

(e) If the Offeror represents it is a foreign person in paragraph (d)(1) of this provision, then—

(1) The clause at FAR 52.229–XX, Tax on Certain Foreign Procurements, will be included in any resulting contract; and

(2) The Offeror shall submit with its offer the IRS Form W–14. If the IRS Form W–14 is not submitted with the offer, exemptions will not be applied to any resulting contract and the Government will withhold a full 2 percent of each payment.

(f) If the Offeror selects “is” in paragraph (d)(1) and “partial or no exemption” in paragraph (d)(2) of this provision, the Offeror will be subject to withholding in accordance with the clause at FAR 52.229–XX, Tax on Certain Foreign Procurements, in any resulting contract.

(g) A taxpayer may, for a fee, seek advice from the Internal Revenue Service (IRS) as to the proper tax treatment of a transaction. This is called a private letter ruling. Also, the IRS may publish a revenue ruling, which is an official interpretation by the IRS of the Internal Revenue Code, related statutes, tax treaties, and regulations. A revenue ruling is the conclusion of the IRS on how the law is applied to a specific set of facts. For questions relating to the interpretation of the IRS regulations go to <https://www.irs.gov/help/tax-law-questions>.

(End of provision)

#### **52.229–XX Tax on Certain Foreign Procurements.**

As prescribed in 29.402–3(b), insert the following clause:

#### **Tax on Certain Foreign Procurements ([DATE])**

##### *(a) Definitions.*

*Foreign person* means any person other than a United States person.

*United States person*, as defined in 26 U.S.C. 7701(a)(30), means—

- (1) A citizen or resident of the United States,
- (2) A domestic partnership,
- (3) A domestic corporation,
- (4) Any estate (other than a foreign estate, within the meaning of paragraph (31)), and
- (5) Any trust if—
  - (i) A court within the United States is able to exercise primary supervision over the administration of the trust; and
  - (ii) One or more United States persons have the authority to control all substantial decisions of the trust.

(b) This clause applies to foreign persons. It implements 26 U.S.C. 5000C, Imposition of tax on certain foreign procurement, and its implementing regulations at 26 CFR 1.5000C–1 through 1.5000C–7.

(c)(1) If the Contractor is a foreign person and has only a partial or no exemption to the withholding, the Contractor shall include the Department of the Treasury Internal Revenue Service Form W–14, Certificate of Foreign Contracting Party Receiving Federal Procurement Payments, with each voucher or invoice submitted under this contract throughout the period in which this status is applicable. The excise tax withholding is applied at the payment level, not at the

contract level. The Contractor should revise each IRS Form W–14 submission to reflect the exemption (if any) that applies to that particular invoice, such as a different exemption applying. In the absence of a completed IRS Form W–14 accompanying a payment request, the default withholding percentage is 2 percent for the section 5000C withholding for that payment request. Information about IRS Form W–14 and its separate instructions is available via the internet at [www.irs.gov/w14](http://www.irs.gov/w14).

(2) If the Contractor is a foreign person and has indicated in its offer in the provision 52.229–WW, Tax on Certain Foreign Procurements—Notice and Representation, that it is fully exempt from the withholding, and certified the full exemption on the IRS Form W–14, and if that full exemption no longer applies due to a change in circumstances during the performance of the contract that causes the Contractor to become subject to the withholding for the 2 percent excise tax then the Contractor shall—

(i) Notify the Contracting Officer within 30 days of a change in circumstances that causes the Contractor to be subject to the excise tax withholding under 26 U.S.C. 5000C, Imposition of tax on certain foreign procurement; and

(ii) Comply with paragraph (c)(1) of this clause.

(d) The Government will withhold a full 2 percent of each payment unless the Contractor claims an exemption. If the Contractor enters a ratio in Line 12 of the IRS Form W–14, the result of Line 11 divided by Line 10, the Government will withhold from each payment an amount equal to 2 percent multiplied by the contract ratio. If the Contractor marks box 9 of the IRS Form W–14 (rather than completes Lines 10 through 12), the Contractor must identify and enter the specific exempt and nonexempt amounts in Line 15 of the IRS Form W–14; the Government will then withhold 2 percent only from the nonexempt amount. See the IRS Form W–14 and its instructions.

(e) Exemptions from the withholding under this clause are described at 26 CFR 1.5000C–1(d)(5) through (d)(7). Any exemption claimed and self-certified on the IRS Form W–14 is subject to audit by the IRS. Any disputes regarding the imposition and collection of the section 5000C tax are adjudicated by the IRS as the section 5000C tax is a tax matter, not a contract issue.

(f) Taxes imposed under 26 U.S.C. 5000C may not be—

- (1) Included in the contract price; nor
- (2) Reimbursed.

(g) A taxpayer may, for a fee, seek advice from the Internal Revenue Service (IRS) as to the proper tax treatment of a transaction. This is called a private letter ruling. Also, the IRS may publish a revenue ruling, which is an official interpretation by the IRS of the Internal Revenue Code, related statutes, tax treaties, and regulations. A revenue ruling is the conclusion of the IRS on how the law is applied to a specific set of facts. For questions relating to the interpretation of the IRS regulations go to <https://www.irs.gov/help/tax-law-questions>.

(End of clause)

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## **DEPARTMENT OF DEFENSE**

### **GENERAL SERVICES ADMINISTRATION**

#### **NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

#### **48 CFR Parts 12, 29, and 52**

[FAR Case 2018–023; Docket No. FAR–2018–0023, Sequence No. 1]

RIN 9000–AN68

#### **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:** Proposed rule.

**SUMMARY:** DoD, GSA, and NASA are proposing to amend 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:** Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before November 19, 2019 to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments in response to FAR Case 2018–023 using any of the following methods:

- *Regulations.gov:* <https://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering “FAR Case 2018–023” under the heading “Enter Keyword or ID” and selecting “Search”. Select the link “Submit a Comment” that corresponds with “FAR Case 2018–023”. Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2018–023” on your attached document.

- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), ATTN: Lois Mandell, 1800 F Street NW, 2nd Floor, Washington, DC 20405.

*Instructions:* Please submit comments only and cite “FAR Case 2018–023” in all correspondence related to this case. All comments received will be posted without change to <https://www.regulations.gov>, including any

personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Mr. Kevin Funk, Procurement Analyst, at 202-357-5805 or [kevin.funk@gsa.gov](mailto:kevin.funk@gsa.gov) for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite “FAR Case 2018-023.”

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Agreements established with the Islamic Republic of Afghanistan exempt the United States Government 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 Government, and its 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 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 Government, 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 and its contractors and subcontractors (other than those that are Afghan legal entities or residents) from paying any tax or similar charge assessed within Afghanistan. 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.

DoD, GSA, and NASA are proposing to add two new FAR clauses to notify contractors of the exemptions under the Agreement and the SOFA.

This FAR rule was opened at the request of DoD's Regulatory Reform Task Force (RRTF). The RRTF was established under Executive Order 13777, titled “Enforcing the Regulatory

Reform Agenda,” which requires agencies to evaluate existing regulations on whether they should be repealed, replaced, modified, or retained. The focus of the DoD RRTF was to reduce regulatory burden on the public. The DoD RRTF recommended this case be opened, since these policies apply to multiple federal agencies identified in this rule as a “covered agency.” Some covered agencies have developed agency-level clauses. Therefore, the recommendation was made to elevate and include this policy in the FAR. This measure eliminates the need for agency-unique supplemental regulations and ensures unified guidance among the affected agencies, consistent with the purpose of the FAR system.

**II. Discussion and Analysis**

This proposed rule would notify contractors about the tax exemptions described in Section I of this preamble by adding the following two clauses:

- FAR 52.229-XX, Taxes-Foreign Contracts in Afghanistan, is proposed for inclusion in all 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 52.229-YY is used. The Agreement incorporated by this clause exempts: (1) 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 on activities associated with contracts within Afghanistan; and (2) the acquisition, importation, exportation, reexportation, transportation, and use of supplies and services in Afghanistan, by or on behalf of the United States Government, from any taxes, customs, duties, or similar charges in Afghanistan. Contractors are required to exclude any Afghan taxes, customs, duties, or similar charges from contract prices, other than those charged to Afghan legal entities or residents.

- FAR 52.229-YY, Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement) is proposed for inclusion, instead of clause 52.229-XX, Taxes-Foreign Contracts in Afghanistan, in all 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 NATO. The SOFA incorporated by this clause exempts: (1) 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 within

Afghanistan; and (2) the acquisition, importation, exportation, transportation, and use of supplies and services in Afghanistan, by or on behalf of the U.S. Government, from all Afghan taxes, customs, duties, or similar charges.

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. DoD issued a final rule on December 30, 2015, at 80 FR 81467 that added similar clauses for applicable DoD contracts.

**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 creates two new clauses: (1) FAR 52.229-XX, Taxes—Foreign Contracts in Afghanistan, and (2) FAR 52.229-YY, 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 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.

**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 rule is a not 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.

#### 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

DoD, GSA, and NASA do not expect this 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.*, because this rule only clarifies contractor exemptions from Afghan taxes, customs, duties, fees or similar charges on contracts performed in Afghanistan. However, an Initial Regulatory Flexibility Analysis has been performed, and is summarized as follows:

DoD, GSA, and NASA are proposing to amend 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 contracts are being performed in Afghanistan.

The Agreement between the Islamic Republic of Afghanistan and the U.S. Government exempts the Government, and its 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 SOFA between NATO and the Islamic Republic of Afghanistan 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 within Afghanistan.

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

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 proposed rule does not include additional reporting, record keeping requirements, or other compliance requirements. The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no available alternatives to the proposed rule to accomplish the desired objective of the statute. We do not expect this proposed 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.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (FAR Case 2018–023), in correspondence.

#### VII. 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 propose amending 48 CFR parts 12, 29, and 52 to read as follows:

■ 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)(12) as paragraph (d)(14), and adding new paragraphs (d)(12) and (d)(13) to read as follows:

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

\* \* \* \* \*

(d) \* \* \*

(12) Insert the clause at 52.229–XX, Taxes—Foreign Contracts in Afghanistan, as prescribed in 29.402–3(a).

(13) Insert the clause at 52.229–YY, Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement), as prescribed in 29.402–3(b).

\* \* \* \* \*

#### 29.001 [Added]

■ 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.

#### 29.402–3 [Added]

■ 4. Add section 29.402–3 to read as follows:

#### 29.402–3 Taxes—Foreign Contracts in Afghanistan.

(a) Use the clause at 52.229–XX, 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–YY is used.

(b) Use the clause at 52.229–YY, Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces

Agreement), instead of the clause at 52.229–XX, 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**

### **52.229–XX and 52.229–YY [Added]**

■ 5. Add sections 52.229–XX and 52.229–YY to read as follows:

#### **52.229–XX Taxes—Foreign Contracts in Afghanistan.**

As prescribed in 29.402–3(a), use the following clause:

#### **Taxes—Foreign Contracts in Afghanistan (Date)**

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

As prescribed in 29.402–3(b), use the following clause:

#### **TAXES—FOREIGN CONTRACTS IN AFGHANISTAN (NORTH ATLANTIC TREATY ORGANIZATION STATUS OF FORCES AGREEMENT) (DATE)**

(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 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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