

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 2, 12, 46, 52****[FAR Case 2000–303]****RIN 9000–A188****Federal Acquisition Regulation;
Acquisition of Commercial Items**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: Federal Acquisition Regulatory Council (FARC) is proposing to amend the Federal Acquisition Regulation (FAR) to implement two statutory changes relevant to the definition of “Commercial Items”: Section 803(a)(2)(D) of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 to revise the definition of “commercial item” to provide specific guidance on the meaning and appropriate application of the term “purposes other than government purposes” at 41 U.S.C. 403(12)(A); and Section 805 of the National Defense Authorization Act for Fiscal Year 2000 to clarify the definition of “commercial item” with respect to associated services.

In addition, the FAR Council is proposing other changes related to the acquisition of commercial items, including conforming the coverage regarding contractor liability for property loss or damage to commercial practice.

This proposed rule revises and supersedes the proposed rule FAR case 98–304, Commercial Items—Nongovernmental Purposes, published in the **Federal Register** at 64 FR 40694, July 27, 1999. As a result, proposed rule 98–304 is hereby withdrawn.

DATES: Interested parties should submit comments in writing on or before October 27, 2000, to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to: General Services Administration, FAR Secretariat (MVRs), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to: farcase.2000–303@gsa.gov.

Please submit comments only and cite FAR case 2000–303 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Victoria Moss, Procurement Analyst, at (202) 501–4764. Please cite FAR case 2000–303.

SUPPLEMENTARY INFORMATION:**A. Background**

Federal Acquisition Regulation Part 12, Acquisition of Commercial Items, was developed to implement Title VIII of the Federal Acquisition Streamlining Act of 1994 (FASA) (Pub. L. 103–355). The regulations became effective on October 1, 1995. The FAR Council has identified several areas that need updating and clarification. This rule addresses a number of those changes.

This proposed rule amends the definition of “commercial item” at FAR 2.101 and the definition in the clause at FAR 52.202–1 to implement Section 803(a)(2)(D) of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (Pub. L. 105–261) and Section 805 of the National Defense Authorization Act for Fiscal Year 2000.

Paragraph (a) of the “commercial item” definition at FAR 2.101 is revised to implement Section 803(a)(2)(D) of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (Pub. L. 105–261). Section 803(a)(2)(D) requires that the FAR be revised to provide specific guidance on the meaning and appropriate application of the term “purposes other than Government purposes” in the definition of “commercial item” at 41 U.S.C. 403(12)(A). This proposed language revises and supercedes a proposed rule, published in the **Federal Register** at 64 FR 40694, July 27, 1999, under FAR case 98–304, that was issued to implement Section 803(a)(2)(D). Eight public comments were received in response to the July 27, 1999, proposed rule. A majority of the public comments were substantive and had a common theme. In general, the public believed that the proposed rule exceeded the scope of the statute, introduced ambiguous terms, created new criteria, and narrowed the definition of a commercial item. This proposed rule addresses those concerns by incorporating language from FASA into the definition.

Paragraph (e) of the commercial item definition at FAR 2.101 has been revised to implement Section 805 of the National Defense Authorization Act for Fiscal Year 2000 (Pub. L. 106–65), (Clarification of Definition of Commercial Items with Respect to

Associated Services). Section 805 clarifies that services ancillary to a commercial item, such as installation, maintenance, repair, training, and other support services, are considered a commercial service, regardless of whether the service is provided by the same vendor or at the same time as the item, if the service is provided contemporaneously to the general public under similar terms and conditions. The FAR clause at 52.202–1, Definitions, is similarly revised to make the new definition available to contractors and subcontractors.

Paragraph (f) of the “commercial item” definition at FAR 2.101 is revised to add definitions of “Catalog Price” and “Market Price” to this rule to provide guidance for identifying services that may be acquired under FAR Part 12.

Guidance is added at FAR 12.209 to help make contracting officers aware of customary commercial terms and conditions related to the determination of price reasonableness when pricing commercial items. Additionally, the rule proposes to amend language in Part 46 to reconcile it with the coverage regarding contractor liability for property loss or damage with paragraph (p) in the clause at 52.212–4, and to amend the clause at 52.212–4(p) to conform to commercial practice (*i.e.*, deleting the phrase “or implied” permits industry to take advantage of the latitude provided by the Uniform Commercial Code which allows sellers to exclude the application of an implied warranty through the terms of an express warranty).

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The FAR Council does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because changes made by the rule will primarily affect large businesses that are more likely than small businesses to have separate workforces for Federal contracts and to be ultimately liable for consequential damages. It clarifies the definition of commercial item to more closely parallel the statutory language and provide guidance for identifying services that may be acquired under FAR Part 12. The rule further conforms language regarding contractor liability to

commercial practice. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR parts 2, 12, 46, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2000–303), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 2, 12, 46, and 52

Government procurement.

Jeremy F. Olson,

Acting Director, Federal Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose that 48 CFR parts 2, 12, 46, and 52 be amended as set forth below:

1. The authority citation for 48 CFR parts, 2, 12, 46, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2. In section 2.101, amend the definition “Commercial item” by revising paragraphs (a), (e), and (f) to read as follows:

2.101 Definitions.

* * * * *

Commercial item means—

(a) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental

entities for purposes other than governmental purposes, and that—

(1) Has been sold, leased, or licensed to the general public; or

(2) Has been offered for sale, lease, or license to the general public;

Purposes other than governmental purposes are those that are not unique to a government.

* * * * *

(e) Installation services, maintenance services, repair services, training services, and other services if—

(1) Such services are procured for support of an item referred to in paragraphs (a), (b), (c), or (d) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and

(2) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;

(f) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions.

This does not include services that are sold based on hourly rates without a catalog or market price for a specific service performed. For purposes of these services—

(1) *Catalog Price* means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and

(2) *Market Prices* mean current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be

substantiated through competition or from sources independent of the offerors.

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PART 12—ACQUISITION OF COMMERCIAL ITEMS

3. Revise section 12.209 to read as follows:

12.209 Determination of price reasonableness.

While the contracting officer must establish price reasonableness in accordance with 13.106–3, 14.408–2, or subpart 15.4, as applicable, when contracting by negotiation, the contracting officer should be aware of customary commercial terms and conditions when pricing commercial items. Commercial item prices are affected by factors that include, but are not limited to, speed of delivery, length and extent of warranty, limitations of seller's liability, quantities ordered, length of the performance period, and specific performance requirements. The contracting officer must ensure that contract terms, conditions and prices are commensurate with the Government's need.

PART 46—QUALITY ASSURANCE

4. In section 46.801, revise the last sentence of paragraph (a) to read as follows:

46.801 Applicability.

(a) * * * This subpart does not apply to commercial items.

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46.804 [Reserved]

5. Remove and reserve section 46.804.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. In section 52.202–1, revise the date of the clause and paragraphs (c)(1), (c)(5), and (c)(6) to read as follows:

52.202-1 Definitions.

* * * * *

Definitions (Date)

* * * * *

(c) *Commercial item* means—
(1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and that—

(i) Has been sold, leased, or licensed to the general public; or

(ii) Has been offered for sale, lease, or license to the general public:

Purposes other than governmental purposes are those that are not unique to a government.

* * * * *

(5) Installation services, maintenance services, repair services, training services, and other services if—

(i) Such services are procured for support of an item referred to in paragraphs (c)(1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and

(ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;

(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. This does not include services that we sold based on hourly rates without a catalog or market price for a specific service performed. For purposes of these services—

(i) *Catalog Price* means a price included in a catalog, price list, schedule, or other form

that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public.

(ii) *Market Prices* mean current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

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52.212-4 [Amended]

7. In section 52.212-4, revise the date of the clause and remove “or implied” in paragraph (p).

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