

DEPARTMENT OF DEFENSE**48 CFR Parts 204, 209, 212, 225, and 252**

RIN 0750-AI34

Defense Federal Acquisition Regulation Supplement: State Sponsors of Terrorism (DFARS Case 2014-D014)

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 clarify and relocate coverage relating to state sponsors of terrorism (as identified by the Department of State), add an explicit representation, and conform the terminology.

DATES: *Comment Date:* Comments on the proposed rule should be submitted in writing to the address shown below on or before October 6, 2014, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2014-D014, using any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2014-D014" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2014-D014." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2014-D014" on your attached document.

- *Email:* osd.dfars@mail.mil. Include DFARS Case 2014-D014 in the subject line of the message.

- *Fax:* 571-372-6094.

- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check 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. Amy G. Williams, Defense Acquisition Regulations System,

OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:**I. Background**

10 U.S.C. 2327 requires a firm or a subsidiary of a firm that submits an offer in response to a DoD solicitation to disclose if the firm is owned or controlled by a foreign government of a country that the Secretary of State determines under section 6(j)(1)(A) of the Export Administration Act of 1979 (50 App. U.S.C. 2405 (j)(1)(A)) has repeatedly provided support for acts of international terrorism. The statute further provides restrictions on entering into contracts or subcontracts with such firms.

The Department of State identifies the countries identified as sponsoring terrorism on a list of "State Sponsors of Terrorism" available at [http://www/state.gov/ct/list/c14151.htm](http://www.state.gov/ct/list/c14151.htm).

The restrictions are currently implemented in the DFARS in subpart 209.1, Responsible Prospective Contractors; subpart 209.4, Debarment, Suspension, and Ineligibility; and clauses 252.209-7001, Disclosure of Ownership or Control by the Government of a Terrorist Country; and 252.209-7004, Subcontracting with Firms that are owned or controlled by the Government of a Terrorist Country.

This rule is part of DoD's retrospective plan, completed in August 2011, under Executive Order 13563, "Improving Regulation and Regulatory Review." DoD's full plan and updates can be accessed at: <http://www.regulations.gov/#!docketDetail;dc=FR+PR+N+O+SR;pp=10;po=0;D=DOD-2011-OS-0036>.

II. Discussion and Analysis**A. Clarification**

The prohibition, notification, and disclosure requirements have been amended to—

- Be consistent with the disclosure requirements of current DFARS 252.209-7001(e); and
- Make clear in each case whether the term "subsidiary" refers to a subsidiary of the offeror, or whether the offeror itself is a subsidiary of another firm that owns or controls the offeror.

B. Representation

Although the solicitation provision 252.209-7001, Disclosure of Ownership or Control by the Government of a Terrorist Country, is currently included in the annual representations and certifications in the System for Award

Management (SAM), the provision does not actually contain an explicit representation. The nonstatutory certification was removed from the provision in the 1991 DFARS rewrite, due to an initiative to streamline the DFARS. However, the fact that an offeror fails to disclose any significant interest by the government of a country that is a state sponsor of terrorism is not equivalent to an explicit representation that there is no such interest. DoD is proposing to include an explicit representation in the relocated provision at 252.225-70XX, Disclosure of Ownership or Control by the Government of a Country that is a State Sponsor of Terrorism, that, unless the offeror submits with its offer the disclosure required in paragraph (d) of the provision, the offeror represents, by submission of its offer, that the government of a country that is a state sponsor of terrorism does not own or control a significant interest in—

1. The offeror;
2. A subsidiary of the offeror; or
3. Any other firm that owns or controls the offeror.

If this representation is false, then an offeror can be held liable for a false statement if the offeror does not disclose the ownership or control by the government of a country that is a state sponsor of terrorism.

C. Terminology

In this proposed rule, the term "terrorist country" has been replaced with the more accurate term "country that is a state sponsor of terrorism," which is consistent with the terminology used by the Department of State and in section 1261(c)(2)(C) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239).

D. Location

The text at 209.104-1(g)(i) and 209.104-70(a) has been relocated to DFARS subpart 225.7 and the provision at 252.209-7001 has been relocated to 252.225-70XX. Subpart 225.7, Prohibited Sources, is a better location because the prohibition is based on ownership or control of an offeror by the government of specified countries, rather than the responsibility of the individual offeror. Furthermore, DoD has included in DFARS 225.7 coverage of the restriction of acquisition of commercial satellite services from certain foreign entities (including restrictions relating to countries that are state sponsors of terrorism) (see DFARS Case 2014-D0).

The coverage at 209.405-2 and 209.409 is properly located in subpart 209.4, Debarment, Suspension, and

Ineligibility, because it relates to treatment of entities listed as ineligible in the Exclusion section of the System for Award Management (SAM). However, cross-references have been added between DFARS 209.405–2 and 225.771.

E. Applicability

This rule does not change the applicability of the provision 252.209–7001 or the clause at 252.209–7004 to solicitations for an amount less than the simplified acquisition threshold or for the acquisition of commercial items.

10 U.S.C. 2327(f) specifically excludes applicability of the statute to contracts for acquisitions less than \$100,000 (now escalated to \$150,000, in accordance with 41 U.S.C. 1908).

The provision currently at DFARS 252.209–7001 is included in the Exclusion section of SAM and is applicable to the acquisition of commercial items. Therefore, conforming changes are required at 204.1202(2)(i), 212.201(f)(xi), and 252.204–7007.

The clause at 252.209–7004 is not prescribed for use in the acquisitions of commercial items. This clause implements paragraphs (d) and (e) of 10 U.S.C. 2327, which were enacted in 1997 (Pub. L. 105–85) (subsequent to the Federal Acquisition Streamlining Act of 1994), and therefore were inapplicable to the acquisitions of commercial items and COTS items, unless a determination was made that it would not be in the best interest of the Government to exempt these acquisitions from applicability of the statute.

The prescription for the solicitation provision 252.225–70XX has been slightly modified, to exclude applicability to acquisitions of commercial satellite services, which are covered by a separate provision (see DFARS Case 2014–D010).

III. 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.

IV. Regulatory Flexibility Act

DoD does not expect this 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.*, because this rule will only have an impact on a firm, or a subsidiary of a firm, in which the government of a country that is a state sponsor of terrorism has a significant interest.

The number of domestic entities significantly impacted by this rule will be minimal, if any. For the definition of “small business,” the Regulatory Flexibility Act refers to the Small Business Act, which in turn allows the U.S. Small Business Administration (SBA) Administrator to specify detailed definitions or standards (5 U.S.C. 601(3) and 15 U.S.C. 632(a)). The SBA regulations at 13 CFR 121.105 discuss who is a small business: “(a)(1) Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.” Therefore, an initial regulatory flexibility analysis has not been performed. DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider 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 2014–D014), in correspondence.

V. Paperwork Reduction Act

The rule contains 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); however, these changes to the DFARS do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 0704–0187, entitled “Information Collection in Support of the DoD Acquisition Process (Various Miscellaneous Requirements).” The burden in this clearance that is associated with the provision 252.209–7001, Disclosure of Ownership or Control by the Government of a

Terrorist Country, is estimated at 1 hour, because such disclosure occurs rarely, if ever. 10 U.S.C. prohibits award to a firm or a subsidiary of a firm if the government of country that is a state sponsor of terrorism has a significant interest in the firm or subsidiary, unless the Secretary of Defense grants a waiver.

List of Subjects in 48 CFR Parts 204, 209, 212, 225, and 252

Government procurement.

Amy G. Williams,

Deputy, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 204, 209, 212, 225, and 252 are proposed to be amended as follows:

■ 1. The authority citation for parts 204, 209, 212, 225, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 204—ADMINISTRATIVE MATTERS

- 2. Amend section 204.1202 by—
- a. Removing paragraph (2)(i);
 - b. Redesignating paragraphs (2)(ii) through (xi) as (2)(i) through (x), respectively; and
 - c. Adding a new paragraph (2)(xi).

204.1202 Solicitation provision.

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(2) * * *

(xi) 252.225–70XX, Disclosure of Ownership or Control by the Government of a Country that is a State Sponsor of Terrorism.

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PART 209—CONTRACTOR QUALIFICATIONS

209.104–1 [Amended]

- 3. Amend section 209.104–1 by—
- a. Removing paragraph (g)(i); and
 - b. Redesignating paragraph (g)(ii) as (g)(i).
- 4. Amend section 209.104–70 by—
- a. Revising the section heading;
 - b. Removing paragraph (a); and
 - c. Removing the paragraph “(b)” designation from the remaining text.

The revision reads as follows:

209.104–70 Solicitation provision.

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- 5. Revise section 209.405–2 to read as follows:

209.405–2 Restrictions on subcontracting.

(a) The contracting officer shall not consent to any subcontract with a firm, or a subsidiary of a firm, that is identified by the Secretary of Defense in the Exclusions section of the System for

Award Management as being owned or controlled by the government of a country that is a state sponsor of terrorism unless the agency head states in writing the compelling reasons for the subcontract. (See also 225.771.)

■ 6. Revise section 209.409 to read as follows:

209.409 Solicitation provision and contract clause.

Use the clause at 252.209–7004, Subcontracting with Firms That Are Owned or Controlled by the Government of a Country that is a State Sponsor of Terrorism, in solicitations and contracts with a value of \$150,000 or more.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

- 7. Amend section 212.301 by—
■ a. Removing paragraph (f)(xi);
■ b. Redesignating paragraphs (f)(xii) through (xlvi) as (xi) through (xlvii); and
■ c. Adding a new paragraph (f)(xlviii) to read as follows:

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

(f) * * *
(xlviii) Use the provision at 252.225–70XX, Disclosure of Ownership or Control by the Government of a Country that is a State Sponsor of Terrorism, as prescribed in 225.771–5, to comply with 10 U.S.C. 2327(b).

PART 225—FOREIGN ACQUISITION

225.701 [Removed]

- 8. Remove section 225.701.
■ 9. Add sections 225.771, 225.771–0, 225.771–1, 225.771–2, 225.771–3, 225.771–4, and 225.771–5 to subpart 225.7 to read as follows.

225.771 Prohibition on contracting or subcontracting with a firm that is owned or controlled by the government of a country that is a state sponsor of terrorism.

225.771–0 Scope.

This section implements 10 U.S.C. 2327(b).

225.771–1 Definition.

“State sponsor of terrorism,” as used in this section, is defined in the provision at 252.225–70XX, Disclosure of Ownership or Control by the Government of a Country that is a State Sponsor of Terrorism.

225.771–2 Prohibition.

(a) The contracting officer shall not award a contract of \$150,000 or more to a firm when a foreign government that is a state sponsor of terrorism owns or

controls, either directly or indirectly, a significant interest in—

- (i) The firm;
(ii) A subsidiary of the firm; or
(iii) Any other firm that owns or controls the firm.

(b) For restrictions on subcontracting with a firm, or a subsidiary of a firm, that is identified by the Secretary of Defense as being owned or controlled by the government of a country that is a state sponsor of terrorism, see 209.405–2.

225.771–3 Notification.

Any disclosure that the government of a country that is a state sponsor of terrorism has a significant interest in an offeror, a subsidiary of an offeror, or any other firm that owns or controls an offeror shall be forwarded through agency channels to the address at PGI 225.771–3.

225.771–4 Waiver of prohibition.

The prohibition in 225.771–2 may be waived if the Secretary of Defense determines that a waiver is not inconsistent with the national security objectives of the United States in accordance with 10 U.S.C. 2327(c).

225.771–5 Solicitation provision.

Use the provision at 252.225–70XX, Disclosure of Ownership or Control by the Government of a Country that is a State Sponsor of Terrorism, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items (other than commercial satellite services), that are expected to result in contracts of \$150,000 or more. If the solicitation includes the provision at FAR 52.204–7, do not separately list the provision 252.225–70XX in the solicitation.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 10. Amend section 252.204–7007 by—
■ a. Removing the clause date “(AUG 2014)” and adding “(DATE)” in its place;
■ b. Removing paragraph (d)(1)(i);
■ c. Redesignating paragraphs (d)(1)(ii) through (v) as (d)(1)(i) through (iv); and
■ d. Adding a new paragraph (d)(1)(v) to read as follows:

252.204–7007 Alternate A, Annual Representations and Certifications.

* * * * *
(d)(1) * * *
(v) 252.225–70XX, Disclosure of Ownership or Control by the Government of a Country that is a State Sponsor of Terrorism. Applies to all

solicitations expected to result in contracts of \$150,000 or more.

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252.209–7001 [Removed and Reserved]

■ 11. Remove and reserve section 252.209–7001.

252.209–7002 [Amended]

- 12. Amend the provision introductory text by removing “209.104–70(b)” and adding “209.104–70” in its place.
■ 13. Amend section 252.209–7004 by—
■ a. Revising the clause heading, clause title, and date; and
■ b. Amending paragraphs (a) and (b) by removing “terrorist country” and adding “country that is a state sponsor of terrorism” in both places.

The revision reads as follows:

252.209–7004 Subcontracting with Firms That Are Owned or Controlled by the Government of a Country that is a State Sponsor of Terrorism.

* * * * *

Subcontracting With Firms That Are Owned or Controlled by the Government of a Country That Is a State Sponsor of Terrorism (Date)

* * * * *

■ 14. Add a new section 252.225–70XX to read as follows:

252.225–70XX Disclosure of Ownership or Control by the Government of a Country that is a State Sponsor of Terrorism.

As prescribed in 225.771–5, use the following provision:

Disclosure of Ownership or Control by the Government of a Country That Is a State Sponsor of Terrorism (Date)

(a) Definitions. As used in this provision—
Government of a country that is a state sponsor of terrorism includes the state and the government of a country that is a state sponsor of terrorism, as well as any political subdivision, agency, or instrumentality thereof.

Significant interest means—

- (i) Ownership of or beneficial interest in 5 percent or more of the firm’s or subsidiary’s securities. Beneficial interest includes holding 5 percent or more of any class of the firm’s securities in “nominee shares,” “street names,” or some other method of holding securities that does not disclose the beneficial owner;
(ii) Holding a management position in the firm, such as a director or officer;
(iii) Ability to control or influence the election, appointment, or tenure of directors or officers in the firm;
(iv) Ownership of 10 percent or more of the assets of a firm such as equipment, buildings, real estate, or other tangible assets of the firm; or
(v) Holding 50 percent or more of the indebtedness of a firm.

State sponsor of terrorism means a country determined by the Secretary of State, under

section 6(j)(1)(A) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)(1)(A)), to be a country the government of which has repeatedly provided support for acts of international terrorism. As of the date of this provision, state sponsors of terrorism include: Cuba, Iran, Sudan, and Syria.

(b) *Prohibition on award.* In accordance with 10 U.S.C. 2327, unless a waiver is granted by the Secretary of Defense, no contract may be awarded to a firm if the government of a country that is a state sponsor of terrorism owns or controls a significant interest in—

(1) The firm;

(2) A subsidiary of the firm; or
(3) Any other firm that owns or controls the firm.

(c) *Representation.* Unless the Offeror submits with its offer the disclosure required in paragraph (d) of this provision, the Offeror represents, by submission of its offer, that the government of a country that is a state sponsor of terrorism does not own or control a significant interest in—

(1) The Offeror;
(2) A subsidiary of the Offeror; or
(3) Any other firm that owns or controls the Offeror.

(d) *Disclosure.*

(1) The Offeror shall disclose in an attachment to its offer if the government of a country that is a state sponsor of terrorism owns or controls a significant interest in the Offeror; a subsidiary of the Offeror; or any other firm that owns or controls the Offeror.

(2) The disclosure shall include—

(i) Identification of each government holding a significant interest; and

(ii) A description of the significant interest held by each government.

(End of provision)

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