

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 212, 219, and 252**

[Docket DARS–2018–0035]

RIN 0750–AJ21

Defense Federal Acquisition Regulation Supplement: Inapplicability of Certain Laws and Regulations to Commercial Items (DFARS Case 2017–D010)

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 implement a section of the National Defense Authorization Act for Fiscal Year 2017 that addresses the inapplicability of certain laws and regulations to the acquisition of commercial items, including commercially available off-the-shelf items.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before August 28, 2018, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2017–D010, using any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for sending comments.

- *Email:* osd.dfars@mail.mil. Include DFARS Case 2017–D010 in the subject line of the message.

- *Fax:* 571–372–6094.

- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Amy G. Williams, OUSD (AT&L) DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Instructions: Search for “DFARS Case 2017–D010.” Select “Comment Now” and follow the instructions provided to submit a comment. All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. 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).

Docket: For access to the docket to read background documents or comments received, go to: <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571–372–6106.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD is proposing to amend the DFARS to implement section 874 of the National Defense Authorization Act for Fiscal Year 2017. Section 874—

- Amends 10 U.S.C. 2375, Relationship of commercial item provisions to other provisions of law, to provide that—

- No contract for the acquisition of a commercial item, subcontract under a contract for the procurement of a commercial item, or contract for the procurement of a commercially available off-the-shelf (COTS) item shall be subject to any law properly listed in the Federal Acquisition Regulation (FAR) pursuant to 41 U.S.C. 1906 or 1907, respectively; and

- The DFARS shall include lists of defense-unique provisions of law and contract clause requirements based on Governmentwide acquisition regulations, policies, or Executive orders not expressly authorized in law, that are inapplicable to—

- The acquisition of a commercial item;

- Subcontracts for commercial items under a contract for the procurement of commercial items; or

- Contracts for the procurement of a COTS item;

- Provides that a covered provision of law or contract clause requirement is a provision of law or contract clause requirement that the Under Secretary of Defense for Acquisition, Technology, and Logistics determines sets forth policies, procedures, requirements, or restrictions for the procurement of property or services by the Federal Government, except for a provision of law or contract clause requirement that—

- Provides for civil or criminal penalties;

- Requires that certain articles be bought from American sources pursuant to 10 U.S.C. 2533a; or requires that strategic materials critical to national security be bought from American sources pursuant to 10 U.S.C. 2533b; or

- Specifically refers to this section and provides that, notwithstanding this section, it shall be applicable to contracts for the procurement of commercial items.

- Provides that a covered provision of law or contract clause requirement shall

be included on the list unless the Under Secretary of Defense for Acquisition, Technology, and Logistics makes a written determination that such exemption would not be in the best interest of DoD.

- Requires the Under Secretary of Defense for Acquisition, Technology, and Logistics to ensure that, to the maximum extent practicable—

- The DFARS shall not require the inclusion of contract clauses in contracts for the procurement of commercial items (including COTS items), unless such clauses are required to implement provisions of law or Executive orders applicable to such contracts, or determined to be consistent with standard commercial practice; and

- The flowdown of contract clauses to subcontracts under contracts for the procurement of commercial items (including COTS items) is prohibited unless such flowdown is required to implement provisions of law or Executive orders applicable to such subcontracts; and

- Defines the term “subcontract” to exclude agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the DoD and other parties, and are not identifiable to any particular contract.

II. Discussion and Analysis

10 U.S.C. 2375(b)(2) limits the required review of applicability of provisions of law and contract clauses to prime contracts for commercial items to those provisions of law and contract clauses enacted after January 1, 2015. Although the subsequent paragraphs (c) and (d) relating to applicability of provisions of law and contract clauses to subcontracts for commercial items and contracts for COTS items are in all other regards parallel, the date of January 1, 2015, is not repeated in the subsequent paragraphs. DoD has interpreted the date as equally applicable to all three paragraphs, because the three paragraphs are closely inter-related. Any law or clause that is inapplicable to a contract for commercial items is also inapplicable to a contract for COTS items (which are commercial items). The COTS list builds on the list of laws and clauses inapplicable to commercial items in general. Further, laws and clauses that are inapplicable to contracts for commercial items will also be inapplicable to subcontracts for commercial items, even though there may be a few additional laws or clauses that are just inapplicable at the subcontract level.

Therefore, as the first step toward implementation of section 874 of the NDAA for FY 2017 in the DFARS, DoD identified all new DFARS and FAR provisions and clauses published as interim or final rules after January 1, 2015; determined whether these provisions and clauses were based on statute or Executive order, and reviewed their applicability to commercial items.

A. Governmentwide Statutes

Since the DFARS supplements the FAR, the lists of inapplicable statutes at FAR 12.503 through 12.505 are applicable to DoD. This rule proposes language at DFARS 212.503, 212.504, and 212.505, to emphasize that the DFARS lists of statutes are in addition to the FAR lists, not in place of them.

B. Defense-Unique Statutes

Although the following defense-unique statutes were all enacted prior to January 1, 2015, and are therefore not covered statutes as defined in section 874, they are the basis for DFARS provisions and clauses issued after January 1, 2015, and have therefore been reviewed.

1. The Director of Defense Procurement and Acquisition Policy, acting under authority delegated by the Under Secretary of Defense for Acquisition, Technology, and Logistics, has determined that the following statutes apply to the acquisition of commercial items, except for the acquisition of COTS items. Note that services are not COTS items, so no determination is required to exclude applicability to COTS items when acquiring services and the clause prescription and flowdown paragraph of the clause do not specify exclusion of COTS items.

a. Section 941 of the NDAA for FY 2013 and section 1632 of NDAA for FY 2015 (DFARS Case 2013–D018, Network Penetration Reporting and Contracting of Cloud Services (80 FR 51739 and 81 FR 72986); DFARS 252.204–7008, 252.204–7009, and 252.204–7012). This rule proposes to clarify that the flowdown requirement in paragraph (m) of the clause at DFARS 252.204–7012 excludes flowdown to COTS items. Although the final rule under DFARS case 2013–D018 stated the exclusion of applicability to COTS items for all provisions and clauses under the case and the clause prescriptions were amended, the corresponding amendment to paragraph (m) of the clause at DFARS 252.204–7012 did not explicitly exclude flowdown to COTS items. This statute has been added to the proposed list at DFARS 212.505.

b. Section 862 of the NDAA for FY 2008 (DFARS Case 2015–D021, Defense Contractors Performing Private Security Functions (80 FR 81496 and 81 FR 42559); DFARS 252.225–7039). This statute was not added to the proposed list at DFARS 212.505 because it is for the acquisition of services.

2. The Director of Defense Procurement and Acquisition Policy, acting under authority delegated by the Under Secretary of Defense for Acquisition, Technology, and Logistics, determined that section 818(c)(3) of the NDAA for FY 2012, as amended (DFARS Case 2014–D005, Detection and Avoidance of Counterfeit Parts—Further Implementation (80 FR 63735 and 81 FR 50635); DFARS 252.246–7008) applies to the acquisition of commercial items, including COTS items.

3. The following two statutes are currently applied in the DFARS to the acquisition of commercial items, including COTS items. However, continued application to commercial items is dependent upon a determination by the Director of Defense Procurement and Acquisition Policy, acting under authority delegated by the Under Secretary of Defense for Acquisition and Sustainment, with regard to the applicability to commercial items:

a. Section 1611 of the NDAA for FY 2014 (10 U.S.C. 2419) (DFARS Case 2014–D009, Advancing Small Business Growth (79 FR 65917 and 80 FR 30115); DFARS 252.219–7000). The provision at DFARS 252.219–7000, Advancing Small Business Growth, is prescribed at DFARS 219.309 for use in solicitations, including solicitations using FAR part 12 procedures for acquisition of commercial items, when the estimated annual value of the contract is expected to exceed—

- The small business size standard, if expressed in dollars, for the North American Industry Classification System (NAICS) code assigned by the contracting officer; or
- \$70 million, if the small business size standard is expressed as number of employees for the NAICS code assigned by the contracting officer.

The provision is also listed at DFARS 212.301(f)(vii) as applicable to the acquisition of commercial items. The provision is inapplicable to subcontracts. This provision does not impose any burden on offerors, but is intended only to advise small businesses that entering into a DoD contract may eventually cause such businesses to exceed the small business size standard.

b. Section 8123 of the DoD Appropriations Act and the same

provision in subsequent annual defense appropriations acts (DFARS Case 2015–D005, Acquisition of the American Flag (80 FR 10452 and 80 FR 51748); DFARS 252.225–7006). The clause at DFARS 252.225–7006, Acquisition of the American Flag, is prescribed at 225.7002–3 for use in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that are for the acquisition of the American flag, with an estimated value that exceeds the simplified acquisition threshold, unless an exception at 225.7002–2 applies. The clause is also listed at 212.301(f)(x)(C) as applicable to acquisition of commercial items. The clause does not flow down to subcontracts. Since most, if not all, flags are commercial items, this statute would be without affect if not applied to commercial items. Furthermore, this is an appropriations act restriction, which specifically prohibits the expenditure of any funds appropriated under these acts, unless the flags to be acquired are manufactured in the United States (regardless of whether the flags are commercial items).

C. FAR and DFARS Provisions and Clauses, Issued Since January 1, 2015, Not Expressly Authorized in Law

1. The following DFARS and FAR provisions are not required for use in solicitations for the acquisition of commercial items, including COTS items. FAR 12.301(e) provides for discretionary use of provisions and clause not required for use solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, when their use is consistent with the limitations contained in FAR 12.302. These provisions do not apply to subcontracts. Both provisions are proposed for addition to the proposed list at DFARS 212.370. DoD welcomes comments as to whether use of these provisions in solicitations for commercial items should be prohibited, or whether their use might be appropriate for discretionary use.

a. 252.219–7010, Notification of Competition Limited to Eligible 8(a) Concerns—Partnership Agreement (DFARS Case 2015–D017, 80 FR 58669 and 81 FR 17045), is prescribed at DFARS 219.811–3 for use in lieu of the clause at FAR 52.219–18, Notification of Competition Limited to Eligible 8(a) Concerns, in competitive solicitations and contracts when the acquisition is accomplished using the procedures of FAR 19.805 and processed in accordance with the partnership agreement cited in DFARS 219.800. It is

not listed at 212.301(f) as applicable to acquisitions using FAR part 12 procedures for the acquisition of commercial items.

This rule proposes to modify the clause prescription to specifically exclude applicability to acquisitions using FAR part 12 procedures for the acquisition of commercial items.

b. 52.204–22, Alternative Line Item Proposals (FAR Case 2013–014, 79 FR 45408 and 82 FR 4709), is prescribed at FAR 4.1008 for use in all solicitations. However, this provision is not prescribed for use in FAR part 12. In accordance with FAR 12.301(d), notwithstanding prescriptions contained elsewhere in the FAR, when acquiring commercial items, contracting officers are only required to use those provisions and clauses prescribed in FAR part 12. This rule proposes to modify the clause prescription to specifically exclude applicability to acquisitions using FAR part 12 procedures for the acquisition of commercial items.

2. The following DFARS and FAR provisions and clause are applicable to the acquisition of commercial items, except for COTS items. In accordance with section 874, continued applicability to commercial items is dependent upon a determination by the Director of Defense Procurement and Acquisition Policy, acting under authority delegated by the Under Secretary of Defense for Acquisition, Technology, and Logistics, with regard to the applicability to commercial items:

a. DFARS 252.239–7009, Representation of Use of Cloud Computing, and 252.239–7010, Cloud Computing Services (DFARS Case 2013–D018, 80 FR 51739, 80 FR 81472, and 81 FR 50635), are prescribed at DFARS 239.7604 for use in solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, for information technology services and are also listed at DFARS 212.301(f)(xvi)(A) and (B) as applicable to acquisitions of commercial items. The clause also flows down to all subcontracts that involve or may involve cloud services, including subcontracts for commercial items. This provision and clause are not listed at proposed DFARS 212.371 because this provision and clause apply to the acquisition of services, which are not COTS items.

DoD applies this provision and clause to the acquisition of commercial items, excluding COTS items, because the harm that could result from the loss or compromise of defense information is the same under a FAR part 12 contract as it would be under any other contract.

Recent high-profile breaches of Federal information show the need to ensure that information security protections are clearly, effectively, and consistently addressed in contracts. Failure to apply this provision and clause to acquisition of cloud services may cause harm to the Government which could directly impact national security. The information collection requirement for this provision and clause is approved under OMB clearance 0704–0478, Safeguarding Covered Defense Information, Cyber Incident Reporting, and Cloud Computing, in the amount of 250,850 total annual burden hours, which also includes burden hours associated with Safeguarding and cyber incident reporting.

b. FAR 52.204–21, Basic Safeguarding of Covered Contractor Information Systems (FAR Case 2011–020, 77 FR 51496 and 82 FR 4709), is prescribed at FAR 4.1903, for use when the contractor or a subcontractor at any tier may have Federal contract information residing in or transiting through the information system. FAR 12.301(d)(3) requires use in solicitations and contracts for commercial items (except for acquisitions of COTS items), as prescribed in FAR 4.1903. Paragraph (c) of FAR 52.204–21 requires flowdown to subcontracts, including subcontracts for the acquisition of commercial items, other than COTS items, in which the contractor may have Federal contract information residing in or transiting through its information system. Flowdown to subcontracts for commercial item, other than subcontracts for COTS items, is also required at FAR 52.244–6(c)(1)(iv), if flowdown is required in accordance with FAR 52.204–21(c).

This clause requires only a basic level of safeguarding of contractor information systems reflective of actions any prudent business person would employ. The exclusion of COTS items was incorporated in the final rule in response to public comments. This clause does not impose any information collection burden on contractors.

c. FAR 52.222–62, Paid Sick Leave Under Executive Order 13706 (FAR Case 2017–001, 81 FR 91627, interim rule), is prescribed at FAR 22.2110, for use in solicitations and contracts that include the clause 52.222–6, Construction Wage Rate Requirements, or 52.222–41, Service Contract Labor Standards, where work is to be performed, in whole or in part, in the United States. Use of the clause when using part 12 procedures for the acquisition of commercial items is provided at FAR 52.212–5(c)(9). The clause flows down to all subcontracts,

regardless of dollar value, that are subject to the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute and are also to be performed in whole or in part in the United States. Flowdown to commercial subcontracts (excluding COTS items) is provided at FAR 52.212–5(e)(1)(xix) and 52.244–6(c).

This rule implements Executive Order 13706, which does not exempt contracts for the acquisition of commercial items. The implementing regulations by the Department of Labor were issued on September 30, 2016 (81 FR 67598). The rule applies to contracts that are covered by the Service Contract Labor Standards statute or the Wage Rate Requirements (Construction) statute, and meet or exceed the thresholds specified in those statutes. However, since these statutes do not apply to contracts for acquisition of supplies, the rule does not cover acquisitions of COTS items.

The Executive Order seeks to increase efficiency and cost savings in the work performed by parties who contract with the Government by ensuring that employees on those contracts can earn up to 7 days or more of paid sick leave annually. The Executive order was first implemented in Department of Labor regulations (81 FR 67598), which OIRA declared to be an economically significant rule and a major rule. Most of the costs associated with this rule are transfer costs from employers to employees. The information collection requirements associated with the Department of Labor final rule were cleared under OMB clearances 1235–0018, 1235–0021, 1235–0029. The FAR rule does not impose any additional burdens.

3. The following DFARS and FAR provisions and clause are applicable to the acquisition of commercial items, including COTS items. In accordance with section 874, continued applicability to commercial items is dependent upon a determination by the Director of Defense Procurement and Acquisition Policy, acting under authority delegated by the Under Secretary of Defense for Acquisition, Technology, and Logistics, with regard to the applicability to commercial items:

a. DFARS 252.213–7000, Notice to Prospective Suppliers on Use of Past Performance Information Retrieval System—Statistical Reporting in Past Performance Evaluation (DFARS Case 2014–D015, 80 FR 4848 and 80 FR 30117), is prescribed at DFARS 213.106–2–70, in competitive solicitations for supplies when using FAR part 13 simplified acquisition procedures, including competitive solicitations using FAR part 12

procedures for the acquisition of commercial item and acquisitions values at less than or equal to \$1 million under the authority at FAR subpart 13.5 procedures. This provision is also listed at DFARS 212.301(f)(v) as applicable to solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items. There is no flowdown because this is a provision.

DoD developed and deployed the Past Performance Information Retrieval System—Statistical Reporting (PIRS—SR) module to fill the need for past performance data on lower dollar value contracts. This objective data on past performance will assist contracting officers in making better-informed best value award decisions on small dollar value acquisitions for supplies, while also eliminating the burden of collecting subjective past performance information on contractors for smaller dollar value contracts. This benefit is equally applicable, whether or not the items to be acquired are commercial. There is no information collection burden on offerors.

b. DFARS 252.229–7014, Taxes—Foreign Contracts in Afghanistan, and 252.229–7015, Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement) (DFARS Case 2014–D003, 79 FR 35715 and 80 FR 81467), are prescribed at 229.402–70 (k) and (l), respectively.

- DFARS 252.229–7014, Taxes—Foreign Contracts in Afghanistan, is for use in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, with performance in Afghanistan, unless the clause at 252.229–7015 is used.

- DFARS 252.229–7015, Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement), is for use instead of the clause at 252.229–7014, Taxes—Foreign Contracts in Afghanistan, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, with performance in Afghanistan awarded on behalf of the North Atlantic Treaty Organization (NATO), which are governed by the NATO Status of Forces Agreement (SOFA), if approval from the Director, Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, has been obtained prior to each use.

These clause are also listed at DFARS 212.301(f)(xiii) as applicable to solicitations and contracts using FAR part 12 procedures for the acquisition of

commercial items. Both clauses flow down to all subcontracts, including subcontracts for commercial items.

The objective of these clauses is to exempt DoD contracts performed in Afghanistan from payment liability for Afghan taxes pursuant to the bilateral security agreement between Afghanistan and the United States and the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA). DoD applies these two clauses to solicitations and contracts for the acquisition of commercial items, including COTS items, for contracts performed in Afghanistan. Not applying this guidance to contracts for the acquisition of commercial items, including COTS items, would result in DoD paying unnecessary taxes, reducing the funds available for pursuing the war effort in Afghanistan. These clauses do not impose any information collection burden on offerors or contractors.

c. FAR 52.223–11, Ozone-Depleting Substances and High Global Warming Potential Hydrofluorocarbons; FAR 52.223–12, Maintenance, Service, Repair, or Disposal of Refrigeration Equipment and Air Conditioner; FAR 52.223–20, Aerosols; and FAR 52.223–21, Foams (FAR Case 2014–026, 80 FR 26883 and 81 FR 30429), are prescribed at FAR 23.804(a) for use as follows:

(1) FAR 52.223–11, Ozone-Depleting Substances and High Global Warming Potential Hydrofluorocarbons, in solicitations and contracts for—

- (i) Refrigeration equipment (in product or service code (PSC) 4110);
- (ii) Air conditioning equipment (PSC 4120);
- (iii) Clean agent fire suppression systems/equipment (*e.g.*, installed room flooding systems, portable fire extinguishers, aircraft/tactical vehicle fire/explosion suppression systems) (in PSC 4210);

- (iv) Bulk refrigerants and fire suppressants (in PSC 6830);

- (v) Solvents, dusts, freezing compounds, mold release agents, and any other miscellaneous chemical specialty that may contain ozone-depleting substances or high global warming potential hydrofluorocarbons (in PSC 6850);

- (vi) Corrosion prevention compounds, foam sealants, aerosol mold release agents, and any other preservative or sealing compound that may contain ozone-depleting substances or high global warming potential hydrofluorocarbons (in PSC 8030);

- (vii) Fluorocarbon lubricants (primarily aerosols) (in PSC 9150); and

- (viii) Any other manufactured end products that may contain or be

manufactured with ozone-depleting substances.

(2) FAR 52.223–12, Maintenance, Service, Repair, or Disposal of Refrigeration Equipment and Air Conditioners, in solicitations and contracts that include the maintenance, service, repair, or disposal of—

- (i) Refrigeration equipment, such as refrigerators, chillers, or freezers; or
- (ii) Air conditioners, including air conditioning systems in motor vehicles.

(3) FAR 52.223–20, Aerosols, in solicitations and contracts—

- (i) For products that may contain high global warming potential hydrofluorocarbons as a propellant, or as a solvent; or

- (ii) That involve maintenance or repair of electronic or mechanical devices.

(4) FAR 52.223–21, Foams, in solicitations and contracts for—

- (i) Products that may contain high global warming potential hydrofluorocarbons or refrigerant blends containing hydrofluorocarbons as a foam blowing agent, such as building foam insulation or appliance foam insulation; or

- (ii) Construction of buildings or facilities. A majority of the acquisitions involving high GWP HFCs involve the acquisition of commercial items. Applicability of the requirements to commercial items is necessary to be effective. The information collection requirements associated with this case are covered under OMB clearance 9000–0191, High Global Warming Potential Hydrofluorocarbons, in the amount of 25,376 total annual burden hours.

d. FAR 52.223–22, Public Disclosure of Greenhouse Gas Emissions and Reduction Goals—Representation (FAR Case 2015–024, 81 FR 33192 and 81 FR 83092), is prescribed for use at FAR 23.804(b). The provision at 52.223–22, Public Disclosure of Greenhouse Gas Emissions and Reduction Goals—Representation, is required only when 52.204–7, System for Award Management, is included in the solicitation (see 52.204–8, Annual Representations and Certifications).

The information obtained from these representations will assist agencies in developing strategies to engage with offerors to reduce supply chain emissions, as directed in Executive Order 13693, Planning for Federal Sustainability in the Next Decade. In response to the proposed rule, one respondent remarked that the rule should not exclude commercial item or COTS item vendors from the disclosure requirements, because then the benefits of the rule would be “sub-optimal.”

The Federal Acquisition Regulatory Council determined that the rule would apply to acquisitions of commercial items, including commercially available off-the-shelf (COTS) items, if the contractor has been awarded contracts of more than \$7.5 million in goods and services during the prior Government fiscal year. The FAR Council considered (i) The benefits of the policy in furthering Administration goals; (ii) the extent to which the benefits of the policy would be reduced if exemptions are provided; and (iii) the burden on contractors if the policy is applied to these categories of spend. By developing an inventory of contractor greenhouse gas (GHG) management practices, the Government can more fully understand the current state of activity by companies doing business with the Government and work with contractors over time to develop appropriate strategies to reduce supply chain emissions. GHG reporting is becoming increasingly commonplace in the commercial marketplace. If an exclusion were provided to sellers of commercial items and COTS, a large number of contractors that sell in both the commercial and Federal marketplace would be exempted and the rule would fail at providing the type of information and insight that is needed to help agencies assess supplier GHG management practices. With respect to the third factor, the FAR Council sought to minimize burden associated with the disclosure requirement. Specifically, the disclosure will apply only to major Federal suppliers who have been awarded contracts totaling more than \$7.5 million in goods and services in the prior Government fiscal year. Based on fiscal year (FY) 2015 data, the FAR Council estimated this requirement would cover approximately 5,500 unique entities, including about 2,700 small businesses. This represents approximately 3.5 percent of total entities that did business with the Federal Government in FY 2015, and 2.6 percent of small businesses. The FAR Council projected a minimal paperwork burden associated with the disclosure, approximately .25 hours per response for annual reporting for the 5,500 contractor, or 1,375 hours (OMB clearance 9000-0194, Public Disclosure of Greenhouse Gas Emissions and Reduction Goals). Accordingly, the FAR Council determined that it would not be in the best interest of the Government to exclude application of the rule for acquisitions, or sellers, of commercial items or COTS.

D. Limitation on Inclusion of Contract Clauses in Contracts for the Procurement of Commercial Items

Section 874(b) requires that the Under Secretary of Defense for Acquisition, Technology, and Logistics (now Under Secretary of Defense for Acquisition and Sustainment) shall ensure that the DFARS does not require inclusion of contract clauses in contracts for the procurement of commercial items or contracts for the procurement of COTS items, unless those clauses are required to implement provisions of law or executive orders applicable to such contracts, or determined to be consistent with standard commercial practice. This requirement is essentially the same as the requirement at 41 U.S.C. 3307, which is implemented at FAR 12.301(a). Since the DFARS supplements the FAR, FAR 12.301(a) is already applicable to DoD.

E. Prohibition of Flowdown of Certain Contract Clauses to Subcontracts Under Contracts for the Procurement of Commercial Items, Including COTS Items

Currently, FAR clauses 52.212-5, 52.244-6, and DFARS clause 52.244-7000, require flowdown of certain clauses to subcontracts for commercial items, but allow the contractor to flow down “a minimal number of additional clauses necessary to satisfy its contractual obligations.” One of the respondents to the proposed rule under DFARS Case 2011-D056, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items, (Proprietary Industries Association) commented back in May of 2012 that this allowance of a minimal number of necessary clauses was being abused by contractors, who were overloading commercial item subcontracts “with whatever flowdown clauses they felt were even remotely deemed necessary, regardless of any harmful consequences to the Governments commercial item acquisition process.” We now have a statutory prohibition on such discretionary overloading of commercial item subcontracts (although still providing “to the maximum extent practicable). This rule proposes that any discretion to impose flowdown of clauses that are not based on statute or Executive order shall rest with the Government, not with the contractors. They will be prohibited from flowing down FAR or DFARS clauses to commercial items, unless flow down is specifically required in the FAR or DFARS. A contractor can, of course, still impose its own requirements on subcontractors, but cannot just flow

down FAR and DFARS clauses as a whole. DoD invites specific comment on the extent to which FAR and DFARS clauses are flowed down to subcontracts on an optional basis and the expected burden reduction that may result from this prohibition.

F. Definition of “Subcontract”

10 U.S.C. 2375(c)(3) provides a definition of “subcontract” that includes transfers of commercial items between divisions, subsidiaries, or affiliates, of a contractor or subcontractor, but excludes supplier agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with DoD and other parties and are not identifiable to any particular contract. This definition is similar to the definition of “subcontract” at FAR 44.101, which states that the subcontract is “entered into by a subcontractor to furnish supplies or services for performance of a prime contract or subcontract,” but is more explicit in the exclusion of supplier agreements that are not associated with a single contract. This definition has been added to the clause at DFARS 252.244-7000 and each DFARS clause that requires flowdown to subcontracts for the acquisition of commercial items, with specified applicability to the flowdown paragraph of the clause. In general, the clauses now clearly exclude flowdown to supplier agreements that are not identifiable to any particular contract.

However, DoD has determined that the provisions of section 818 of Public Law 112-81 for the prohibitions against counterfeit and suspect counterfeit electronic items and the requirements for systems to detect such parts must flow down to all levels of the supply chain without exception for any contractual instrument that could be used to acquire electronic parts. Therefore, with regard to the DFARS clauses 252.246-7007, Contractor Counterfeit Electronic Part Detection and Avoidance System, and 252.246-7008, Sources of Electronic Parts, the flowdown has been modified to include flowdown to contractual instruments other than subcontracts (such supplier agreements), because electronic commodity types are often acquired from suppliers through supplier agreements that do not meet the new definition of “subcontract.” Exempting acquisitions of such electronic parts from the DFARS 252.246-7007 and 252.246-7008 flowdown requirements would create unacceptable risks of introducing counterfeit or suspect counterfeit electronic parts into the

Defense supply chain. Counterfeit electronic parts, regardless of dollar value, can seriously disrupt the DoD supply chain, cause critical failure of fielded systems, such as aircraft, ships, and other weapon systems, and endanger troops' lives.

III. 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 reviews the current applicability of defense-unique statute and Governmentwide provisions and clause, issued since January 1, 2015, not expressly authorized in law. DoD solicits public comments, especially with regard to the applicability of the two defense-unique statutes at section II.B.3 of this preamble and the FAR and DFARS provisions and clauses at section II.C.2. and II.C.3., for which the Director of Defense Procurement and Acquisition Policy is considering whether to sign a determination and finding in support of continued applicability to commercial items, or whether all commercial items or just COTS items should be exempt from a particular requirement. Please provide specific rationale for any recommendations.

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 an E.O. 13771, Reducing Regulation and Controlling Regulatory Costs, regulatory action, because this rule is not significant 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 required in order to implement section 874 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017, which amended 10 U.S.C. 2375 and required certain changes to the Defense Federal Acquisition Regulation Supplement (DFARS).

The objective of the rule is to reduce any unnecessary burdens on contractors and subcontractors that were awarded DoD contracts or subcontracts for the acquisition of commercial items, including commercially available off-the-shelf items. The legal basis for the rule is section 874 of the NDAA for FY 2017.

There were 29,833 unique entities awarded DoD contracts exceeding the micro-purchase threshold and using FAR part 12 procedures in FY 2016, of which 21,857 were unique small entities. DoD estimates there may be at least twice that many small entities receiving subcontracts for commercial items. Any reductions in the applicability of provisions and clauses to contracts and subcontracts for the acquisition of commercial items may be beneficial to these small entities.

There are no projected reporting, recordkeeping, or other compliance requirements associated with this rule. The final rule may result in some reductions of reporting or recordkeeping requirements, currently approved under—

- OMB Control Number 0704–0478, Safeguarding Covered Defense Information, Cyber Incident Reporting, and Cloud Computing.

- OMB Control Number 9000–0191, High Global Warming Potential Hydrofluorocarbons.

- OMB Control Number 9000–0194, Public Disclosure of Greenhouse Gas Emissions and Reduction Goals.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

Any impacts of this rule will have a positive impact on small business entities.

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 2017–D010), in correspondence.

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). However, if some of the requirements are made inapplicable to the acquisition of all commercial items, or just COTS items, then the estimated

burden of the following information collection requirements could be reduced:

- OMB Control Number 0704–0478, Safeguarding Covered Defense Information, Cyber Incident Reporting, and Cloud Computing.

- OMB Control Number 9000–0191, High Global Warming Potential Hydrofluorocarbons.

- OMB Control Number 9000–0194, Public Disclosure of Greenhouse Gas Emissions and Reduction Goals.

List of Subjects in 48 CFR Parts 212, 219, and 252

Government procurement.

Amy G. Williams,

Deputy, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 219, and 252 are proposed to be amended as follows:

■ 1. The authority citation for parts 212, 219, and 252 continues to read as follows:

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

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Amend section 212.001 by adding the definition of “Subcontract” in alphabetical order to read as follows:

212.001 Definitions.

* * * * *

Subcontract means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. The term—

(1) Includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractors or subcontractor; and

(2) Does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract. (10 U.S.C. 2375(c)(3))

* * * * *

■ 3. Add section 212.370 to read as follows:

212.370 Inapplicability of certain provisions and clauses to contracts and subcontracts for the acquisition of commercial items, including commercially available off-the-shelf items.

The following provisions and clauses, not expressly authorized in law, are inapplicable to contracts for the acquisition of commercial items:

(a) FAR 52.204–22, Alternative Line Item Proposal.

(b) 252.219–7010, Notification of Competition Limited to Eligible 8(a) Concerns—Partnership Agreement.

■ 4. Add section 212.371 to read as follows:

212.371 Inapplicability of certain provisions and clauses to contracts for the acquisition of commercially available off-the-shelf items.

Commercially available off-the-shelf (COTS) items are a subset of commercial items. Therefore, any provisions and clauses are inapplicable to contracts or subcontracts for the acquisition of COTS items if listed in section 212.370 of this subpart as inapplicable to contracts or subcontracts for the acquisition of commercial items. In addition, the following provisions and clauses published after January 1, 2015, not expressly authorized in law, are inapplicable to the acquisition of COTS items (provisions and clauses for the acquisition of services, which by definition are not COTS items, are not listed):

(a) FAR 52.204–21, Basic Safeguarding of Covered Contractor Information Systems.

(b) Reserved

■ 5. Amend section 212.503 by—

■ a. In the section heading, removing “executive” and adding “Executive” in its place;

■ b. Revising paragraph (a) introductory text; and

■ c. Amending paragraph (a)(ix) by removing “(Section 843(a), Public Law 103–160)” and adding “(section 843(a), Pub. L. 103–160)”.

212.503 Applicability of certain laws to Executive agency contracts for the acquisition of commercial items.

(a) In addition to the laws listed at FAR 12.503, the following laws are not applicable to contracts for the acquisition of commercial items:

* * * * *

■ 6. Amend section 212.504 by—

■ a. Revising paragraph (a) introductory text; and

■ b. In paragraph (a)(xvii), removing “(Pub. L. 111–118)” and adding “(Pub. L. 111–118) (prohibits mandatory arbitration)” in its place.

212.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.

(a) In addition to the laws listed at FAR 12.504, the following laws are not applicable to subcontracts at any tier for the acquisition of commercial items or commercial components:

* * * * *

212.570 [Redesignated as 212.505]

■ 7. Redesignate section 212.570 as 212.505 and revise newly redesignated section 212.505 to read as follows:

212.505 Applicability of certain laws to contracts and subcontracts for the acquisition of commercially available off-the-shelf items.

Commercially available off-the-shelf (COTS) items are a subset of commercial items. Therefore, any laws listed at FAR 12.503, FAR 12.504, 212.503, or 212.504 are also inapplicable or modified in their applicability to contracts or subcontracts for the acquisition of COTS items. In addition to the laws listed at FAR 12.505 as specifically inapplicable to COTS items, the following laws are inapplicable to contracts or subcontracts for the acquisition of COTS items:

(1) Paragraph (a)(1) of 10 U.S.C. 2533b, Requirement to buy strategic materials critical to national security from American sources, except as provided at 225.7003–3(b)(2)(i).

(2) Section 941 of the National Defense Authorization Act for Fiscal Year 2013 (Reports to Department of Defense on penetration of networks and information systems of certain contractors) and section 1632 of the National Defense Authorization Act for Fiscal year 2015 (Reporting on cyber incidents with respect to networks and information systems of operationally critical contractors).

PART 219—SMALL BUSINESS PROGRAMS

■ 8. Amend section 219.811–3 by revising paragraph (2) to read as follows:

219.811–3 Contract clauses.

* * * * *

(2) Use the clause at 252.219–7010, Notification of Competition Limited to Eligible 8(a) Concerns-Partnership Agreement, in lieu of the clause at FAR 52.219–18, Notification of Competition Limited to Eligible 8(a) Concerns, in competitive solicitations and contracts, excluding solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, when the acquisition is accomplished using the procedures of FAR 19.805 and processed in accordance with the partnership agreement cited in 219.800.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 9. Amend section 252.204–7009 by—

■ a. Removing the clause date of “(OCT 2016)” and adding “(DATE)” in its place; and

■ b. In paragraph (a), adding the definition of “Subcontract” in alphabetical order to read as follows:

252.204–7009 Limitations on the Use or Disclosure of Third-Party Contractor Reported Cyber Incident Information.

* * * * *

(a) * * *

Subcontract, as used in paragraph (c) of this clause, means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. The term—

(1) Includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractors or subcontractor; and

(2) Does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract. (10 U.S.C. 2375(c)(3))

* * * * *

■ 10. Amend section 252.204–7012 by—

■ a. Removing the clause date of “(OCT 2016)” and adding “(DATE)” in its place; and

■ b. In paragraph (a), adding the definition of “Subcontract” in alphabetical order; and

■ c. Revising paragraph (m)(1).

The addition and revision reads as follows:

252.204–7012 Safeguarding Covered Defense Information and Cyber Incident Reporting.

* * * * *

(a) * * *

Subcontract, as used in paragraph (m) of this clause, means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. The term—

(1) Includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractors or subcontractor; and

(2) Does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract. (10 U.S.C. 2375(c)(3))

* * * * *

(m) * * *

(1) Include this clause, including this paragraph (m), without alteration except to identify the parties, in subcontracts, or similar contractual instruments, for operationally critical support, or for

which subcontract performance will involve covered defense information, including subcontracts for commercial items, except subcontracts for commercially available off-the-shelf items. The Contractor shall determine if the information required for subcontractor performance retains its identity as covered defense information and will require protection under this clause, and, if necessary, consult with the Contracting Officer; and

* * * * *

■ 11. Amend section 252.204–7014 by—
 ■ a. Removing the clause date of “(MAY 2016)” and adding “(DATE)” in its place; and

■ b. In paragraph (a), adding the definition of “Subcontract” in alphabetical order to read as follows:

252.204–7014 Limitations on the Use or Disclosure of Information by Litigation Support Contractors.

* * * * *

(a) * * *

Subcontract, as used in paragraph (f) of this clause, means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. The term—

(1) Includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractors or subcontractor; and

(2) Does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract. (10 U.S.C. 2375(c)(3))

* * * * *

■ 12. Amend section 252.204–7015 by—
 ■ a. Removing the clause date of “(MAY 2016)” and adding “(DATE)” in its place; and

■ b. In paragraph (a), adding the definition of “Subcontract” in alphabetical order to read as follows:

252.204–7015 Notice of Authorized Disclosure of Information for Litigation Support.

* * * * *

(a) * * *

Subcontract, as used in paragraph (c) of this clause, means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. The term—

(1) Includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractors or subcontractor; and

(2) Does not include agreements entered into by a contractor for the

supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract. (10 U.S.C. 2375(c)(3))

* * * * *

■ 13. Amend section 252.211–7003 by—
 ■ a. Removing the clause date of “(MAR 2016)” and adding “(DATE)” in its place; and

■ b. In paragraph (a), adding the definition of “Subcontract” in alphabetical order to read as follows:

252.211–7003 Item Unique Identification and Valuation.

* * * * *

(a) * * *

Subcontract, as used in paragraph (g) of this clause, means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. The term—

(1) Includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractors or subcontractor; and

(2) Does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract. (10 U.S.C. 2375(c)(3))

* * * * *

■ 14. Amend section 252.223–7008 by—
 ■ a. Removing the clause date of “(JUN 2013)” and adding “(DATE)” in its place; and

■ b. In paragraph (a), adding the definition of “Subcontract” in alphabetical order to read as follows:

252.223–7008 Prohibition of Hexavalent Chromium.

* * * * *

(a) * * *

Subcontract, as used in paragraph (d) of this clause, means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. The term—

(1) Includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractors or subcontractor; and

(2) Does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract. (10 U.S.C. 2375(c)(3))

* * * * *

■ 15. Amend section 252.225–7009 by—
 ■ a. Removing the clause date of “(OCT 2014)” and adding “(DATE)” in its place; and

■ b. In paragraph (a), adding the definition of “Subcontract” in alphabetical order to read as follows:

252.225–7009 Restriction on Acquisition of Certain Articles Containing Specialty Metals.

* * * * *

(a) * * *

Subcontract, as used in paragraph (e) of this clause, means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. The term—

(1) Includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractors or subcontractor; and

(2) Does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract. (10 U.S.C. 2375(c)(3))

* * * * *

■ 16. Amend section 252.225–7039 by—
 ■ a. Removing the clause date of “(JUN 2016)” and adding “(DATE)” in its place; and

■ b. In paragraph (a), adding the definition of “Subcontract” in alphabetical order to read as follows:

252.225–7039 Defense Contractors Performing Private Security Functions Outside the United States.

* * * * *

(a) * * *

Subcontract, as used in paragraph (f) of this clause, means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. The term—

(1) Includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractors or subcontractor; and

(2) Does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract. (10 U.S.C. 2375(c)(3))

* * * * *

■ 17. Amend section 252.229–7014 by—
 ■ a. Removing the clause date of “(DEC 2015)” and adding “(DATE)” in its place;

■ b. Redesignating paragraph (b) as paragraph (b)(2);

- c. Redesignating paragraph (a) as paragraph (b)(1);
- d. Adding a new paragraph (a);
- e. In paragraph (e), adding a paragraph heading.

The additions read as follows:

252.229–7014 Taxes—Foreign Contracts in Afghanistan.

* * * * *

(a) *Definition.* As used in this clause—
Subcontract, as used in paragraph (e) of this clause, means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. The term—

(1) Includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractors or subcontractor; and

(2) Does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract.

* * * * *

(e) *Subcontracts.* * * *

* * * * *

■ 18. Amend section 252.229–7015 by—

- a. Removing the clause date of “(DEC 2015)” and adding “(DATE)” in its place;
- b. Redesignating paragraph (b) as paragraph (b)(2);
- c. Redesignating paragraph (a) as paragraph (b)(1);
- d. Adding a new paragraph (a);
- e. In paragraph (e), adding a paragraph heading.

The additions read as follows:

252.229–7015 Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement).

* * * * *

(a) *Definition.* As used in this clause—
Subcontract, as used in paragraph (e) of this clause, means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. The term—

(1) Includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractors or subcontractor; and

(2) Does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract. (10 U.S.C. 2375(c)(3))

* * * * *

(e) *Subcontracts.* * * *

* * * * *

■ 19. Amend 252.237–7010 Prohibition on Interrogation of Detainees by Contractor Personnel by—

- a. Removing the clause date of “(JUN 2013)” and adding “(DATE)” in its place; and
- b. In paragraph (a), adding the definition of “Subcontract” in alphabetical order to read as follows:

252.237–7010 Prohibition on Interrogation of Detainees by Contractor Personnel.

* * * * *

(a) * * *

Subcontract, as used in paragraph (c) of this clause, means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. The term—

(1) Includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractors or subcontractor; and

(2) Does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract. (10 U.S.C. 2375(c)(3))

* * * * *

■ 20. Amend section 252.237–7019 by—

- a. Removing the clause date of “(JUN 2013)” and adding “(DATE)” in its place; and
- b. In paragraph (a), adding the definition of “Subcontract” in alphabetical order to read as follows:

252.237–7019 Training for Contractor Personnel Interacting with Detainees.

* * * * *

(a) * * *

Subcontract, as used in paragraph (c) of this clause, means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. The term—

(1) Includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractors or subcontractor; and

(2) Does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract. (10 U.S.C. 2375(c)(3))

* * * * *

■ 21. Amend section 252.239–7010 by—

- a. Removing the clause date of “(OCT 2016)” and adding “(DATE)” in its place; and

- b. In paragraph (a), adding the definition of “Subcontract” in alphabetical order to read as follows:

252.239–7010 Cloud Computing Services.

* * * * *

(a) * * *

Subcontract, as used in paragraph (l) of this clause, means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. The term—

(1) Includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractors or subcontractor; and

(2) Does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract. (10 U.S.C. 2375(c)(3))

* * * * *

■ 22. Amend section 252.244–7000 by—

- a. Removing the clause date of “(JUN 2013)” and adding “(DATE)” in its place;
- b. Removing paragraph (b);
- c. Redesignating paragraph (a) as paragraph (b);
- d. Adding a new paragraph (a);
- e. Revising the newly redesignated paragraph (b); and
- f. In paragraph (c), adding a paragraph heading.

The additions read as follows:

252.244–7000 Subcontracts for Commercial Items.

* * * * *

(a) *Definition.* As used in this clause—

Subcontract means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. The term—

(1) Includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractors or subcontractor; and

(2) Does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract. (10 U.S.C. 2375(c)(3))

(b) The Contractor shall not flow down the terms of any Federal Acquisition Regulation (FAR) clause or Defense Federal Acquisition Regulation Supplement (DFARS) clause in subcontracts for commercial items at any tier under this contract, unless—
(1) For DFARS clauses, it is so specified in the particular clause; or

(2) For FAR clauses, the clause is listed at FAR 12.301(d) or it is so specified in paragraph (e)(1) of the clause at FAR 52.212-5 or paragraph (b)(1) of the clause at FAR 542.244-6, as applicable.

(c) *Subcontracts.* * * *

* * * * *

■ 23. Amend section 252.246-7003 by—

■ a. Removing the clause date of “(JUN 2013)” and adding “(DATE)” in its place;

■ b. In paragraph (a) adding the definition of “Subcontract” in alphabetical order and revising the definition of “Subcontractor”;

■ c. In paragraph (f)(1), adding a paragraph heading.

The additions and revision read as follows:

252.246-7003 Notification of Potential Safety Issues.

* * * * *

(a) * * *

Subcontract, as used in paragraph (f) of this clause, means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. The term—

(1) Includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractors or subcontractor; and

(2) Does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract. (10 U.S.C. 2375(c)(3))

Subcontractor means any supplier, distributor, or vendor at any level below the prime contractor whose contractual obligation to perform results from, or is conditioned upon, award of the prime contract and who is performing any part of the work or other requirement of the prime contract.

* * * * *

(f)(1) *Subcontracts.* * * *

* * * * *

■ 24. Amend section 252.246-7007 by—

■ a. Removing the clause date of “(AUG 2016)” and adding “(DATE)” in its place;

■ b. In paragraph (a), adding the definition of “Subcontract” in alphabetical order;

■ c. In paragraph (c)(9), removing “subcontractors” and adding “subcontractors or other suppliers” in its place; and

■ d. Revising paragraph (e).

The addition and revision read as follows:

252.246-7007 Contractor Counterfeit Electronic Part Detection and Avoidance System.

* * * * *

(a) * * *

Subcontract, as used in paragraph (e) of this clause, means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. The term—

(1) Includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractors or subcontractor; and

(2) Does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract. (10 U.S.C. 2375(c)(3))

* * * * *

(e) *Subcontracts.* The Contractor shall include the substance of this clause, excluding the introductory text and including only paragraphs (a) through (e), in subcontracts and other contractual instruments, including subcontracts and other contractual instruments for commercial items, that are for electronic parts or assemblies containing electronic parts.

* * * * *

■ 25. Amend section 252.246-7008 by—

■ a. Removing the clause date of “(DEC 2017)” and adding “(DATE)” in its place;

■ b. In paragraph (a), adding the definition of “Subcontract” in alphabetical order;

■ c. In paragraph (b)(3)(i)(A)(2), removing “subcontractor” and adding “subcontractor or other supplier” in its place; and

■ d. Revising paragraph (e).

The addition and revision read as follows:

252.246-7008 Sources of Electronic Parts.

* * * * *

(a) * * *

Subcontract means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. The term—

(1) Includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractors or subcontractor; and

(2) Does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not

identifiable to any particular contract. (10 U.S.C. 2375(c)(3))

* * * * *

(e) *Subcontracts and other contractual instruments.* The Contractor shall include the substance of this clause, including this paragraph (e), in subcontracts and other contractual instruments, including subcontracts and other contractual instruments for commercial items, that are for electronic parts or assemblies containing electronic parts, unless the subcontractor or supplier is the original manufacturer.

* * * * *

■ 26. Amend section 252.247-7003 by—

■ a. Removing the clause date of “(JUN 2013)” and adding “(DATE)” in its place;

■ b. Redesignating paragraphs (a), (b), and (c) as paragraphs (b), (c), and (d);

■ c. Adding a new paragraph (a); and

■ d. In the newly redesignated paragraph (d), adding a paragraph heading.

The additions read as follows:

252.247-7003 Pass-Through of Motor Carrier Fuel Surcharge Adjustment to the Cost Bearer.

* * * * *

(a) *Definitions.* As used in this clause—

Subcontract, as used in paragraph (d) of this contract, means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. The term—

(1) Includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractors or subcontractor; and

(2) Does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract. (10 U.S.C. 2375(c)(3))

* * * * *

(d) *Subcontracts.* * * *

* * * * *

■ 27. Amend section 252.247-7023 by—

■ a. Removing the clause date of “(APR 2014)” and adding “(DATE)” in its place;

■ b. In paragraph (a), adding the definition of “Subcontract” in alphabetical order; and

■ c. In paragraph (h), adding a new paragraph heading.

■ d. In Alternate I—

■ i. Removing the clause date of “(APR 2014)” and adding “(DATE)” in its place;

- ii. In paragraph (a), adding the definition of “Subcontract” in alphabetical order; and
- iii. In paragraph (h), adding a new paragraph heading.
- e. In Alternate II—
- i. Removing the clause date of “(APR 2014)” and adding “(DATE)” in its place;
- ii. In paragraph (a), adding the definition of “Subcontract” in alphabetical order; and
- iii. In paragraph (h), adding a new paragraph heading.

The additions read as follows:

252.247-7023 Transportation of Supplies by Sea.

* * * * *

(a) * * *

Subcontract means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. The term—

(1) Includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractors or subcontractor; and

(2) Does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract.

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(h) *Subcontracts.* * * *

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Alternate I. * * *

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(a) * * *

Subcontract means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. The term—

(1) Includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractors or subcontractor; and

(2) Does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract. (10 U.S.C. 2375(c)(3))

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(h) *Subcontracts.* * * *

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Alternate II. * * *

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(a) * * *

Subcontract means any contract, as defined in FAR subpart 2.1, entered into by a subcontractor to furnish supplies or

services for performance of a prime contract or a subcontract. The term—

(1) Includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractors or subcontractor; and

(2) Does not include agreements entered into by a contractor for the supply of commodities that are intended for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract. (10 U.S.C. 2375(c)(3))

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(h) *Subcontracts.* * * *

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[FR Doc. 2018-14043 Filed 6-28-18; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215 and 252

[Docket DARS-2018-0008]

RIN 0750-AJ19

Defense Federal Acquisition Regulation Supplement: Only One Offer (DFARS Case 2017-D009)

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 partially implement a section of the National Defense Authorization Act for Fiscal Year 2017 to address the requirement for certification of cost or pricing data and potential submission of additional certified cost or pricing data when only one offer is received in response to a competitive solicitation.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before August 28, 2018, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2017-D009, using any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for “DFARS Case 2017-D009.” Select “Comment Now” and follow the instructions provided to submit a comment. Please include “DFARS Case 2017-D009” on any attached document.
- *Email:* osd.dfars@mail.mil. Include DFARS Case 2017-D009 in the subject line of the message.

- *Fax:* 571-372-6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD(AT&L)DPAP/DARS, Room 3B941, 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 2 to 3 days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to partially implement section 822 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328) to (1) address the potential requirement for certification of cost or pricing data and potential requirement for additional certified cost or pricing data when only one offer is received in response to a competitive solicitation and (2) make prime contractors responsible for determining whether a subcontract qualifies for an exception from the requirement for submission of certified cost based on adequate price competition. This DFARS rule supplements the rule proposed under FAR Case 2017-006, Exception from Certified Cost or Pricing Data Requirements-Adequate Price Competition, which proposes to modify the standards for adequate price competition at FAR 15.403-1(c) for DoD, NASA, and the Coast Guard (83 FR 27303, June 12, 2018). Section 822 requires that for DoD, NASA, and the Coast Guard, adequate price competition requires a price that is based on adequate competition that results in at least two or more responsive and viable offers from independently competing offerors.

II. Discussion and Analysis

A. Current DFARS

DoD published a final rule in the **Federal Register** on June 29, 2012 (77 FR 39126) to address acquisitions using competitive procedures in which only one offer is received (DFARS Case 2011-D013). That rule was initiated to implement one of the aspects of the initiative on promoting real competition that was presented by the Under Secretary of Defense for Acquisition, Technology, and Logistics in the