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48 CFR Parts 204, et al.

Federal Acquisition Regulations; Final Rule and Proposed Rule

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 204, 212, 225, and 252****RIN 0750-AI32****Defense Federal Acquisition Regulation Supplement: Foreign Commercial Satellite Services (DFARS Case 2014-D010)****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 (NDAA) for Fiscal Year (FY) 2014 that prohibits acquisition of commercial satellite services from certain foreign entities.

DATES: Effective August 5, 2014.

Comment Date: Comments on the interim rule should be submitted in writing to the address shown below on or before October 6, 2014, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2014-D010, using any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2014-D010" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2014-D010." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2014-D010" on your attached document.

- *Email:* osd.dfars@mail.mil. Include DFARS Case 2014-D010 in the subject line of the message.

- *Fax:* 571-372-6094.

- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Amy G. Williams, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:**I. Background**

This interim rule amends the DFARS to implement section 1602 of the NDAA for FY 2014 (Pub. L. 113-66). Section 1602 prohibits award of a contract for commercial satellite services to a foreign entity if the Secretary of Defense reasonably believes that the foreign entity—

- Is an entity in which the government of a covered foreign country has an ownership interest that enables the government to affect satellite operations; or
- Plans to, or is expected to, provide or use launch or other satellite services under the contract from a covered foreign country.

A covered foreign country means the People's Republic of China, North Korea, or any country that is a state sponsor of terrorism, as described in section 1261(c)(2) of the NDAA for FY 2013 (Pub. L. 112-239). State sponsors of terrorism, as determined by the Secretary of State, currently include Cuba, Iran, Sudan, and Syria.

II. Discussion and Analysis

This interim rule adds a new section at DFARS 225.772 that addresses the prohibition on acquisition of commercial satellite services from certain foreign entities and adds a provision at DFARS 252.225-7049 that requires offerors to represent whether they are foreign entities that fall within the prohibition, or whether they are offering commercial satellite services provided by such a foreign entity. If the offeror responds affirmatively to any of the representations, then the offeror must provide further disclosure regarding the circumstances.

The prohibition on award to such foreign entities does not apply if the Secretary of Defense for Acquisition, Technology, and Logistics or the Under Secretary of Defense for Policy, without power of redelegation, determines that it is in the national security interest of the United States to enter into such contract and, not later than seven days before entering into such contract, the Under Secretary of Defense making the determination, in consultation with the Director of National Intelligence, submits to the congressional defense committees a national security

assessment in accordance with 10 U.S.C. 2279.

There are conforming changes to DFARS 204.1202 and 252.205-7007 to include the new representations in the annual representations and certifications, and changes to DFARS 212.301(f) to add the new provision to the list of provisions and clauses that are applicable to the acquisition of commercial items.

III. Applicability to Acquisitions Not Greater Than the Simplified Acquisition Threshold (SAT) and Commercial Items

10 U.S.C. 2279 is silent on applicability to contracts and subcontracts in amounts not greater than the SAT or for the acquisition of commercial items. Also, the statute does not provide for criminal or civil penalties. Therefore, it does not apply to the acquisition of contracts and subcontracts in amounts not greater than the SAT or the acquisition of commercial items unless the Director, DPAP, makes a written determination as provided in 41 U.S.C. 1905.

There is a potential risk to national security if DoD uses commercial satellite services for DoD communications and the government of a covered foreign country has an ownership interest that enables the government to affect satellite operations, regardless of the dollar value of the contract or order. Likewise, if launch or other satellite services under the contract are occurring in a covered country, the government of that country could impact the ability of the foreign entity to adequately provide those services. Furthermore, although 10 U.S.C. 2279 does not specifically reference 41 U.S.C. 1906, the statute only applies to the acquisition of commercial satellite services, so exempting commercial items from application of the statute would negate the intended effect of the statute. Therefore, consistent with 41 U.S.C. 1905 and 1906, the Director, Defense Procurement and Acquisition Policy, has determined that 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.

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 a significant regulatory action and, therefore, was 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

DoD does not expect this interim 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.* However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 1602 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2014. Section 1602 added 10 U.S.C. 2279, which prohibits acquisition of commercial satellite services from certain foreign entities.

The objective of the rule is to implement 10 U.S.C. 2279, which is the legal basis for the rule. The statute prohibits award of contracts for commercial satellite services to a foreign entity that—

- Is an entity in which the government of a covered foreign country (i.e., the People's Republic of China, North Korea, Cuba, Iran, Sudan, or Syria) has an ownership interest that enables the government to affect satellite operations; or
- Plans to, or is expected to, provide or use launch or other satellite services under the contract from a covered foreign country.

DoD estimates that this rule will apply to less than 111 small entities. According to Federal Procurement Data System data for FY 2013, 111 small entities were awarded contracts or orders for services in PSC 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.

This rule requires an annual representation 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. Further information is required if the offeror provides an affirmative response to any of the representations, but such affirmative response and further submission of information is expected to be extremely rare.

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

This rule will not have a significant economic impact on any small entities, unless they are offering commercial satellite services provided by a foreign entity that is subject to the restrictions of this rule. DoD was not able to identify any alternatives that would reduce the burden on small entities and meet the objectives of the rule.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this 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 2014–D010), in correspondence.

VI. Paperwork Reduction Act

The rule contains information collection requirements that required the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). This information collection requirement is entitled *Foreign Commercial Satellite Services*.

A. Public reporting burden for this collection of information is estimated to average .25 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden estimated as follows:

Respondents: 380.

Responses per respondent: 1.

Total annual responses: 380.

Preparation hours per response: .25 hours.

Total response Burden Hours: 95.

B. Request for Comments Regarding Paperwork Burden.

Written comments and recommendations on the proposed information collection, including suggestions for reducing this burden, should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, or email Jasmeet_K_Seehra@omb.eop.gov, with a copy to the Defense

Acquisition Regulations System, Attn: (Amy G. Williams), OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060. Comments can be received from 30 to 60 days after the date of this notice, but comments to OMB will be most useful if received by OMB within 30 days after the date of this notice.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the DFARS, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Acquisition Regulations System, Attn: Ms. Amy G. Williams, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060, or email osd.dfars@mail.mil. Include DFARS Case 2014–D010 in the subject line of the message.

VII. 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 promulgate this interim rule without prior opportunity for public comment. This action is necessary because to implement 10 U.S.C. 2279, as added by section 1602 of the National Defense Authorization Act for FY 2014 (Pub. L. 113–66), which was effective upon enactment (December 26, 2013). 10 U.S.C. 2279 restricts acquisition of commercial satellite services from certain foreign entities. Until this statute is implemented in the DFARS, there is risk that contracting officers may acquire commercial satellite services in violation of the law, and can create risk to the U.S. military and lost opportunities for the U.S. industrial base.

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 204, 212, 225, and 252

Government procurement.

Amy G. Williams,

Deputy, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 204, 212, 225, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 204, 212, 225, and 252 continues to read as follows:

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

PART 204—ADMINISTRATIVE MATTERS

■ 2. Amend section 204.1202 by—

■ a. Removing, in paragraph (2) introductory text, “Central Contractor Registration” and adding “System for Award Management” in its place;

■ b. Redesignating paragraph (2)(xi) through (xiii) as (2)(xii) through (xiv), respectively; and

■ c. Adding a new paragraph (2)(xi) to read as follows:

204.1202 Solicitation provision.

* * * * *

(2) * * *

(xi) 252.225–7049, Prohibition on Acquisition of Commercial Satellite Services from Certain Foreign Entities—Representations.

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PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 3. Amend section 212.301 by—

■ a. Redesignating paragraphs (f)(xlviii) through (lxxii) as (f)(xlix) through (lxxiii); and

■ b. Adding a new paragraph (f)(xlviii) to read as follows:

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

(f) * * *

(xlviii) Use the provision at 252.225–7049, Prohibition on Acquisition of Commercial Satellite Services from Certain Foreign Entities—Representations, as prescribed at 225.772–5.

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PART 225—FOREIGN ACQUISITION

225.771 [Added and reserved]

■ 4. Add and reserve section 225.771.

■ 5. Add sections 225.772, 225.772–0, 225.772–1, 225.772–2, 225.772–3, 225.772–4, and 225.772–5 to read as follows:

225.772 Prohibition on acquisition of commercial satellite services from certain foreign entities.

225.772–0 Scope.

This section implements 10 U.S.C. 2279.

225.772–1 Definitions.

As used in this section, covered foreign country, foreign entity, government of a covered foreign country, satellite services, and state sponsor of terrorism are defined in the provision at 252.225–7049, Prohibition on Acquisition of Commercial Satellite Services from Certain Foreign Entities—Representations.

225.772–2 Prohibition.

The contracting officer shall not award a contract for commercial satellite services to—

(a) A foreign entity if the Under Secretary of Defense for Acquisition, Technology, and Logistics or the Under Secretary of Defense for Policy reasonably believes that the foreign entity—

(1) Is an entity in which the government of a covered foreign country has an ownership interest that enables the government to affect satellite operations; or

(2) Plans to or is expected to provide or use launch or other satellite services under the contract from a covered foreign country; or

(b) An offeror that is offering commercial satellite services provided by a foreign entity as described in paragraph (a) of this section.

225.772–3 Procedures.

(a) If an offeror discloses information in accordance with paragraph (d) of the provision 252.225–7049, Prohibition on Acquisition of Commercial Satellite Services from Certain Foreign Entities—Representations, the contracting officer—

(1) Shall forward the information regarding the offeror through agency channels to the address at PGI 225.772–3; and

(2) Shall not award to that offeror, unless an exception is determined to apply in accordance with 225.772–4.

(b)(1) If the otherwise successful offeror provides negative responses to all representations in the provision at 252.225–7049, the contracting officer may rely on the representations, unless the contracting officer has an independent reason to question the representations.

(2) If the contracting officer has an independent reason to question a negative representation of the otherwise successful offeror, the contracting

officer shall consult with the office specified in PGI 225.772–3, prior to deciding whether to award to that offeror.

225.772–4 Exception.

(a) The prohibition in 225.772–2 does not apply if—

(1) The Under Secretary of Defense for Acquisition, Technology, and Logistics, or the Under Secretary of Defense for Policy, without power of redelegation, determines that it is in the national security interest of the United States to enter into such contract; and

(2) Not later than seven days before entering into such contract, the Under Secretary of Defense making the determination in paragraph (a)(1) of this section, in consultation with the Director of National Intelligence, submits to the congressional defense committees a national security assessment, in accordance with 10 U.S.C. 2279.

(b) If requesting an exception pursuant to paragraph (a) of this section, the contracting officer shall forward the request through agency channels to the address at PGI 225.772–3, providing any available information necessary for the Under Secretary of Defense making the determination in paragraph (a)(1) of this section to evaluate the request and perform a national security assessment, in accordance with 10 U.S.C. 2279.

225.772–5 Solicitation provision.

Use the provision at 252.225–7049, Prohibition on Acquisition of Commercial Satellite Services from Certain Foreign Entities—Representations, in solicitations for the acquisition of commercial satellite services. If the solicitation includes the provision at FAR 52.204–7, do not separately list the provision 252.225–7049 in the solicitation.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. Amend section 252.204–7007 by—

■ a. Removing the clause date “(MAR 2014)” and adding “(AUG 2014)” in its place;

■ b. Redesignating paragraphs (d)(1)(v) through (vii) as (d)(1)(vi) through (viii); and

■ c. Adding a new paragraph (d)(1)(v) to read as follows:

252.204–7007 Alternate A, Annual Representations and Certifications.

* * * * *

(d)(1) * * *

(v) 252.225–7049, Prohibition on Acquisition of Commercial Satellite Services from Certain Foreign Entities—

Representations. Applies to solicitations for the acquisition of commercial satellite services.

* * * * *

■ 7. Add section 252.225–7049 to read as follows:

252.225–7049 Prohibition on Acquisition of Commercial Satellite Services From Certain Foreign Entities—Representations.

As prescribed in 225.772–5, use the following provision:

Prohibition on Acquisition of Commercial Satellite Services From Certain Foreign Entities—Representations (Aug 2014)

(a) *Definitions.* As used in this provision—
Covered foreign country means—

- (i) The People's Republic of China;
- (ii) North Korea; or
- (iii) Any country that is a state sponsor of terrorism. (10 U.S.C. 2279)

Foreign entity means—

(i) Any branch, partnership, group or sub-group, association, estate, trust, corporation or division of a corporation, or organization organized under the laws of a foreign state if either its principal place of business is outside the United States or its equity securities are primarily traded on one or more foreign exchanges.

(ii) Notwithstanding paragraph (i) of this definition, any branch, partnership, group or sub-group, association, estate, trust, corporation or division of a corporation, or organization that demonstrates that a majority of the equity interest in such entity is ultimately owned by U.S. nationals is not a foreign entity. (31 CFR 800.212)

Government of a covered foreign country includes the state and the government of a covered foreign country, as well as any political subdivision, agency, or instrumentality thereof.

Satellite services means communications capabilities that utilize an on-orbit satellite for transmitting the signal from one location to another.

State sponsor of terrorism means a country determined by the Secretary of State, under section 6(j)(1)(A) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)(1)(A)), to be a country the government of which has repeatedly provided support for acts of international terrorism. As of the date of this provision, state sponsors of terrorism subject to this provision are Cuba, Iran, Sudan, and Syria. (10 U.S.C. 2327)

(b) *Prohibition on award.* In accordance with 10 U.S.C. 2279, unless an exception is determined to apply in accordance with DFARS 225.71–4, no contract for commercial satellite services may be awarded to—

(1) A foreign entity if the Under Secretary of Defense for Acquisition, Technology, and Logistics or the Under Secretary of Defense for Policy reasonably believes that the foreign entity—

(i) Is an entity in which the government of a covered foreign country has an ownership interest that enables the government to affect satellite operations; or

(ii) Plans to, or is expected to, provide or use launch or other satellite services under the contract from a covered foreign country; or

(2) An offeror that is offering to provide the commercial satellite services of a foreign entity as described in paragraph (b)(1) of this section.

(c) *Representations.* The Offeror represents that—

(1) It [] is, [] is not a foreign entity in which the government of a covered foreign country has an ownership interest that enables the government to affect satellite operations;

(2) It [] is, [] is not a foreign entity that plans to provide or use launch or other

satellite services under the contract from a covered foreign country;

(3) It [] is, [] is not offering commercial satellite services provided by a foreign entity in which the government of a covered foreign country has an ownership interest that enables the government to affect satellite operations; and

(4) It [] is, [] is not offering commercial satellite services provided by a foreign entity that plans to or is expected to provide or use launch or other satellite services under the contract from a covered foreign country.

(d) *Disclosure.* If the Offeror has responded affirmatively to any of the above representations, provide the following information, as applicable:

(1) Identification of the foreign entity proposed to provide the commercial satellite services, if other than the Offeror.

(2) To the extent practicable, a description of any ownership interest that the government of a covered foreign country has in the foreign entity proposed to provide the satellite services, including identification of the covered foreign country.

(3) Identification of any covered foreign country in which launch or other satellite services will be provided or used, and a description of any satellite services planned to be provided or used in that country.

(e) The representations in paragraph (c) of this provision are a material representation of fact upon which reliance will be placed when making award. If it is later determined that the Offeror knowingly rendered an erroneous representation, in addition to other remedies available to the Government, the Contracting Officer may terminate the contract resulting from this solicitation for default.

(End of provision)

[FR Doc. 2014–18204 Filed 8–4–14; 8:45 am]

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