



**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 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:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2020. This section prohibits contracts for the acquisition of furnished energy for a covered military installation in Europe that is sourced from inside the Russian Federation.

**DATES:** Effective **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Kimberly Bass, telephone 571-372-6174.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD published a proposed rule in the **Federal Register** at 86 FR 3935 on January 15, 2021, 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. No public comments were received in response to the proposed rule.

## **II. Discussion and Analysis**

### *A. Summary of significant changes*

No changes are made to the final rule as a result of public comments.

### *B. Other changes*

One change is made to the rule as proposed to clarify the same language that appears in section 225.7019-2, paragraph (b); the provision 252.225-7053, paragraph (b)(2); and clause 252.225-7054, paragraph (b)(2). In all three locations, the statement "Does not apply to a third party that uses it to create some other form of energy (e.g., heating, cooling, or electricity)" is changed to read "Does not apply to energy converted by a third party into another form of energy and not directly delivered to a covered military installation." No other changes are made to the rule.

## **III. Applicability To Contracts At or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-The-Shelf 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 unless a waiver is approved by the head of the contracting activity. To implement section 2821, this rule creates a new solicitation provision and contract clause: (1) DFARS 252.225-7053, Representation Regarding Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation, and (2) DFARS 252.225-7054, 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 simplified acquisition threshold (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, 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 will apply section 2821 to solicitations and contracts at or 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 at or 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 will apply the rule to contracts at or 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. Expected Impact of the Rule**

This rule amends the DFARS to implement section 2821 of the NDAA for FY 2020 (Pub. L. 116-92). Section 2821 prohibits the 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 that is "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 electric). The prohibition applies only to Europe, not to Asia (for example, those parts of Turkey located in Asia).

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 rule requires the head of the contracting activity to submit to the congressional defense committees a notice of the waiver.

The following factors will be taken into consideration for granting a waiver:

(1) The energy supply system is physically incapable of segregating Russian Federation energy from non-Russian Federation energy.

(2) The installation can only obtain the necessary energy from its current supplier without the unaffordable expense of constructing new supply lines.

(3) The price of requiring the supplier to segregate the energy is unaffordable and would result in the installation being unable to perform its mission within its budget authority.

(4) Consideration, by the requiring activity, of installation energy and security resilience has been taken into account (e.g., on-site sources of energy and fuel resupply would allow the installation to continue to perform its mission even with disruption of Russian Federation-sourced energy, the installation has addressed energy resilience and security risks and vulnerabilities, etc.).

According to Federal Procurement Data System (FPDS) data for fiscal years 2017 through 2019, DoD awards an average of 108 contracts each year that are assigned the product service code

(PSC) S111, with an average of 3 of those awards being made to unique entities that were other than small businesses.

PSC	Description
S111	Utilities - Gas (with locations in Europe)

The awardees were listed as foreign contractor consolidated reporting. Foreign contractor consolidated reporting 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 highly unlikely that an American small entity would be providing these utility services in Europe. It is expected that this rule will not impact small businesses, but it may impact large businesses or their subcontractors who compete on solicitations for Federal overseas energy contracts for utilities and gas in Europe.

Utilizing energy sourced from inside the Russian Federation could increase the risk of limited access to the required energy supply, resulting in negative impacts to the warfighter. Section 2911 of title 10 United States Code ensures the readiness of the armed forces for their military missions by pursuing energy security and resilience. Further, DoD Instruction 4170.11, Installation Energy Management, encourages DoD components to pursue energy resilience. In today's environment, maintaining secure access to energy resources is critical to DoD's execution of its mission, and ensuring energy resilience at DoD installations is a top priority.

This prohibition will ensure improved energy security for main operating bases in Europe. This rule requires an offeror to represent, by submission of their offer, that the offeror will not use any energy sourced from inside the Russian Federation as a means of generating the furnished energy for the covered military installation in Europe. In addition, the rule provides a contract clause that ensures the prohibition is incorporated as a term and condition of the resulting contract.

#### **V. Executive Orders 12866 and 13563**

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.

#### **VI. Congressional Review Act**

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules Under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

#### **VII. Regulatory Flexibility Act**

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

The final rule is necessary to revise 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 objective for and 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.

No public comments were received in response to the initial regulatory flexibility analysis.

According to 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. Therefore, DoD does not expect this rule to impact small entities.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small entities.

DoD has not identified any alternative approaches to the rule that would meet the requirements of the statute.

#### **VIII. Paperwork Reduction Act**

This 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,**

*Editor/Publisher, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 212, 225, and 252 are 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 252.225-7053, Representation Regarding Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation, as prescribed in 225.7019-4(a), to comply with section 2821 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92).

(HH) Use the clause at 252.225-7054, Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation, as prescribed in 225.7019-4(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 225.7019, 225.7019-1, 225.7019-2, 225.7019-3, and 225.7019-4 to subpart 225.70 to read as follows:

\* \* \* \* \*

Sec.

225.7019 Prohibition on use of certain energy sourced from inside the Russian Federation.

225.7019-1 Definitions.

225.7019-2 Prohibition.

225.7019-3 Waiver.

225.7019-4 Solicitation provision and contract clause.

\* \* \* \* \*

**225.7019 Prohibition on use of certain energy sourced from  
inside the Russian Federation.**

**225.7019-1 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.

**225.7019-2 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 energy converted by a third party into another form of energy and not directly delivered to a covered military installation.

**225.7019-3 Waiver.**

(a) *Request and approval of waiver.* The requiring activity may submit to the contracting activity a request for waiver of the prohibition in 225.7019-2 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 225.7019-3 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.

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

**225.7019-4 Solicitation provision and contract clause.**

Unless a waiver has been granted in accordance with 225.7019-3-

(a) Use the provision at 252.225-7053, 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 252.225-7054, 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 252.225-7053 to read as follows:

**252.225-7053 Representation Regarding Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation.**

As prescribed in 225.7019-4(a), use the following provision:

REPRESENTATION REGARDING PROHIBITION ON USE OF CERTAIN ENERGY SOURCED FROM INSIDE THE RUSSIAN FEDERATION (AUG 2021)

(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 energy converted by a third party into another form of energy and not directly delivered to a covered military installation.

(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 252.225-7054 to read as follows:

**252.225-7054 Prohibition on Use of Certain Energy Sourced from Inside the Russian Federation.**

As prescribed in 225.7019-4(b), use the following clause:

PROHIBITION ON USE OF CERTAIN ENERGY SOURCED FROM INSIDE THE  
RUSSIAN FEDERATION (AUG 2021)

(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 energy converted by a third party into another form of energy and not directly delivered to a covered military installation.

(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)