

commercial products and commercial services, relating to fire-fighting on a military installation.

(End of clause)

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 209, 212, and 252

[Docket DARS-2023-0029]

RIN 0750-AL41

Defense Federal Acquisition Regulation Supplement: Limitation on Certain Institutes of Higher Education (DFARS Case 2021-D023)

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

ACTION: Interim rule.

SUMMARY: DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2021, that provides for the limitation of funds authorized to be appropriated or otherwise made available for any fiscal year for DoD, to be provided to an institution of higher education that hosts a Confucius Institute.

DATES: Effective October 1, 2023.

Comments on the interim rule should be submitted in writing to the address shown below on or before November 28, 2023, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2021-D023, using any of the following methods:

○ *Federal eRulemaking Portal:* <https://www.regulations.gov>. Search for “DFARS Case 2021-D023.” Select “Comment” and follow the instructions to submit a comment. Please include “DFARS Case 2021-D023” on any attached documents.

○ *Email:* osd.dfars@mail.mil. Include DFARS Case 2021-D023 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

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

SUPPLEMENTARY INFORMATION:

I. Background

This interim rule revises the DFARS to implement section 1062 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021 (Pub. L. 116-283). Section 1062 provides that none of the funds authorized to be appropriated or otherwise made available for any fiscal year for DoD may be provided to an institution of higher education that hosts a Confucius Institute, defined as a cultural institute directly or indirectly funded by the government of the People’s Republic of China. According to section 1062, the limitation of funds is applicable to amounts other than those provided directly to students as educational assistance. The effective date of section 1062 is October 1, 2023.

II. Discussion and Analysis

A. New Definitions

The interim rule adds new definitions at DFARS section 209.170-1, Definitions, for “Confucius Institute” and “institution of higher education”. “Confucius Institute” means a cultural institute directly or indirectly funded by the government of the People’s Republic of China. “Institution of higher education” has the meaning given in 20 U.S.C. 1002.

B. Limitation of Funds

At DFARS 209.170-2, the limitation is added regarding not providing funds appropriated or otherwise made available for any fiscal year for DoD to an institution of higher education that hosts a Confucius Institute, other than amounts provided directly to students as educational assistance.

C. Waiver of Funds Limitation

Pursuant to section 1286(g) of the NDAA for FY 2019 (Pub. L. 115-232; 10 U.S.C. 4001 note), the funds limitation with respect to an institution of higher education can be waived by the Office of the Under Secretary of Defense for Research and Engineering (OUSD(R&E)). Section 209.170-3 addresses the OUSD(R&E), Confucius Institute Waiver Program procedures.

D. Solicitation Provision

A new solicitation provision is added at DFARS 252.209-7011, Representation for Restriction on the Use of Certain Institutions of Higher Education, for use in solicitations, including solicitations using Federal Acquisition Regulation

(FAR) part 12 procedures for the acquisition of commercial products and commercial services, for acquisitions to an institution of higher education. The prescription for the provision is at DFARS 209.170-4. The provision is also added to the list of solicitation provisions and contract clauses for the acquisition of commercial products and commercial services at DFARS 212.301.

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

This rule creates a new solicitation provision at DFARS 252.209-7011, Representation for Restriction on the Use of Certain Institutions of Higher Education. The provision at DFARS 252.209-7011 is prescribed in DFARS 209.170-4 for use in solicitations for acquisitions to an institution of higher education, including solicitations for acquisitions to an institution of higher education using FAR part 12 procedures for the acquisition of commercial products, including COTS items, and commercial services. DoD is applying the rule to contracts at or below the SAT, to contracts for the acquisition of commercial products including COTS items, and for the acquisition of commercial services.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations. DoD has made that determination. Therefore, this rule applies at or below the simplified acquisition threshold.

B. Applicability to Contracts for the Acquisition of Commercial Products Including COTS Items and for the Acquisition of Commercial Services

10 U.S.C. 3452 exempts contracts and subcontracts for the acquisition of commercial products, including COTS items, and commercial services from provisions of law enacted after October 13, 1994, unless the Under Secretary of Defense (Acquisition and Sustainment) (USD(A&S)) makes a written determination that it would not be 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 or that strategic materials critical to national security be bought from American sources pursuant to 10 U.S.C. 4863; 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.

Section 1062 of the NDAA for FY 2021, which is implemented in this rule, does not impose criminal or civil penalties, does not require purchase pursuant to 10 U.S.C. 4862 or 4863, and does not refer to 10 U.S.C. 3452. Section 1062 is silent on applicability to the acquisition of commercial services and commercial products (including COTS items). Therefore, section 1062 will not apply to the acquisition of commercial services or commercial products including COTS items 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 made that determination. Therefore, this rule applies to the acquisition of commercial products including COTS items and to the acquisition of commercial services.

C. Determinations

To ensure compliance with the limitation on the use of funds, the rule must apply to all contracts with institutions of higher education. An exception for acquisitions at or below the SAT or for the acquisition of commercial products including COTS items and commercial services would exclude the contracts intended to be covered by the law, thereby

undermining the overarching public policy purpose of the law and the associated statutory funds limitation.

IV. Expected Impact of the Rule

Offerors that are institutions of higher education will be required to comply with the new provision and to represent, by submission of an offer, that they are not an entity hosts a Confucius Institute, or that they have obtained a waiver from OUSD(R&E). De minimis associated burden exists since the rule only requires the prospective offeror, when submitting an offer in response to a solicitation, to represent compliance with the requirements of section 1062. Moreover, data from the Federal Procurement Data System (FPDS) indicate that 10 unique entities in fiscal year 2022 met the definition of an institution of higher education; none of those 10 entities hosted a Confucius Institute.

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

DoD does not expect this interim 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 the funds limitation concerns a very limited number of offerors and, therefore, has a limited impact. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to require that none of the funds authorized to be appropriated or otherwise made available for any fiscal year for DoD may be provided to an institution of higher education that hosts a Confucius Institute, defined as a cultural institute directly or indirectly funded by the government of the People's Republic of China.

The objective for the rule is to implement section 1062 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021, which is the legal basis for the rule. Section 1062 provides limitations on appropriated funds. Specifically, section 1062 prohibits DoD from providing funding to any U.S. institution of higher education hosting a Confucius Institute, unless that institution receives a waiver from the DoD Office of the Under Secretary of Defense for Research and Engineering (OUSD(R&E)), when a determination is made that such a waiver is appropriate in accordance with the OUSD(R&E) Confucius Institute Waiver Program.

To assess the potential impact, the Federal Procurement Data System (FPDS) was queried for FY 2020, 2021, and 2022 for DoD contracts and purchase orders, to include commercial products and commercial services, awarded to institutions of higher education that meet the definition in 20 U.S.C. 1002. The FPDS data reflect that DoD made a total of 110 contract awards to 10 unique entities over the entire three fiscal years. All awards were made to other than small unique entities. Entities in FPDS categorized as higher-level institutions of education are designated only as other than small entities.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small entities, unless they are associated with an institution of higher education that hosts a Confucius Institute.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the rule that would meet the requirements of the statute.

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 2021–D023), in correspondence.

VIII. Paperwork Reduction Act

This interim 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).

IX. Determination To Issue an Interim Rule Effective in Less Than 30 Days

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to promulgate this interim rule, effective in less than 30 days, without prior opportunity for public comment. This action must be effective in less than 30 days, because the effective date of the statute is October 1, 2023. Section 1062 of the NDAA for FY 2021 provides that none of the funds authorized to be appropriated or otherwise made available for any fiscal year for DoD may be provided to an institution of higher education that hosts a Confucius Institute, defined as a cultural institute directly or indirectly funded by the government of the People's Republic of China. Therefore, the interim rule, which implements section 1062, is necessary to ensure that contracting officers adhere to the limitation on the use of funds to avoid the risk of a possible violation of the Anti-Deficiency Act.

However, pursuant to 41 U.S.C. 1707 and FAR 1.501–3(b), DoD will consider public comments received in response to this interim rule in the formation of the final rule.

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

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 209, 212, and 252 are amended as follows:

- 1. The authority citation for 48 CFR parts 209, 212, and 252 continues to read as follows:

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

PART 209—CONTRACTOR QUALIFICATIONS

209.106 [Amended]

- 2. Amend section 209.106 by removing “preawared” and adding “preaward” in its place.
- 3. Add sections 209.170, 209.170–0, 209.170–1, 209.170–2, 209.170–3, and 209.170–4 to read as follows:

*	*	*	*	*
Sec.				
209.170	Restriction on the use of certain institutions of higher education.			
209.170–0	Scope.			
209.170–1	Definitions.			
209.170–2	Restriction.			
209.170–3	Waiver of restriction.			
209.170–4	Solicitation provision.			
*	*	*	*	*

209.170 Restriction on the use of certain institutions of higher education.

209.170–0 Scope.

This section implements section 1062 of the National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116–283).

209.170–1 Definitions.

As used in this section—
Confucius Institute means a cultural institute directly or indirectly funded by the government of the People's Republic of China.

Institution of higher education has the meaning given in 20 U.S.C. 1002.

209.170–2 Restriction.

None of the funds authorized to be appropriated or otherwise made available for any fiscal year for DoD may be used to contract with an institution of higher education that hosts a Confucius Institute, other than amounts provided directly to students as educational assistance. Contracting officers shall not enter into a contract with any institution of higher education that hosts a Confucius Institute, unless a waiver has been granted.

209.170–3 Waiver of restriction.

The restriction in 209.170–2 can be waived by the Office of the Under Secretary of Defense (Research and Engineering), without power of delegation, in accordance with the Confucius Institute Waiver Program guidance. See PGI 209.170–4.

209.170–4 Solicitation provision.

Use the provision at 252.209–7011, Representation for Restriction on the Use of Certain Institutions of Higher Education, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial products and commercial

services, for acquisitions to an institution of higher education.

PART 212—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

- 3. Amend section 212.301 by—
- a. Redesignating paragraphs (f)(iv) through (xix) as paragraphs (f)(v) through (xx); and
- b. Adding new paragraph (f)(iv) to read as follows:

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

(f) * * *

(iv) *Part 209—Contractor Qualifications.* Use the provision at 252.209–7011, Representation for Restriction on the Use of Certain Institutions of Higher Education, as prescribed at 209.170–4, to comply with section 1062 of the National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116–283).

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 4. Add section 252.209–7011 to read as follows:

252.209–7011 Representation for Restriction on the Use of Certain Institutions of Higher Education.

As prescribed in 209.170–4, use the following provision:

Representation for Restriction on the Use of Certain Institutions of Higher Education (Oct 2023)

(a) *Definitions.* As used in this provision—
Confucius Institute means a cultural institute directly or indirectly funded by the government of the People's Republic of China.

Institution of higher education has the meaning given in 20 U.S.C. 1002.

(b) *Restriction.* As required by section 1062 of the National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116–283), DoD may not award a contract with any institution of higher education that hosts a Confucius Institute. Section 1062 prohibits DoD from providing funding to any U.S. institution of higher education hosting a Confucius Institute unless that institution receives a waiver from the Department of Defense Office of the Under Secretary of Defense for Research and Engineering (OUSD(R&E)). See the OUSD(R&E) Confucius Institute Waiver Program Guidance to U.S. Institutions of Higher Education at <https://rt.cto.mil/wp-content/uploads/Confucius-Institute-Waiver-Program-Guidance-28Mar2023.pdf>.

(c) *Representation.* By submission of an offer, the Offeror represents that—

(1) It is not an institution of higher education that hosts a Confucius Institute; or

(2) The Offeror has obtained a waiver approved by OUSD(R&E).

(End of provision)

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