



5001-06-P

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 212, 225, and 252**

**[Docket DARS-2020-0036]**

**RIN 0750-AL03**

**Defense Federal Acquisition Regulation Supplement: Source Restrictions on Auxiliary Ship Components (DFARS Case 2020-D017)**

**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 requires certain auxiliary ship components to be procured from a manufacturer in the national technology and industrial base.

**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 2019-D017, using any of the following methods:

- o *Regulations.gov*: <http://www.regulations.gov>. Search for "DFARS Case 2020-D017" 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-D017" on any attached documents.

- o *Email: osd.dfars@mail.mil.* Include DFARS Case 2020-D017 in the subject line of the message.

- 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](http://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 853 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020. Section 853 amends 10 U.S.C. 2534, Miscellaneous limitations on the procurement of goods other than United States goods, to establish limitations on the procurement of large medium-speed diesel engines for contracts awarded for new

construction of an auxiliary ship, unless the engines are manufactured in the national technology and industrial base, which includes the United States, Australia, Canada, and the United Kingdom.

## **II. Discussion and Analysis**

This proposed rule addresses the restrictions related to auxiliary ship components in DFARS section 225.7010, which already restricts contracting officers from acquiring certain components of naval vessels, to the extent they are unique to marine applications, unless the components are from the national industrial base. Paragraph 225.7010-1(b) is added to include limitations on large medium-speed diesel engines for auxiliary ships for contracts awarded by the Secretary of a military department for new construction of an auxiliary ship using funds available for National Defense Sealift Fund programs or Shipbuilding and Conversion, Navy.

Language is added at DFARS 225.7010-2, Exceptions, to state that the newly added restriction at 225.7010-1(b) does not apply to contracts or subcontracts that do not exceed the simplified acquisition threshold or to large medium-speed diesel engines for icebreakers or special mission ships.

The waiver criteria at DFARS 225.7008 apply to the restrictions; therefore, a conforming change is made to DFARS 225.7010-3, Waiver, to add a pointer to the restrictions at

225.7010-1. An editorial change is also made to DFARS 225.7010-4 to add cross-references to 225.7010-1(a).

A new clause, DFARS 252.225-70XX, Restriction on Acquisition of Large Medium-Speed Diesel Engines, is added. The clause applies to acquisitions greater than the simplified acquisition threshold and to contracts using FAR part 12 procedures for the acquisition of commercial items that require large medium-speed diesel engines for new construction of auxiliary ships using funds available for National Defense Sealift Fund programs or Shipbuilding and Conversion, Navy. The restriction does not apply to large medium-speed diesel engines for icebreakers or special mission ships. DFARS 212.301 is amended to reflect that the clause will apply to commercial item acquisitions.

DoD seeks public input and feedback on the content of the proposed rule and specifically in regard to a clarifying definition for "large medium-speed diesel engines" for auxiliary ships using funds available for National Defense Sealift Fund programs or Shipbuilding and Conversion, Navy. As noted in the statute, the term "auxiliary ship" does not include an icebreaker or a special mission ship.

**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 DFARS clause, 252.225-70XX, Restriction on Acquisition of Large Medium-Speed Diesel Engines. DoD does not intend to apply the requirements of section 853 of the NDAA for FY 2020 to contracts at or below the simplified acquisition threshold (SAT). Section 853 amends 10 U.S.C. 2534(a) to provide a limitation on components for auxiliary ships. 10 U.S.C. 2534 does not apply to a contract or subcontract for an amount that does not exceed the SAT (see paragraph (g)). Therefore this clause will not apply to acquisitions at or below the SAT. However the rule proposes to apply the clause to contracts for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items.

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

10 U.S.C. 2375 governs the applicability of laws to DoD contracts for the acquisition of commercial items, including COTS items, and is intended to limit the applicability of laws to contracts and subcontracts for the acquisition of commercial items, including COTS items. 10 U.S.C. 2375 provides that if a provision of law contains criminal or civil penalties, or if the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) makes a written determination that it is not in the best interest of the Federal Government to exempt commercial

item contracts, the provision of law will apply to contracts for the acquisition of commercial items 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
    - 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 (DPC).

#### *B. Applicability*

Section 853 of the NDAA for FY 2020 does not apply to contracts at or below the SAT and is silent on applicability to contracts and subcontracts 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 for the acquisition of commercial items unless the

Principal Director, DPC, makes a written determination as provided in 10 U.S.C. 2375.

DoD intends to determine that it is in the best interest of the Federal Government to apply the rule to contracts and subcontracts for the acquisition of commercial items, including COTS items, as defined at FAR 2.101. Not applying this rule to contracts and subcontracts 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 restrict the purchase of large medium-speed diesel engines for auxiliary ships, unless the engines are manufactured in the national technology and industrial base, which includes the United States, Australia, Canada, and the United Kingdom.

#### **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 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 requires certain auxiliary ship components to be procured from a manufacturer in the national technology and industrial base, which includes the United States, Australia, Canada, and the United Kingdom, subject to exceptions.

The objective and legal basis for the rule is to implement section 853 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020, which amends 10 U.S.C. 2534, Miscellaneous limitations on the procurement of goods other than United States goods. Section 853 establishes limitations on procurement of large medium-speed diesel engines for contracts



awarded by the Secretary of a military department using funds available for National Defense Sealift Fund programs or Shipbuilding and Conversion, Navy.

for new construction of an auxiliary ship using funds available for National Defense Sealift Fund programs or Shipbuilding and Conversion, Navy, unless manufactured in the United States, Australia, Canada, or the United Kingdom.

DoD reviewed Federal Procurement Data System (FPDS) data for fiscal years (FY) 2017, 2018, and 2019 (excluding contracts or subcontracts that do not exceed the simplified acquisition threshold or acquisitions of spare or repair parts needed to support naval vessels manufactured outside the United States; and large medium-speed diesel engines specifically for icebreakers or special mission ships). The FPDS data reflected that there were a total of 241 awards, of which 121 were made to small businesses, a median of 50 percent awarded to unique small entities over the last three fiscal years.

It is expected that this rule will benefit small businesses. The rule will provide small businesses the opportunity to participate in the manufacture of auxiliary ship components in support of the national technology and industrial base.

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-D017), 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 D. Johnson,**

*Regulatory Control Officer,*

*Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 212, 225, and 252 is 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 12—ACQUISITION OF COMERCIAL ITEMS**

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

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

\* \* \* \* \*

(f) \* \* \*

(ix) \* \* \*

(GG) Use the clause at 252.225-70XX, Restriction on Acquisition of Large Medium-Speed Diesel Engines, as prescribed in 225.7010-5, to comply with 10 U.S.C. 2534(a)(6).

**PART 225—FOREIGN ACQUISITION**

3. Revise the section 225.7010 heading to read as follows:

**225.7010 Restrictions on certain naval vessel and auxiliary ship components.**

4. Revise section 25.7010-1 to read as follows:

**225.7010-1 Restrictions.**

In accordance with 10 U.S.C. 2534, unless manufactured in the United States, Australia, Canada, or the United Kingdom, do not acquire—

(a) The following components of naval vessels, to the extent they are unique to marine applications:

(1) Gyrocompasses.

(2) Electronic navigation chart systems.

- (3) Steering controls.
- (4) Pumps.
- (5) Propulsion and machinery control systems.
- (6) Totally enclosed lifeboats.

(b) Large medium-speed diesel engines for auxiliary ships using funds available for National Defense Sealift Fund programs or Shipbuilding and Conversion, Navy.

5. Revise section 225.7010-2 to read as follows:

**225.7010-2 Exceptions.**

(a) The restriction at 225.7010-1(a) does not apply to—

- (1) Contracts or subcontracts that do not exceed the simplified acquisition threshold; or
- (2) Acquisition of spare or repair parts needed to support components for naval vessels manufactured outside the United States. Support includes the purchase of spare gyrocompasses, electronic navigation chart systems, steering controls, pumps, propulsion and machinery control systems, or totally enclosed lifeboats, when those from alternate sources are not interchangeable.

(b) The restriction at 225.7010-1(b) does not apply to—

- (1) Contracts or subcontracts that do not exceed the simplified acquisition threshold; or
- (2) Large medium-speed diesel engines for icebreakers or special mission ships.

6. Revise 225.7010-3 to read as follows:

**225.7010-3 Waiver.**

The waiver criteria at 225.7008 apply to the restrictions at 225.7010-1.

7. Amend section 225.7010-4 by-

- a. Revising the section heading; and
- b. In paragraphs (a) and (b), removing "this restriction" and adding "the restriction at 225-7010-1(a)" in both places.

The revision reads as follows:

**225.7010-4 Implementation of restriction on certain naval vessel components.**

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8. Add section 225.7010-5 to read as follows:

**225.7010-5 Contract clause.**

Use the clause at 252.225-70XX, Restriction on Acquisition of Large Medium-Speed Diesel Engines, in solicitations and contracts that exceed the simplified acquisition threshold, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that require large medium-speed diesel engines for new construction of auxiliary ships using funds available for National Defense Sealift Fund programs or Shipbuilding and Conversion, Navy unless-

- (a) An exception at 225.7010-2(b)(2) applies; or
- (b) A waiver has been granted.

**PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

9. Add section 252.225-7038 to read as follows:

**252.225-7038 Restriction on Acquisition of Large Medium-Speed Diesel Engines.**

As prescribed in 225.7010-5, use the following clause:

**RESTRICTION ON ACQUISITION OF LARGE MEDIUM-SPEED DIESEL ENGINES  
(DATE)**

Unless otherwise specified in its offer, the Contractor shall deliver under this contract large medium-speed diesel engines manufactured in the United States, Australia, Canada, or the United Kingdom.

(End of clause)