



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 244, and 252

[Docket DARS-2019-0052]

RIN 0750-AK66

Defense Federal Acquisition Regulation Supplement: Treatment of Certain Items as Commercial Items (DFARS Case 2019-D029)

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 implement several sections of the National Defense Authorization Act for Fiscal Year 2017 that address treatment of commingled items purchased by contractors and services provided by nontraditional defense contractors as commercial items. DoD is also proposing to further implement a section of the National Defense Authorization Act for Fiscal Year 2018 that provides that a contract for an item using FAR part 12 procedures shall serve as a prior commercial item determination.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60**

days after date of publication in the FEDERAL REGISTER], to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2019-D029, using any of the following methods:

- o *Regulations.gov:* <http://www.regulations.gov>. Search for "DFARS Case 2019-D029" under the heading "Enter keyword or ID" and selecting "Search." Select "Comment Now" and follow the instructions provided to submit a comment. Please include "DFARS Case 2019-D029" on any attached documents.

- o *Email:* osd.dfars@mail.mil. Include DFARS Case 2019-D029 in the subject line of the message.

- o *Fax:* 571-372-6094.

- o *Mail:* Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD(A&S)DPC/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, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to implement sections 877 and 878 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328) and further implement section 848 of the NDAA for FY 2018 (Pub. L. 115-91). Section 877, Treatment of Commingled Items purchased by Contractors as Commercial Items, adds 10 U.S.C. 2380B. Section 878, Treatment of Services Provided by Nontraditional Contractors as Commercial Items, amends 10 U.S.C. 2380a. Section 848 modifies 10 U.S.C. 2380(b) to provide that a contract for an item using FAR part 12 procedures shall serve as a prior commercial item determination, unless the appropriate official determines in writing that the use of such procedures was improper or that it is no longer appropriate to acquire the item using commercial item acquisition procedures.

II. Discussion and Analysis

A. *Section 848.* This rule proposes to amend DFARS 212.102(a) in order to further implement section 848 of the NDAA for FY 2017, which was partially implemented in the final rule under DFARS Case 2018-D006, published in the Federal Register on January 31, 2018 (83 FR 4431). This rule—

- Adds a new paragraph at (a)(i) to clarify that the use of FAR part 12 procedures is not only for the acquisition of items that have been determined to be commercial items, as defined in

FAR 2.101, but also for the acquisition of items that do not meet than FAR definition of "commercial item" and do not require a commercial item determination, but are to be treated as commercial items due to the applicability of 41 U.S.C. 1908 or 10 U.S.C. 2380a;

- Redesignates paragraph (a)(ii) on prior commercial item determinations as (a)(iii) and expands it to cover other prior use of FAR part 12 procedures;

- Adds a paragraph at (a)(iii)(A)(2) to state that a contract for an item acquired using commercial item acquisition procedures under FAR part 12 shall serve as a prior commercial item determination, unless the item was acquired pursuant to one of those statutes and therefore did not require a commercial item determination.

- Adds a clarification at (a)(iii)(B) with regard to when DFARS subpart 212.70 is applicable.

B. Section 878. This rule also proposes to add a new DFARS 212.102(a)(iv)(B) to implement section 878 of the NDAA for FY 2017, with regard to the requirement to treat services provided by a business unit that is a nontraditional defense contractor as commercial services, to the extent that such services use the same pool of employees as used for commercial customers and are priced using methodology similar to methodology used for commercial

pricing. This is an exception to the general rule of granting agency discretion to treat supplies and services provided by nontraditional defense contractors as commercial items.

C. *Section 877.* Lastly, this rule proposes to implement section 877 of the NDAA for FY 2018 at DFARS 244.402 and 252.244.7000, Subcontracts for Commercial Items. The policy is established at DFARS 244.403(S-70), and the requirement is imposed on the contractor in a new paragraph (c) of the clause at DFARS 252.244-7000, to treat as commercial items any items valued at less than \$10,000 per item that were purchased by the contractor for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract when purchased. This does not apply to items that were purchased specifically for a DoD contract but were subsequently commingled with similar items purchased for other contracts. The clause also requires that the contractor shall ensure that any such items to be used in performance of a DoD contract meet all applicable terms and conditions of the DoD contract, because issues may arise with regard to the compliance of commingled parts that were not purchases specifically for use in performance of a DoD contract.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule proposes to modify the clause at DFARS 252.244,7000, Subcontracts for Commercial Items, but does not modify its applicability. The clause is applicable to all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items and solicitations and contracts valued at or below the simplified acquisition procedures. However, the amendment to DFARS 252.244-7000 proposed by this rule does not add or impose any burdens on contractors, but allows treatment of certain items as commercial items that do not otherwise meet the definition of "commercial item" in FAR part 2.

IV. 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, dated

September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not expected to be an E.O. 13771 regulatory action, because this rule is not significant under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this proposed 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 has been performed and is summarized as follows:

This proposed rule is issued in order to implement sections 877 and 878 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (10 U.S.C. 2380a and 10 U.S.C. 2380b) and further implements section 848 of the NDAA for FY 2018 (10 U.S.C. 2380(b)).

The objective of this rule is to address the use of FAR part 12 procedures, prior commercial item determinations, and the treatment as commercial items of services provided by nontraditional defense contractors and certain items purchased by a contractor for use in the performance of multiple contracts. The legal basis for the rule is the NDAA section cited as the reasons for the action.

Based on FY 2018 data from the Federal Procurement Data System (FPDS), awards of commercial contracts were made to 15,231 nontraditional defense contractors that were also small entities. It is unknown how many of those entities might provide services that use the same pool of employees used for commercial customers and are priced using methodology similar to the methodology used for commercial pricing.

Also based on FPDS data for FY 2018, DoD awarded 110,000 contracts for the purchase of supplies, commercial or noncommercial, exceeding \$10,000, to 13,892 unique small entities. This rule will affect an unknown number of those 13,892 small entities, if such small entities purchase noncommercial items valued at less than \$10,000 per item that are not identifiable to any particular contract when purchased and are for use in the performance of multiple contracts with DoD and other parties.

This rule does not impose any new reporting, recordkeeping, or other compliance requirements. The rule does remind the contractor of the responsibility to ensure that items treated as commercial items pursuant to section 877 of the NDAA for FY 2017 that are to be used in the performance of the DoD contract meet all terms and conditions of the contract that are applicable to commercial items.

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

DoD did not identify any significant alternatives that would minimize or reduce the significant economic impact on small entities, because there is no significant impact on small entities. Any impact is expected to be beneficial.

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 2019-D027), in correspondence.

VII. Paperwork Reduction Act

The rule does not contain any new 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, 244, and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 244, and 252 are proposed to be amended as follows:

1. The authority citation for 48 CFR parts 212, 244, and 252 continues to read as follows:

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

PART 212-ACQUISITION OF COMMERCIAL ITEMS

2. Revise section 212.102 to read as follows:

212.102 Applicability.

(a) (i) *Use of FAR part 12 procedures.* Use of FAR part 12 procedures is based on-

(A) A determination that an item is a commercial item, as defined in FAR 2.101; or

(B) Applicability of the following statutes that provide for treatment as a commercial item and use of part 12 procedures, even though the item does not meet the definition of "commercial item" at FAR 2.101 and does not require a commercial item determination:

(1) 41 U.S.C. 1903, when used to procure supplies or services to be used to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack pursuant to FAR 12.102(f).

(2) 10 U.S.C. 2380a, when used to procure supplies or services from nontraditional defense contractors pursuant to 212.102(a) (iv).

(ii) *Commercial item determination.* (A) When using FAR part 12 procedures for acquisitions of commercial items pursuant to 212.102(a)(i)(A) exceeding \$1 million in value, the contracting officer shall—

(1) Determine in writing that the acquisition meets the commercial item definition in FAR 2.101;

(2) Include the written determination in the contract file;

(3) Obtain approval at one level above the contracting officer when a commercial item determination relies on paragraph (1)(ii), (3), (4), or (6) of the “commercial item” definition at FAR 2.101; and

(4) Follow the procedures and guidance at PGI 212.102(a)(ii)(A) regarding file documentation and commercial item determinations.

(B) See PGI 212.102(a)(ii)(B) for information about items that DoD has historically acquired as military-unique, noncommercial items.

(iii) *Prior commercial item determination or other use of FAR part 12 procedures.* (A)(1) Pursuant to 10 U.S.C.

2306a(b)(4)(A), the contracting officer may presume that a prior commercial item determination made by a military department, a defense agency, or another component of DoD shall serve as a determination for subsequent procurements of such item.

(2) Pursuant to 10 U.S.C. 2380(b), except as provided in paragraph (a)(iii)(B)(2) of this section, a contract for an item acquired using commercial item acquisition procedures under FAR part 12 shall serve as a prior commercial item determination, unless the item was acquired pursuant to paragraph (a)(i)(B) of this section.

(B)(1) Until November 15, 2020, prior to converting a procurement of commercial items valued at more than \$1 million from commercial acquisition procedures to noncommercial acquisition procedures under FAR part 15, follow the procedures at subpart 212.70 in lieu of the procedures in paragraph (a)(iii)(B)(2) of this section.

(2) Pursuant to 10 U.S.C. 2306a(b)(4)(B) and (C) and 10 U.S.C. 2380(b), except as provided in paragraph (a)(iii)(B)(1) of this section, if the contracting officer does not make the presumption that a prior commercial item determination is valid, or that the continued use of FAR part 12 procedures for other statutory reasons is still appropriate, and instead chooses to proceed with a procurement of an item using procedures other than FAR part 12 procedures, the contracting officer shall request a review by the head of the contracting activity that will conduct the procurement. Not later than 30 days after receiving a request for review, the head of a contracting activity shall-

(i) Confirm that the prior use of FAR part 12 procedures was appropriate and still applicable; or

(ii) Issue a determination that the prior use of FAR part 12 procedures was improper or that it is no longer appropriate to acquire the item using FAR part 12 procedures, with a written explanation of the basis for the determination.

(iv) *Nontraditional defense contractors.* In accordance with 10 U.S.C. 2380a, contracting officers-

(A) Except as provided in paragraph (a)(iv)(B) of this section, may treat supplies and services provided by nontraditional defense contractors as commercial items. This permissive authority is intended to enhance defense innovation and investment, enable DoD to acquire items that otherwise might not have been available, and create incentives for nontraditional defense contractors to do business with DoD. It is not intended to recategorize current noncommercial items, however, when appropriate, contracting officers may consider applying commercial item procedures to the procurement of supplies and services from business segments that meet the definition of "nontraditional defense contractor" even though they have been established under traditional defense contractors;

(B) Shall treat services provided by a business unit that is a nontraditional defense contractor as commercial items, to the extent that such services use the same pool of employees as used

for commercial customers and are priced using methodology similar to methodology used for commercial pricing; and

(C) Shall document the file when treating supplies or services from a nontraditional defense contractor as commercial items in accordance with paragraph (a)(iv)(A) or (B) of this section.

212.7001 [Amended]

3. Amend section 212.7001(a)(2) by removing "Acquisition, Technology, and Logistics" and adding "Acquisition and Sustainment" in its place.

PART 244—SUBCONTRACTING POLICIES AND PROCEDURES

4. Amend section 244.402 by—

- a. In paragraph (a), removing "Contractors shall" and adding "Contractors are required to" in its place; and
- b. Adding paragraph S-70.

The addition reads as follows:

244.402 Policy requirements.

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(S-70) In accordance with 10 U.S.C. 2380B, items that are valued at less than \$10,000 per item that are purchased by a contractor for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract when purchased shall be treated as commercial items.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Amend section 252.244-7000 by-

- a. In the clause heading, removing the date "(JUN 2013)" and adding "(ABBREVIATED MONTH AND YEAR OF FINAL RULE EFFECTIVE DATE)" in its place;
- b. Redesignating paragraph (c) as paragraph (d);
- c. Adding a new paragraph (c); and
- d. In the newly redesignated paragraph (d), removing "paragraph (c)" and adding "paragraph (d)" in its place.

The addition reads as follows:

252.244-7000 Subcontracts for Commercial Items

* * * * *

(c) The Contractor shall treat as commercial items any items valued at less than \$10,000 per item that were purchased by the Contractor for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract when purchased. The Contractor shall ensure that any such items to be used in performance of this contract meet all terms and conditions of this contract that are applicable to commercial items.

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