

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 10 and 12**

[FAC 2021–02; FAR Case 2020–006; Item V; Docket No. FAR–2020–0006, Sequence No. 1]

RIN 9000–AO09

**Federal Acquisition Regulation:
Documentation of Market Research**

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act for Fiscal Year 2020 that requires the head of the agency to document the results of market research in a manner appropriate to the size and complexity of the acquisition.

DATES: *Effective:* November 23, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Camara Francis, Procurement Analyst, at 202–550–0935 or camara.francis@gsa.gov for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2021–02, FAR Case 2020–006.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD, GSA, and NASA are issuing a final rule to implement section 818 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92). Section 818 amends 10 U.S.C. 2377(c) and 41 U.S.C. 3307(d) to require the head of the agency to document the results of market research in a manner appropriate to the size and complexity of the acquisition.

II. Discussion and Analysis

Paragraph (e) of FAR 10.002 currently states that agencies should document the results of market research in a manner appropriate to the size and complexity of the acquisition. The change will make this mandatory. Conforming changes were made to FAR 12.101.

**III. Publication of This Final Rule for
Public Comment Is Not Required by
Statute**

The statutory provision that applies to the publication of the FAR is 41 U.S.C. 1707. Specifically, 41 U.S.C. 1707(a)(1) requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because it addresses agency documentation of market research. These requirements affect only the internal operating procedures of the Government.

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 subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section III. of this preamble), the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

VII. Paperwork Reduction Act

The 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 Parts 10 and 12

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 10 and 12 as set forth below:

■ 1. The authority citation for 48 CFR parts 10 and 12 continues to read as follows:

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

PART 10—MARKET RESEARCH**10.002 [Amended]**

■ 2. Amend section 10.002 by removing from paragraph (e) “Agencies should” and adding “The head of the agency shall” in its place.

**PART 12—ACQUISITION OF
COMMERCIAL ITEMS****12.101 [Amended]**

■ 3. Amend section 12.101 by removing from the introductory text “Agencies” and adding “The head of the agency” in its place.

[FR Doc. 2020–21699 Filed 10–22–20; 8:45 am]

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DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 12, 29, and 52**

[FAC 2021–02; FAR Case 2018–023; Item VI; Docket No. FAR–2018–0023, Sequence No. 1]

RIN 9000–AN81

**Federal Acquisition Regulation:
Taxes—Foreign Contracts in
Afghanistan**

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to add two new clauses that notify

contractors of requirements relating to Afghanistan taxes or similar charges when contracts are being performed in Afghanistan.

DATES: *Effective:* November 23, 2020.

FOR FURTHER INFORMATION CONTACT: Mr. Kevin Funk, Procurement Analyst, at 202-357-5805 or kevin.funk@gsa.gov for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite FAC 2021-02, FAR Case 2018-023.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule on September 20, 2019, at 84 FR 49502, to add two new clauses that notify contractors of requirements relating to Afghanistan taxes or similar charges when contracts are being performed in Afghanistan. A correction to the proposed rule was published on October 15, 2019, at 84 FR 55109, to correct the regulation identifier number.

Agreements established with the Islamic Republic of Afghanistan exempt the United States Forces and the North Atlantic Treaty Organization (NATO) Forces, and their contractors from liability for Afghanistan taxes and similar charges (*e.g.*, customs, duties, fees).

The Security and Defense Cooperation Agreement (the Agreement) between the Islamic Republic of Afghanistan and the United States of America was signed on September 30, 2014, and entered into force on January 1, 2015. The Agreement exempts the United States Forces from paying any tax or similar charge assessed by the Government of Afghanistan within Afghanistan. The Agreement exempts United States contractors and subcontractors (other than those that are Afghan legal entities or residents) from paying any tax or similar charges assessed by the Government of Afghanistan within Afghanistan on their activities relating to or on behalf of the United States Forces under a contract or subcontract with or in support of United States Forces. The Agreement also exempts the acquisition, importation, exportation, reexportation, transportation, and use of supplies and services in Afghanistan, by or on behalf of the United States Forces, from any taxes, customs, duties, fees, or similar charges in Afghanistan.

The Status of Forces Agreement (SOFA) between NATO and the Islamic Republic of Afghanistan was issued on September 30, 2014, and entered into force on January 1, 2015. The SOFA exempts NATO Forces (other than those

that are Afghan legal entities or residents) from paying any tax or similar charge assessed by the Government of Afghanistan within Afghanistan. The SOFA exempts NATO contractors and subcontractors (other than those that are Afghan legal entities or residents) from paying any tax or similar charge assessed by the Government of Afghanistan within Afghanistan on their activities relating to or on behalf of NATO Forces under a contract or subcontract with or in support of NATO Forces. The SOFA also exempts the acquisition, importation, exportation, reexportation, transportation, and use of supplies and services in Afghanistan from all Afghan taxes, customs, duties, fees, or similar charges.

This rule adds two new clauses that notify contractors of requirements relating to Afghanistan taxes or similar charges when certain contracts are being performed in Afghanistan. Since both agreements are currently effective for contractors operating in Afghanistan, this rule is only notifying contractors about the exemptions from liability for Afghanistan taxes, customs, duties, fees or similar charges. The rule is not adding any new requirements for contractors, however, it is providing unified guidance for contractors performing in Afghanistan.

No public comments were submitted in response to the proposed rule. However, the rule was updated to clarify that both clauses only exempt taxes or similar charges assessed by the Government of Afghanistan.

II. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule creates two new clauses: (1) FAR 52.229-13, Taxes—Foreign Contracts in Afghanistan, and (2) FAR 52.229-14, Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement). The objective of the rule is to notify U.S. Government contractors that certain contracts performed in Afghanistan are exempt from payment liability for Afghan taxes, customs, duties, fees or similar charges pursuant to the Agreement and SOFA.

DoD, GSA, and NASA are applying these two clauses to applicable solicitations and contracts below the SAT and to the acquisition of commercial items, including COTS items, as defined at FAR 2.101. This rule clarifies the application of requirements relating to treatment of Afghan taxes, customs, duties, fees or similar charges for contracts performed

in Afghanistan. Not applying these clauses to contracts below the SAT and for the acquisition of commercial items, including COTS items, would exclude contracts intended to be covered by this rule and undermine the overarching purpose of the rule for providing guidance to all applicable contractors. Consequently, DoD, GSA, and NASA are applying the rule to applicable contracts below the SAT and for the acquisition of applicable commercial items, including COTS items.

III. 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, is 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.

IV. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

V. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to add two new clauses that notify contractors of requirements relating to Afghanistan taxes, customs, duties, fees, or similar charges when certain contracts are being performed in Afghanistan.

The Agreement between the Islamic Republic of Afghanistan and the U.S. Government exempts the U.S. Forces, and their contractors and subcontractors (other than those that are Afghan legal entities or residents), from paying any tax or similar charge assessed on activities associated with contracts performed within Afghanistan.

The Status of Forces Agreement (SOFA) between the North Atlantic Treaty Organization (NATO) and the Islamic Republic of Afghanistan exempts NATO Forces and their contractors and subcontractors (other than those that are Afghan legal entities or residents) from paying any tax or similar charge assessed within Afghanistan.

The objective is to notify contractors of both the Agreement and SOFA to clarify how they apply to contracts performed in Afghanistan.

There were no issues raised by the public in response to the Initial Regulatory Flexibility Analysis provided in the proposed rule.

According to data in the Federal Procurement Data System, the Government awarded an annual average of 4,277 contracts for fiscal years 2017 and 2018 with the principal place of performance in Afghanistan to 444 unique contractors annually, of which 488 contracts were awarded annually to 110 unique small businesses (23 percent). There was an average of 488 contracts with the principal place of performance in Afghanistan awarded annually to small businesses in fiscal years 2017 and 2018. There was an average of 3,789 contracts with the principal place of performance in Afghanistan awarded annually to large businesses. The number of potential subcontractors to which the clause would flow down was calculated by using a ratio of 1:3, subcontractors per prime contract (4,277 annual prime contracts). This equates to 1,426 subcontractors, of which DoD, GSA, and NASA estimate that 75 percent would be small entities (*i.e.*, 1,069). The total number of prime contractor and subcontractor small businesses impacted annually is 1,577.

The final rule does not include additional reporting, record keeping requirements, or other compliance requirements.

There are no available alternatives to the final rule to accomplish the desired objective of the statute.

We do not expect this final rule to have a significant economic impact on a substantial number of small entities, because the rule is not implementing any new requirements with which small entities must comply. Also, small entities will benefit from having one governmentwide clause that identifies the current requirements relating to Afghanistan taxes or similar charges when contracts are being performed in Afghanistan.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VI. 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 Parts 12, 29, and 52

Government procurement.

William F. Clark

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 12, 29, and 52 as set forth below:

- 1. The authority citation for 48 CFR parts 12, 29, and 52 continues to read as follows:

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

PART 12—ACQUISITION OF COMMERCIAL ITEMS

- 2. Amend section 12.301 by redesignating paragraph (d)(13) as paragraph (d)(15) and adding a new paragraph (d)(13) and paragraph (d)(14) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(d) * * *

(13) Insert the clause at 52.229–13, Taxes—Foreign Contracts in Afghanistan, as prescribed in 29.402–4(a).

(14) Insert the clause at 52.229–14, Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement), as prescribed in 29.402–4(b).

* * * * *

PART 29—TAXES

- 3. Add section 29.001 to read as follows:

29.001 Definitions.

As used in this part—

North Atlantic Treaty Organization (NATO) Forces means the Members of the Force, Members of the Civilian Component, NATO Personnel and all property, equipment, and materiel of NATO, NATO Member States, and Operational Partners present in the territory of Afghanistan.

U.S. Forces means the entity comprising the members of the force and of the civilian component, and all property, equipment, and materiel of the United States Armed Forces present in the territory of Afghanistan.

- 4. Add section 29.402–4 to read as follows:

29.402–4 Taxes—Foreign Contracts in Afghanistan.

(a) Use the clause at 52.229–13, Taxes—Foreign Contracts in Afghanistan, in solicitations and contracts with performance in Afghanistan awarded by or on behalf of U.S. Forces, unless the clause at 52.229–14 is used.

(b) Use the clause at 52.229–14, Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement), instead of the clause at 52.229–13, Taxes—Foreign Contracts in Afghanistan, in solicitations and contracts with performance in Afghanistan awarded on behalf of or in support of the North Atlantic Treaty Organization (NATO), which are governed by the NATO Status of Forces Agreement (SOFA).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 5. Add sections 52.229–13 and 52.229–14 to read as follows:

52.229–13 Taxes—Foreign Contracts in Afghanistan.

As prescribed in 29.402–4(a), use the following clause:

Taxes—Foreign Contracts in Afghanistan (Nov 2020)

(a) *Definition.* *U.S. Forces*, as used in this clause, means the entity comprising the members of the force and of the civilian component, and all property, equipment, and materiel of the United States Armed Forces present in the territory of Afghanistan.

(b) *Tax exemption.* This acquisition is covered by the Security and Defense Cooperation Agreement (the Agreement) between the Islamic Republic of Afghanistan (Afghanistan) and the United States of America signed on September 30, 2014, and entered into force on January 1, 2015.

(1) The Agreement exempts the United States Government, and its contractors and subcontractors (other than those that are Afghan legal entities or residents), from paying any tax or similar charge assessed by the Government of Afghanistan on activities associated with this contract within Afghanistan if the activities are on behalf of or in support of U.S. Forces. The Agreement also exempts the acquisition, importation, exportation, reexportation, transportation, and use of supplies and services in Afghanistan, on behalf of or in support of U.S. Forces, from any taxes, customs, duties, fees, or similar charges imposed by the Government of Afghanistan.

(2) The Contractor shall exclude any Afghan taxes, customs, duties, fees, or similar charges from the contract price, other than those charged to Afghan legal entities or residents.

(3) The Agreement does not exempt Afghan employees of Government contractors and subcontractors from Afghan tax laws. To the

extent required by Afghan law, the Contractor shall withhold tax from the wages of these employees and remit those payments to the appropriate Afghan taxing authority. These withholdings are an individual's liability, not a tax against the Contractor.

(c) *Subcontracts*. The Contractor shall include the substance of this clause, including this paragraph (c), in all subcontracts, including subcontracts for commercial items.

(End of clause)

52.229-14 Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement).

As prescribed in 29.402-4(b), use the following clause:

Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement) (Nov 2020)

(a) *Definition*. *North Atlantic Treaty Organization (NATO) Forces*, as used in this clause, means the Members of the Force, Members of the Civilian Component, NATO Personnel and all property, equipment, and materiel of NATO, NATO Member States, and Operational Partners present in the territory of Afghanistan.

(b) *Tax exemption*. This acquisition is covered by the Status of Forces Agreement (SOFA) entered into between NATO and the Islamic Republic of Afghanistan (Afghanistan) issued on September 30, 2014, and entered into force on January 1, 2015.

(1) The SOFA exempts NATO Forces and its contractors and subcontractors (other than those that are Afghan legal entities or residents) from paying any tax or similar charge assessed by the Government of Afghanistan within Afghanistan if the activities are on behalf of or in support of NATO Forces. The SOFA also exempts the acquisition, importation, exportation, reexportation, transportation, and use of supplies and services in Afghanistan on behalf of or in support of NATO Forces from all Afghan taxes, customs, duties, fees, or similar charges.

(2) The Contractor shall exclude any Afghan taxes, customs, duties, fees or similar charges from the contract price, other than those charged to Afghan legal entities or residents.

(3) Afghan citizens employed by NATO contractors and subcontractors are subject to Afghan tax laws. To the extent required by Afghan law, the Contractor shall withhold tax from the wages of these employees and remit those withholdings to the appropriate Afghan taxing authority. These withholdings are an individual's liability, not a tax against the Contractor.

(c) *Subcontracts*. The Contractor shall include the substance of this clause, including this paragraph (c), in all subcontracts including subcontracts for commercial items.

(End of clause)

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 22 and 52

[FAC 2021-02; FAR Case 2019-002; Item VII; Docket No. FAR 2019-0004, Sequence No. 1]

RIN 9000-AN85

Federal Acquisition Regulation: Recreational Services on Federal Lands

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule to amend the Federal Acquisition Regulation (FAR) to implement a Department of Labor (DOL) rule, which exempts certain contracts for seasonal recreational services or seasonal recreational equipment rental for the general public on Federal lands from an Executive order on minimum wage. This rule does not change the extent to which contractors can be used to assist Federal agencies with providing services on Federal lands. This rule only changes the extent to which minimum wages are required for applicable Federal contracts.

DATES: *Effective:* November 23, 2020.

FOR FURTHER INFORMATION CONTACT: Mr. Kevin Funk, Procurement Analyst, at 202-357-5805 or kevin.funk@gsa.gov for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite FAC 2021-02, FAR Case 2019-002.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule on October 21, 2019, at 84 FR 56157, to amend the FAR to implement a DOL final rule, Minimum Wage for Contractors; Updating Regulations To Reflect Executive Order 13838, published in the **Federal Register** at 83 FR 48537 on September 26, 2018.

The DOL rule implemented Executive Order (E.O.) 13838, Exemption From Executive Order 13658 for Recreational Services on Federal Lands (May 25, 2018, published June 1, 2018, 83 FR 25341), which exempted certain

contracts and contract-like instruments from the requirements of E.O. 13658, Establishing a Minimum Wage for Contractors. E.O. 13658 raised the hourly minimum wage paid to workers performing on or in connection with covered Federal contracts to: (i) \$10.10 per hour, beginning January 1, 2015; and (ii) beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary of Labor in accordance with the E.O. As of January 1, 2020, E.O. 13658 raised minimum wage to \$10.80 per hour (84 FR 49345).

E.O. 13838 and DOL's implementing regulation exempt contracts or contract-like instruments entered into with the Federal Government in connection with seasonal recreational services or seasonal recreational equipment rental for the general public on Federal lands from the requirements of E.O. 13658; lodging and food services are not exempted.

The purpose of this rule is to make a conforming change in the FAR. This rule implements E.O. 13838 by amending FAR 22.1903(b)(2) and FAR clause 52.222-55(c)(2) to conform to the DOL rule by adding seasonal recreational services or seasonal recreational equipment rental for the general public on Federal lands to the list of exemptions.

Eighteen respondents provided comments in response to the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Changes to Rule

A new definition for "seasonal recreational equipment rental" was added to provide additional clarity within the rule. An additional conforming editorial change was also made within the FAR clause at 52.222-55.

B. Analysis of Public Comments

1. Support for the Rule

Comment: One respondent expressed support for the rule.

Response: Noted.

2. Legal Sufficiency of Rule

Comment: Two respondents stated the rule was illegal or would violate E.O. 13658.