



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 225, and 252

[Docket DARS-2020-0031]

RIN 0750-AK97

Defense Federal Acquisition Regulation Supplement: Prohibition on Contracting with Persons that have Business Operations with the Maduro Regime (DFARS Case 2020-D010)

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

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a statute that prohibits the Department of Defense from entering into contracts for the procurement of goods and services with any person that has business operations with an authority of the government of Venezuela that is not recognized as the legitimate government of Venezuela by the United States Government.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2020-D010,

using any of the following methods:

- o *Regulations.gov*: <http://www.regulations.gov>. Search for "DFARS Case 2020-D010" under the heading "Enter keyword or ID" and selecting "Search." Select "Comment Now" and follow the instructions provided to submit a comment. Please include "DFARS Case 2020-D010" on any attached documents.

- o *Email*: osd.dfars@mail.mil. Include DFARS Case 2020-D010 in the subject line of the message.

- o *Fax*: 571-372-6094.

- o *Mail*: Defense Acquisition Regulations System, Attn: Ms. Kimberly Bass, OUSD(A&S)DPC/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. Kimberly Bass, telephone 571-372-6174.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS, to implement section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year

(FY) 2020 (Pub. L. 116-92). Section 890 prohibits contracts for the procurement of goods and services with any person that has business operations with an authority of the government of Venezuela that is not recognized as the legitimate government of Venezuela by the United States Government, subject to exceptions.

II. Discussion and Analysis

This rule proposes to add section DFARS 225.7019, Prohibition on Contracting with the Maduro Regime. This section provides to contracting officers a new solicitation provision and contract clause for use in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, unless an exception applies.

A. Solicitation provision and contract clause.

Per the new solicitation provision, DFARS 252.225-70XX, Representation Regarding Business Operations with the Maduro Regime, an offeror represents, by submission of its offer, that the offeror does not conduct any prohibited business operations with persons or entities with the Maduro regime or the government of Venezuela, or the offeror has a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury. The clause, DFARS 252.225-70YY, Prohibition Regarding Business Operations with the Maduro Regime, prohibits DoD contractors from entering into a

contract or subcontract for the procurement of products or services with any person that has business operations with an authority of the government of Venezuela that is not recognized as the legitimate government of Venezuela by the United States Government, subject to the listed exceptions, as a condition of the contract.

B. Definitions

Definitions are added for the terms "Agency or instrumentality of the government of Venezuela," "Business operations," "Government of Venezuela," and "Person," as set out in the regulatory text at the end of this document.

C. Exceptions

Exceptions to the prohibition are provided to include contracts that are—

- Jointly determined by the Secretary of Defense and the Secretary of State to be necessary for certain humanitarian or disaster relief purposes or vital to the national security interests of the United States;

- Related to the operation and maintenance of the United States Government's consular offices and diplomatic posts in Venezuela; or

- Awarded to a person that has a valid license to operate

in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury, that otherwise would be prohibited.

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

This rule proposes to create a new provision and a new clause:

(1) DFARS 252.225-70XX, Representation Regarding Business Operations with the Maduro Regime; and (2) DFARS 252.225-70YY, Prohibition Regarding Business Operations with the Maduro Regime.

DoD plans to apply the provision and the clause to solicitations, contracts, or subcontracts below the simplified acquisition threshold (SAT) and to the acquisition of commercial items, including commercially available off-the-shelf (COTS) items, as defined at FAR 2.101. This DFARS rule implements section 890 of the NDAA for FY 2020. Section 890 prohibits contracts for the procurement of goods and services with any person that has business operations with an authority of the government of Venezuela, subject to exceptions.

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 FAR 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.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items

10 U.S.C. 2375 exempts contracts and subcontracts for the acquisition of commercial items (including COTS items) from provisions of law enacted after October 13, 1994, that, as determined by the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)), set forth policies, procedures, requirements, or restrictions for the acquisition of property or services unless—

- The provision of law—
 - Provides for criminal or civil penalties;
 - Requires that certain articles be bought from American sources pursuant to 10 U.S.C. 2533a or that strategic materials critical to national security be bought from American sources pursuant to 10 U.S.C. 2533b; or

o Specifically refers to 10 U.S.C. 2375 and states that it shall apply to contracts and subcontracts for the acquisition of commercial items (including COTS items); or

- USD(A&S) determines in writing that it would not be in the best interest of the Government to exempt contracts or subcontracts for the acquisition of commercial items from the applicability of the provision.

This authority has been delegated to the Principal Director, Defense Pricing and Contracting.

C. Applicability

Section 890 of the NDAA for FY 2020 is silent on applicability to contracts and subcontracts in amounts no greater than the SAT or for the acquisition of commercial items. Also, the statute does not provide for civil or criminal penalties. Therefore, it does not apply to contracts or subcontracts in amounts not greater than the SAT or to the acquisition of commercial items unless the Principal Director, Defense Pricing and Contracting, makes a written determination as provided in 41 U.S.C. 1905 and 10 U.S.C. 2375.

Not applying this rule to contracts and subcontracts below the SAT and for the acquisition of commercial items, including COTS items, would exclude contracts intended to be covered by this rule and undermine the overarching purpose of the rule to prohibit business operations with the Maduro Regime with an authority of the

government of Venezuela. This is particularly true with regard to the acquisition of fuel and petroleum, procurements which are usually commercial items. To not include the acquisition of fuel and petroleum within this prohibition or not applying the prohibition below the SAT will unacceptably diminish the impact of these sanctions on the Maduro regime, the government of Venezuela that is not recognized by the United States Government as the legitimate government of Venezuela. Consequently, DoD plans to apply the rule to contracts and subcontracts below the SAT and for the acquisition of commercial items, 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. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not expected to be subject to E.O. 13771, because this rule is not expected to be significant under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this proposed 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. Nevertheless, an initial regulatory flexibility analysis has been performed and summarized as follows:

The rule amends the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a statute that prohibits contracts for the procurement of goods and services with any person that has business operations with an authority of the government of Venezuela, subject to exceptions.

The objective and legal basis for the rule is to implement section 890 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 which prohibits contracts for the procurement of goods and services with any person that has business operations with an authority of the government of Venezuela, subject to exceptions for contracts that are—

- Jointly determined by the Secretary of Defense and the Secretary of State to be necessary for certain humanitarian or

disaster relief purposes or vital to the national security interests of the United States;

- Related to the operation and maintenance of the United States Government's consular offices and diplomatic posts in Venezuela; or

- Awarded to a person that has a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury, that otherwise would be prohibited.

DoD reviewed the Federal Procurement Data System (FPDS) data for fiscal years (FY) 2017, 2018, and 2019 (including contracts or subcontracts that do not exceed the simplified acquisition threshold) to determine the estimated impact of the rule on U.S. small businesses. There were no DoD actions reported to FPDS during the period FY 2017 through FY 2019, where the vendor is located in Venezuela or the place of performance is Venezuela.

It is expected that this rule will not impact small businesses.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. The rule does not duplicate, overlap, or conflict with any other Federal rules.

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

DoD invites 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 2020-D010), in correspondence.

VII. Paperwork Reduction Act

The 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).

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

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 225, and 252 are proposed to be amended as follows:

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

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

PART 212—ACQUISITION OF COMMERCIAL ITEMS

2. Amend section 212.301 by adding paragraphs (f) (ix) (GG) and (HH) to read as follows:

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

* * * * *

(f) * * *

(ix) * * *

(GG) Use the provision at 252.225-70XX, Representation Regarding Business Operations with the Maduro Regime, as prescribed in 225.7019-5(a), to comply with section 890 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92).

(HH) Use the clause at 252.225-70YY, Prohibition Regarding Business Operations with the Maduro Regime, as prescribed in 225.7019-5(b), to comply with section 890 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92).

* * * * *

PART 225—FOREIGN ACQUISITION

3. Add sections 225.7019, 225.7019-1, 225.7019-2, 225.7019-3, 225.7019-4, and 225.7019-5 to subpart 225.70 to read as follows:

* * * * *

Sec.

225.7019 Prohibition on contracting with the Maduro regime.

225.7019-1 Definitions.

225.7019-2 Prohibition.

225.7019-3 Exceptions.

225.7019-4 Joint determination.

225.7019-5 Solicitation provision and contract clause.

* * * * *

225.7019 Prohibition on contracting with the Maduro regime.

225.7019-1 Definitions.

As used in this section—

Agency or instrumentality of the government of Venezuela means an agency or instrumentality of a foreign state as defined in section 28 U.S.C.1603(b), with each reference in such section to a foreign state deemed to be a reference to Venezuela.

Business operations means engaging in commerce in any form, including acquiring, developing, maintaining, owning, selling, possessing, leasing, or operating equipment, facilities, personnel, products, services, personal property, real property, or any other apparatus of business or commerce.

Government of Venezuela means the government of any political subdivision of Venezuela, and any agency or instrumentality of the government of Venezuela.

Person means—

(1) A natural person, corporation, company, business association, partnership, society, trust, or any other nongovernmental entity, organization, or group;

(2) Any governmental entity or instrumentality of a government, including a multilateral development institution (as defined in section 1701(c)(3) of the International Financial Institutions Act (22 U.S.C. 262r(c)(3)); and

(3) Any successor, subunit, parent entity, or subsidiary of, or any entity under common ownership or control with, any entity described in paragraph (1) or (2) of this definition.

225.7019-2 Prohibition.

In accordance with section 890 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92), DoD is prohibited from entering into a contract for the procurement of products or services with any person that has business operations with an authority of the government of Venezuela that is not recognized as the legitimate government of Venezuela by the United States Government, except as provided in 225.7019-3 or 225.7019-4.

225.7019-3 Exceptions.

The prohibition in 225.7019-2 does not apply if-

(a) The person has a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury; or

(b) The acquisition is related to the operation and maintenance of the United States Government's consular office and diplomatic posts in Venezuela.

225.7019-4 Joint determination.

(a) The prohibition in section 225.7019-2 does not apply to an acquisition jointly determined by the Secretary of Defense and Secretary of State to be-

(1) Necessary for purposes of-

(i) Providing humanitarian assistance to the people of Venezuela;

(ii) Disaster relief and other urgent lifesaving measures; or

(iii) Carrying out noncombatant evacuations; or

(2) Vital to the national security interests of the United States.

(b) Follow the procedures at PGI 225.7019-4(b) when entering into a contract on the basis of a joint determination.

225.7019-5 Solicitation provision and contract clause.

(a) Use the provision at 252.225-70XX, Representation Regarding Business Operations with the Maduro Regime, in solicitations that include the clause at 252.225-70YY, Prohibition Regarding Business Operations with the Maduro Regime, including solicitations using FAR part 12 procedures for the acquisition of commercial items.

(b) Unless an exception at 225.7019-3 applies or a joint determination has been made in accordance with 225.7019-4, use the clause at 252.225-70YY, Prohibition Regarding Business

Operations with the Maduro Regime, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Add section 252.225-70XX to read as follows:

252.225-70XX Representation Regarding Business Operations with the Maduro Regime.

As prescribed in 225.7019-5(a), use the following provision:

**REPRESENTATION REGARDING BUSINESS OPERATIONS WITH THE MADURO
REGIME (DATE)**

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

Agency or instrumentality of the government of Venezuela means an agency or instrumentality of a foreign state as defined in section 28 U.S.C. 1603(b), with each reference in such section to a foreign state deemed to be a reference to Venezuela.

Business operations means engaging in commerce in any form, including acquiring, developing, maintaining, owning, selling, possessing, leasing, or operating equipment, facilities, personnel, products, services, personal property, real property, or any other apparatus of business or commerce.

Government of Venezuela means the government of any political subdivision of Venezuela, and any agency or instrumentality of the government of Venezuela.

Person means—

(1) A natural person, corporation, company, business association, partnership, society, trust, or any other nongovernmental entity, organization, or group;

(2) Any governmental entity or instrumentality of a government, including a multilateral development institution (as defined in section 1701(c)(3) of the International Financial Institutions Act (22 U.S.C. 262r(c)(3)); and

(3) Any successor, subunit, parent entity, or subsidiary of, or any entity under common ownership or control with, any entity described in paragraph (1) or (2) of this definition.

(b) *Prohibition.* In accordance with section 890 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92), DoD is prohibited from entering into a contract for the procurement of products or services with any person that has business operations with an authority of the government of Venezuela that is not recognized as the legitimate government of Venezuela by the United States Government, unless the person has a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury.

(c) *Representation.* By submission of its offer, the Offeror represents that the Offeror—

(1) Does not have any business operations with an authority of the Maduro regime or the government of Venezuela

that is not recognized as the legitimate government of Venezuela by the United States Government; or

(2) Has a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury.

(End of provision)

5. Add section 252.225-70YY to read as follows:

252.225-70YY Prohibition Regarding Business Operations with the Maduro Regime.

As prescribed in 225.7019-5(b), use the following clause:

PROHIBITION REGARDING BUSINESS OPERATIONS WITH THE MADURO REGIME

(DATE)

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

Agency or instrumentality of the government of Venezuela means an agency or instrumentality of a foreign state as defined in section 28 U.S.C. 1603(b), with each reference in such section to a foreign state deemed to be a reference to Venezuela.

Business operations means engaging in commerce in any form, including acquiring, developing, maintaining, owning, selling, possessing, leasing, or operating equipment, facilities, personnel, products, services, personal property, real property, or any other apparatus of business or commerce.

Government of Venezuela means the government of any political subdivision of Venezuela, and any agency or instrumentality of the government of Venezuela.

Person means—

(1) A natural person, corporation, company, business association, partnership, society, trust, or any other nongovernmental entity, organization, or group;

(2) Any governmental entity or instrumentality of a government, including a multilateral development institution (as defined in section 1701(c)(3) of the International Financial Institutions Act (22 U.S.C. 262r(c)(3)); and

(3) Any successor, subunit, parent entity, or subsidiary of, or any entity under common ownership or control with, any entity described in paragraph (1) or (2) of this definition.

(b) *Prohibition.* In accordance with section 890 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92), DoD is prohibited from entering into a contract for the procurement of products or services with any person that has business operations with an authority of the government of Venezuela that is not recognized as the legitimate government of Venezuela by the United States Government, unless the person has a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury.

(c) The Contractor shall—

(1) Not have any business operations with an authority of the Maduro regime or the government of Venezuela that is not recognized as the legitimate government of Venezuela by the United States Government; or

(2) Have a valid license to operate in Venezuela issued by the Office of Foreign Assets Control of the Department of the Treasury.

(d) *Subcontracts.* The Contractor shall insert the substance of this clause, including this paragraph (d), in all subcontracts, including subcontracts for the acquisition of commercial items.

(End of clause)