



DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Parts 169 and 169a

[Docket ID: DOD-2019-OS-0113]

RIN 0790-AK91

Commercial Activities Program

AGENCY: Office of the Secretary, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: This final rule removes DoD’s regulations concerning the Commercial Activities Program. The regulations are obsolete since they have been superseded by statute, regulation, and policy and, therefore, can be removed from the Code of Federal Regulations (CFR).

DATES: This rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Jason M. Beck, (703) 697-1735 (desk); 571-309-0478 (mobile).

SUPPLEMENTARY INFORMATION: This final rule removes the DoD regulations at 32 CFR part 169, most recently updated on May 19, 1989 (54 FR 21726), and 32 CFR part 169a, most recently updated on July 1, 1992 (57 FR 29207), because they are obsolete. This action is predicated on reissued guidance and policy from the Office of Management and Budget (OMB), cancellation of associated DoD policies, and the enactment of statute in title 10 of the United States Code (U.S.C.).

The content of 32 CFR part 169 was based on the DoD policy document, DoD Instruction 4100.15, “Commercial Activities Program,” which was subsequently cancelled on July 10, 2013, because it was obsolete. The content of 32 CFR part 169a was based on the DoD policy document, DoD Instruction 4100.33, “Commercial Activities Program Procedures,” which was also subsequently cancelled on March 4, 2011, because it was obsolete. DoD’s commercial

activities program was based on a previous version of OMB Circular A-76, “Performance of Commercial Activities,” which was rescinded and replaced in May 2003 (available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A76/a76_incl_tech_correction.pdf).

In addition to the cancellation of the associated DoD Instructions for parts 169 and 169a that deem the rules obsolete, the subject matter aligned to these rules have substantially changed and been addressed in other areas. For example, 10 U.S.C. 2330a and 10 U.S.C. 2461 were enacted in 2008 and 1996, respectively; the Federal Activities Inventory Reform (FAIR) Act was enacted in 1998; the definitions and policy in the Federal Acquisition Regulation (FAR) Parts 2, 7.3, and 7.5, as well as the Defense Federal Acquisition Regulation Supplement (DFARS) 207.5 were changed to reflect the new rules in the FAIR Act and the 2003 version of OMB Circular A-76; and the Office of Federal Procurement Policy (OFPP) issued Policy Letter 11-01, “Performance of Inherently Governmental and Critical Functions,” in 2011 (76 FR 56227). These laws, regulations, and Federal policies all substantially address the policy space covered by 32 CFR parts 169 and 169a. The FAIR Act, for example, establishes in law the framework of inherently governmental and commercial activities functions, while 10 U.S.C. 2461 establishes the requirement for public/private competitions before conversion to contractor performance—competitions which are covered under OMB Circular A-76. The FAR and DFARS regulations, as well as OFPP Policy Letter 11-01, go even farther than the FAIR Act and delineate additional categories of functions (such as closely associated with inherently governmental and critical) which are not mentioned in 32 CFR 169 and 169a. Similarly, 10 U.S.C. 2330a establishes law for the collection of contract services data, another area related to the commercial activities discussed in 32 CFR 169 and 169a, but not covered by them.

Additionally, the OMB Circular A-76 public-private competition process has been under a Congressional moratorium since 2008. If the moratorium were lifted, the rules would still be considered obsolete and unnecessary, and promulgating new rules would be unnecessary due to

the inclusion of language in title 10 U.S.C., the FAR, DFARS, and elsewhere in executive agency policy, as previously noted. These acts and policies address and cover the intent of parts 169 and 169a and, therefore, no longer make them applicable and worthy of staying active. Furthermore, not only are parts 169 and 169a unnecessary, they are no longer current with the statutory, regulatory, and policy framework that governs the acquisition of services and functions in the Total Force Management policy space.

It has been determined that publication of these CFR part removals for public comment is impracticable, unnecessary, and contrary to public interest since they are based on the removal of obsolete information. These removals are not significant under Executive Order (E.O.) 12866, “Regulatory Planning and Review.”

List of Subjects in 32 CFR Parts 169 and 169a

Armed forces, Government procurement.

Accordingly, the Department of Defense amends 32 CFR chapter I as follows:

PART 169—[REMOVED]

1. Under the authority of 5 U.S.C. 301, 32 CFR part 169 is removed.

PART 169a—[REMOVED]

2. Under the authority of 5 U.S.C. 301, 32 CFR part 169a is removed.

Dated: July 13, 2021.

Kayyonne T. Marston,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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