



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 212

[Docket DARS-2020-0044]

RIN 0750-AL19

Defense Federal Acquisition Regulation Supplement: Commercial Item Determinations (DFARS Case 2020-D033)

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 further implement a section of the National Defense Authorization Act for Fiscal Year 2018 that provides that a contract for an item using Federal Acquisition Regulation (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 2020-D033, using any of the following methods:

- o *Regulations.gov*: <http://www.regulations.gov>. Search for "DFARS Case 2020-D033". Select "Submit a Comment Now" and follow the instructions provided to submit a Comment. Please

"DFARS Case 2020-D033" on any attached document.

- o Email: *osd.dfars@mail.mil*. Include DFARS Case 2020-D033 in the subject line of the message.

- o Mail: Defense Acquisition Regulations System, Attn: Ms. Heather Kitchens, OUSD(A&S)DPC/DARS, Room 3B938, 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).

OR FURTHER INFORMATION CONTACT: Ms. Heather Kitchens, telephone 571-372-6104.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the *Federal Register* at 84 FR 65322 on November 27, 2019, under DFARS Case 2019-D029 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). DoD is publishing a second proposed rule under DFARS Case 2020-D033 to further implement section 848, because of substantial changes from the first proposed rule. 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. This rule also proposes to remove the procedures at DFARS subpart 212.70, established pursuant to section 856 of the NDAA for FY 2016 (Pub. L. 114-92), which apply to procurements of more than \$1 million previously procured under a prime contract using FAR part 12 procedures. The authority for these procedures expires on November 25, 2020.

II. Discussion and Analysis

One respondent submitted public comments with regard to prior use of part 12 procedures and commercial item determinations in response to the first proposed rule. DoD reviewed the public comments in the development of this second proposed rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes from the Proposed Rule

1. Moves to paragraph 212.102(a)(ii) the coverage on prior commercial item determinations proposed originally at paragraph 212.102(a)(iii), in order to precede the paragraph on commercial item determinations.

2. Rewrites the coverage at 212.102(a)(ii) to shift emphasis to prior use of commercial item determinations.

3. Changes the applicability of the proposed paragraph on commercial item determinations at 212.102(a)(iii) to apply to

acquisitions at any dollar value, not just those that exceed \$1 million.

B. Analysis of Public Comments

Comment: One respondent recommended revision of the proposed rule to direct contracting officers to rely on prior use of FAR part 12 procedures or prior commercial item determinations and only request waivers on a case-by-case basis. The respondent believed that the proposed rule, as written, would undermine this policy objective, and recommended rewrite of proposed DFARS 212.102(a)(ii)(A) and (a)(iii)(B)(2).

Response: DoD has increased the emphasis on the requirement to rely on prior use of FAR part 12 procedures. However, some recommendations were not accepted, such as removal of the limited applicability to acquisition of commercial items pursuant to 212.102(a)(i)(A), and the requirement of higher-level approvals for certain commercial item determinations. The following are responses to specific aspects of the respondent's comments on the first proposed rule:

1. Applicability to statutory exceptions (212.102(a)(i)(B)).

10 U.S.C. 2380(b)(1) requirement with regard to prior use of FAR part 12 procedures serving as prior commercial item determination does not apply to items purchased using FAR part 12 procedures that are not commercial items, but only treated as commercial items (i.e., 41 U.S.C. 1903 and 10 U.S.C. 2380a). It does not make sense to infer a commercial item determination for acquisitions of items that may not be commercial items, and do

not require a commercial item determination. Further, applicability of these statutory exceptions to treat certain items as commercial items is not dependent on the particular items being purchased, but on circumstances peculiar to a particular acquisition, that cannot be extrapolated to other acquisitions of the same item. DoD concluded that the 10 U.S.C. 2380(b)(1) statement "shall serve as a prior commercial item determinations for such item for purposes of this chapter" is applicable only if a commercial item determination is applicable to the item.

2. Applicability at all dollar values.

According to 10 U.S.C. 2380, as amended by section 848 of the NDAA for FY 2018, unless certain determinations are made, a contract for an item acquired using commercial item acquisition procedures under part 12 of the Federal Acquisition Regulation shall serve as a prior commercial item determination with respect to such item for purposes of this chapter. This law does not distinguish between acquisitions above or below \$1 million. DoD concluded that it, therefore, applies regardless of dollar value.

3. Prior use of FAR part 12 procedures (212.102(a)(ii)).

Due to amendment of 10 U.S.C. 2380 by section 848 of the NDAA for FY 2019, the consideration of whether FAR part 12 procedures have been previously used should be the next step in the decision-making process (after determining that a statutory exception does not apply). Therefore, these paragraphs have

been relocated from 212.102(a)(iii) to 212.102(a)(ii), because prior use of part 12 procedures needs to be considered prior to the need for a new commercial item determination. In order to determine whether part 12 procedures have been previously used, the contracting officer shall review the Commercial Item Determination Database, or may utilize other available evidence. The contracting officer shall document the file accordingly.

This proposed rule limits to DoD contracts the requirement that prior use of part 12 procedures shall serve as a commercial item determination, because this is a DoD statute, implemented in the DFARS, and DoD does not control how civilian agencies make commercial item determinations and use FAR part 12 procedures, nor does it have the data on civilian agency commercial item determinations in its commercial item determination database.

DoD has not accepted all of the recommended changes to the prior use of FAR part 12 procedures, because there are nuances relating to other statutes that need to be addressed; this rule also addresses 10 U.S.C. 2306a(b)(4) and 10 U.S.C. 2380b. This rule also retains the delegation to the head of the contracting activity of the function assigned in the statute to the senior procurement executive.

4. Million dollar threshold for commercial item determinations (when there is no evidence of prior use of FAR part 12 procedures for the acquisition of commercial items (212.102(a)(iii)).

The million dollar threshold was based on policy, to avoid overly burdensome requirements on lower dollar value acquisitions. If contracting officers are accepting prior use of part 12 procedures, even below \$1 million, as commercial item determinations for subsequent buys, then it is necessary to apply the same standards at any dollar value, since these determinations can form the basis for much larger acquisitions.

C. Other changes.

The rule proposes to delete, add, or amend some of the pointers to DFARS Procedures, Guidance, and Information (PGI) to conform to the current PGI.

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

This rule does not create any new solicitation provisions or contract clauses, or amend any existing provisions or clauses.

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 subject to E.O. 13771, because this rule is not a significant regulatory action 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 necessary in order to further implement section 848 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (10 U.S.C. 2380(b)).

The objective of this rule is to address the use of FAR part 12 procedures and commercial item determinations. If the Commercial Item Determination Database contains a prior commerciality determination, or the contracting officer has other evidence that an item has previously been acquired by DoD using commercial item acquisition procedures under FAR part 12, the prior contract shall serve as a prior determination that an item is a commercial item, as defined in FAR 2.101. The legal

basis for the rule is the NDAA section cited as the reason for the action.

DoD awarded contracts to an average of 40,689 unique entities (including 30,806 small businesses) each year from FY 2016 through FY 2018. This rule impacts the procedures for commercial item determinations for products and services offered to the Government.

This rule does not impose any new reporting, recordkeeping, or other compliance requirements.

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 2020-D033), 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 Part 212

Government procurement.

Jennifer D. Johnson,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 212 is proposed to be amended as follows:

PART 212—ACQUISITION OF COMMERCIAL ITEMS

1. The authority citation for part 212 continues to read as follows:

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

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 (see paragraph (a) (iii) of this section); or

(B) Applicability of one of the following statutes that provide for treatment as a commercial item and use of part 12 procedures, even though the item may 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 - 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); or

(2) 10 U.S.C. 2380a - Supplies or services from nontraditional defense contractors pursuant to 212.102(a)(iv).

(ii) *Prior use of FAR part 12 procedures.* (A) Pursuant to 10 U.S.C. 2380(b), except as provided in paragraph (a)(ii)(B) of this section or unless the item was acquired pursuant to paragraph (a)(i)(B) of this section, if the Commercial Item Determination (CID) Database (for website see PGI 212.102(a)(iii)(3)) contains a prior commerciality determination, or the contracting officer has other evidence that an item has been acquired previously by DoD using commercial item acquisition procedures under FAR part 12, then the prior contract shall serve as a determination that an item is a commercial item, as defined in FAR 2.101. The contracting officer shall document the file accordingly.

(B) (1) If the item to be acquired meets the criteria in paragraph (a)(ii)(A) of this section the item may not be acquired using other than FAR part 12 procedures unless the head of a contracting activity issues a determination as specified in paragraph (a)(ii)(B)(2)(ii) of this section.

(2) 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. In accordance with 10 U.S.C. 2306a(b)(4) and 10 U.S.C. 2380(b), if the contracting officer

questions a prior determination to use part 12 procedures and instead chooses to proceed with a procurement of an item previously determined to be a commercial 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.

(iii) *Commercial item determination.* Unless the procedures in paragraph (a)(ii) of this section are applicable, when using FAR part 12 procedures for acquisitions of commercial items pursuant to 212.102(a)(i)(A), the contracting officer shall—

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

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

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

(D) Follow the procedures and guidance at PGI 212.102(a)(iii) regarding file documentation and commercial item determinations.

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

(A) Except as provided in paragraph (a)(iii)(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. The decision to apply commercial item procedures to the procurement of supplies and services from nontraditional defense contractors does not require a commercial item determination and does not mean the item is commercial;

(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) (iii) (A) or (B) of this section.

(v) *Commercial item guidebook.* For a link to the commercial item guidebook, see PGI 212.102(a) (iii) (4).

Subpart 212.70 [Removed and reserved]

3. Remove and reserve subpart 212.70, consisting of sections 212.7000 and 212.7001.

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