMPLIFIED ACQUISITION PROCEDURES

■ 3. Amend section 213.201 by adding new paragraph (f) to read as follows:

213.201 General.

(f) Notwithstanding FAR 13.201(f), apply the prohibition at 223.7402 to purchases at or below the micro-purchase threshold.

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PART 223—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

■ 4. Add subpart 223.74 to read as follows:

Subpart 223.74—Prohibition on Procurement of Certain Items Containing Perfluoroalkyl or Polyfluoroalkyl Substances

Sec.

223.7400 Scope of subpart.

223.7401 Definition.

223.7402 Prohibition.

223.7403 Procedures.

223.7404 Contract clause.

Subpart 223.74—Prohibition on Procurement of Certain Items Containing Perfluoroalkyl or Polyfluoroalkyl Substances

223.7400 Scope of subpart.

This subpart implements section 322(b), (c), and (d) of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92).

223.7401 Definition.

As used in this subpart—
Ocean-going vessel means a vessel over 59 feet in length owned or operated by DoD or the U.S. Coast Guard, other

than vessels that are chartered by the Armed Forces on a time or voyage basis.

223.7402 Prohibition.

After October 1, 2023, do not procure aqueous film-forming foam, which is used for fighting fires, that contains in excess of one part per billion perfluoroalkyl substances or polyfluoroalkyl substances. Procurements of fire-fighting agent for use solely onboard ocean-going vessels are exempt from this prohibition.

223.7403 Procedures.

After October 1, 2023, contracting officers shall only issue a solicitation to procure fire-fighting foam in accordance with performance specification MIL–PRF–24385F(SH), unless the requiring activity provides documentation of the exemption at 223.7402. The contracting officer shall maintain the documentation in the contract file.

223.7404 Contract clause.

Use the clause at 252.223–7009, Prohibition of Procurement of Fluorinated Aqueous Film-Forming Foam Fire-Fighting Agent for Use on Military Installations, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, relating to fire-fighting on military installations.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Add section 252.223–7009 to read as follows:

252.223–7009 Prohibition of Procurement of Fluorinated Aqueous Film-Forming Foam Fire-Fighting Agent for Use on Military Installations.

As prescribed in 223.7404, use the following clause:

Prohibition of Procurement of Fluorinated Aqueous Film-Forming Foam Fire-Fighting Agent for Use on Military Installations (Oct 2023)

(a) *Definitions.* As used in this clause, *perfluoroalkyl substances* and *polyfluoroalkyl substances* have the meanings given in section 322(f) of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92).

(b) *Prohibition.* The Contractor shall not provide or use under this contract any aqueous film-forming foam fire-fighting agent that contains perfluoroalkyl substances or polyfluoroalkyl substances in excess of one part per billion.

(c) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (c), in all subcontracts, including subcontracts for

commercial products and commercial services, relating to fire-fighting on a military installation.

(End of clause)

[FR Doc. 2023–20800 Filed 9–28–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 209, 212, and 252

[Docket DARS–2023–0029]

RIN 0750–AL41

Defense Federal Acquisition Regulation Supplement: Limitation on Certain Institutes of Higher Education (DFARS Case 2021–D023)

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 2021, that provides for the limitation of funds authorized to be appropriated or otherwise made available for any fiscal year for DoD, to be provided to an institution of higher education that hosts a Confucius Institute.

DATES: Effective October 1, 2023.

Comments on the interim rule should be submitted in writing to the address shown below on or before November 28, 2023, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2021–D023, using any of the following methods:

○ *Federal eRulemaking Portal:* <https://www.regulations.gov>. Search for “DFARS Case 2021–D023.” Select “Comment” and follow the instructions to submit a comment. Please include “DFARS Case 2021–D023” on any attached documents.

○ *Email:* osd.dfars@mail.mil. Include DFARS Case 2021–D023 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: Kimberly Bass, telephone 703–717–3446.

SUPPLEMENTARY INFORMATION:

I. Background

This interim rule revises the DFARS to implement section 1062 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116–283). Section 1062 provides that none of the funds authorized to be appropriated or otherwise made available for any fiscal year for DoD may be provided to an institution of higher education that hosts a Confucius Institute, defined as a cultural institute directly or indirectly funded by the government of the People’s Republic of China. According to section 1062, the limitation of funds is applicable to amounts other than those provided directly to students as educational assistance. The effective date of section 1062 is October 1, 2023.

II. Discussion and Analysis

A. New Definitions

The interim rule adds new definitions at DFARS section 209.170–1, Definitions, for “Confucius Institute” and “institution of higher education”. “Confucius Institute” means a cultural institute directly or indirectly funded by the government of the People’s Republic of China. “Institution of higher education” has the meaning given in 20 U.S.C. 1002.

B. Limitation of Funds

At DFARS 209.170–2, the limitation is added regarding not providing funds appropriated or otherwise made available for any fiscal year for DoD to an institution of higher education that hosts a Confucius Institute, other than amounts provided directly to students as educational assistance.

C. Waiver of Funds Limitation

Pursuant to section 1286(g) of the NDAA for FY 2019 (Pub. L. 115–232; 10 U.S.C. 4001 note), the funds limitation with respect to an institution of higher education can be waived by the Office of the Under Secretary of Defense for Research and Engineering (OUSD(R&E)). Section 209.170–3 addresses the OUSD(R&E), Confucius Institute Waiver Program procedures.

D. Solicitation Provision

A new solicitation provision is added at DFARS 252.209–7011, Representation for Restriction on the Use of Certain Institutions of Higher Education, for use in solicitations, including solicitations using Federal Acquisition Regulation

(FAR) part 12 procedures for the acquisition of commercial products and commercial services, for acquisitions to an institution of higher education. The prescription for the provision is at DFARS 209.170–4. The provision is also added to the list of solicitation provisions and contract clauses for the acquisition of commercial products and commercial services at DFARS 212.301.

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

This rule creates a new solicitation provision at DFARS 252.209–7011, Representation for Restriction on the Use of Certain Institutions of Higher Education. The provision at DFARS 252.209–7011 is prescribed in DFARS 209.170–4 for use in solicitations for acquisitions to an institution of higher education, including solicitations for acquisitions to an institution of higher education using FAR part 12 procedures for the acquisition of commercial products, including COTS items, and commercial services. DoD is applying the rule to contracts at or below the SAT, to contracts for the acquisition of commercial products including COTS items, and for the acquisition of commercial services.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations. DoD has made that determination. Therefore, this rule applies at or below the simplified acquisition threshold.