

Org: IT Alliance for Public Sector, ITI

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sectionnumber: Sec. 874

Input: Section 874 of the FY2017 NDAA revised 10 U.S. Code § 2375, subpara. (b)(2) to define the term “subcontract”. Congress’ intent was to provide relief from DFARS flow-downs to the commercial supply chain, thereby enabling the mandatory requirement to incorporate commercial items throughout the supply chain. A broad definition of “commodities” would be consistent with Congressional intent, and, equally important, be consistent with commercial practices regarding supply chain management.

The price of the item should not be a factor in determining whether an item is a commodity that should be exempt from DFARS flow-downs. The key is whether the item is purchased by the manufacturer/Seller in support of on-going production rates of the commercial item, or whether it is purchased solely and uniquely for the performance of a prime contract with the Government (i.e., the purchase does not meet the criteria of being “not identifiable to any particular contract”).

Recommendation: The DFARS provisions implementing Section 874 should include the following definition for “commodity” in FAR 2.101 and/or DFARS 202.101: A “commodity” is any fungible commercial item purchased by a party for use in the manufacture of, or integration into, a commercial item.

The DAR Council should issue the following guidance: a) the price of the items being procured, either individually or in total, is not a key consideration when determining whether an item is a commodity; and b) commodities may include commercial items that are “of a type” sold or offered for sale in the commercial marketplace, as well as those with customer modifications available in the market place, or that include minor modifications made for governmental purposes.”

Additionally, ITAPS recommends the inapplicability of the following clauses to COTS and Commercial Items:

- 216.403-1- Fixed-price incentive (firm target) contracts
- 252.204-7012- Safeguarding Covered Defense Information and Cyber Incident Reporting
- 252.227-7015- Technical Data - Commercial Items
- 252.244-7000- Subcontracts for Commercial Items (Flowdown Requirement)
- 52.212-5- Contract T&Cs Required to Implement Statutes or Executive Orders - Commercial Items
- 52.222-17- Nondisplacement of Qualified Workers (E.O. 14395)
- 52.222-50- Combating Trafficking in Persons
- 52.222-62- Paid Sick Leave Under Executive Order 13706 (Jan 2017)
- 52.232-40- Providing Accelerated Payments to Small Business Subcontractors (If flowdown required IAW 52.232-40)
- 52.244-6- Subcontracts for Commercial Items
- 52.245-1- Government Property (if USG property is involved)
- 252.225-7008- Restriction on Acquisition of Specialty Metals
- 252.225-7009- Restriction on Acquisition of Certain Articles Containing Specialty Metals
- 252.246-7007- Contractor Counterfeit Electronic Part Detection and Avoidance System.
- 252.246-7008- Sources of Electronic Parts
- 52.204-10- Reporting Executive Compensation and First-Tier Subcontract Awards.
- 52.219-16- Liquidated Damages - Subcontracting Plan (if subcontract is over \$650K)
- 52.219-28- Post Award Small Business Program Representation

52.219-9- Small Business Contracting Plan (if subcontract exceeds \$650K)
52.222-37- Employment Reports of Special Disabled Vets, Vietnam Vets, and Other Eligible Vets (if 52.222-35 applies)
52.225-1- Buy American Act—Supplies
52.247-64- Preference for Privately Owned U.S.-Flag Commercial Vessels (Feb 2006) 252.203-7003- Agency Office of the Inspector General 252.204-7002-Payment for Subline Items Not Separately Priced (NSP)
252.204-7003- Control of Government Personnel Work Product
252.204-7004- Alternate A, System for Award Management
252.204-7010- Requirement for Contractor to Notify DoD if subject to reporting under US IAEA
252.204-7015- Notice of Authorized Disclosure of Information for Litigation Support
252.209-7004- Subcontracting with Firms that are owned or controlled by the USG of a Terrorist Country
252.211-7003- Item Identification and Valuation
252.211-7007- Reporting of Government Furnished Property 252.215-7000-Pricing Adjustments for certified cost
252.219-7003- Small Business Subcontracting Plan (DOD) 252.219-7004-Small Business Subcontracting Plan (Test Program)
252.223-7006- Prohibition on Storage and Disposal of Toxic and Hazardous Materials
252.223-7008- Prohibition of Hexavalent Chromium
252.225-7013- Duty-Free Entry
252.227-7020- Rights in Special Works.
252.232-7003- Electronic Submission of Payment Requests
252.232-7006- Wide Area Workflow Payment Instructions
252.245-7003- Contractor Property Management System Administration 252.245-7004-Reporting, Reutilization, and Disposal
252.246-7003- Notification of Potential Safety Issues
52.203-14 -Display of Hotline Poster(s).
52.203-19- Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements (Jan. 2017)
52.204-18- Commercial and Government Entity Code Maintenance 52.204-21-Basic Safeguarding of Covered Contractor Information Systems
52.204-4- Printed or Copied Double Sided on Recycled Paper
52.204-9- Personal Identity Verification of Contractor Personnel 52.209-10-Prohibition on Contracting with Inverted Domestic Corporations
52.212-3- Offeror Representation and Certs - Commercial Items 52.212-4-Contract Terms and Conditions--Commercial Items.
52.215-12- Subcontractor Certified Cost or Pricing Data 52.215-13-Subcontractor Certified Cost or Pricing Data -- Modifications 52.215-2-Audit and Records -- Negotiation 52.215-20-Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data 52.215-21- Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data -- Mods 52.215-22-Limitations on Pass-Through Charges -- Identification of Subcontract Effort 52.215-23- Limitations on Pass-Through Charges 52.222-19-Child Labor - Cooperation and Authorities and Remedies
52.222-21- Prohibition of Segregated Facilities
52.222-26- Equal Opportunity (if subcontract over \$50K and has more than 50 employees)
52.222-3- Convict Labor
52.222-40-Notification of Employee Rights under the National Labor Relations Act (if subcontract over \$10K)

52.222-43- Fair Labor Standards Act and Service Contract Labor Standards - Price Adjustment (MY/Option Contracts)

52.222-44- Fair Labor Standards Act and Service Contract Labor Standards - Price Adjustment

52.222-51- Exemption from Application of the Service Contract Labor Standards to Contracts for Certain Services-MCR

52.222-53-Exemption from Application of the Service Contract Labor Standards to Contracts for Certain Services-Req

52.222-54-Employment Eligibility Verification (if subcontract exceeds \$K except for commercial item)

52.222-55-Minimum Wages under Executive Order 13658 (Dec 2015),

52.222-59-Compliance with Labor Laws

52.222-60-Paycheck Transparency (Executive Order 13673) (Oct 2016)

52.223-12-Maintenance, Service, Repair, or Disposal of Refrigeration Equipment and Air Conditioners

52.223-13- Acquisition of EPEAT®-Registered Imaging Equipment

52.223-14- Acquisition of EPEAT®-Registered Televisions

52.223-16- Acquisition of EPEAT®-Registered Personal Computer Products (only for use by gov or COGO facilities)

52.223-18-Encouraging Contractor Policies to Ban Text Messaging While Driving (if contract is over \$3K)

52.223-20-Aerosols

52.223-21- Foams

52.225-13- Restrictions on Certain Foreign Purchases

52.225-5- Trade Agreements

52.226-6- Promoting Excess Food Donation to Nonprofit Organizations

52.227-17- Rights in Data -- Special Works.

52.232-39- Unforceability of Unauthorized Obligations

52.233-11- Ozone-Depleting Substances and High Global Warming Potential Hydrofluorocarbons

52.237-11- Accepting and Dispensing of \$1 Coin

52.248-1- Value Engineering (if subcontract over \$150K)

52.251-1-Government Supply Sources

52.277-11- Patent Rights -- Ownership by the Contractor

52.277-13- Patent Rights -- Ownership by the Government

52.277-14- Rights in Data – General.

252.205-7000- Provision of Information to Cooperative Agreement Holders

252.247-7023- Transportation of Supplies By Sea

52.203-13- Contractor Code of Business Ethics and Conduct (If over \$5M and more than 120 days)

52.203-15- Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009

52.203-17- Contractor Employee Whistleblower Rights

52.203-6- Restrictions on Contractor Sales to the Government (if subcontract over \$100K)

52.204-14- Service Contract Reporting Requirements

52.204-15- Service Contract Reporting Requirements for Indefinite-Delivery Contracts.

52.209-6- Protecting the USG Interest when subcontracting with Contractors Debarred (does not apply to COTS)

52.209-9 - Updates of Publicly Available Information Regarding Responsibility Matters

52.219-13- Notice of Set-Aside of Orders

52.219-14- Limitations on Subcontracting

52.219-27- Notice of Service-Disabled Veteran-Owned Small Business Set-Aside

52.219-29- Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns.

52.219-3- Notice of HUBZone Set-Aside or Sole Source Award

52.219-30- Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program

52.219-4- Notice of Price Evaluation Preference for HUB Zone Small Business Concerns

52.219-6- Notice of Total Small Business Set-Aside

52.219-7- Notice of Partial Small Business Set-Aside
52.219-8- Utilization of Small Business Concerns (if subcontract is over \$150K)
52.222-25- Affirmative Action Compliance
52.222-35- Equal Opportunity for Disabled Veterans, Vets of Vietnam Era, and Other Eligible Vets (over \$100K)
52.222-36- Affirmative Action for Workers with Disabilities (if subcontract over \$15K)
52.222-41- Service Contract Labor Standards
52.222-42- Statement of Equivalent Rates for Federal Hires
52.223-15- Energy Efficiency in Energy-Consuming Products (for use in federally controlled building)
52.223-9- Estimate of Percentage of Recovered Material Content for EPA-Designated Items
52.224-3- Privacy Training (Jan 2017)
52.225-26- Contractors Performing Private Security Functions Outside the United States
52.225-3- Buy American Act—Free Trade Agreements-Israeli Trade Act
52.226-4- Notice of Disaster or Emergency Area Set-Aside
52.226-5- Restrictions on Subcontracting Outside Disaster or Emergency Area 52.232-29-Terms for Financing of Purchases of Commercial Items
52.232-30- Installment Payments for Commercial Items
52.232-33- Payment by Electronic Fund Transfer-System for Award Management
52.232-34- Payment by Electronic Fund Transfer-Other than System for Award Management
52.232-36- Payment by Third Party
52.233-3- Protest after award
52.233-4- Applicable Law for Breach of Contract Claim
52.239-1- Privacy or Security Safeguards
52.242-5- Payments to Small Business Subcontractors
52.247-63- Preference for US Flag Air Carriers