

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 202, 212, and 234**

RIN 0750-AG23

Defense Federal Acquisition Regulation Supplement; Acquisition of Commercial Items (DFARS Case 2008-D011)

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is adopting as final, with minor editorial changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections 805 and 815 of the National Defense Authorization Act for Fiscal Year 2008.

DATES: *Effective Date:* April 19, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Manuel Quinones, telephone 703-602-8383.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD published an interim rule at 74 FR 34263 on July 15, 2009 to implement sections 805 and 815 of the National Defense Authorization Act (NDAA) for Fiscal Year 2008 (Pub. L. 110-181). A correction to the interim rule was published at 74 FR 35825 on July 21, 2009, to clarify the types of services to which this rule applies, consistent with subsections (c)(1)(A) and (c)(1)(C)(i) of section 805 of Public Law 110-181. Section 805 specified when time-and-materials or labor-hour contracts may be used for commercial item acquisitions. Section 815 provided clarification regarding situations under which a major weapon system, subsystems of major weapon systems, or components and spare parts for major weapon systems may be acquired using procedures established for the acquisition of commercial items. Section 815 also clarified that the terms "general public" and "nongovernmental entities", with regard to sales of commercial items, do not include the Federal Government or a State, local, or foreign government.

II. Discussion and Analysis

Three respondents submitted comments on the interim rule, which are discussed below.

A. Contracting Officer Guidance for Drafting Solicitations

Comment: One respondent stated that the final rule should provide guidance on how contracting officers can prepare

solicitations that maximize the use of commercial items while obtaining sufficient information to conduct price analysis.

DoD Response: The current provisions and clauses at DFARS 212.301 provide appropriate guidance to the contracting officer to assist with the preparation of solicitations and contracts for commercial items. Contracting officers receive formal instruction and on-going assistance regarding how to conduct price analysis, to include guidance provided at PGI 215.404-1. Therefore, additional guidance is not required.

B. Clarify and Separate Commercial Item and Price Determinations

Comment: One respondent stated that the rule should clarify that commercial item determinations are separate from pricing determinations.

DoD Response: There is currently sufficient coverage in the FAR to assist contracting officers with making separate commercial and pricing determinations. Contracting officers have the appropriate tools to establish price reasonableness in accordance with FAR 13.106-3, FAR 14.408-2, and FAR subpart 15.4. The FAR provides guidance to allow contracting officers, at their discretion, to request the offeror to submit prices paid for the same or similar commercial items under comparable terms and conditions by both Government and commercial customers. Additionally, to further assist the contracting officer when making a commercial item determination, FAR 12.209 instructs the contracting officer to be familiar with "customary commercial terms and conditions when pricing commercial items."

C. Submission of Pricing Information

Comment: One respondent stated that FAR part 12 solicitations issued on a sole-source basis should specify that the pricing information is to be submitted with the proposal.

DoD Response: It is at the discretion of the contracting officer to specify in the solicitation the manner in which pricing information is to be submitted.

Comment: One respondent stated that it is not appropriate to issue a FAR part 15-type solicitation for commercial items and require the offeror to request an exception to the requirement to submit cost and pricing data.

DoD Response: The contracting officer determines the appropriate process to utilize when acquiring products and services and may use FAR part 15-type solicitations for commercial items. However, the contracting officer may, at his or her discretion, use as appropriate

the streamlined procedures at FAR subpart 12.6 to reduce the time required to solicit and award contracts for commercial items.

D. Exemption for Commercially-Available Off-the-Shelf (COTS) Items

Comment: One respondent agreed that COTS items should not be subject to the procedures at DFARS 234.7002(b) and (c), and recommended adding a more explicit statement, as paragraph (e), that "COTS items are exempt from the requirements of 234.7002."

DoD Response: DoD maintains that the inclusion of the parenthetical reference to a COTS is clear to the contracting officer and no additional statement is needed.

E. Define Component, Spare Part, Subsystem, and No or Negligible Value

Comment: Three respondents requested that the terms "component" and "spare part" be defined. Two respondents requested that the phrase "no or negligible value" be defined and clarified and one respondent requested that the term "subsystem" be defined.

DoD Response: The term "component" is defined at FAR 2.101. The term "spare part" is a commonly used term understood to mean any item that is supplied as a replacement part of an end item. The term "subsystem" is also a commonly used term throughout the FAR and DFARS that denotes a functional grouping of lower-tier components that combine to perform a major function within an end item, such as electrical power, altitude control, or propulsion. DoD maintains that the phrase "no or negligible value" is self-explanatory and does not require further clarification.

F. Emphasize the Conditions for Limited Cost Information

Comment: Two respondents stated the rule closely mirrors the legislative language and recommended that the final rule be amended to emphasize the conditions of the request for limited cost information.

DoD Response: The underlying basis for the rule is the legislation, and when it is practical to do so, the implementing regulations will contain language that is drawn from the legislation that does not conflict with existing requirements established to ensure the government is receiving fair and reasonable prices. The contracting officer must make a determination that a component or spare part has been appropriately identified as a commercial item. The amount of cost information required by the contracting officer to make an evaluation about the component or

spare part is determined by the sufficiency of the information provided by the prime contractor. FAR subpart 15.4 currently provides the contracting officer with pricing policy and guidance regarding obtaining pricing data. Contracting officers will ask for information sufficient to determine if the price is fair and reasonable. Therefore, additional guidance is not required.

G. Exemption From DFARS 234.7002 for Previously Acquired of Spare Parts

Comment: Two respondents requested clarification regarding how a procurement of spare parts should be handled if DoD procured a subsystem as a commercial item [using FAR part 12] years ago. Additionally, clarification was requested that DFARS 234.7002 does not apply to components or spare parts that have been previously procured under FAR part 12.

DoD Response: DoD maintains that an item that was previously procured as a commercial item, and defined as such, will continue to be identified as commercial, unless there is a written determination by the contracting officer that the item no longer meets the commercial item definition. Though commercial items may evolve through technical or performance advances, these items are still able to meet the commercial item definition.

H. Price Determination for Subcontracts

Comment: One respondent asked who makes the pricing determination if DoD is procuring through the subcontract. The respondent recommended that language be added that “the prime contractor is responsible for determining reasonableness of price for components and spare parts under subcontracts.”

DoD Response: The rule does not change the pricing determination procedures for subcontractors used by the contracting officer. In accordance with DFARS 244.402, prime contractors are responsible for determining whether a particular subcontract item meets the definition of a commercial item. This does not affect the contracting officer’s responsibilities to determine price reasonableness of prime contractors and subcontractors at FAR 15.404–3. However, the contracting officer may provide assistance to prime contractors being denied access to lower-tier subcontractor records.

Comment: One respondent suggested that applying the rule at lower tiers would be impracticable and could cause significant delays in the negotiation and award of subcontracts that could

adversely impact performance of the prime contract.

DoD Response: The definition of commercial items is not limited solely to items supplied directly from prime contractors. It also extends to commercial items acquired by the prime contractor to be sold to the Government from subcontractors at all tiers, including items transferred from a contractor’s division, affiliates, or subsidiaries. The prime contractor has the responsibility to determine if a subcontracted item meets the definition of a commercial item, as defined in FAR 2.101.

Comment: One respondent stated that the rule is in potential conflict with DFARS part 244. The respondent stated that if the rule applies to subcontracts, it would conflict with the language at DFARS 244.402(a) that requires contractors to determine if the subcontract item meets the definition of a commercial item.

DoD Response: The rule aligns with DFARS 244.402(a). It further supports the contracting officer’s responsibility to make the commercial item determination for items acquired and the prime to flow this requirement down to subcontractors.

I. Procedures for Applying the Rule

Comment: One respondent recommended that there be specific procedures for applying the rule.

DoD Response: DoD maintains that the rule is clear in its implementation of the statute. It informs the prime contractor and the contracting officer of the procedures to be followed.

Comment: One respondent recommended that the solicitation and contract clauses inform the contractor that the rule applies for procurements constituting a major weapon system.

DoD Response: The rule at DFARS 234.7002(a) instructs the contracting officer that the acquisition of a major weapon system may be treated as a commercial item. The conditions required to make this determination are outlined in the DFARS for the contracting officer. Therefore, additional guidance is not required.

Comment: One respondent requested that the contracting officer be prohibited from changing the determination unless there is a substantial change in the nature of the work performed by the subcontractor, if the item no longer meets the definition of commercial items.

DoD Response: Contracting officers are required to fully and adequately document the contract file regarding the market research performed by the contracting officer as required by FAR

10.002(e). The contracting officer is required to provide the rationale supporting his or her determination that the commercial item definition at FAR 2.101 was satisfied. Therefore, the contracting officer must follow the instructions regarding defining a commercial item from subcontractors. The contracting officer must document any changes that warrant the non-applicability of the definition of commercial items.

J. Reference Procedures in FAR 15.4 and DFARS 215.4

Comment: One respondent recommended that references to the procedures in FAR part 15.4 and DFARS 215.4 be included.

DoD Response: The rule at DFARS 212.207(b)(iii)(B) refers the contracting officer to the procedures at FAR 15.4 if the services to be acquired are subject to FAR 15.4.

K. Contracting Officers Make Prompt Commercial Item Determination

Comment: One respondent recommended that contracting officers be instructed to respond promptly to requests for determination if a proposed item is a commercial item, and to provide the reason if it is determined that the item is not commercial, to assist the contractor to resolve the matter. Another respondent recommended encouraging contracting officers and contractors to address requirements of the rule prior to award of the prime contract.

DoD Response: FAR 2.101 defines a commercial item and provides the contracting officer instructions regarding how to determine whether or not an item is commercial. The commercial determination is made before contract award. This determination is based on market research, an analysis of the marketplace, and the Government’s requirement. FAR part 12 provides the contracting officer specific guidance, policies, and procedures regarding the acquisition of commercial items. The contracting officer works within the timeframe required to procure the item based upon the Government’s need for the requirement.

III. Executive Order 12866 and Executive Order 13563

Executive Orders 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). Executive Order 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 Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD certifies that this rule will not 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.*, because the rule reinforces existing requirements for the appropriate use of commercial acquisition procedures and for ensuring that contract prices are fair and reasonable.

V. Paperwork Reduction Act

The rule does not impose 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 Parts 202, 212, and 234

Government procurement.

Mary Overstreet,

Editor, Defense Acquisition Regulations System.

Therefore, the Defense Acquisition Regulations System confirms as final the interim rule published at 74 FR 34263 on July 15, 2009, with the following changes:

■ 1. The authority citation for 48 CFR parts 202, 212, and 234 continues to read as follows:

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

PART 202—DEFINITIONS OF WORDS AND TERMS

§ 202.101 [Amended]

■ 2. Section 202.101 is amended in the definition for *General public* and *non-governmental entities* by removing “Section” and adding in its place “section”.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

§ 212.207 [Amended]

■ 3. Section 212.207 paragraph (b) introductory text is amended by removing “Section” and adding in its place “section”.

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 209 and 252

RIN 0750–AG78

Defense Federal Acquisition Regulation Supplement; Ownership or Control by a Foreign Government (DFARS Case 2010–D010)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is adopting as a final rule, without change, an interim rule that implemented revisions to DoD Directive-Type Memorandum (DTM) 09–019, “Policy Guidance for Foreign Ownership, Control, or Influence (FOCI).” This DTM revises the description of communications security material that is “proscribed information.”

DATES: *Effective date:* April 19, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Julian Thrash, Telephone 703–602–0310.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule in the **Federal Register** at 75 FR 35684 on June 23, 2010, to implement changes required by Directive-Type Memorandum (DTM) 09–019, “Policy Guidance for Foreign Ownership, Control, or Influence (FOCI),” which required conforming changes to the DFARS. The public comment period closed August 23, 2010, and no public comments were received. DoD has therefore adopted the interim rule as a final rule without change.

II. Executive Order 12866 and Executive Order 13563

Executive Orders 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). Executive Order 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 Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

III. Regulatory Flexibility Act

DoD certifies that this final rule will not have a significant economic impact on a substantial number of entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because it only impacts companies that are owned or controlled by a foreign government, and most small entities, as defined in the Regulatory Flexibility Act, are not owned or controlled by a foreign government.

DoD published an interim rule in the **Federal Register** at 75 FR 35684 on June 23, 2010, to which there were no public comments.

IV. Paperwork Reduction Act

The rule does not impose 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 Parts 209 and 252

Government procurement.

Mary Overstreet,

Editor, Defense Acquisition Regulations System.

Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR parts 209 and 252 published at 75 FR 35684 on June 23, 2010, is adopted as final without change.

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