requirements for contractors or changing any existing policies or practices. However, a final regulatory flexibility analysis has been prepared and is summarized as follows:

The Department of Defense is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to repeal DFARS provision 252.211–7004, Alternate Preservation, Packaging, and Packing, as the provision is no longer necessary. The objective of this rule is to reduce regulatory burden on the public. This repeal is pursuant to action taken by the Regulatory Reform Task Force established under Executive Order (E.O.) 13777, Enforcing the Regulatory Reform Agenda.

No public comments were received in response to the initial regulatory flexibility analysis.

DoD does not collect data on the number of small businesses that respond to a solicitation that includes DFARS clause 252.211–7004 or the number of small businesses responding to such a solicitation with alternative preservation, packaging, or packing methods. Instead, DoD subject matter experts advise that approximately 375 solicitations are issued each year that contain military preservation, packaging, or packing requirements where commercial or industrial methods may also be acceptable. DoD estimates that it receives 1.5 responses to each solicitation, for a total of 563 offers received in response to these solicitation. This total estimated number of responses does not delineate between the business size of the offerors or those offerors that did and did not propose alternative methods for preservation, packaging, or packing in lieu of military specifications. Based on the information available, DoD does not anticipate that this rule will significantly impact small business entities.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses.

There are no known alternative to the rule that will meet the stated objectives or minimize the impact on of the rule on small entities.

VI. Paperwork Reduction Act

This rule removes the burden associated with DFARS 252.211–7004 from the information collection requirement currently approved under 0704–0398, entitled DFARS Part 211, Describing Agency Needs, and Related Clause at DFARS 252.211. This reduction is reflected in the revision to and extension of the information collection, as published in the **Federal Register** on February 27, 2020, at 85 FR 11351, and May 28, 2020, at 85 FR 32019.

List of Subjects in 48 CFR Parts 211 and 252

Government procurement.

Jennifer D. Johnson,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore 48 CFR parts 211 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 211 and 252 continues to read as follows:

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

PART 211—DESCRIBING AGENCY NEEDS

211.272 [Removed and Reserved]

■ 2. Remove and reserve section 211.272.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.211–7004 [Removed and Reserved]

■ 3. Remove and reserve section 252.211–7004.

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 244, and 252

[Docket DARS–2019–0052]

RIN 0750–AK66

Defense Federal Acquisition Regulation Supplement: Treatment of Certain Items as Commercial Items (DFARS Case 2019–D029)

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement several sections of the National Defense Authorization Act for Fiscal Year 2017 that address treatment of commingled items purchased by contractors and services provided by nontraditional defense contractors as commercial items.

DATES: Effective October 1, 2020.

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

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 84 FR 65322 on November 27, 2019, to implement sections 877 and 878 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328) and further implement section 848 of the NDAA for FY 2018 (Pub. L. 115–91). Section 877, Treatment of Commingled Items Purchased by Contractors as Commercial Items, adds 10 U.S.C. 2380b. Section 878, Treatment of Services Provided by Nontraditional Contractors as Commercial Items, amends 10 U.S.C. 2380a. Section 848 modifies 10 U.S.C. 2380(b) to provide that a contract for an item using FAR part 12 procedures shall serve as a prior commercial item determination, unless the appropriate official determines in writing that the use of such procedures was improper or that it is no longer appropriate to acquire the item using commercial item acquisition procedures. Two respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule

Further implementation of section 848 of the NDAA for FY 2018 (Pub. L. 115–91) has been removed from the final rule under this case. DoD plans to publish a new proposed rule under a separate case (DFARS Case 2020–D033).

B. Analysis of Public Comments

1. Treatment of commingled items as commercial items (section 877 of the NDAA for FY 2017).

a. Strike ''when purchased'' from proposed DFARS 244.402(S–70) and the proposed clause at DFARS 252.244–7000(c).

Comment: One respondent suggested removal of the words ''when purchased,'' which were added as a clarification to the statutory text in the proposed rule, suggesting that the addition ''serves only to erode the purpose of the law, and will increase administrative burden of identifying comingled items.''

Response: The statutory change adding a new section 10 U.S.C. 2380b is titled, ''Treatment of commingled items purchased contractors as commercial items.'' The statute is intended to

address the common situation in which a contractor purchases items in bulk, intending to use the items for its general business, as distinguished from a specific subcontract, identifiable at the time of purchase with a specific prime contract. This is consistent with the legislative history quoted by the respondent with regard to cases where contractors often place orders with subcontractors for material, supplies, and parts that may be applicable to several Government programs in advance of any Government contract or RFP. The text of the enactment is fully consistent with this interpretation: ''items . . . that are *purchased by a contractor for use in the performance of multiple contracts* with the Department of Defense and other parties and are not identifiable to any particular contract.'' The language ''when purchased'' was added to avoid a possible application to items that were in fact purchased for specific purposes, as subcontracts subject to the wide range of contract terms that the purchaser might be required to ''flow down'' to the particular subcontracts. Many of those ''flow down'' clauses are required by other laws, or otherwise reflect important procurement policies, and any exceptions must be applied narrowly. It is contrary to the intent of the underlying laws if those items are to be ''treated as commercial items'' on the sole basis that after acquisition, the prime contractor commingles them with other materials in inventory, whether by policy or in error, so that they lose their ''identification.''

b. Clarify that items are not ''identifiable to any particular contract'' if they are not specifically identified, are indistinguishable, and are not serialized (DFARS 244.402(S–70)).

Comment: In connection with this issue, one respondent suggested that DoD define the term ''identifiable to any particular contract'' as stated. The respondent argued that this is ''in the Government's best interest'' on the basis of an example in which the prime contractor purchases items in bulk, apparently ''for use in the performance of multiple contracts with the Department of Defense and other parties.'' In the example, the items are ''identifiable to any particular contract'' only to the extent that DPAS ratings are ''flowed down'' to the supplier as to a small proportion of the total quantity purchased. On this basis, the respondent suggests, while the subcontract order did not identify any particular items as designated for the DPAS-rated prime contract; the items are physically indistinguishable from each other; and they will be commingled in inventory; yet because the *costs* of the few items will be allocable to the particular prime contract, they will be considered ''identifiable to [the] particular contract'' and thus effectively excluded from the coverage of 10 U.S.C. 2380b unless the suggested amendment is adopted.

Response: This clarification is unnecessary. The Congressional intent to allow contractors to buy relatively low-value items in bulk, for various customers, appears to be directly applicable to the described situation. There is no single definition of the term ''identifiable,'' as used in the NDAA, but the statute is written in regard to items, not the cost of the items. DoD does not consider that unspecified items procured as part of a bulk purchase for multiple customers are ''identifiable to [a] particular contract'' on the sole basis that a related portion of the cost is allocable to the contract.

There may, however, be other bases on which particular items or subdivisions of a single purchase may be identifiable with a particular contract, and creating a criterion that the items must be identifiable by individual serial number is not warranted.

c. Strike ''The Contractor shall ensure that any such items to be used in performance of this contract meet all terms and conditions of this contract that are applicable to commercial items'' from the clause at 252.244–7000(c).

Comment: One respondent suggested that the quoted language ''would require specific clauses to be applied 'after the fact' in direct conflict with Section 877 and negate its intent.''

Response: Section 877 only specifies that the items shall be treated as commercial items. It is not in conflict with section 877 to state that items treated as commercial items must comply with requirements that are applicable to commercial items. The respondent is apparently concerned that because the items are not purchased for a specific Government contract, that the contractor will not have imposed Government requirements upon the suppliers. The proposed language simply clarifies that if certain items are to be ''treated as commercial items'' pursuant to the first sentence and 10 U.S.C. 2380b, on the basis that they are ''valued under $10,000 and [were] purchased by a contractor for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract,'' then in place of clauses that might otherwise apply, the items must comply with the clauses that apply to commercial items. If the respondent is suggesting that section 877, by providing that the items are to be ''treated as commercial items,'' was intended to further excuse a contractor from compliance with the clauses identified in FAR 52.244–6(c) (and any authorized agency supplements), DoD disagrees. One of the criteria for an acceptable purchasing system requires the contractor to ensure that all applicable purchase orders and subcontracts contain all flowdown clauses . . . needed to carry out the requirements of the prime contract (DFARS 252.244–7001(c)(2)).

d. Clarify what is meant by ''treatment as'' a commercial item (DFARS 244.402(S–70)).

Comment: One respondent suggested that the term ''shall be treated as commercial items'' be supplemented by adding language to the effect that ''treatment'' of an item as a commercial item under the authority provided in 10 U.S.C. 2380b means that FAR part 12 applies, as it would apply under the proposed rule applicable to 41 U.S.C. 1903, Special Emergency Procurement Authority, and 10 U.S.C. 2380a, Treatment of Services Provided by Nontraditional Contractors as Commercial Items.

Response: 41 U.S.C. 1903 provides that in defined circumstances in which its ''special emergency procurement authority'' applies, an executive agency ''may treat the property or service as a commercial item for the purpose of carrying out the procurement.'' 10 U.S.C. 2380a provides the same ''treatment'' by an agency for items and services provided by nontraditional defense contractors. Both of these provisions apply to acquisitions by an agency. To the extent that an agency ''may treat the property or service as a commercial item for the purpose of carrying out the procurement,'' this logically implies application of FAR part 12 procedures. 10 U.S.C. 2380b, however, applies to purchases by a contractor. The requirements of FAR part 12 do not apply to purchases by a contractor, it would be extremely burdensome on contractors to make its requirements applicable, and DoD did not propose to do so.

Comment: The respondent further suggested that language be added to specify that when 10 U.S.C. 2380b applies, ''a commercial item determination is not required.''

Response: By the proposed language, contractors are entitled to treat items as commercial items when they are ''purchased by a contractor for use in the performance of multiple contracts'' and meet the other criteria of the

section. The following has been added: '', even though the items *may* not meet the definition of ''commercial item'' at FAR 2.101 and do not require a commercial item *determination*.

e. Retain existing language at DFARS 244.402(a).

Comment: One respondent questioned why the wording at DFARS 244.402 was changed from ''Contractors shall determine whether a particular subcontract item meets the definition of a commercial item'' to ''Contractors are required to determine whether a particular subcontract item meets the definition of a commercial item.''

Response: This change is to conform to the DFARS drafting convention that provisions and clauses are the appropriate place to direct contractors to do something. The text of the DFARS that is not a provision or a clause is directed to the contracting officer. Therefore, DFARS 244.402(a) should not tell the contractor that it shall do something, but should inform the contracting officer of a requirement applicable to contractors.

f. Need to add Government checks on industry's new responsibility to treat certain items as commercial items.

Comment: One respondent stated that even the DAR Council's proposed rule itself says there are checks to be made on industry in determining an item is commingled. The respondent requests that the administrative contracting officer (ACO) to be given the authority to examine industry's rationale against the Council's stated stipulations, by assigning this responsibility to the ACO and adding contractual requirement for the contractor to provide the requested documentation. Specifically, the respondent requested the following:

- DFARS 244.303(a)—Add the requirement, as part of the Contractors' Purchasing System Review, to review the adequacy of rationale documenting how items were purchased for use in the performance of multiple contracts with the Department of Defense and other parties and were not identifiable to any particular contract when purchased.

Response: The contracting officer already has the authority to request and review contractor supporting documentation. Those performing a CPSR or audit may adjust their requests to ensure that ''treated as commercial'' items are included in their reviews.

- FARS 252.244–7001, Contractor Purchasing System Administration, paragraph (b)—Add a new subparagraph to require the following: ''Upon request by the Contracting Officer, the Contractor shall provide rationale documenting commercial item determinations to ensure compliance with the definition of 'commercial item' in FAR 2.101. In addition, the Contractor shall provide rationale documenting how it determined items were purchased for use in the performance of multiple contracts with the Department of Defense and other parties and were not identifiable to any particular contract when purchased.''

Response: This change does not fit in this clause on Contractor Purchasing System Administration. Paragraph (b) addresses the general requirement to establish and maintain an acceptable purchasing system. Paragraphs (a) and (c) provide applicable definitions and the criteria for an acceptable system. This change would duplicate requirements in other clauses. The contractor has the obligation to document and justify purchasing commingled items under this authority.

2. Treatment of services provided by nontraditional contractors as Commercial Items (section 878 of the NDAA for FY 2017).

a. Authorize prime contractors to treat supplies and services from nontraditional contractors as commercial items.

Comment: One respondent recommended that authorizing prime contractors to utilize 10 U.S.C. 2380a (a) and (b) in their subcontracts and treating the supplies and services as commercial items, will help attract nontraditional defense contractors to do business with DOD. The file documentation proposed under DFARS 212.102(iv)(C) to use either authority would be a representation by the subcontractor in accordance with DFARS 252.215–7013, and the prime contractor should be able to rely on such.

Response: Both the permissive authority of 10 U.S.C. 2380a(a) and the mandatory treatment of 10 U.S.C. 2380a(b) apply only on the Government (prime contract) level. The statute does not allow DoD to flow down the authority.

Comment: One respondent commented that additional direction is needed for certain nontraditional services that shall be treated as commercial items.

Response: The DFARS final text includes DFARS 212.102(a)(iii)(B), which provides sufficient direction.

b. Retain existing language at DFARS 212.102(a)(iii).

Comment: One respondent recommended retention of the existing language at DFARS 212.102(a)(iii), which states explicitly that the decision to apply commercial item procedures to the procurement of supplies and services from nontraditional defense contractors does not require a commercial item determination and does not mean that the item is commercial.

Response: Concur.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule proposes to modify the clause at DFARS 252.244,7000, Subcontracts for Commercial Items, but does not modify its applicability. The clause is applicable to all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items and solicitations and contracts valued at or below the simplified acquisition threshold. However, the amendment to DFARS 252.244–7000 proposed by this rule does not impose any burdens on contractors, but allows treatment of certain items as commercial items, that do not otherwise meet the definition of ''commercial item'' in FAR part 2.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

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

VI. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq*. The FRFA is summarized as follows:

This final rule is issued in order to implement sections 877 and 878 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (10 U.S.C. 2380a and 10 U.S.C. 2380b). The objective of this rule is to address the

treatment as commercial items of services provided by nontraditional defense contractors and certain items purchased by a contractor for use in the performance of multiple contracts. The legal basis for the rule is the NDAA section cited as the reasons for the action.

There were no significant issues raised by the public comments in response to the initial regulatory flexibility analysis.

Based on FY 2018 data from the Federal Procurement Data System (FPDS), awards of commercial contracts were made to 15,231 nontraditional defense contractors that were also small entities. It is unknown how many of those entities might provide services that use the same pool of employees used for commercial customers and are priced using methodology similar to the methodology used for commercial pricing.

Also based on FPDS data for FY 2018, DoD awarded 110,000 contracts for the purchase of supplies, commercial or noncommercial, exceeding $10,000, to 13,892 unique small entities. This rule will affect an unknown number of those 13,892 small entities, if such small entities purchase noncommercial items valued at less than $10,000 per item that are not identifiable to any particular contract when purchased and are for use in the performance of multiple contracts with DoD and other parties.

This rule does not impose any new reporting, recordkeeping, or other compliance requirements. The rule does remind the contractor of the responsibility to ensure that items treated as commercial items pursuant to section 877 of the NDAA for FY 2017 that are to be used in the performance of the DoD contract meet all terms and conditions of the contract that are applicable to commercial items.

DoD did not identify any significant alternatives that would minimize or reduce the significant economic impact on small entities, because there is no significant impact on small entities. Any impact is expected to be beneficial.

VII. Paperwork Reduction Act

The rule does not contain any new 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 212, 244, and 252

Government procurement.

Jennifer D. Johnson,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 244, and 252 are amended as follows:

■ 1. The authority citation for parts 212, 244, and 252 continues to read as follows:

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

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Amend section 212.102 by revising paragraph (a)(iii) to read as follows:

212.102 Applicability.

(a)(i) * * *

(iii) *Nontraditional defense contractors.* In accordance with 10 U.S.C. 2380a, contracting officers—

(A) Except as provided in paragraph (a)(iii)(B) of this section, may treat supplies and services provided by nontraditional defense contractors as commercial items. This permissive authority is intended to enhance defense innovation and investment, enable DoD to acquire items that otherwise might not have been available, and create incentives for nontraditional defense contractors to do business with DoD. It is not intended to recategorize current noncommercial items; however, when appropriate, contracting officers may consider applying commercial item procedures to the procurement of supplies and services from business segments that meet the definition of ''nontraditional defense contractor'' even though they have been established under traditional defense contractors. The decision to apply commercial item procedures to the procurement of supplies and services from nontraditional defense contractors does not require a commercial item determination and does not mean the item is commercial;

(B) Shall treat services provided by a business unit that is a nontraditional defense contractor as commercial items, to the extent that such services use the same pool of employees as used for commercial customers and are priced using methodology similar to methodology used for commercial pricing; and

(C) Shall document the file when treating supplies or services from a nontraditional defense contractor as commercial items in accordance with paragraph (a)(iii)(A) or (B) of this section.

* * * * *

PART 244—SUBCONTRACTING POLICIES AND PROCEDURES

■ 3. Amend section 244.402 by—

■ a. In paragraph (a) removing ''shall'' and adding ''are required to'' in its place; and

■ b. Adding a new paragraph (S–70).

The addition reads as follows:

244.402 Policy requirements.

* * * * *

(S–70) In accordance with 10 U.S.C. 2380b, items that are valued at less than $10,000 per item that are purchased by a contractor for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract when purchased shall be treated as commercial items, even though the items may not meet the definition of ''commercial item'' at FAR 2.101 and do not require a commercial item determination.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 252.244–7000 by—

■ a. Removing the clause date of ''(JUN 2013)'' and adding ''(SEP 2020)'' in its place;

■ b. Redesignating paragraph (c) as (d);

■ c. In the newly redesignated paragraph (d), removing ''(c)'' and adding ''(d)'' in its place; and

■ c. Adding a new paragraph (c).

The addition reads as follows:

252.244–7000 Subcontracts for Commercial Items.

* * * * *

(c)(1) In accordance with 10 U.S.C. 2380b, the Contractor shall treat as commercial items any items valued at less than $10,000 per item that were purchased by the Contractor for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract when purchased.

(2) The Contractor shall ensure that any items to be used in performance of this contract, that are treated as commercial items pursuant to paragraph (c)(1) of this clause, meet all terms and conditions of this contract that are applicable to commercial items in accordance with the clause at Federal Acquisition Regulation 52.244–6 and paragraph (a) of this clause.

* * * * *

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