



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

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

FOR FURTHER INFORMATION CONTACT: Kimberly Bass, telephone 703-717-3446.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 85 FR 60943 on September 29, 2020, and a correction at 85 FR 65787 on October 16, 2020, to amend the DFARS to implement section 853 of

the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Pub. L. 116-92). Section 853 amends 10 U.S.C. 2534 (now 10 U.S.C. 4864), Miscellaneous Limitations on the Procurement of Goods Other than United States Goods, by establishing a limitation on the procurement of large medium-speed diesel engines for contracts awarded for new construction of an auxiliary ship, which requires the engines to be manufactured in the national technology and industrial base. The national technology and industrial base is defined at 10 U.S.C. 4801(1) to include the United States, Australia, Canada, New Zealand, and the United Kingdom. Section 853 also added paragraph (k) to clarify that the term auxiliary ship does not include an icebreaker or a special mission ship.

All references to 10 U.S.C. 2534 in this final rule preamble and DFARS text are updated to 10 U.S.C. 4864 to reflect the title 10 transfer accomplished by the final rule for DFARS Case 2022-D018, Reorganization of Defense Acquisition Statutes, published at 87 FR 76988 and effective December 30, 2022.

One respondent submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes from the Proposed Rule

Changes are made to DFARS 225.7001, Definitions, and to the contract clause at 252.225-7062, Restriction on Acquisition of Large Medium-Speed Diesel Engines, to add a definition for large medium-speed diesel engines. Additional changes are made to the clause at 252.225-7062 to (1) designate the paragraph that includes the 10 U.S.C. 4864 limitation as paragraph (b), Restrictions; and (2) add the requirement to include the substance of the clause in all subcontracts that exceed the simplified acquisition threshold (SAT), including contracts for the acquisition of commercial products and commercial services that require large medium-speed diesel engines for new construction of auxiliary ships.

DFARS 212.503(a)(vii) adds 10 U.S.C. 4864 to the list of laws that are not applicable to contracts for the acquisition of commercial products and commercial services, and states that 10 U.S.C. 4864 does not apply to contracts valued at or below the SAT. At DFARS 212.504(a)(xii) clarifying language is added to state that the limitation at 10 U.S.C. 4864 does not apply to subcontracts for commercial products and commercial services valued at or below the SAT. At DFARS 212.504(b), paragraph (iii) adds 10 U.S.C. 4864 to the list of laws that have been eliminated for subcontracts at any tier for the acquisition of commercial products, commercial services, or commercial components and clarifies that the statute does not apply to subcontracts valued at or below the SAT.

B. Analysis of Public Comments

1. Support for the Rule

Comment: The respondent expressed support for the rule and the determination that it is in the best interest of the Government to apply the new DFARS clause to contracts and subcontracts for commercial items, including commercial off-the-shelf (COTS) items. The respondent further stated that excluding the new rule from application to contracts and subcontracts for commercial items would create a loophole that would undermine the overarching intent of the statute and 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.

Response: DoD acknowledges the respondent's support for the rule.

2. Clarifying Definition for "Large Medium-Speed Diesel Engines"

Comment: The respondent recommended revising the definition for large medium-speed diesel engines with the addition of the following for clarity: A "medium-speed diesel engine" operates between 400 and 1200 rotations per minute (RPM). "Large" refers to the brake horsepower (bHP) delivered starting at a minimum of 5,000 bHP (~3.75 MW).

Response: DoD concurs with the need for clarity concerning the definition of "large medium-speed diesel engine". Accordingly, large medium-speed diesel engines are defined as diesel engines whose revolutions per minute (RPM) fall between

300 and 1500 RPM with a displacement greater than 1500 cubic inches per cylinder. DoD considers medium-speed diesel engines to fall within the range of 300 to 1500 RPMs based on purchasing experience and market research. Regarding the definition of "large", DoD considers displacement, i.e., how much volume can be pumped through the engine, as the appropriate factor for engine size as opposed to brake horsepower that measures the power of the engine. Based on this analysis, DoD determines that large marine diesel engines have a displacement of 1500 cubic inches per cylinder or more.

The following new definition for large medium-speed diesel engines is added at DFARS 225.7001, Definitions, and to the clause at 252.225-7062: "Large medium-speed diesel engines means diesel engines whose revolutions per minute (RPM) fall between 300 and 1500 RPM with a displacement greater than 1500 cubic inches per cylinder."

3. Recommended Clarification to DFARS 212.504(a)

Comment: The respondent recommended a minor clarifying revision to DFARS 212.504(a) to reflect the determination that the proposed new clause at DFARS 252.225-70XX should apply to commercial item subcontracts. The respondent stated that currently, DFARS 212.504(a) lists statutory provisions that are not applicable to subcontracts at any tier for the acquisition of commercial items or commercial components. The respondent further stated that currently included in that list of statutory provisions at DFARS 212.504(a), is 10 U.S.C. 2534, the statute

that implements section 853. While the proposed rule stated the intent to apply the new DFARS 252.225-70XX clause to commercial item subcontracts at all tiers, leaving DFARS 212.504(a) as currently drafted may create confusion as to whether subcontracts for commercial item large medium-speed diesel engines are subject to the restriction imposed by the rule.

The respondent recommended a conforming edit to DFARS 212.504(a) to apply the new restriction imposed by 10 U.S.C. 2534 for large medium-speed diesel engines to commercial item subcontracts. The respondent further recommended additional revisions to remove 10 U.S.C 2534 from its listing under DFARS 212.504(a) and add as a new listing under DFARS 212.504(b).

Response: DoD acknowledges the omission and concurs with revising DFARS 212.504(a) to clarify the application of the new restriction imposed by 10 U.S.C. 4864 to commercial product, commercial service, and commercial component subcontracts that exceed the SAT, and therefore include an additional reference at 212.504(b) (iii). Related conforming changes are also made to DFARS 212.503. Accordingly, DoD has revised the following:

1. DFARS 212.503(a) (vii) - added 10 U.S.C. 4864 to the list of laws that are not applicable to contracts for the acquisition of commercial products and commercial services, and that 10 U.S.C. 4864 does not apply to contracts valued at or below the SAT.

2. DFARS 212.504(a) (xii) - added to the existing 10 U.S.C. 4864 reference the statement that the limitation does not apply

to subcontracts for commercial products, commercial services, or commercial components valued at or below the SAT; and

3. DFARS 212.504(b) - added paragraph (iii) to state that 10 U.S.C. 4864 does not apply to subcontracts for commercial products, commercial services, or commercial components valued at or below the SAT.

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

This rule creates a new DFARS clause, 252.225-7062, Restriction on Acquisition of Large Medium-Speed Diesel Engines. Section 853 amends 10 U.S.C. 4864(a) to provide a limitation on components for auxiliary ships. 10 U.S.C. 4864 does not apply to a contract or subcontract for an amount that does not exceed the SAT (see paragraph (g)). Therefore, DoD will not apply this clause to acquisitions at or below the SAT. However, DoD is applying this clause to contracts for the acquisition of commercial products, commercial services, and COTS items.

A. Applicability to Contracts for the Acquisition of Commercial Products, Commercial Services, and COTS Items

10 U.S.C. 3452 exempts contracts and subcontracts for the acquisition of commercial products, commercial services, and COTS items from provisions of law enacted after October 13, 1994, unless 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 DoD to exempt contracts for the procurement of commercial products and commercial services from the applicability of the provision or contract requirement, except for a provision of law that—

- Provides for criminal or civil penalties;
- Requires that certain articles be bought from American sources pursuant to 10 U.S.C. 4862 (previously 10 U.S.C. 2533a) or that strategic materials critical to national security be bought from American sources pursuant to 10 U.S.C. 4863 (previously 10 U.S.C. 2533b); or
- Specifically refers to 10 U.S.C. 3452 and states that it shall apply to contracts and subcontracts for the acquisition of commercial products (including COTS items) and commercial services.

B. Determination

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 products and commercial services. 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 products and commercial services unless a written determination is made. Due to delegations of authority, the Principal Director, Defense Pricing and Contracting is the appropriate authority to make this determination.

DoD has determined that it is in the best interest of the Federal Government to apply the rule to contracts and subcontracts for the acquisition of commercial products, commercial services, and COTS items, as defined at Federal Acquisition Regulation (FAR) 2.101. Not applying this rule to contracts and subcontracts for such acquisitions would exclude contracts intended to be covered by this rule and undermine the overarching purpose for 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 is defined at 10 U.S.C. 4801(1).

IV. Expected Impact of the Rule

This rule does not propose to add any new burden on the public. It amends DFARS 225.7010, Restriction on certain naval vessel components, and adds the contract clause 252.225-7062, Restriction on Acquisition of Large Medium-Speed Diesel Engines, with flowdown to subcontractors to include additional 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.

The domestic source restriction does not apply to—

(1) Contracts or subcontracts that do not exceed the simplified acquisition threshold;

(2) The acquisition of spare or repair parts needed to support components for naval vessels manufactured outside the United States; and

(3) Large medium-speed diesel engines for icebreakers or special mission ships.

Contracting officers will include the clause in solicitations and contracts that exceed the SAT, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products, commercial services, and COTS 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 waiver is granted or an exception applies.

V. 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.

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 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 has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* and is summarized as follows:

The final rule is necessary to revise 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, subject to exceptions. The national technology and industrial base is defined at 10 U.S.C. 4801(1) and currently includes the United States, Australia, Canada, New Zealand, and the United Kingdom of Great Britain and Northern Ireland.

The objective of 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 (now 10 U.S.C. 4864),

Miscellaneous Limitations on the Procurement of Goods Other Than United States Goods, that establishes limitations on auxiliary ship components for contracts awarded for new construction of an auxiliary ship unless the components are manufactured in the national technology and industrial base. The rule includes additional 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.

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

DoD reviewed data from the Federal Procurement Data System (FPDS) for FY 2017, 2018, and 2019 excluding (1) contracts or subcontracts that do not exceed the simplified acquisition threshold, (2) acquisitions of spare or repair parts needed to support naval vessels manufactured outside the United States, and (3) large medium-speed diesel engines specifically for icebreakers or special mission ships. The review of the FPDS data revealed that there was a total of 241 awards, of which 121 were made to small businesses, a median of 50 percent awarded to small entities during those 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 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 PRODUCTS AND SERVICES

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

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

* * * * *

(f) * * *

(ix) * * *

(NN) Use the clause at 252.225-7062, Restriction on Acquisition of Large Medium-Speed Diesel Engines, as prescribed in 225.7010-5, to comply with 10 U.S.C. 4864.

* * * * *

3. Amend section 212.503 by-

a. Redesignating paragraphs (a)(vii) and (viii) as paragraphs (a)(viii) and (ix), respectively; and

b. Adding new paragraph (a)(vii).

The addition reads as follows:

212.503 Applicability of certain laws to Executive agency contracts for the acquisition of commercial products and commercial services.

(a) * * *

(vii) 10 U.S.C. 4864, Miscellaneous Limitations on the Procurement of Goods Other Than United States Goods. 10 U.S.C. 4864 is not applicable to contracts valued at or below the simplified acquisition threshold.

* * * * *

4. Amend section 212.504 by revising paragraph (a)(xii) and adding paragraph (b)(iii) to read as follows:

212.504 Applicability of certain laws to subcontracts for the acquisition of commercial products and commercial services.

(a) * * *

(xii) 10 U.S.C. 4864, Miscellaneous Limitations on the Procurement of Goods Other Than United States Goods. 10 U.S.C.

4864 is not applicable to subcontracts valued at or below the simplified acquisition threshold.

* * * * *

(b) * * *

(iii) 10 U.S.C. 4864, Miscellaneous Limitations on the Procurement of Goods Other Than United States Goods. 10 U.S.C. 4864 is not applicable to subcontracts at any tier valued at or below the simplified acquisition threshold.

PART 225—FOREIGN ACQUISITION

5. Amend section 225.7001 by adding, in alphabetical order, the definition of "Large medium-speed diesel engines" to read as follows:

225.7001 Definitions.

* * * * *

Large medium-speed diesel engines means diesel engines whose revolutions per minute (RPM) fall between 300 and 1500 RPM with a displacement greater than 1500 cubic inches per cylinder.

* * * * *

6. Revise section 225.7010 to read as follows:

225.7010 Restrictions on certain naval vessel and auxiliary ship components.

7. Revise section 225.7010-1 to read as follows:

225.7010-1 Restrictions.

In accordance with 10 U.S.C. 4864, 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 new construction of auxiliary ships using funds available for National Defense Sealift Fund programs or Shipbuilding and Conversion, Navy.

8. 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.

9. Revise section 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.

10. Amend section 225.7010-4-

- a. By revising the section heading; and
- b. In paragraphs (a) and (b) by removing "this restriction" and adding "the restriction at 225.7010-1(a)" in its place.

The revision reads as follows:

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

* * * * *

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

225.7010-5 Contract clause.

Use the clause at 252.225-7062, 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 products and commercial services, 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

12. Add section 252.225-7062 to read as follows:

252.225-7062 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

(JUL 2023)

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

Large medium-speed diesel engines means diesel engines whose revolutions per minute (RPM) fall between 300 and 1500 RPM with a displacement greater than 1500 cubic inches per cylinder.

(b) *Restriction.* As required by 10 U.S.C. 4864, the Contractor shall deliver under this contract large medium-speed diesel engines manufactured in the United States, Australia, Canada, New Zealand, or the United Kingdom.

(c) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (c), in subcontracts that exceed the simplified acquisition threshold, including subcontracts for commercial products and commercial services, that require large medium-speed diesel engines for new construction of auxiliary ships.

(End of clause)

[FR Doc. 2023-15153 Filed: 7/19/2023 8:45 am; Publication Date: 7/20/2023]