**DFARS Case 2020-D033**

**(S) Commercial Item Determinations**

**Final Rule**

**PART 212—ACQUISITION OF COMMERCIAL ITEMS**

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**SUbpart 212.1—ACQUISITION OF COMMERCIAL ITEMS – GENERAL**

**212.102 Applicability.**

(a)(i) **[*Use of FAR part 12 procedures.* Use of FAR part 12 procedures is based on—**

**(A) A determination that an item is a commercial item (see paragraph (a)(iii) of this section); or**

**(B) Applicability of one of the following statutes that provide for treatment as a commercial item and use of FAR part 12 procedures, even though the item may not meet the definition of “commercial product” or “commercial service” at FAR 2.101 and does not require a commercial item determination:**

**(*1*) 41 U.S.C. 1903 - Supplies or services to be used to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack pursuant to FAR 12.102(f).**

**(*2*) 10 U.S.C. 2380a - Supplies or services from nontraditional defense contractors pursuant to 212.102(a)(iv).**

**(ii) *Prior use of FAR part 12 procedures.***

**(A) Pursuant to 10 U.S.C. 2380(c), except as provided in paragraph (a)(ii)(B) of this section or unless the item was acquired pursuant to paragraph (a)(i)(B) of this section,** **if the Commercial Item Database (for website see PGI 212.102(a)(iii)(B)(*4*)) contains a prior commerciality determination, or the contracting officer has other evidence that an item has previously been acquired by DoD using commercial item acquisition procedures under FAR part 12, then the prior contract shall serve as a prior determination that an item is a commercial item. The contracting officer shall document the file accordingly.**

**(B)(*1*) If the item to be acquired meets the criteria in paragraph (a)(ii)(A) of this section, the item may not be acquired using other than FAR part 12 procedures unless the head of the contracting activity issues a determination as specified in paragraph (a)(ii)(B)(*2*)(*ii*) of this section.**

**(*2*) Pursuant to 10 U.S.C. 2306a(b)(4)(A), the contracting officer may presume that a prior commercial item determination made by a military department, a defense agency, or another component of DoD shall serve as a determination for subsequent procurements of such item. In accordance with 10 U.S.C. 2306a(b)(4) and 10 U.S.C. 2380(c), if the contracting officer questions a prior determination to use FAR part 12 procedures and instead chooses to proceed with a procurement of an item previously determined to be a commercial item using procedures other than FAR part 12 procedures, the contracting officer shall request a review by the head of the contracting activity that will conduct the procurement. Not later than 30 days after receiving a request for review, the head of the contracting activity shall—**

**(*i*) Confirm that the prior use of FAR part 12 procedures was appropriate and still applicable; or**

**(*ii)* Issue a determination that the prior use of FAR part 12 procedures was improper or that it is no longer appropriate to acquire the item using FAR part 12 procedures, with a written explanation of the basis for the determination.**

**(iii)]** *Commercial item determination.* **[Unless the procedures in paragraph (a)(ii) of this section are applicable, w]**~~W~~hen using FAR part 12 procedures for acquisitions **[of commercial items pursuant to 212.102(a)(i)(A) that exceed the simplified acquisition threshold]** ~~exceeding $1 million in value, except for acquisitions made pursuant to FAR 12.102(f)(1)~~, the contracting officer shall—

(A) Determine in writing that the acquisition meets the commercial ~~item~~**[product or commercial service]** definition in FAR 2.101;

(B) Include the written determination in the contract file; ~~and~~

(C) Obtain approval at one level above the contracting officer when a commercial item determination relies on ~~subsections~~**[paragraphs]** (1)(ii), (3), **[or]** (4)~~, or (6)~~ of the “commercial ~~item~~**[product]**” definition at FAR 2.101~~.~~**[ or paragraph (2) of the “commercial service” definition at FAR 2.101; and]**

(D) Follow the procedures and guidance at [PGI 212.102](https://www.acq.osd.mil/dpap/dars/pgi/pgi_htm/PGI212_1.htm#212.102)(a)(i**[ii]**) regarding file documentation and commercial item determinations.

~~(ii)~~ *~~Prior commercial item determination.~~*  ~~This section implements 10 U.S.C. 2306a(b)(4) and 10 U.S.C. 2380(b).~~

~~(A) The contracting officer may presume that a prior commercial item determination made by a military department, a defense agency, or another component of DoD shall serve as a determination for subsequent procurements of such item. See~~ [~~PGI 212.102~~](https://www.acq.osd.mil/dpap/dars/pgi/pgi_htm/PGI212_1.htm#212.102)~~(a)(ii) for information about items that the Department has historically acquired as military unique, noncommercial items.~~

~~(B) If the contracting officer does not make the presumption that a prior commercial item determination is valid, and instead chooses to proceed with a procurement of an item previously determined to be a commercial item using procedures other than procedures authorized for the procurement of a commercial item~~**~~,~~**~~, the contracting officer shall request a review of the commercial item determination by the head of the contracting activity that will conduct the procurement. Not later than 30 days after receiving a request for review of a commercial item determination, the head of a contracting activity shall—~~

~~(~~*~~1~~*~~) Confirm that the prior determination appropriate and still applicable; or~~

~~(~~*~~2~~*~~) Issue a determination that the prior use of FAR part 12 procedures was improper or that it is no longer appropriate to acquire the item using FAR part 12 procedures, with a written explanation of the basis for the determination (see~~ [~~212.70~~](https://www.acq.osd.mil/dpap/dars/dfars/html/current/212_70.htm)~~).~~

(~~iii~~**[iv]**) *Nontraditional defense contractors.* In accordance with 10 U.S.C. 2380a, contracting officers—

(A) Except as provided in paragraph (a)(~~iii~~**[iv]**)(B) of this section, may treat supplies and services provided by nontraditional defense contractors as commercial items. This permissive authority is intended to enhance defense innovation and investment, enable DoD to acquire items that otherwise might not have been available, and create incentives for nontraditional defense contractors to do business with DoD. It is not intended to recategorize current noncommercial items; however, when appropriate, contracting officers may consider applying commercial item procedures to the procurement of supplies and services from business segments that meet the definition of “nontraditional defense contractor” even though they have been established under traditional defense contractors. The decision to apply commercial item procedures to the procurement of supplies and services from nontraditional defense contractors does not require a commercial item determination and does not mean the item is commercial;

(B) Shall treat services provided by a business unit that is a nontraditional defense contractor as commercial items, to the extent that such services use the same pool of employees as used for commercial customers and are priced using methodology similar to methodology used for commercial pricing; and

(C) Shall document the file when treating supplies or services from a nontraditional defense contractor as commercial items in accordance with paragraph (a)(~~iii~~**[iv]**)(A) or (B) of this section.

**[(v) *Commercial item guidebook*. For a link to the commercial item guidebook, see PGI 212.102(a)(v).]**

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**SUBPART 212.70 [Reserved]~~LIMITATION ON CONVERSION OF PROCUREMENT FROM COMMERCIAL ACQUISITION PROCEDURES~~**

**~~212.7000 Scope.~~**

~~This subpart implements section 856 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92).~~

**~~212.7001 Procedures.~~**

~~(a) Limitation.~~

~~(1) For a procurement valued at more than $1 million, but less than $100 million, previously procured under a prime contract using FAR part 12 procedures based on a commercial item determination made by a military department, a defense agency, or another DoD component, prior to converting the procurement from commercial acquisition procedures to noncommercial acquisition procedures under FAR part 15, the head of the contracting activity shall determine in writing, upon recommendation from the contracting officer for the procurement that—~~

~~(i) The earlier use of commercial acquisition procedures under FAR part 12 was in error or based on inadequate information; and~~

~~(ii) DoD will realize a cost savings compared to the cost of procuring a similar quantity or level of such item or service using commercial acquisition procedures.~~

~~(2) In the case of a procurement valued at $100 million or more, a contract may not be awarded pursuant to a conversion of the procurement described in paragraph (a)(1) of this section until a copy of the head of contracting activity determination is provided to the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics.~~

~~(b) In making a determination under paragraph (a) of this section, the determining official shall, at a minimum, consider the following factors:~~

~~(1) The estimated cost of research and development to be performed by the existing contractor to improve future products or services.~~

~~(2) The costs for DoD and the contractor in assessing and responding to data requests to support a conversion to noncommercial acquisition procedures.~~

~~(3) Changes in purchase quantities.~~

~~(4) Costs associated with potential procurement delays resulting from the conversion.~~

~~(c) The requirements of this subpart terminate November 25, 2020.~~