

New DoD Contracts Require Self-Reporting of Workers in China

On December 27, 2021, President Joe Biden signed into law the National Defense Authorization Act (NDAA) for 2022. To implement Section 855 of the NDAA, which mandated a two-phased disclosure from contractors holding a covered contract, DFARS 252.225-7057 and 252.225-7058 were implemented. One impacts what is required when a contractor submits a bid or proposal for a covered contract, and the other in an annual disclosure.

For definitional purposes, the term “covered contract” is any Department of Defense (DoD) contract or subcontract with a value exceeding \$5 million, exclusive of commercial products. This definition includes the leasing or owning of real property used in the performance of a covered contract.

The term “covered entity” is any entity (corporation, company, limited liability, limited partnership, business trust, business association or similar entity, including any subsidiary) that performs services on a covered contract in the People’s Republic of China.

DFARS 252.225-7057, Pre-award Disclosure of

Employment of Individuals Who Work in the People’s Republic of China

DFARS 252.225-7057 implements the requirement that a covered entity, contractor or subcontractor must identify the total number of individuals and description of their physical presence at the time of submission of an offer for a prime contract that includes the proposed use of a workforce in China.

The only exception is the DoD granting a national security waiver if such disclosure would not be in the national security interests of the United States. The contracting officer will be required to insert the new solicitation provision and contract clause into all solicitations and resulting prime contracts.

DFARS 252.225-7058, Post-award Disclosure of Employment of Individuals Who Work in the People’s Republic of China

DFARS 252.225-7058 implements the disclosure requirements for “covered contracts,” except for contracts for commercial products or services. The disclosure requirements apply for fiscal years 2022 and 2023. To date, no

guidance has been provided on when during the fiscal year the disclosures must be made.

Impact on Government Contracts

According to recent data from the Federal Procurement Data System (FPDS), and the North Atlantic Treaty Organization (NATO) Commercial and Government Entity (NCAGE) codes from the NATO Support and Procurement Agency, no awards met these criteria. It is interesting to note that these *DFARS* clauses appear to have no impact on existing prime government contracts. **CM**

Irvin Gray, JD, MBA, LL.M., CPCPM, CFCM, CCCM is the Assistant General Counsel for Contracts at Honeywell Federal Manufacturing & Technologies, LLC in Kansas City, Missouri. He provides legal advice to executives, buyers, and contract managers with an emphasis on federal government prime contracts and commercial subcontracts. He earned his LL.M in Government Procurement Law at George Washington Law School. He is president of the NCMA Kansas City Chapter.

Marc J. Soss, JD, LL.M. is a Contracts Senior Advisor, an attorney, retired U.S. Navy Supply Corps Officer, and serves as the treasurer of the NCMA Sun Coast Chapter.

DFARS 252.225-7057 Preaward Disclosure of Employment of Individuals Who Work in the People’s Republic of China (August 2022)

(a) Definitions. As used in this provision—“covered contract” and “covered entity” have the meaning given in the clause 252.225-7058, Postaward Disclosure of Employment of Individuals Who Work in the People’s Republic of China.

(b) Prohibition on award. In accordance with section 855 of the National Defense Authorization Act for Fiscal Year 2022 (Pub. L. 117-81, 10 U.S.C. 4651 note prec.), DoD may not award a contract to the Offeror if it is a covered entity and proposes to employ one or more individuals who will perform work in the People’s Republic of China on a covered contract, unless the Offeror has disclosed its use of workforce and facilities in the People’s Republic of China.

(c) Preaward disclosure requirement. At the time of submission of an offer for a covered contract, an Offeror that is a covered entity shall provide disclosures to include—

(1) The proposed use of workforce on a covered contract or subcontract, if the Offeror employs one or more individuals who perform work in the People’s Republic of China;

(2) The total number of such individuals who will perform work in the People’s Republic of China; and

(3) A description of the physical presence, including street address or addresses, in the People’s Republic of China, where work on the covered contract will be performed.

252.225-7058 Postaward Disclosure of Employment of Individuals Who Work in the People’s Republic of China (August 2022)

(a) Definitions. As used in this clause— “Covered contract” means any DoD contract or subcontract with a value in excess of \$5 million, not including

contracts for commercial items. “Covered entity” means any corporation, company, limited liability company, limited partnership, business trust, business association, or other similar entity, including any subsidiary thereof, performing work on a covered contract in the People’s Republic of China, including by leasing or owning real property used in the performance of the covered contract in the People’s Republic of China.

(b) Disclosure requirement.

(1) In accordance with section 855 of the National Defense Authorization Act for Fiscal Year 2022 (Pub. L. 117-81, 10 U.S.C. 4651 note prec.), DoD may not award, extend, or exercise an option on a covered contract with a covered entity unless such covered entity submits each required disclosure of its use of workforce and facilities in the People’s Republic of China, if it employs one or more individuals who perform work in the People’s Republic of China on a covered contract.

(2) If the Contractor is a covered entity, the Contractor shall disclose for the Government’s fiscal years 2023 and 2024, the Contractor’s employment of one or more individuals who perform work in the People’s Republic of China on any covered contract. The disclosures shall include—

(i) The total number of such individuals who perform work in the People’s Republic of China on the covered contracts funded by DoD; and

(ii) A description of the physical presence, including street address or addresses in the People’s Republic of China, where work on the covered contract is performed.

(c) Subcontracts. The Contractor shall insert this clause, including this paragraph (c), without alteration other than to identify the appropriate parties, in all subcontracts that meet the definition of a covered contract.