

September 11, 2001, is adopted as a final rule without change.

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DEPARTMENT OF DEFENSE

48 CFR Part 244

[DFARS Case 2000-D028]

Defense Federal Acquisition Regulation Supplement; Subcontract Commerciality Determinations

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to clarify the responsibilities of contractors and administrative contracting officers regarding determinations as to whether a subcontract item meets the definition of "commercial item" specified in the Federal Acquisition Regulation (FAR).

EFFECTIVE DATE: May 31, 2002.

FOR FURTHER INFORMATION CONTACT: Mr. Rick Laysner, Defense Acquisition Regulations Council, OUSD(AT&L)DP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0293; facsimile (703) 602-0350. Please cite DFARS Case 2000-D028.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the DFARS to specify that—

(1) The contractor will determine whether a particular subcontract item meets the definition of "commercial item"; and

(2) When conducting a contractor purchasing system review (CPSR), the administrative contracting officer will review the adequacy of rationale documenting commercial item determinations to ensure compliance with the definition of "commercial item" in FAR 2.101.

DoD published a proposed rule at 66 FR 47159 on September 11, 2001. Three sources submitted comments on the proposed rule. A summary of the comments and the DoD response is provided below:

Comment: Amend DFARS subpart 244.3 to add a requirement for the administrative contracting officer, when performing a CPSR, to ascertain whether the contractor is requiring its subcontractors to provide any form of cost or pricing data. This will provide insight as to whether prime contractors

are correctly adhering to the definition of a commercial item.

DoD Response: The recommended additional requirement is beyond the intent of this DFARS rule. The intent of the rule is to clarify the responsibilities of contractors and administrative contracting officers regarding commercial item determinations for subcontracts, not to add new requirements for the performance of CPSRs. FAR subpart 44.3, as supplemented by this DFARS rule, provides sufficient policy regarding the extent of CPSRs.

Comment: The rule introduces additional confusion to the process of conducting CPSRs, which are now done on a risk evaluation basis. The rule does not have a threshold for the value of the prime contract or the subcontract. The rule will result in significant additional effort on the part of the buying organization to justify and support the commercial item determination for the subcontract.

DoD Response: Do not concur. In accordance with FAR 44.302, a CPSR is not performed for a specific contract. Rather, when a contractor's sales to the Government are expected to exceed \$25 million during the next 12 months, the administrative contracting officer must perform a review to determine if a CPSR is needed. This rule does not change the CPSR process or increase the amount of Government oversight. The Government already had the authority to review all aspects of subcontracts that are subject to review as part of the CPSR. Documentation for commercial item determinations should be part of a contractor's normal business procedures; therefore, this rule should not result in significant additional effort.

Comment: Amend DFARS 244.402 to clarify that subcontractors are responsible for making commerciality determinations for lower-tier subcontracts.

DoD Response: The additional clarification is unnecessary, as the Government does not have privity of contract with subcontractors, and DoD administrative contracting officers do not review lower-tier subcontracts when conducting CPSRs.

Comment: The reference to FAR 15.403-1(c)(3) is unnecessary in that it pertains to the exceptions from obtaining cost or pricing data and does not clarify responsibilities for commercial item determinations.

DoD Response: The reference to FAR 15.403-1(c)(3) is relevant in situations where subcontract items are improperly designated as commercial and, as a result, are improperly exempted from

cost or pricing data requirements. As outlined in FAR 44.305-3, recurring noncompliance with FAR 15.403 is a condition for withholding or withdrawing a contractor's purchasing system approval. The language in DFARS 244.402(a) has been modified to make the point of the FAR reference clearer.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD certifies that this final 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 merely clarifies responsibilities regarding commercial item determinations for subcontracts.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 244

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

Therefore, 48 CFR part 244 is amended as follows:

1. The authority citation for 48 CFR part 244 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 244—SUBCONTRACTING POLICIES AND PROCEDURES

2. Section 244.303 is added to read as follows:

244.303 Extent of review.

Also review the adequacy of rationale documenting commercial item determinations to ensure compliance with the definition of "commercial item" in FAR 2.101.

3. Section 244.402 is added to read as follows:

244.402 Policy requirements.

(a) Contractors shall determine whether a particular subcontract item meets the definition of a commercial item. This requirement does not affect the contracting officer's responsibilities or determinations made under FAR 15.403-1(c)(3). Contractors are expected to exercise reasonable business judgment in making such

determinations, consistent with the guidelines for conducting market research in FAR part 10.

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