

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 212, 215, 225, and 252**

[Docket DARS–2024–0002]

RIN 0750–AL64

Defense Federal Acquisition Regulation Supplement: Assuring Integrity of Overseas Fuel Supplies (DFARS Case 2022–D013)**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 2022 that requires offerors to certify that they will not provide fuel from a prohibited source and that they will comply with certain export control and anticorruption regulations and statutes for contracts awarded for the acquisition of fuel in support of overseas contingency operations.

DATES: Effective October 1, 2024.**FOR FURTHER INFORMATION CONTACT:** Mr. Jon Snyder, telephone 703–945–5341.**SUPPLEMENTARY INFORMATION:****I. Background**

DoD published a proposed rule in the *Federal Register* at 89 FR 11800 on February 15, 2024, to implement section 843 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2022 (Pub. L. 117–81). Section 843 requires offerors to certify that fuel to be provided for a contract in support of an overseas contingency operation is not sourced from a prohibited nation or region and to furnish such records as are necessary to verify their compliance with applicable export control and anticorruption regulations and statutes. Section 843 requires contracting officers, when conducting a source selection for such contracts, to consider using tradeoff processes and certain evaluation factors. If the contracting officer does not consider a tradeoff process prior to issuing the solicitation, the contracting officer is required to justify in writing why a tradeoff process was not considered. Section 843 also requires the contracting officer to ensure, prior to contract award, that the offeror is not disqualified based upon an unsupported denial of access to a facility or equipment by the host nation. 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

There are no significant changes from the proposed rule.

B. Analysis of Public Comments

1. Support for the Rule

Comment: The respondent expressed support for the rule.

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

2. Clarifications

Comment: The respondent recommended the rule include Russia as a prohibited source and questioned how a contracting officer would know if an offeror is proposing fuel from Russia or not. The respondent suggested that the rule should better clarify the definition and identification of prohibited sources of fuel and include Russia among them.

Response: This rule implements section 843 of the NDAA for FY 2022, which does not establish a specific list of prohibited countries, entities, or individuals. This rule specifies, at DFARS 225.7024–2, a prohibition on procuring fuel sourced from nations or regions that are prohibited from selling petroleum to the United States (*i.e.*, prohibited sources). These prohibited sources are identified in FAR subpart 25.7 and at <https://ofac.treasury.gov/sanctions-programs-and-country-information>; therefore, it is not necessary to identify Russia as a prohibited source in this rule. The website is added to the final rule at DFARS 225.7024–2.

Comment: The respondent expressed concerns regarding the fungibility of fuel and the possibility of laundering fuel from a prohibited source through an allowable fuel storage system. The respondent suggests that the rule require offerors to provide documentation or evidence of the origin and quality of the fuel they supply, such as bills of lading, certificates of origin, or laboratory tests.

Response: The rule adds a new solicitation provision at DFARS 252.225–7065, Restriction on Acquisition of Fuel for Overseas Contingency Operations, which requires offerors to certify that the fuel, in whole or in part, or derivatives of such fuel, to be provided under any contract resulting from this solicitation is not

sourced from a nation or region prohibited from selling petroleum to the United States. This rule implements section 843 of the NDAA for FY 2022, which does not require offerors to provide documentation to support such certifications.

Comment: The respondent suggested that the rule might leverage the logistics information technologies to track and monitor the fuel supply chain to identify any anomalies or discrepancies and enforce more strictly the applicability of certain laws and regulations, such as the Foreign Corrupt Practices Act and the Export Administration Regulations, to deter and punish any violations or corruption in the fuel acquisition process.

Response: Section 843 specifies that the contracting officer will obtain certain certifications from offerors regarding their compliance with certain preaward requirements prior to awarding a contract. As a result of this rule, the offeror is required to certify the fuel to be provided under the resulting contract is not sourced from nations or regions prohibited from selling petroleum to the United States.

There are several mandatory solicitation provisions and contract clauses that require contractors to comply with all applicable laws and regulations regarding export-controlled items, *e.g.*, International Traffic in Arms Regulations and Export Administration Regulations. This responsibility exists independent of, and is not established or limited by, this rule.

C. Other Changes

At DFARS 225.7024–3 and 252.225–7065, editorial changes are made to use the term “prospective contractor” in place of “apparent successful offeror” to comply with drafting conventions. The terms have the same meaning.

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 provision at DFARS 252.225–7065 is prescribed at DFARS 225.7024–4 for use in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial products and commercial services, that are for the acquisition of fuel for overseas contingency operations and are expected to exceed the simplified acquisition threshold. Consistent with the analysis that DoD provided in the proposed rule with regard to the application of the requirements of section 843 of the

NDAA for FY 2022, DoD has made the determination to apply the statute, as implemented in the provision at DFARS 252.225–7065, to contracts for the acquisition of commercial products including COTS items and to the acquisition of commercial services, as defined at Federal Acquisition Regulation 2.101.

IV. Expected Impact of the Rule

As a result of this final rule, offerors responding to a solicitation for fuel, that is for an overseas contingency operation and that is expected to exceed the SAT, are now required to certify that the proposed fuel, in whole or in part, or derivatives of such fuel will not be sourced from a nation or region prohibited from selling petroleum to the United States. Offerors will also be required to comply with certain export control and anticorruption statutes and regulations. The prospective contractor may be requested to provide records to verify such compliance upon contracting officer request.

This final rule also imposes new requirements on contracting officers. Contracting officers must not disqualify an offeror based on an unsupported denial of access to a facility or equipment by a host nation government. When conducting a source selection for such acquisitions, contracting officers will be required to consider the use of a tradeoff process and the use of certain evaluation factors. If the contracting officer does not consider a tradeoff process, the contracting officer must justify and obtain approval of the rationale for not considering a tradeoff process.

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 is necessary to implement section 843 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2022 (Pub. L. 117–81). Section 843 requires offerors to certify that the fuel procured for an overseas contingency operation is not sourced from a prohibited nation or region and to furnish such records as are necessary to verify their compliance with certain export control and anticorruption statutes and regulations. Section 843 requires contracting officers to consider a tradeoff process and the use of certain evaluation factors when procuring fuel for an overseas contingency operation. If the contracting officer does not consider a tradeoff process, section 843 requires the contracting officer to justify, before issuing the solicitation, why a tradeoff process was not considered. The objective of the rule is to implement section 843 of the NDAA for FY 2022.

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis.

Data from the Federal Procurement Data System was analyzed for fiscal years 2021, 2022, and 2023 for DoD contracts awarded to procure fuel for overseas operations. The data revealed there was an average of five awards per fiscal year for the procurement of fuel supporting overseas operations. These awards were made to three unique entities, of which none were small entities. Therefore, DoD does not anticipate that this final rule will impact any small entities.

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

There are no known alternatives that would accomplish the stated objectives of the applicable statute. The rule is not expected to have a significant economic impact on small entities.

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, 215, 225, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, the Defense Acquisition Regulations System amends 48 CFR parts 212, 215, 225, and 252 as follows:

- 1. The authority citation for parts 212, 215, 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 COMMERCIAL SERVICES

- 2. Amend section 212.203 by adding paragraph (5) to read as follows:

212.203 Procedures for solicitation, evaluation, and award.

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(5) See 215.101–71 and 225.7024 for the acquisition of fuel for overseas contingency operations.

- 3. Amend section 212.301 by adding paragraph (f)(x)(PP) to read as follows:

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

* * * * *

- (f) * * *
- (x) * * *

(PP) Use the provision at 252.225–7065, Restriction on Acquisition of Fuel for Overseas Contingency Operations, as prescribed in 225.7024–4, to comply with section 843 of the National Defense Authorization Act for Fiscal Year 2022 (Pub. L. 117–81).

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PART 215—CONTRACTING BY NEGOTIATION

- 4. Add section 215.101–71 to read as follows:

215.101–71 Tradeoff process when acquiring fuel for overseas contingency operations.

(a) When conducting a source selection for the acquisition of fuel that is for an overseas contingency operation and is expected to exceed the simplified acquisition threshold, the contracting

officer shall consider using a tradeoff process in accordance with FAR 15.101-1 (section 843 of the National Defense Authorization Act for Fiscal Year 2022 (Pub. L. 117-81)). The contracting officer should consider using the following evaluation factors in any such tradeoff process:

- (1) Past performance.
- (2) Cost.
- (3) Anticorruption training.
- (4) Anticorruption compliance.

(b) If a tradeoff process was not considered, prior to the issuance of the solicitation, the contracting officer shall justify in writing why a tradeoff process was not considered and obtain approval by an official one level above the contracting officer. This authority is not delegable. The contracting officer shall include the justification in the contract file.

PART 225—FOREIGN ACQUISITION

■ 5. Add sections 225.7024, 225.7024-1, 225.7024-2, 225.7024-3, and 225.7024-4 to read as follows:

* * * * *

- Sec.
- 225.7024 Restriction on acquisition of fuel for overseas contingency operations.
- 225.7024-1 Scope.
- 225.7024-2 Prohibition.
- 225.7024-3 Procedures.
- 225.7024-4 Solicitation provision.

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225.7024 Restriction on acquisition of fuel for overseas contingency operations.

225.7024-1 Scope.

This section implements section 843 of the National Defense Authorization Act for Fiscal Year 2022 (Pub. L. 117-81), for the acquisition of fuel for overseas contingency operations.

225.7024-2 Prohibition.

Contracting officers shall not award, for an overseas contingency operation, a contract for fuel, in whole or in part, or derivatives of such fuel, that is sourced from nations or regions prohibited from selling petroleum to the United States. See FAR subpart 25.7 and the Office of Foreign Assets Control website at <https://ofac.treasury.gov/sanctions-programs-and-country-information> for prohibited sources.

225.7024-3 Procedures.

(a) For contracts for the acquisition of fuel for overseas contingency operations, including contracts using FAR part 12 procedures, expected to exceed the simplified acquisition threshold, the contracting officer—

- (1) May request records from the prospective contractor to verify

compliance with the following statutes and regulations only when the head of the contracting activity determines in writing that it is necessary:

- (i) The Foreign Corrupt Practices Act (15 U.S.C. 78dd-1 *et seq.*).
- (ii) International Traffic in Arms Regulations at 22 CFR parts 120 through 130 (see PGI 225.7901-2).
- (iii) Export Administration Regulations at 15 CFR parts 730 through 774 (see PGI 225.7901-2).

(iv) Relevant regulations promulgated by the Office of Foreign Assets Control of the Department of the Treasury. Sanction information for specific countries and programs is available at <https://ofac.treasury.gov/sanctions-programs-and-country-information>.

(2) To the maximum extent practicable, shall not disqualify an otherwise responsible offeror on the basis of an unsupported denial of access to a facility or equipment by a host-nation government. The provision at 252.225-7065, Restriction on Acquisition of Fuel for Overseas Contingency Operations, requires offerors to report promptly to the contracting officer, prior to award, any instance of unsupported denial of access to a facility or equipment by a host-nation government that may prevent it from complying with the terms and conditions of the solicitation.

(b) See 215.101-71 for the requirement to consider using a tradeoff process.

225.7024-4 Solicitation provision.

Use the provision at 252.225-7065, Restriction on Acquisition of Fuel for Overseas Contingency Operations, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial products and commercial services, that are for the acquisition of fuel for overseas contingency operations and are expected to exceed the simplified acquisition threshold.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. Add section 252.225-7065 to read as follows:

252.225-7065 Restriction on Acquisition of Fuel for Overseas Contingency Operations.

As prescribed in 225.7024-4, use the following provision:

Restriction on Acquisition of Fuel for Overseas Contingency Operations (Oct 2024)

- (a) *Prohibition.* For an overseas contingency operation, DoD may not procure

fuel in whole or in part, or derivatives of such fuel, that is sourced from nations or regions prohibited from selling petroleum to the United States. See Federal Acquisition Regulation subpart 25.7 and the Office of Foreign Assets Control website at <https://ofac.treasury.gov/sanctions-programs-and-country-information> for prohibited sources.

(b) *Certification.* Offerors shall complete the certification in paragraph (b)(1) of this provision and submit the certification with their offer.

(1) The Offeror does [] does not [] certify that the fuel, in whole or in part, or derivatives of such fuel, to be provided under any contract resulting from this solicitation is not sourced from a nation or region prohibited from selling petroleum to the United States.

(2) Only Offerors who certify that the fuel to be provided is not sourced from a prohibited nation or region will be eligible for award.

(c) *Compliance.*

(1) When requested by the Contracting Officer, the prospective Contractor shall submit records necessary to demonstrate compliance with applicable laws and regulations regarding export-controlled items and anticorruption statutes and regulations including—

- (i) The Foreign Corrupt Practices Act (15 U.S.C. 78dd-1 *et seq.*);
- (ii) International Traffic in Arms Regulations (ITAR) at 22 CFR parts 120 through 130 (also see Defense Federal Acquisition Regulation Supplement (DFARS) clause 252.225-7048, Export-Controlled Items);

(iii) Export Administration Regulations (EAR) at 15 CFR parts 730 through 774 (also see DFARS clause 252.225-7048); and

(iv) Relevant regulations promulgated by the Office of Foreign Assets Control of the Department of the Treasury. Sanction information for specific countries and programs is available at <https://ofac.treasury.gov/sanctions-programs-and-country-information>.

(2) The Offeror shall contact the Department of State regarding ITAR compliance and the Department of Commerce regarding EAR compliance.

(d) *Reporting requirement.* The Offeror shall, prior to contract award, promptly report to the Contracting Officer any instance of unsupported denial of access to a facility or equipment by a host-nation government that may prevent it from complying with the terms and conditions of the solicitation.

(End of provision)

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