



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 212, 225, and 252

[Docket DARS-2020-0039]

RIN 0750-AL15

Defense Federal Acquisition Regulation Supplement: Improved Energy Security for Main Operating Bases in Europe (DFARS Case 2020-D030)

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 section of the National Defense Authorization Act for Fiscal Year 2020 that prohibits contracts for the acquisition of furnished energy for a covered military installation in Europe that is sourced from inside the Russian Federation.

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-D030, using any of the following methods:

o *Regulations.gov*: <https://www.regulations.gov>. Search for "DFARS Case 2020-D030". Select "Comment Now" and follow the

instructions provided to submit a comment. Please include "DFARS Case 2020-D030" on any attached documents.

- o *Email:* *osd.dfars@mail.mil*. Include DFARS Case 2020-D030 in the subject line of the message.

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

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 (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 2821 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Pub. L. 116-92). Section 2821 prohibits use of energy sourced from inside the Russian Federation in an effort to promote energy security in Europe. The prohibition applies to all forms of energy "furnished to a covered military installation", as that term is defined in the statute, and only to main operating bases as defined and identified by DoD. This means the energy itself must be furnished to the military

installation, not to a third party that uses it to create some other form of energy (e.g., heating, cooling, or electricity). The prohibition applies only to Europe, not to Asia; for example, those parts of Turkey located in Asia are not affected by the rule.

DoD will promote the energy security of its European installations by encouraging energy security and energy resilience and will not purchase energy sourced from inside the Russian Federation unless a waiver of the prohibition in section 2821 is approved by the head of the contracting activity. The approval authority for the waiver may not be further delegated.

II. Discussion and Analysis

This rule proposes to add DFARS section 225.70XX, Prohibition on use of energy sourced from inside the Russian Federation. A new provision and a new clause are provided for use in solicitations and contracts for the acquisition of furnished energy for a covered military installation in Europe, including acquisitions at or below the simplified acquisition threshold, and acquisitions using FAR part 12 procedures for the acquisition of commercial items, unless a waiver is approved by the head of the contracting activity. Per the new solicitation provision, 252.225-70XX, Representation Regarding Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation, an offeror represents, by submission of its offer, that the offeror will not use or supply energy sourced in the Russian Federation in the performance of a contract resulting

from the solicitation. The proposed clause, 252.225-70YY, Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation, prohibits a contractor from using, in the performance of the contract, any energy sourced from inside the Russian Federation as a means of generating the furnished energy for the covered military installation, unless a waiver is approved.

Definitions for the following terms are included at DFARS 225.70XX-1: "covered military installation", "furnished energy", and "main operating base".

Waiver procedures at DFARS 225.70XX-3 provide that the head of the contracting activity, without power of redelegation, may waive application of section 2821 to a specific contract for the acquisition of furnished energy for a covered military installation, if the head of the contracting activity certifies to the congressional defense committees that the—

- Waiver of the prohibition is necessary to ensure an adequate supply of furnished energy for the covered military installation; and
- The head of the contracting activity has balanced these national security requirements against the potential risk associated with reliance upon the Russian Federation for furnished energy.

Not later than 14 days before the execution of any energy contract for which a waiver is granted, the head of the contracting activity must submit to the congressional defense

committees a notice of the waiver. The waiver notice shall include the following:

- The rationale for the waiver, including the basis for the certification required by section 2821 of the NDAA for FY 2020;
- An assessment of how the waiver may impact DoD's European energy resilience strategy; and
- An explanation of the measures DoD is taking to mitigate the risk of using Russian Federation-furnished energy.

A cross-reference is provided to DFARS Procedures, Guidance, and Information 225.70XX-3 that lists factors to take into consideration for granting a waiver.

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

This DFARS rule implements section 2821 of the NDAA for FY 2020 (Pub. L. 116-92). Section 2821 prohibits use of energy sourced from inside the Russian Federation in an effort to promote energy security in Europe unless a waiver is approved by the head of the contracting activity.

To implement section 2821, this rule proposes to create a new provision and clause: (1) DFARS 252.225-70XX, Representation Regarding Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation, and (2) DFARS 252.225-70YY, Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation.

Section 2821 is silent on applicability to contracts and subcontracts in amounts at or below 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 the acquisition of contracts or subcontracts in amounts not greater than the SAT or to the acquisition of commercial items, including COTS items, unless a written determination is made as provided for in 41 U.S.C. 1905 and 10 U.S.C. 2375, respectively. The Principal Director, Defense Pricing and Contracting, is the appropriate authority to make a determination for regulations to be published in the DFARS, which is part of the FAR system of regulations.

In consonance with the written determination made by the Principal Director, Defense Pricing and Contracting, on May 29, 2020, DoD plans to apply section 2821 to solicitations and contracts below the SAT and to the acquisition of commercial items, including COTS items, as defined at FAR 2.101. Not applying this prohibition guidance to contracts 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 use of energy sourced from inside the Russian Federation. Consequently, DoD plans to apply the rule to contracts below the SAT and for the acquisition of commercial items, including COTS items, to promote energy security in Europe and reduce the risk of supply shortages and reliance on energy sourced inside the Russian Federation.

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. Executive Order 13771

This rule is not subject to the requirements of E.O. 13771, because the rule is issued with respect to a national security function of the United States.

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 is summarized as follows:

The rule proposes to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a statute that prohibits contracts for the use of energy sourced inside the Russian Federation for military installations in Europe.

The legal basis for the rule is section 2821 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020, which prohibits use of energy sourced from inside the Russian Federation in an effort to promote energy security in Europe. The prohibition applies to all forms of energy "furnished to a covered military installation", as that term is defined in the statute and only to main operating bases as defined and identified by DoD.

Based on data obtained from the Federal Procurement Data System (FPDS) for fiscal years 2017 through 2019 for awards coded for product service code S111 (Utilities-Gas) with locations in Europe, 108 awards per year were made on average over the three fiscal years, with an average of 3 awards to unique entities that were other than small businesses. The awardees were listed as foreign contractor consolidated reporting, which is used to report procurement actions awarded to contractors located outside the United States providing utilities goods or services when a unique entity identifier is not available. When a generic entity identifier is used to report these actions, FPDS only allows contracting officers to select "other than small business" as the contracting officer's determination of business size. FPDS allows contracting officers to aggregate awards and report one record that includes multiple awards, which masks the identity of the entity. Consequently, reporting awards in this manner is likely to result in an undercount of the number of unique entities, as

there is no data available to determine the number of entities or whether the entities are small or other than small. Based on this analysis, DoD estimates it is unlikely that an American small entity would be providing these utility services in Europe.

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-D030), 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 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 Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation, as prescribed in 225.70XX-4(a), to comply with section 2821 the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92).

(HH) Use the clause at 252.225-70YY, Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation, as prescribed in 225.70XX-4(b), to comply with section 2821 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92).

* * * * *

PART 225—FOREIGN ACQUISITION

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

* * * * *

Sec.

225.70XX Prohibition on use of certain energy sourced from
inside the Russian Federation.

225.70XX-1 Definitions.

225.70XX-2 Prohibition.

225.70XX-3 Waiver.

225.70XX-4 Solicitation provision and contract clause.

* * * * *

**225.70XX Prohibition on use of certain energy sourced from
inside the Russian Federation.**

225.70XX-1 Definitions.

As used in this section—

Covered military installation means a military installation in Europe identified by DoD as a main operating base.

Furnished energy means energy furnished to a covered military installation in any form and for any purpose, including heating, cooling, and electricity.

Main operating base means a facility outside the United States and its territories with permanently stationed operating forces and robust infrastructure.

225.70XX-2 Prohibition.

In accordance with section 2821 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92),

contracts for the acquisition of furnished energy for a covered military installation shall not use any energy sourced from inside the Russian Federation as a means of generating the furnished energy for the covered military installation. The prohibition—

(a) Applies to all forms of energy that are furnished to a covered military installation; and

(b) Does not apply to a third party that uses it to create some other form of energy (e.g., heating, cooling, or electricity).

225.70XX-3 Waiver.

(a) The requiring activity may submit to the contracting activity a request for waiver of the prohibition in section 225.70XX-2 for a specific contract for the acquisition of furnished energy for a covered military installation. The head of the contracting activity, without power of redelegation, may approve the waiver, upon certification to the congressional defense committees that—

(1) The waiver of section 2821 is necessary to ensure an adequate supply of furnished energy for the covered military installation; and

(2) National security requirements have been balanced against the potential risk associated with reliance upon the Russian Federation for furnished energy.

(b) Submission of waiver notice.

(1) Not later than 14 days before the execution of any energy contract for which a waiver is granted under paragraph (a) of this section, the head of the contracting activity shall submit to the congressional defense committees a notice of the waiver. See PGI 225.70XX-3 for waiver procedures.

(2) The waiver notice shall include the following:

(i) The rationale for the waiver, including the basis for the certifications required by paragraph (a) of this section.

(ii) An assessment of how the waiver may impact DoD's European energy resilience strategy.

(ii) An explanation of the measures DoD is taking to mitigate the risk of using Russian Federation furnished energy.

225.70XX-4 Solicitation provision and contract clause.

Unless a waiver has been granted in accordance with 225.70XX-3-

(a) Use the provision at 252.225-70XX, Representation Regarding Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items and solicitations at or below the simplified acquisition threshold, that are for the acquisition of furnished energy for a covered military installation; and

(b) Use the clause at 252.225-70YY, Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of

commercial items and solicitations and contracts at or below the simplified acquisition threshold, that are for the acquisition of furnished energy for a covered military installation.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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

252.225-70XX Representation Regarding Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation.

As prescribed in 225.70XX-4(a), use the following provision:

REPRESENTATION REGARDING PROHIBITION ON USE OF CERTAIN ENERGY SOURCED FROM INSIDE THE RUSSIAN FEDERATION (DATE)

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

Covered military installation means a military installation in Europe identified by DoD as a main operating base.

Furnished energy means energy furnished to a covered military installation in any form and for any purpose, including heating, cooling, and electricity.

Main operating base means a facility outside the United States and its territories with permanently stationed operating forces and robust infrastructure.

(b) *Prohibition.* In accordance with section 2821 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92), contracts for the acquisition of furnished energy for a covered military installation shall not use any energy sourced from inside the Russian Federation as a means of generating the furnished energy for the covered military installation, unless a waiver is approved. The prohibition—

(1) Applies to all forms of energy that are furnished to a covered military installation; and

(2) Does not apply to a third party that uses it to create some other form of energy (e.g., heating, cooling, or electricity).

(c) *Representation.* By submission of its offer, the Offeror represents that the Offeror will not use or provide any energy sourced from inside the Russian Federation as a means of generating the furnished energy for the covered military installation in the performance of any contract, subcontract, or other contractual instrument resulting from this solicitation.

(End of provision)

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

252.225-70YY Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation.

As prescribed in 225.70XX-4(b), use the following clause:

PROHIBITION ON USE OF CERTAIN ENERGY SOURCED FROM INSIDE THE RUSSIAN FEDERATION (DATE)

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

Covered military installation means a military installation in Europe identified by DoD as a main operating base.

Furnished energy means energy furnished to a covered military installation in any form and for any purpose, including heating, cooling, and electricity.

Main operating base means a facility outside the United States and its territories with permanently stationed operating forces and robust infrastructure.

(b) *Prohibition.* In accordance with section 2821 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92), the Contractor shall not use in the performance of this contract any energy sourced from inside the Russian Federation as a means of generating the furnished energy for the covered military installation unless a waiver is approved. The prohibition—

(1) Applies to all forms of energy that are furnished to a covered military installation; and

(2) Does not apply to a third party that uses it to create some other form of energy (e.g., heating, cooling, or electricity).

(c) *Subcontracts.* The Contractor shall insert the substance of this clause, including this paragraph (c), in subcontracts and other commercial instruments that are for furnished energy at a covered military installation, including subcontracts and commercial instruments for commercial items.

(End of clause)