



Ref: DFARS Case 2018-D074, Inapplicability of Additional Defense-Unique Laws and Certain Non-Statutory DFARS Clauses to Commercial Item Contracts

Dear Ms. Synder,

The Coalition for Government Procurement (“the Coalition”) appreciates the opportunity to submit these comments on the Proposed Rule, DFARS Case 2018-D074, Inapplicability of Additional Defense-Unique Laws and Certain Non-Statutory DFARS Clauses to Commercial Item Contracts (the “Proposed Rule”).

By way of background, the Coalition is a non-profit association of firms selling commercial services, products, and solutions to the Federal Government. Coalition members include small, medium, and large businesses that account for more than \$145 billion in Federal Government contracts. The Coalition is proud to have worked with Government officials for more than 40 years towards the mutual goal of common-sense acquisition.

The Proposed Rule states that one of its purposes is to “amend the DFARS to implement paragraphs (b) and (c) of section 849 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115–91).” 88 F.R. 80468. The cited paragraphs of section 849 of the FY 2018 NDAA, among other things, require DoD to “propose revisions to the [DFARS] to eliminate regulations [that require specific contract clauses for contracts using commercial item acquisition procedures under part 12 of the Federal Acquisition Regulation and for subcontracts for commercially available off-the-shelf items] unless the Secretary determines *on a case-by-case basis* that there is a specific reason not to eliminate the regulation.” (Emphasis added). Despite this statutory mandate, DoD in the Proposed Rule proposes to eliminate only two provisions and one clause from the DFARS 212.301(f) list of provisions and clauses applicable to contracts and subcontracts for commercial products and commercial services.

Even more fundamentally, the Proposed Rule does not provide any explanation or description of any “case-by-case” determinations that were made to determine “specific reason[s]” for not eliminating any of the other 100+ provisions and clauses that must be included in contracts for the acquisition of commercial products and commercial services, listed in DFARS 212.301. It is thus difficult, if not impossible, to determine why DoD has determined that only two DFARS provisions and one DFARS clause should be eliminated, but none of the other numerous provisions and clauses listed in DFARS 212.301. This failure to provide sufficient explanation regarding how DoD has complied with section 849 of the FY 2018 NDAA does not allow the public, including Coalition members, the opportunity to provide meaningful input on the Proposed Rule, contrary to the principal purpose of the notice-and-comment process. *See* Exec. Order No. 13563, 76 F.R. 3821 (Jan. 21, 2011) (providing that “each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation”).



The lack of explanation, and the identification of only two provisions and one clause for elimination, are also inconsistent with the principal purpose of section 849: to address the dramatic increase in DFARS provisions and clauses applicable to contracts and subcontracts for commercial products and commercial services over the last approximately thirty years. In this regard, in 1996 (the first year that the DFARS included Part 212 relating to the acquisition of commercial items), there were three such clauses. Now, as noted above, there are over 100. It also is noteworthy that the Advisory Panel on Streamlining and Codifying Acquisition Regulations (Section 809 Panel), created by Congress to review acquisition by DoD, recommended the elimination of 55 of these DFARS provisions. *See* 3 Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations 39 (2018).

In light of the foregoing, before issuing a final rule, DoD should: (1) examine on a “case-by-case basis” (to the extent it has not already done so) the applicability of all “regulations [that require specific contract clauses for contracts using commercial item acquisition procedures under part 12 of the Federal Acquisition Regulation and for subcontracts for commercially available off-the-shelf items,” as required by section 849 of the FY 2018 NDAA; and (2) issue a revised/new proposed rule, consistent with that examination, in which it explains and describes its “case-by-case” determinations with respect to each of these regulations.

Thank you again for the opportunity to submit these comments on the Proposed Rule.

Best regards,

A handwritten signature in blue ink, appearing to be "RW", with a long horizontal flourish extending to the right.

Roger Waldron
President
The Coalition for Government Procurement