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What’s In and What’s Out: DoD’s Assessment of Clauses Under Proposed Rule (83 Fed. Reg. 30646; DFARS Case 2017-D010)

| Provision/Clause | DoD Assessment and Comments |
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| <p><u>DFARS 252.204-7008</u>, Compliance with Safeguarding Covered Defense Information Controls</p> <p><u>DFARS 252.204-7009</u>, Limitations on the Use or Disclosure of Third-Party Contractor Reported Cyber Incident Information</p> <p><u>DFARS 252.204-7012</u>, Safeguarding Covered Defense Information and Cyber Incident Reporting</p> | <ul style="list-style-type: none"> • DoD determined that these clauses apply to the acquisition of commercial items, except for the acquisition of COTS items. Flow-down requirements for DFARS 252.204-7009 and DFARS 252.204-7012 are applicable to commercial item subcontracts, except for COTS subcontracts. DFARS 252.204-7008 is not applicable to subcontracts. • DoD noted that DFARS 252.204-7012 is being revised “to clarify that the flowdown requirement in paragraph (m) of the clause” because that paragraph “did not explicitly exclude flowdown to COTS items” as required by the final rule implementing that clause. DoD also noted that “no determination is required to exclude applicability to COTS items when acquiring services.” • The proposed rule includes a revised definition of “subcontract” applicable to DFARS 252.204-7009 and 252.204-7012. |
| <p><u>DFARS 252.213-7000</u>, Notice to Prospective Suppliers on Use of Supplier Performance Risk System in Past Performance Evaluations</p> | <ul style="list-style-type: none"> • DoD determined that this clause applies to the acquisition of commercial items, including COTS items; it does not apply to subcontracts. DoD noted that “continued applicability to commercial items is dependent upon a determination by the Director of Defense Procurement and Acquisition Policy.” • DoD noted the Past Performance Information Retrieval System—Statistical Reporting (PIRS- SR) module is intended to “fill the need for past performance data on lower dollar value contracts,” and that the benefit of collecting this data is “equally applicable, whether or not the items to be acquired are commercial.” |
| <p><u>DFARS 252.219-7000</u>, Advancing Small Business Growth</p> | <ul style="list-style-type: none"> • DoD noted that this clause “currently applie[s]” to the acquisition of commercial items, including COTS items; it is inapplicable to subcontracts. DoD noted that “continued application to commercial items is dependent upon a determination by the Director of Defense Procurement and Acquisition Policy.” • DoD noted that this requirement is “intended only to advise small businesses that entering into a DoD contract may eventually cause such businesses to exceed the small business size standard.” |

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| <p><u>DFARS 252.219-7010</u>, Notification of Competition Limited to Eligible 8(a) Concerns—Partnership Agreement</p> <p><u>FAR 52.204-22</u>, Alternative Line Item Proposal</p> | <ul style="list-style-type: none"> • DoD noted that these clauses are “not required” for use in the acquisition of commercial items, including COTS items; they are inapplicable to subcontracts. • DoD sought “comments as to whether use of these provisions in solicitations for commercial items should be prohibited, or whether their use might be appropriate for discretionary use.” |
| <p><u>DFARS 252.225-7006</u>, Acquisition of the American flag</p> | <ul style="list-style-type: none"> • DoD determined that this clause “currently applie[s]” to the acquisition of commercial items, including COTS items. Flow-down requirements are not applicable to commercial item subcontracts. DoD noted that “continued application to commercial items is dependent upon a determination by the Director of Defense Procurement and Acquisition Policy.” • DoD noted that because most flags are commercial items, this requirement “would be without affect if not applied to commercial items.” DoD also noted that this provision relates back to an appropriations restriction that requires the U.S. to acquire American flags that are “manufactured” in the United States. |
| <p><u>DFARS 252.225-7039</u>, Defense Contractors Performing Private Security Functions Outside the United States</p> | <ul style="list-style-type: none"> • DoD determined that this clause applies to acquisition of commercial items, except for COTS items. Flow-down requirements are applicable to commercial item subcontracts, except for COTS subcontracts. • DoD noted this clause is for the acquisition of services, and “no determination is required to exclude applicability to COTS items when acquiring services.” • The proposed rule includes a revised definition of “subcontract” applicable this DFARS clause. |
| <p><u>DFARS 252.229-7014</u>, Taxes—Foreign Contracts in Afghanistan</p> <p><u>DFARS 252.229-7015</u>, Taxes—Foreign Contracts in Afghanistan (North Atlantic treaty Organization Status of Forces Agreement)</p> | <ul style="list-style-type: none"> • DoD determined that these clauses apply to the acquisition of commercial items, including COTS items. Flow-down requirement applies to commercial item and COTS subcontracts. DoD noted that “continued applicability to commercial items is dependent upon a determination by the Director of Defense Procurement and Acquisition Policy.” • DoD noted that the failure to apply these clauses to contracts for commercial items “would result in DoD paying unnecessary taxes,” thereby “reducing the funds available for the war effort in Afghanistan.” • The proposed rule includes a revised definition of “subcontract” applicable these DFARS clauses. |

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| <p><u>DFARS 252.239-7009</u>, Representation of Use of Cloud Computing</p> <p><u>DFARS 252.239-7010</u>, Cloud Computing Services</p> | <ul style="list-style-type: none"> • DoD noted that these clauses apply to the acquisition of commercial items, except for COTS items. Flow-down requirement for DFARS 252.239-7010 is applicable to commercial item subcontracts, except for COTS subcontracts. DFARS 252.239-7009 is inapplicable to subcontracts. DoD noted that “continued applicability to commercial items is dependent upon a determination by the Director of Defense Procurement and Acquisition Policy.” • DoD noted that the “[f]ailure to apply this provision and clause to acquisition of cloud services may cause harm to the Government which could directly impact national security,” and that this harm is the same under a FAR Part 12. • The proposed rule includes a revised definition of “subcontract” applicable to DFARS 252.239-7009. |
| <p><u>DFARS 252.246-7008</u>, Sources of Electronic Parts</p> | <ul style="list-style-type: none"> • DoD determined that this clause applies to the acquisition of commercial items, including COTS items. Flow-down requirements are applicable to commercial items, including COTS subcontracts. • DoD noted that the “prohibitions against counterfeit and suspect counterfeit electronic items and the requirements for systems to detect such parts must flow down to all levels of the supply chain without exception for any contractual instrument that could be used to acquire electronic parts.” A failure to flow-down the requirements in DFARS 252.246-7008 and 252.246-7007 (Contractor Counterfeit Electronic Part Detection and Avoidance System) would “create unacceptable risks of introducing counterfeit or suspect counterfeit electronic parts into the Defense supply chain.” • The proposed rule includes a revised definition of “subcontract” applicable to DFARS 252.246-7008 and 252.246-7007. |
| <p><u>FAR 52.204-21</u>, Basic Safeguarding of Covered Contractor Information Systems</p> | <ul style="list-style-type: none"> • DoD determined that this clause applies to the acquisition of commercial items, except for COTS items. Flow-down requirement is applicable to commercial item subcontracts, other than COTS subcontracts. DoD noted that “continued applicability to commercial items is dependent upon a determination by the Director of Defense Procurement and Acquisition Policy.” • DoD noted that this clause “requires only a basic level of safeguarding of contractor information systems reflective of actions any prudent business person would employ.” |

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| <p>FAR 52.222-62, Paid Sick Leave Under Executive Order 13706</p> | <ul style="list-style-type: none"> • DoD determined that this clause applies to the acquisition of commercial items, except for COTS items. Flow-down requirement is applicable to commercial item subcontracts. DoD noted that “continued applicability to commercial items is dependent upon a determination by the Director of Defense Procurement and Acquisition Policy.” • DoD noted that this FAR clause implemented Executive Order (“EO”) 13706, Paid Sick Leave, and that commercial item contracts are not exempted from complying with this EO. DoD also noted that this EO “seeks to increase efficiency and cost savings in the work performed by parties who contract with the Government by ensuring that employees on those contracts can earn up to 7 days or more of paid sick leave annually.” |
| <p>FAR 52.223-11, Ozone-Depleting Substances and High Global Warming Potential Hydrofluorocarbons</p> <p>FAR 52.223-12, Maintenance, Service, Repair, or Disposal of Refrigeration Equipment and Air Conditioners</p> <p>FAR 52.223-20, Aerosols</p> <p>FAR 52.223-21, Foams</p> | <ul style="list-style-type: none"> • DoD determined that these clause apply to the acquisition of commercial items, including COTS items; they do not apply to subcontracts. DoD noted that “continued applicability to commercial items is dependent upon a determination by the Director of Defense Procurement and Acquisition Policy.” • DoD noted that the “[a]pplicability of the requirements to commercial items is necessary to be effective.” |
| <p>FAR 52.223-22, Public Disclosure of Greenhouse Gas Emissions and Reduction Goals—Representation</p> | <ul style="list-style-type: none"> • DoD determined that this clause applies to the acquisition of commercial items, including COTS items; it does not apply to subcontracts. DoD noted that “continued applicability to commercial items is dependent upon a determination by the Director of Defense Procurement and Acquisition Policy.” • DoD noted that the information obtained from the representations in this FAR clause “will assist agencies in developing strategies to engage with offerors to reduce supply chain emissions” as required by EO 13693, Planning for Federal Sustainability in the Next Decade. |