



DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 2

[FAR Case 2018-008; Docket No. 2018-0008, Sequence No. 1]

RIN: 9000-AN68

Federal Acquisition Regulation: Definition of "Commercial Item"

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2018 to revise the definition of a "commercial item."

DATES: Interested parties should submit comments to the Regulatory Secretariat Division at one of the addresses shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]** to be considered in the formulation of a final rule.

ADDRESSES: Submit comments in response to FAR Case 2018-008 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by entering "FAR Case 2018-008" under the heading "Enter Keyword or ID" and selecting "Search." Select the link "Comment Now" that corresponds with "FAR Case 2018-008." Follow the instructions provided on the screen. Please include your name, company name (if any), and "FAR Case 2018-008" on your attached document.

- Mail: General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Ms. Lois Mandell, 1800 F Street, N.W., 2nd floor, Washington, DC 20405.

Instructions: Please submit comments only and cite "FAR case 2018-008" in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential 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: For clarification of content, contact Ms. Zenaida Delgado, Procurement Analyst, at 202-969-7207. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite "FAR Case 2018-008."

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to change the definition of "commercial item" at FAR 2.101, so that the regulatory definition conforms to statutory changes made to the definition by section 847 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91, enacted December 12, 2017). The rule would broaden the definition to allow certain additional items developed exclusively at private expense to qualify for the benefits associated with being treated as a commercial item. Section 847 amends the definition of "commercial item" at 41 U.S.C. 103(8) to expand the universe of nondevelopmental items (NDIs) that qualify as commercial items to include items sold in substantial quantities on a competitive basis to multiple foreign governments.

The statutory and regulatory definition of "commercial item" is broad and covers a wide range of products and services. It includes:

- Products, other than real property, that have been offered for sale, lease, or license to the public. Possible indications that an item is commercial are a commercial sales history, listing in catalogs or

brochures, an established price, and distributors.

Examples of commercial items bought by agencies are transport aircraft, computers, medicine, and fuel.

The commercial market is global; commercial items are not limited to the domestic commercial market.

- Products that evolved through advances in technology or performance and will be available in the commercial market in time to meet the delivery requirements of the solicitation. Examples of such items are product updates, model changes, and product improvements such as new versions of software.
- Products that have received minor modifications to meet agency requirements. To be considered minor, a modification may not significantly alter the product's nongovernmental function or essential physical characteristics. In determining whether a modification is minor, agencies should consider the value and size of the modification and the comparative value and size of the final product.
- Products that were created by integrating commercial subsystems and components into a unique system. For example, a computer system composed of commercial subsystems would be considered a commercial item.

Another example is industrial plant equipment that combines commercial components into a unique item based on customer needs.

- Installation services, maintenance services, repair services, training services, and other services procured to support a commercial product. Help desks, call centers, warranty repair services, user training, equipment installation, and other services related to item support are examples.
- Standalone services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog or market prices for specific tasks performed and under standard commercial terms and conditions. Construction, research and development (R&D), warehousing, garbage collection, and transportation of household goods are examples.
- NDIs, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments. NDI is defined separately in FAR 2.101. An NDI includes an item of supply used exclusively for governmental purposes by a Federal agency, a State or local government, or a

foreign government with which the United States has a mutual defense cooperation agreement. Examples include-

- o Protective vests used by police departments and rescue equipment used by fire and rescue units;
- o Defense products previously developed by defense agencies of U.S. allies and used exclusively for governmental purposes by Federal agencies, state or local governments, or a foreign government;
- o Items that require only minor modifications to meet the requirements of the procuring agency; and
- o A mechanical dereefer (mechanism for releasing parachute reefing lines) used with the U.S. Army's cargo parachutes that was developed for and first used by the Canadian Army.

II. Discussion and analysis.

This proposed rule will amend the definition of commercial item in FAR part 2 to reflect the statutory change made by section 847. Specifically, the rule would add the phrase "or to multiple foreign governments" at the end of paragraph (8).

III. Expected Impact of the Proposed Rule

This rule allows for more transactions to follow requirements for commercial items. This simplifies the transaction in terms of fewer Government reporting requirements and should decrease the cost per transaction for both the Government and the contractor. Under the proposed rule, for the first time, NDIs that are developed exclusively at private expense and sold in substantial quantities to multiple foreign governments may be treated as commercial items.

Because commercial items, which include commercially available off-the-shelf items, are sold to the Government in the same way as NDIs, the Government can take advantage of the previous testing and general acceptance of the product in the commercial marketplace or by a state, local, or foreign government.

To promote the Government's acquisition of commercial items, the law and FAR part 12 create a preference for buying commercial items and provide relief from certain record-keeping, reporting, and compliance requirements. According to an analysis published by the Section 809 Panel in its May 2017 Interim Report, commercial item acquisitions are subject to up to 138 contract clauses, while acquisitions for NDIs that do not meet the commercial item definition as well as acquisitions for non-commercial

items could be subject to nearly 500 clauses, depending on the principal type and purpose of the contract. For example, a commercial firm selling an NDI today to multiple foreign governments in substantial quantities could face compliance costs with the Truth In Negotiations Act (TINA), which requires implementation of government-specific business systems for any modifications to competitively awarded items. Policies governing commercial item acquisitions favor reliance on commercial sector business practices and use of standard commercial terms and conditions to the maximum extent practicable. Each of these dimensions of the commercial item framework contributes to more simplified and less costly transactions.

DoD, GSA, and NASA are unable to monetize the cost savings, because procurement data is not captured in a manner that enables a determination to be made regarding how many NDIs developed exclusively at private expense have been sold or are expected to be sold to multiple foreign governments in substantial quantities, that are not also sold in substantial quantities to multiple State and local governments.

Accordingly, DoD, GSA, and NASA welcome feedback, especially from respondents who would expressly benefit

from this rulemaking, such as: (i) identification of any transactional information (e.g., Procurement Instrument Identifiers (PIIDs)) associated with contracts awarded in the past 10 years that would have benefitted from the rule had it been in effect; (ii) any information that might help the regulatory drafters better understand - both qualitatively and quantitatively - the savings and/or cost avoidance that the rule will provide; and (iii) -potential burden reductions associated with future regulatory actions that facilitate broader acquisition of commercial items. In responding to item (ii), respondents are encouraged to discuss, to the extent possible, specific components of savings and cost-avoidance (e.g., identify savings and/or cost-avoidance associated with specific clauses that would no longer be required as a result of this regulatory change).

IV. Applicability to Contract at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-shelf Items

This rule proposes to amend the FAR to change the definition of "commercial item". The revision does not add any new solicitation provisions or clauses, or impact any existing provisions or clauses.

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 rule is not a significant regulatory action and therefore, this rule was not subject to the review of the Office of Information and Regulatory Affairs (OIRA) under section 6(b) of E.O. 12866. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This proposed rule is expected to be an E.O. 13771 deregulatory action. Details are provided in section III of this preamble.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA do 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. However, an Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to change the definition of "commercial item" so that NDIs that are developed exclusively at private expense and sold in substantial quantities to multiple foreign governments may be treated as commercial items.

The objective is to implement section 847 of the NDAA for FY18. The legal basis for this rule is 41 U.S.C. 103(8).

The proposed rule impacts all entities who do business with the Federal Government, including the over 327,458 small business registrants in the System for Award Management database. This proposed rule expands the definition of "commercial item" for nondevelopmental items (NDIs) to include those sold to multiple foreign governments. This change will allow more acquisitions to fall under the definition of commercial item procurements and use standard commercial terms and conditions to the maximum extent practicable. This will result in a reduction of statutory and regulatory requirements as FAR part 12 contract actions are exempt at the prime or subcontract level from various statutes, policies, and contracting requirements unique to the federal procurement process. Therefore, small businesses would benefit from the streamlined processes.

The proposed rule does not include additional reporting or record keeping requirements.

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

There are no available alternatives to the proposed rule to accomplish the desired objective of the statute. Small businesses will benefit from the streamlined commercial acquisition procedures.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule consistent with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2018-008) in correspondence.

VIII. Paperwork Reduction Act

This 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 Part 2

Government procurement.

Dated: April 22, 2019

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR part 2 as set forth below:

PART 2—DEFINITIONS OF WORDS AND TERMS

1. The authority citation for 48 CFR part 2 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

2.101 [Amended]

2. In paragraph (b) (2), amend paragraph (8) in the definition of "Commercial item" by removing "local governments" and adding in its place "local governments or to multiple foreign governments".

Billing Code: 6820-EP

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