



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 213, 223, and 252

[Docket DARS-2023-0028]

RIN 0750-AK98

Defense Federal Acquisition Regulation Supplement: Replacement of Fluorinated Aqueous Film-Forming Foam (DFARS Case 2020-D011)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is adopting as final, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2020 that prohibits DoD procurement of fluorinated aqueous film-forming foam containing in excess of one part per billion of perfluoroalkyl and polyfluoroalkyl substances after October 1, 2023, unless an exemption applies.

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

FOR FURTHER INFORMATION CONTACT: David Johnson, telephone 202-913-5764.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule in the **Federal Register** at 88 FR 67604 on September 29, 2023, to implement section 322(b), (c), and (d) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Pub. L. 116-92). Section 322 prohibits DoD procurement of fire-fighting agent containing in excess of one part per billion of perfluoroalkyl and polyfluoroalkyl substances (PFAS) after October 1, 2023, unless an exemption applies. One respondent submitted a public comment in response to the interim rule.

II. Discussion and Analysis

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

A. Summary of Significant Changes From the Interim Rule

There are no significant changes from the interim rule based on the public comments.

B. Analysis of Public Comments

1. Exemption for Ocean-Going Vessels

Comment: The respondent recommended the exemption for procurement of aqueous film-forming foam (AFFF) for use solely on ocean-going vessels be removed from the final rule.

Response: The respondent's recommendation cannot be accepted because removing the exemption for procurement of AFFF for use solely on ocean-going vessels from the final rule would be inconsistent with implementing section 322. The exemption for use on ocean-going vessels is explicitly stated in section 322.

2. Use of the Term "PFAS"

Comment: The respondent suggested the rule consistently use the term "PFAS" in the context of the statutory prohibition.

Response: Concur. The rule employs the term "perfluoroalkyl substances and polyfluoroalkyl substances," in accordance with the language of section 322, which is also referred to as "PFAS."

3. Out-of-Scope Comments

Comment: The respondent suggested manufacturers of PFAS-containing fire-fighting agents would face technical challenges when transitioning to manufacture of PFAS-free fire-fighting agents. The respondent also:

- Opined on the cleanup and remediation of PFAS spills.
- Suggested use of PFAS-containing fire-fighting agents should be criminalized.
- Suggested continued use of PFAS-containing fire-fighting agents in accordance with MIL-PRF-24385F(SH) would hamper military recruitment.
- Provided written materials that describe the dangers of PFAS exposure both to humans, particularly fire fighters, and to the environment and that document the transition of various entities away from use of fluorinated fire-fighting agents.

Response: These comments do not directly relate to implementation of section 322 and are outside the scope of this rule.

C. Other Changes

The final rule removes the incorrect reference to MIL-PRF-24385F(SH) in favor of stating the statutory standard of perfluoroalkyl or polyfluoroalkyl substances not in excess of one part per billion. The final rule also uses the term "fire-fighting agent" consistently throughout the DFARS text within the meaning of the statutory prohibition implemented under this rule. The qualifier "after October 1, 2023" is deleted in the final rule as unnecessary because that date has passed.

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

The clause at DFARS 252.223-7009, Prohibition of Procurement of Fluorinated Aqueous Fire-Fighting Agent for Use on Military Installations, is prescribed at DFARS 223.7404 for use in solicitations and contracts, including solicitations and contracts using Federal Acquisition Regulation (FAR) part 12 (48 CFR part 12) procedures for the acquisition of commercial products and commercial services, relating to fire-fighting on military installations. Consistent with the determination that DoD made and discussed in the interim rule with regard to the application of the requirements of section 322 of the NDAA for FY 2020, the clause at DFARS 252.223-7009 applies to contracts at or below the SAT, for the acquisition of commercial products including COTS items, and to the acquisition of commercial

services, as defined at Federal Acquisition Regulation 2.101. For a discussion of the rationale for DoD's determination, see the interim rule published in the **Federal Register** (see section I of this preamble).

IV. Expected Impact of the Rule

This rule is not expected to have a significant economic impact on contractors. Businesses have been selling fluorine-free fire-fighting agents in various formulations alongside PFAS-containing AFFF in the commercial marketplace for several years. Some or most of the businesses that have supplied PFAS-containing AFFF to DoD will likely supply fluorine-free agents to DoD. Moreover, DoD has already significantly reduced its use of AFFF. By limiting DoD procurement of AFFF containing detectable amounts of PFAS, this rule both protects DoD personnel from PFAS exposure and limits the possibility of AFFF-related PFAS releases into the environment.

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, as amended.

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:

This rule amends the DFARS to implement section 322 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Pub. L. 116-92). Section 322 prohibits DoD procurement of fluorinated fire-fighting agents containing in excess of one part per billion of perfluoroalkyl and polyfluoroalkyl substances (PFAS) after October 1, 2023, unless an exemption applies. Section 322 provides an exemption for fire-fighting agents for use solely onboard ocean-going vessels.

In response to the interim rule, DoD received no comments relating to the initial regulatory flexibility analysis.

This rule is not expected to affect significant numbers of small entities, because DoD has significantly reduced the use of aqueous film-forming foam (AFFF) in the past several years. Data generated from the Federal Procurement Data System for fiscal years 2019 through 2022 indicates that DoD has awarded an average of 32,326 contracts for specific product and service codes related to firefighting supplies, equipment, and services to approximately 643 unique small entities during the three-year period. While DoD is unable to identify how many unique small entities of the 643 currently supply fire-fighting agent to DoD, to the extent they do supply fire-fighting agent, they will most likely continue to do so, whether supplying PFAS-free fire-fighting agent or supplying AFFF under the exemption for use solely on ocean-going vessels. Further, any PFAS-free replacement product will most likely follow existing supply channels.

The rule does not impose any new reporting, recordkeeping, or compliance requirements.

There are no practical alternatives that will accomplish the objectives of the statute.

VIII. Paperwork Reduction Act

This final 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, 213, 223, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Accordingly, the interim rule amending 48 CFR parts 212, 213, 223, and 252, which was published in the **Federal Register** at 88 FR 67604 on September 29, 2023, is adopted as a final rule with the following changes:

1. The authority citation for 48 CFR parts 212, 223, 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 COMMERCIAL SERVICES

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

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

* * * * *

(f) * * *

(ix) *Part 223—Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace.* (A) Use the clause at 252.223-7008, Prohibition of Hexavalent Chromium, as prescribed in 223.7306.

(B) Use the clause at 252.223-7009, Prohibition of Procurement of Fluorinated Fire-Fighting Agent for Use on Military Installations, as prescribed at 223.7404 to comply with section 322(b), (c), and (d) of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92).

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

3. Revise and republish section 223.7402 to read as follows:

223.7402 Prohibition.

Do not procure any fire-fighting agent that contains in excess of one part per billion perfluoroalkyl substances or polyfluoroalkyl substances. Procurements of fire-fighting agent for use solely onboard ocean-going vessels are exempt from this prohibition.

4. Revise and republish section 223.7403 to read as follows:

223.7403 Procedures.

Contracting officers shall not issue a solicitation for any fire-fighting agent that contains perfluoroalkyl or polyfluoroalkyl substances in excess of one part per billion, unless the requiring activity provides documentation of the exemption at 223.7402. The contracting officer shall maintain the documentation in the contract file.

223.7404 [Amended]

5. Amend section 223.7404 by removing "Fluorinated Aqueous Film-Forming Foam Fire-Fighting" and adding "Fluorinated Fire-Fighting" in its place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Revise and republish section 252.223-7009 to read as follows:

252.223-7009 Prohibition of Procurement of Fluorinated Fire-Fighting Agent for Use on Military Installations.

As prescribed in 223.7404, use the following clause:

PROHIBITION OF PROCUREMENT OF FLUORINATED FIRE-FIGHTING AGENT FOR
USE ON MILITARY INSTALLATIONS (MAR 2024)

(a) *Definitions.* As used in this clause, *perfluoroalkyl substances* and *polyfluoroalkyl substances* have the meanings given in section 322(f) of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92).

(b) *Prohibition.* The Contractor shall not provide or use under this contract any fire-fighting agent that contains perfluoroalkyl substances or polyfluoroalkyl substances in excess of one part per billion.

(c) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (c), in all subcontracts, including subcontracts for commercial products and commercial services, relating to fire-fighting on a military installation.

(End of clause)