

DoD Issues Final Rule Requiring Higher Level Approval for Commercial Item Determinations

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On March 12, 2012, the Department of Defense (DoD) issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to require contracting officers to obtain additional approvals and prepare additional documentation for "of a type" and "offered for sale" commercial item determinations in acquisitions exceeding \$1 million. 77 Fed. Reg. 14480. This new rule, which applies to commercial item acquisitions in excess of \$1 million, requires contracting officers to prepare a written determination and obtain approval at one level above the contracting officer whenever a commercial item determination is based on one of the following definitions from FAR 2.101:

- An item that has been "offered for sale, lease or license to the general public," but has not yet been sold in the commercial market (FAR 2.101(1)(ii));
- An item or combination of items that would qualify as a commercial item but for "minor modifications" or modifications "customary available in the commercial marketplace" (FAR 2.101(3), (4)); or
- Services that are "of a type" offered and sold competitively in substantial quantities in the commercial marketplace based on catalog or market prices (FAR 2.101(6)).

This new rule does include an exception for acquisitions of supplies or services that the head of the agency determines are to be used in the defense against, or recovery from, nuclear, biological and chemical attacks. The rule acknowledges that FAR 12.102(f)(1) already permits contracting officers to treat such procurements as acquisitions of commercial items, and therefore clarifies that no

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additional contracting officer determination is required for procurements that satisfy the requirements in FAR 12.102(f)(1).

The rule also includes an exception for acquisitions that are carried out pursuant to FAR 12.102(g)(1), which authorizes the use of FAR Part 12 procedures for performance based contracts under \$29.5 million. To that end, the final rule requires the contracting officer to determine in writing that an acquisition exceeding \$1 million and using Part 12 procedures *either* meets the FAR 2.101 definition of a commercial item, *or* meets the criteria set forth at FAR 12.102(g)(1). Under the new rule, this determination must be included in the contract file.

These changes, which were based on recommendations made by the Panel on Contracting Integrity, are just the latest example of the heightened scrutiny being placed on commercial item determinations. See "Scrutiny Over Commercial Item Contracts Continues," *Government Contracts Issue Update* (Winter 2012).