



5001-06-P

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 212 and 237**

**[Docket DARS-2019-0033]**

**RIN 0750-AJ79**

**Defense Federal Acquisition Regulation Supplement: Preference for Certain Commercial Services (DFARS Case 2018-D016)**

**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 partially implement a section of the National Defense Authorization Act for Fiscal Year 2017 that provides a preference for the acquisition of certain commercial services in contracts that exceed the simplified acquisition threshold. The statute provides for a two-tier approval process, depending on value of the acquisition, if no commercial items are suitable.

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

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

**SUPPLEMENTARY INFORMATION:**

## **I. Background**

This final rule partially implements section 876 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328). Section 876 requires revision of the guidance issued pursuant to section 855 of the NDAA for FY 2016 (Pub. L. 114-92) (final DFARS rule published in the *Federal Register* under DFARS Case 2016-D006 on January 31, 2018 (83 FR 4431)) to provide a preference for certain commercial services, unless the appropriate official determines in writing that no commercial items are suitable to meet the agency's needs. Different approval levels are provided for contracts in excess of \$10 million, and contracts that exceed the simplified acquisition threshold but do not exceed \$10 million. This rule addresses facilities-related services, knowledge-based services (except engineering services), medical services, and transportation services. Construction services are being addressed under DFARS Case 2019-D034.

## **II. Discussion and Analysis.**

The requirements of section 876 have been implemented by adding a new DFARS section 212.272, Preference for certain commercial products and services. A cross-reference to the new section has been added in part 237, Service Contracting, at DFARS 237.102. Also provided in the new DFARS section 212.272, is a cross-reference to the implementation of section 856 of the

NDAAs for FY 2016 at DFARS 239.101 related to the acquisition of information technology products and services.

### **III. Publication of This Final Rule for Public Comment Is Not Required by Statute**

The statute that applies to the publication of the Federal Acquisition Regulation (FAR) is 41 U.S.C. 1707 entitled "Publication of Proposed Regulations." Paragraph (a)(1) of the statute requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because it only specifies the approval process if acquiring certain noncommercial services. These requirements affect only the internal operating procedures of the Government.

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

This final rule does not create any new DFARS provisions or clauses or modify any DFARS existing provision or clauses.

## **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, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

## **VI. Executive Order 13771**

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

## **VII. Regulatory Flexibility Act**

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section III. of this preamble), the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) are not applicable. Accordingly, no

regulatory flexibility analysis is required, and none has been prepared.

#### **VIII. 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).

#### **List of Subjects in 48 CFR Parts 212 and 237**

Government procurement.

**Jennifer L. Hawes,**

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212 and 237 are amended as follows:

1. The authority citation for 48 CFR parts 212 and 237 continues to read as follows:

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

#### **PART 212—ACQUISITION OF COMMERCIAL ITEMS**

2. Add section 212.272 to subpart 212.2 to read as follows:

**212.272 Preference for certain commercial products and services.**

(a) As required by section 855 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92), for requirements relating to the acquisition of commercial information technology products and services, see 239.101.

(b) (1) As required by section 876 of the National Defense Authorization Act of Fiscal Year 2017 (Pub. L. 114-328), a contracting officer may not enter into a contract above the simplified acquisition threshold for facilities-related services, knowledge-based services (except engineering services), medical services, or transportation services that are not commercial services, unless the appropriate official specified in paragraph (b) (2) of this section determines in writing that no commercial services are suitable to meet the agency's needs as provided in section 10 U.S.C. 2377(c) (2).

(2) The following officials are authorized to make the determination specified in paragraph (b) (1) of this section:

(i) For contracts above \$10 million, the head of the contracting activity, the combatant commander of the combatant command concerned, or the Under Secretary of Defense for Acquisition and Sustainment (as applicable).

(ii) For contracts in an amount above the simplified acquisition threshold and at or below \$10 million, the contracting officer.

**PART 237—SERVICE CONTRACTING**

2. Amend section 237.102 by revising paragraph (b) to read as follows:

**237.102 Policy.**

(b) (1) *Preference for certain commercial services.* See 212.272 for procedures for implementation of the preference for commercial facilities-related services, knowledge-based services (except engineering services), medical services, or transportation services, as required by section 876 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328).

(2) *Public-private competitions.* See PGI 207.302 for information on the Governmentwide moratorium and restrictions on public-private competitions conducted pursuant to Office of Management and Budget (OMB) Circular A-76.

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