



(Billing Code 5001-06-P)

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Part 212**

**RIN 0750-AH61**

**Defense Federal Acquisition Regulation Supplement: Commercial Determination Approval (DFARS Case 2011-D041)**

**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 to require higher-level approval for commercial item determinations for acquisitions exceeding \$1 million when the determination is based on "of a type" or "offered for sale" language contained in the definition of commercial item. The rule also clarifies approval requirements for determinations for acquisitions of services exceeding \$1 million using part 12 procedures but which do not meet the definition of commercial item.

**DATES:** [Insert date of publication in the FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Mr. Dustin Pitsch, telephone 703-602-0289.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD is revising the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a recommendation made by the Panel on Contracting Integrity and included in its 2009 Report to Congress concerning compliance with the DFARS documentation requirements for commercial item determinations. The Panel on Contracting Integrity working group concluded, after reviewing a sampling of commercial contract awards, that contracting officer determinations are not always sufficiently documented in accordance with DFARS 212.102.

DoD is issuing a final rule because this rule does not have a significant effect beyond the internal operating procedures of DoD and does not have a significant cost or administrative impact on contractors or offerors. This rule addresses DoD's internal approval process for contracting officer determinations made pursuant to DFARS part 12 for actions in excess of \$1 million.

## **II. Discussion and Analysis**

The DFARS changes are as follows:

- DFARS 212.102(a)(i) is revised to add "except for acquisitions made pursuant to Federal Acquisition Regulation (FAR) 12.102(f)(1)." This language clarifies that no additional contracting officer determination is required for acquisitions made pursuant to FAR 12.102(f)(1).

- DFARS 212.102(a)(i)(A) is revised to add "or meets the criteria at FAR 12.102(g)(1)." This language addresses the inconsistency between the existing DFARS language at 212.102(a)(i)(A) that all FAR part 12 acquisitions exceeding \$1 million must meet the commercial item definition, and the exception at FAR 12.102(g)(1) that allows for the use of part 12 procedures for services that do not meet the definition of commercial item in FAR 2.101, as long as it meets specific criteria listed in FAR 12.102(g)(1). The change clarifies that the contracting officer must determine that an acquisition exceeding \$1 million and using part 12 procedures either meets the commercial item definition in part FAR 2.101 or the criteria set out at FAR 12.102(g)(1).

- Adds DFARS 212.102(a)(i)(C) to require approval at one level above the contracting officer when the commercial item determination relies on subsections (1)(ii), (3), (4), or (6) of the "commercial item" definition at FAR 2.101. The higher-level approval is required for commercial item determinations for actions that exceed \$1 million that are based on "of a type" commercial procurements or items "offered for sale" but not yet sold to the general public.

### **III. 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 a significant regulatory action and, therefore, was 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.

#### **IV. Regulatory Flexibility Act**

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant DFARS revision as defined within the meaning at FAR 1.501-1, and 41 U.S.C. 1707 does not require publication for comment.

#### **V. Paperwork Reduction Act**

The proposed 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 Part 212**

Government procurement.

**Mary Overstreet,**

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 212 is amended as follows:

1. The authority citation for 48 CFR part 212 is revised to read as follows:

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

**PART 212—ACQUISITION OF COMMERCIAL ITEMS**

2. Revise section 212.102 to read as follows:

**212.102 Applicability.**

(a)(i) When using FAR part 12 procedures for acquisitions exceeding \$1 million in value, except for acquisitions made pursuant to FAR 12.102(f)(1), the contracting officer shall—

(A) Determine in writing that the acquisition meets the commercial item definition in FAR 2.101 or meets the criteria at FAR 12.102(g)(1);

(B) Include the written determination in the contract file; and

(C) Obtain approval at one level above the contracting officer when a commercial item determination relies on subsections (1)(ii), (3), (4), or (6) of the “commercial item” definition at FAR 2.101.

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