

How A New DOD Rule Improves Commercial Item Acquisitions

By **Francis Purcell** and **Mona Adabi** (July 12, 2022)

The U.S. Department of Defense recently issued a final rule that revises the Defense Federal Acquisition Regulation Supplement. The new rule, DFARS 212.102, makes it easier for DOD contracting officers to rely on past commercial sales to the government as fair evidence of a prior commercial item determination, or CID, for a particular item.

Federal procurement regulations require contracting officials to analyze and document whether specific products or services meet the Federal Acquisition Regulation definition of "commercial product" or "commercial service" in the form of a CID.

DFARS 212.102 instructs contracting officers on the treatment of prior CIDs and nontraditional defense contractors. The rule also updates DFARS 212.102(a)(iii) to clarify that CIDs are only required for acquisitions that exceed the simplified acquisition threshold.

The final rule requires the government to treat a contract previously awarded using FAR Part 12 procedures as a prior CID for the acquired product or service, unless the head of a contracting activity determines that the prior use of the FAR Part 12 procedures was improper or is no longer appropriate. The final rule implements Section 848 of the National Defense Authorization Act for fiscal year 2018 and applies to DOD contracts regardless of dollar value.

It is important to note, however, that prior FAR Part 12 purchases made pursuant to Title 41 of the U.S. Code, Section 1093 — for supplies or services to be used to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack — or pursuant to Title 10 of the U.S. Code Section 2307a — for supplies or services from nontraditional defense contractors — may not serve as a prior CID, unless the products or services purchased in that prior acquisition otherwise received a CID.

Background — Commercial Products and Services

In recent years, the federal government has focused on the purchase of goods or services that are commercial products or commercial services.

The definition of a "commercial product" or "commercial service," for purposes of federal procurements, can be complex and vary depending on the item at issue, but in general, a commercial product or commercial service is something that is sold to the general public and used for purposes other than exclusively governmental purposes.

From the government's perspective, the commercial marketplace shapes these items by ensuring adequate price competition, allowing for private research and development, and capturing market efficiencies inherent to publicly available commercial products or services.

The government therefore assumes less risk when it purchases commercial products or services. The acquisition process for commercial products or services requires fewer regulatory fail-safes because issues such as price reasonableness have already been



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addressed by the commercial market.

Accordingly, the FAR, which is the regulatory framework for all federal government acquisitions, utilizes more streamlined procedures when the government is acquiring a commercial product or service.

Commercial Item Determinations Under the New DFARS Final Rule

As previously noted, CIDs reflect a contracting official's analysis that a specific product or service meets the regulatory definition of "commercial product" or "commercial service." Under the applicable regulations, an adequate CID clearly identifies and supports how the product or service meets the commercial item definition in FAR 2.101.

A CID should include market analysis and, if applicable, subcontractor sales history. Technical analysis, logic, explanations and justifications supporting conclusions that items are "of a type," "evolved" or "modifications" should also be included to support the determination. Contractors and suppliers are expected to support and document their CIDs.

Additionally, FAR 15.404-3(b) requires contractors to conduct appropriate price or cost analyses to establish the reasonableness of proposed subcontract prices, and include these analyses in their cost proposals. Contractors also are expected to have policies and procedures to ensure accomplishment of these efforts.

When determining whether a contract previously awarded using FAR Part 12 may serve as a CID, the new DFARS final rule emphasizes the use of prior CIDs and previous acquisitions conducted using FAR Part 12 commercial item acquisition procedures.

The contracting officer also may rely on a product's commerciality determination in the DOD commercial item database, a previous contract, or other evidence that identifies the product or service as being acquired using FAR Part 12 procedures.

The final rule does not clearly define the term "other evidence." In response to public comment, the DOD acknowledged that while examples of other evidence may be helpful, it is impossible to provide an exhaustive list, and said examples may inhibit the work of contracting officers by hampering their ability to exercise sound business judgment on a case-by-case basis.

However, in some circumstances, using FAR Part 12 procedures to acquire a product or service may be insufficient to satisfy the CID designation.

For example, contracting officers may determine that the use of FAR Part 12 procedures was improper, or that it is no longer acceptable to procure the product or service using commercial item acquisition channels, thereby nullifying the product or service as the basis for a CID.

Most notably, contracting officers can no longer infer that the use of FAR Part 12 procedures means that the acquisition is always appropriate to serve as a CID, and a review of the commercial item database may be warranted.

This point becomes particularly relevant in circumstances in which the prior use of FAR Part 12 procedures was for items that were not commercial items, but rather items that were only treated as commercial items under Title 41 of the U.S. Code, Section 1903 — products procured using the special emergency procurement authority for supplies or services to be

used to facilitate defense against or recovery from cyber, nuclear, biological, chemical or radiological attack — and under Title 10 of the U.S. Code, Section 2380 — for supplies or services provided by nontraditional defense contractors.

The government suggests that the new DFARS final rule will streamline and simplify FAR Part 12 and CID procedures, extending the key goals outlined in a March 30 Executive Order No. 12866 and a Jan. 18, 2011, Executive Order No. 13563, which direct agencies to maximize efficiencies and benefits of enacting regulatory alternatives that enhance overall benefits to public health, the environment and the economy.

Conclusion

Selling commercial products or services to the federal government is beneficial for many companies and contractors because not only do significantly fewer laws and regulations apply, but such companies are also exempt from many of the traditional government contract requirements that increase administrative costs and risks.

Acquisitions of commercial products or services, as implemented and encouraged in FAR Part 12, also bring significant benefit to the DOD including: creation and integration of new technology; greater product availability and reliability; reduced acquisition cycle times; lower life cycle costs; increased competition; and an expanded pool of innovative and nontraditional contractors that seek to do business with DOD.

The new DFARS final rule is expected to benefit not only the government but also contractors as it will preclude them from the administrative burden of supporting a CID.

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