



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 223

[Docket DARS-2020-0045]

RIN 0750-AL17

Defense Federal Acquisition Regulation Supplement: Authorities for Minimizing the Use of Materials Containing Hexavalent Chromium (DFARS Case 2020-D031)

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 remove references to revoked Executive Orders related to minimizing the use of materials containing hexavalent chromium.

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 the final rule.

ADDRESSES: Submit comments identified by DFARS Case 2020-D031, using any of the following methods:

- o Federal eRulemaking Portal: <http://www.regulations.gov>. Search for "DFARS Case 2020-D031." Select "Comment Now" and follow the instructions to submit a comment. Please include your name, company name (if any), and "DFARS Case 2020-D031" on

any attached document.

- o Email: *osd.dfars@mail.mil*. Include DFARS Case 2020-D031 in the subject line of the message.

- o Mail: Defense Acquisition Regulations System, Attn: Ms. Kimberly R. Ziegler, OUSD(A&S)DPC/DARS, Room 3B938, 3060 Defense Pentagon, Washington, DC 20301-3060.

Instructions: 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 R. Ziegler, telephone 571-372-6095.

SUPPLEMENTARY INFORMATION:

I. Background

This rule proposes to amend the DFARS to remove references to Executive Order (E.O.) 13423, Strengthening Federal Environmental, Energy, and Transportation Management, and E.O. 13514, Federal Leadership in Environmental, Energy, and Economic Performance, as the authorities for the policy at DFARS subpart 223.73, Minimizing the Use of Materials Containing Hexavalent Chromium. Both E.O. 13423 and E.O. 13514 were revoked by E.O. 13693, Planning for Federal Sustainability in the Next Decade, which was later revoked by E.O. 13834, Efficient Federal Operations (83 FR 23771, May 22, 2018). However, the removal of

these references will not impact DoD's policies and procedures for minimizing the use of hexavalent chromium, a known carcinogen, still used in some DoD weapon systems and platforms due to its corrosion protection properties.

On May 5, 2011, DoD issued a final rule, Minimizing the Use of Materials Containing Hexavalent Chromium (DFARS Case 2009-D004) (76 FR 25569), which amended the DFARS to implement requirements for minimizing the use of materials containing hexavalent chromium in items acquired by DoD pursuant to an Under Secretary of Defense (Acquisition, Technology, and Logistics) policy memorandum dated April 8, 2009. The final rule codified internal procedures for addressing the serious human health and environmental risks related to the use of hexavalent chromium and prohibited the delivery of items containing more than 0.1 percent by weight hexavalent chromium in any homogeneous material under DoD contracts unless there is no acceptable alternative to the use of hexavalent chromium. While this rule removes references to the revoked E.O.s, there is no change to the DoD policy implemented under the prior DFARS rule.

II. Discussion and Analysis

The policy related to minimizing the use of materials containing hexavalent chromium is implemented in DFARS subpart 223.73. This rule proposes to remove references to E.O. 13423 and E.O. 13514 in the authorities section at DFARS 223.7302. In addition, this rule proposes to amend the policy section at DFARS 223.7301 to cite the DoD policy memorandum, dated April 8,

2009, as the source for the policy implemented in the DFARS. There are no changes proposed to the requirements of DFARS subpart 223.73 or the associated contract clause at DFARS 252.223-7008, Prohibition of Hexavalent Chromium. Therefore, there will be no impact to contracting officers or contractors as a result of this rule.

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

This proposed rule does not create any new provisions or clauses, nor does it change the applicability of any existing provisions or clauses included in solicitations and contracts valued at or below the simplified acquisition threshold, or for commercial items, including commercially available off-the-shelf 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

The rule is not anticipated to be subject to E.O. 13771, because this rule is not a significant regulatory action 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., because this rule maintains the current policies, procedures, and contract clause. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This rule proposes to amend the DFARS to remove references to Executive Order (E.O.) 13423, Strengthening Federal Environmental, Energy, and Transportation Management; and E.O. 13514, Federal Leadership in Environmental, Energy, and Economic Performance, which were revoked by E.O. 13693, Planning for Federal Sustainability in the Next Decade. E.O. 13693, was later revoked by E.O. 13834, Efficient Federal Operations (83 FR 23771, May 22, 2018). The rule proposes to replace references to the revoked E.O.s with a reference to the DoD policy memorandum, dated April 8, 2009, Minimizing the use of Materials Containing Hexavalent Chromium.

The objective of the case is to remove two revoked E.O.s, while maintaining current DoD policies and procedures for minimizing the use of materials containing hexavalent chromium.

Data generated from the Electronic Data Access system for fiscal years 2017 through 2019, indicates that DoD has awarded an average of 99,832 contracts containing DFARS clause 252.223-7008, Prohibition of Hexavalent Chromium, to approximately 14,777 unique entities per year, of which 70,470 contracts were awarded to 10,868 unique small entities (74 percent).

The rule does not impose any new reporting, recordkeeping, or compliance requirements. The requirements of DFARS clause 252.223-7008 remain unchanged; therefore, this rule is not expected to affect significant numbers of small business concerns.

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

There are no significant alternatives that will accomplish the objective of this rule.

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-D031), 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 Part 223

Government procurement.

Jennifer D. Johnson,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR 223 is proposed to be amended as follows:

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

1. The authority citation for 48 CFR part 223 continues to read as follows:

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

2. Revise section 223.7301 to read as follows:

223.7301 Policy.

In accordance with the DoD policy memorandum of April 8, 2009, Minimizing the Use of Hexavalent Chromium, it is DoD policy to minimize hexavalent chromium (an anti-corrosive) in items acquired by DoD (deliverables and construction material), due to the serious human health and environmental risks related to its use.

223.7302 [Removed and Reserved]

3. Remove and reserve section 223.7302.

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