

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

[Docket DARS–2018–0035; Req No. DARS–2024–00009–FR]

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:** Final rule.

**SUMMARY:** DoD is issuing a final rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to partially 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 products, including commercially available off-the-shelf items, and commercial services.

**DATES:** Effective November 17, 2023.**FOR FURTHER INFORMATION CONTACT:** Ms. Jeanette Snyder, telephone 703–508–7524.**SUPPLEMENTARY INFORMATION:****I. Background**

DoD published a proposed rule in the **Federal Register** at 83 FR 30646 on June 29, 2018, to amend the DFARS to implement section 874 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328). Section 874 amends 10 U.S.C. 2375 (redesignated as 10 U.S.C. 3452), Relationship of other provisions of law to procurement of commercial products and commercial services. Section 874–

- Requires DoD to address commercial item applicability for DoD-unique statutes and associated DFARS contract clauses issued after January 1, 2015;
- Restricts inclusion of contract clauses in contracts for commercial products, commercial services, and commercially available off-the-shelf (COTS) items and in subcontracts under contracts for the acquisition of commercial products, commercial services, and COTS items;
- Redefines “subcontract” and restricts inclusion of contract clauses to subcontracts under contracts for the acquisition of commercial products, commercial services, and COTS items.

Six respondents submitted public comments in response to the proposed rule.

**II. Discussion and Analysis**

This final rule does not implement the definition of “subcontract” based on the section 874 update at 10 U.S.C. 3452(c)(3). A new DFARS case 2023–D022, Definition of Subcontract, will address 10 U.S.C. 3452(c)(3) and will be processed in parallel with the related Federal Acquisition Regulation (FAR) case 2018–006, Definition of “Subcontract”. FAR case 2018–006 implements section 820 of the NDAA for FY 2018 (Pub. L. 115–91) that updates 41 U.S.C. 1906(c)(1) to change the meaning of “subcontract” in certain circumstances. The updated text at 10 U.S.C. 3452(c)(3) and 41 U.S.C. 1906(c)(1) is the same, except for the stated applicability in each of the statutes to either DoD or Federal Government contracts, respectively.

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

**A. Summary of Significant Changes From the Proposed Rule**

As noted in the introductory text of section II of this preamble, this final rule does not implement the changes in the proposed rule related to the definition of “subcontract” based on the updates at 10 U.S.C. 3452(c)(3). Therefore, the comment to add the words “or subcontractor at any tier” at DFARS 212.001 in the definition of “subcontract” in paragraph (2), and in the clauses that include this definition, to clarify that the agreements exclusion applies to subcontractors at any tier, will be considered under the new DFARS Case 2023–D022, Definition of Subcontract. One change was made to add a sentence at DFARS 212.301, paragraph (f), to clarify the prohibition of the use of FAR and DFARS solicitation provisions and contract clauses by the contracting officer, where not required by the FAR or DFARS or consistent with customary commercial practices.

**B. Analysis of Public Comments****1. General**

**Comment:** Several respondents expressed concerns regarding the implementation of the statute and whether all DFARS clauses should be reviewed under this rule.

**Response:** In addition to this DFARS Case 2017–D010, there are other FAR

and DFARS cases related to commercial contracts that are in process (FAR Cases 2018–013 and 2018–006; and DFARS Cases 2018–D074 and 2023–D022). FAR Case 2018–018, published at 86 FR 61017 (November 4, 2021), implemented section 836 of the NDAA for FY 2019 (Pub. L. 115–232) that revised 41 U.S.C. 103 to amend the definition of “commercial item” in the FAR. DFARS case 2018–D066, published at 88 FR 6578 (January 31, 2023), also implemented section 836 of the NDAA for FY 2019 in the DFARS to make similar changes to the term “commercial item”, as well as implementing sections 837(b) and (c) of the NDAA for FY 2019. Section 836 amended the definition of “commercial item”; and section 837(b) and (c) made conforming changes at 10 U.S.C. 2533a and 2533b, now 10 U.S.C. 4862 and 4863, respectively. Under this rulemaking (DFARS Case 2017–D010), DoD reviewed DFARS clauses as directed under section 874 of the NDAA for FY 2017. Section 874 limits the required review of the applicability of provisions of law and contract clauses to prime contracts for commercial products (including COTS items) and commercial services to those provisions of law and contract clauses enacted after January 1, 2015. DFARS Case 2018–D074 will include a review of DFARS clauses for applicability of provisions of law and contract clauses to prime contracts for commercial products (including COTS items) and commercial services for those provisions of law and contract clauses enacted after October 13, 1994.

**2. Contracting Officer Clause Selection**

**Comment:** One respondent stated that the DFARS should be amended to prohibit the use of DFARS provisions and clauses unless consistent with customary commercial practice or approved in accordance with FAR 12.302. The respondent also recommended the SF 1449 block 10 be revised so as to not confuse contracting officers due to the elimination of applicability of DFARS 252.219–7010, Notification of Competition Limited to Eligible 8(a) Participants—Partnership Agreement, to commercial item contracts.

**Response:** The proposed rule text has been revised to clarify at DFARS 212.301(f) that the use of provisions and clauses other than the DFARS part 212 provisions and clauses by the contracting officer is prohibited unless required by the FAR or DFARS or unless consistent with customary commercial practices. In addition, DFARS 212.370, Inapplicability of certain provisions and

clauses to contracts and subcontracts for the acquisition of commercial products, commercial services, and commercially available off-the-shelf items, is amended to remove 252.219–7010 from the proposed rule text. DFARS 219.811–3, paragraph (2), is amended to state that 252.219–7010 is used in solicitations and contracts, including those using FAR part 12 procedures for commercial products and commercial services, when using the competitive 8(a) procedures of FAR 19.805. This is necessary for DoD procurements of commercial products and commercial services that have been accepted by the Small Business Administration for competition under the 8(a) program.

### 3. Flowing Down Clauses to Subcontracts

*Comment:* Three respondents stated that the proposed rule should prohibit flowing down clauses to subcontracts by contractors (and higher-tier subcontractors). One respondent stated that the FAR should be amended to delete the language at FAR 52.244–6(c)(2) and should be amended to limit flowdown only to clauses that specifically require flowdown to subcontracts for commercial items with a prohibition on flowing down any additional clauses. Another respondent recommended that DoD bar contractors from wholesale flowdown of clauses. Another respondent stated that it is unclear what ramifications there will be if a FAR or DFARS clause is improperly flowed down.

*Response:* This final rule prohibits flowing down FAR or DFARS clauses by the prime contractor, under certain conditions, under DFARS clause 252.244–7000, Subcontracts for Commercial Products or Commercial Services. Also, the rule prohibits flowing down FAR or DFARS provisions and clauses by higher-tier subcontractors, under certain conditions, as DFARS clause 252.244–7000 has a flowdown requirement. The ramifications of improperly flowing down FAR or DFARS clauses would be determined in accordance with the terms of the contract.

### 4. Implementation

*Comment:* Two respondents stated that the proposed rule does not fully implement the amendment to 10 U.S.C. 2375 (now 10 U.S.C. 3452) by section 874 of the NDAA for FY 2017. The respondents objected to DoD's application of the date of January 1, 2015, which appears in 10 U.S.C. 3452(b)(2), to paragraphs (c) and (d). The respondents recommended that DoD not limit its review to only those

provisions and clauses enacted after January 1, 2015.

*Response:* The applicability of DFARS clauses published prior to January 1, 2015, to contracts and subcontracts for commercial products, commercial services, and COTS items is being reviewed under DFARS case 2018–D074.

### 5. Definitions of “subcontract” and “Subcontractor”

*Comment:* Several respondents commented on the definitions of “subcontract” and “subcontractor.” One respondent stated that the DFARS definitions of “subcontract” and “subcontractor” should be consistent with the FAR definitions and that the term “similar contractual instrument” should be defined. Two respondents stated that the proposed rule should rephrase the language regarding the exclusion from agreements that are “not identifiable to any particular contract”, as the term “identifiable” may be ambiguous. One respondent stated the language should be changed to state there is an exclusion from agreements “not identified to any particular contract under the contractor’s disclosed (if applicable) or otherwise established business practices.” A respondent stated that the terms “multiple contracts” and “other parties” need clarity. Two respondents stated the exclusion should be modified to clarify that it excludes contractor agreements at any level of the supply chain. One respondent stated the definition of subcontract in the proposed rule text will exclude agreements that would benefit from the flowdown of DFARS 252.225–7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals, and DFARS 252.225–7012, Preference for Certain Domestic Commodities, and recommended those clauses be amended to include language that removes the exclusion in the definition of “subcontract.” Three respondents stated that the term “commodities” should be defined. One respondent stated that the definition of “subcontract” should be moved from DFARS 212.001 to DFARS 244.101 to avoid limiting application of this definition to DFARS part 212 clauses.

*Response:* DoD agrees that the DFARS definitions of “subcontract” and “subcontractor” should be consistent with the FAR definitions. Therefore, DoD has initiated a separate DFARS Case 2023–D022 to implement the definition of “subcontract” in the DFARS to facilitate alignment with the proposed rule for FAR case 2018–006. The DFARS generally relies on the FAR

definitions of “subcontract” and “subcontractor.” The statutory language of 10 U.S.C. 3452(c)(3) is limited to DoD; however, FAR case 2018–006 will amend the definition of “subcontract” in the FAR to implement similar statutory language at 41 U.S.C. 1906(c)(1).

### 6. Statutory Separation of Commercial Products and Commercial Services

*Comment:* One respondent recommended ensuring that the proposed rule can be readily applied when future rulemaking transitions the DFARS to using the terms “commercial product” and “commercial service.”

*Response:* DFARS case 2018–D066, published at 88 FR 6578 (January 31, 2023), has implemented this change to the nomenclature in the DFARS.

### 7. Application to Existing Contracts and Subcontracts

*Comment:* One respondent stated that the proposed rule should be made to apply to existing DoD contracts and subcontracts.

*Response:* Contracting officers may use their discretion to apply this final rule to existing contracts; however, they are not required to do so. See FAR 1.108(d).

### 8. Outside the Scope of the Rule

*Comment:* One respondent stated that when COTS products are provided under services contracts, as well as services primarily for the installation and maintenance of COTS products, those subcontracts should also be excluded from flowdown obligations that are excluded from COTS item subcontracts. One respondent stated that none of the “best interest” determinations made in this rule adequately consider existing standard commercial practice and recommended publishing the determinations. Two respondents stated that the proposed rule impacts the environment.

*Response:* These comments are outside the scope of this rule. A commercial subcontract for services that delivers the installation and maintenance of COTS items is a contract for commercial services and not a contract for COTS items. The only way to extend a COTS item exclusion would be to change the definition of COTS item to include services that deliver the installation and maintenance of COTS products, which is outside the scope of this rule. The applicability of DFARS clauses to commercial contracts and commercial subcontracts that do not have an exemption from inapplicability at 10 U.S.C. 3452 (e)(1), (e)(2), or (e)(3), is being reviewed under DFARS case

2018–D074. The comment regarding environmental impact is unrelated to the proposed rule text.

#### C. Other Changes

All references to 10 U.S.C. 2375 in the proposed rule are changed in the final rule to 10 U.S.C. 3452. This change is a result of the final rule for DFARS Case 2022–D018, Reorganization of Defense Acquisition Statutes, published at 87 FR 76988 on December 16, 2022, which implemented the transfer and reorganization of the defense acquisition statutes.

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

This final rule does not create any new solicitation provisions or contract clauses. It does not impact any existing solicitation provisions or contract clauses or their applicability to contracts valued at or below the simplified acquisition threshold, for commercial products including COTS items, or for commercial services.

### IV. Expected Impact of the Rule

This rule may impact any business, large or small, that is awarded a commercial contract by DoD. The rule does not add any new solicitation provisions or contract clauses. Rather, there may be a reduction in burden on contractors by the creation of two new sections in the DFARS that list solicitation provisions and contract clauses that are inapplicable to solicitations and contracts for commercial products, commercial services, and COTS items.

### V. 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, as amended.

### VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before a final rule takes effect, DoD will submit a copy of the final rule with the form, Submission of Federal Rules Under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

### VII. Regulatory Flexibility Act

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

This final rule is required in order to implement part of section 874 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017. Section 874 amended 10 U.S.C. 2375, redesignated as 10 U.S.C. 3452, and required certain changes to the Defense Federal Acquisition Regulation Supplement (DFARS).

The objective of the final rule is to partially implement section 874 of the NDAA for FY 2017 to address the applicability of Defense-unique statutes to contracts and subcontracts for commercial products, commercial services, and commercially available off-the-shelf items.

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

DoD obtained data from the Federal Procurement Data System for contracts that were awarded in FY 2020 through FY 2022 using FAR part 12 procedures for the acquisition of commercial products and commercial services and that exceeded the micro-purchase threshold. The data indicate that DoD awarded this type of contract to approximately 13,952 unique small entities per year. DoD estimates there may be approximately twice that number of small entities receiving subcontracts for commercial products and commercial services. Any reductions in the applicability of solicitation provisions and contract clauses to contracts and subcontracts for the acquisition of commercial products and commercial services may be beneficial to these small entities.

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

DoD did not identify any significant alternatives that would minimize or reduce the impact on small entities while accomplishing the stated objectives of the applicable statute.

### VIII. Paperwork Reduction Act

The final 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 212, 219, and 252

Government procurement.

Jennifer D. Johnson,

*Editor/Publisher, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 212, 219, and 252 are 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 CFR chapter 1.

### PART 212—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

■ 2. Amend section 212.301 by adding a sentence at the end of paragraph (f) introductory text to read as follows:

**212.301 Solicitation provisions and contract clauses for the acquisition of commercial products and commercial services.**

\* \* \* \* \*

(f) \* \* \* The contracting officer shall not use other FAR or DFARS provisions and clauses unless required by the FAR or DFARS or consistent with customary commercial practices (section 874(b)(1)(A), Pub. L. 114–328).

\* \* \* \* \*

■ 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 products, commercial services, and commercially available off-the-shelf items.**

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

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

(b) [Reserved]

■ 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 products. Therefore, the provisions and clauses listed in 212.370 as not applicable to contracts or subcontracts for the acquisition of commercial products are also not applicable to contracts or subcontracts for the acquisition of COTS items. In addition, the following provisions and clauses published after January 1, 2015, not expressly authorized in law, are not applicable to contracts for the acquisition of COTS items:

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

(b) [Reserved]

■ 5. Revise section 212.505 to read as follows:

**212.505 Applicability of certain laws to contracts for the acquisition of COTS items.**

Commercially available off-the-shelf (COTS) items are a subset of commercial products. Therefore, any laws listed at FAR 12.503, FAR 12.504, 212.503, or 212.504 are also not applicable or modified in their applicability to contracts for the acquisition of COTS items. In addition to the laws listed at FAR 12.505 as specifically not applicable to COTS items, the following laws are not applicable to contracts for the acquisition of COTS items:

(1) 10 U.S.C. 391, Reporting on Cyber Incidents with Respect to Networks and Information Systems of Operationally Critical Contractors and Certain Other Contractors, and 10 U.S.C. 393, Reporting on Penetrations of Networks and Information Systems of Certain Contractors.

(2) Paragraph (a)(1) of 10 U.S.C. 4863, Requirement to buy strategic materials critical to national security from American sources, except as provided at 225.7003–3(b)(2)(i).

(3) Paragraph (a)(1) of 10 U.S.C. 4872, Prohibition on acquisition of sensitive materials from non-allied foreign nations, except as provided at 225.7018–3(c)(1).

**PART 219—SMALL BUSINESS PROGRAMS**

■ 6. 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) Participants-Partnership Agreement, in lieu of the clause at FAR

52.219–18, Notification of Competition Limited to Eligible 8(a) Participants, in competitive solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, when the acquisition is accomplished using the procedures of FAR 19.805 and processed in accordance with the PA cited in 219.800.

\* \* \* \* \*

**PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 7. Revise section 252.244–7000 to read as follows:

**252.244–7000 Subcontracts for Commercial Products or Commercial Services.**

As prescribed in 244.403, use the following clause:

**Subcontracts for Commercial Products or Commercial Services (NOV 2023)**

(a) The Contractor shall not include the terms of any Federal Acquisition Regulation (FAR) clause or Defense Federal Acquisition Regulation Supplement (DFARS) clause in subcontracts for commercial products or commercial services 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 52.244–6, as applicable. (Section 847(b)(1)(B), Pub. L. 114–328)

(b)(1) In accordance with 10 U.S.C. 3457(c), the Contractor shall treat as commercial products 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 products pursuant to paragraph (b)(1) of this clause, meet all terms and conditions of this contract that are applicable to commercial products or commercial services in accordance with the clause at FAR 52.244–6 and paragraph (a) of this clause.

(c) *Subcontracts.* The Contractor shall include the terms of this clause, including this paragraph (c), in subcontracts awarded under this contract, including subcontracts for the acquisition of commercial products or commercial services.

(End of clause)

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**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 211, 215, 223, 234, and 252**

[Docket DARS–2023–0001; Req No. DARS–2024–00013–FR]

**Defense Federal Acquisition Regulation Supplement; Technical Amendments**

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

**ACTION:** Final rule; technical amendment.

**SUMMARY:** DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to make needed editorial changes.

**DATES:** Effective November 17, 2023.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jennifer D. Johnson, Defense Acquisition Regulations System, telephone 703–717–8226.

**SUPPLEMENTARY INFORMATION:** This final rule amends the DFARS to make needed editorial changes to 48 CFR parts 211, 215, 234, and 252 as follows:

1. Update the title of DoD Directive 5000.02 at DFARS 211.002, 234.003, and 234.7100.

2. At DFARS 215.404–75(b), remove an obsolete document reference “DoD FFRDC Management Plan” and replace it with the current reference “DoD Instruction 5000.77, DoD Federally Funded Research and Development Center Program”.

3. Update references to DoD Manual 4145.26 at DFARS 223.370–3 and 252.223–7002, and update references to DoD Manual 5100.76 at DFARS 223.7200, 223.7201, 223.7202, 223.7202, and 252.223–7007.

4. Provide a cross-reference to DFARS Procedures, Guidance, and Information 234.005–1 at DFARS 234.005–1.

5. Update the System for Award Management internet link at DFARS 252.204–7007.

6. Update internet links to the Basic NIST SP 800–171 DoD Assessment reference document at DFARS 252.204–7019 and 252.204–7020.

7. Update references to replace “Bahrainian” with “Bahraini” at DFARS 252.225–7013, 252.227–7017, 252.225–7018, 252.225–7035, 252.225–7036, 252.225–7045, and 252.227–7018.

8. Correct a reference at DFARS 252.227–7018 to “60 days”.