

## Federal Acquisition Regulation

12.301

agreements for commercial computer software, see 27.405-3.

[60 FR 48241, Sept. 18, 1995, as amended at 72 FR 63049, Nov. 7, 2007]

### 12.213 Other commercial practices.

It is a common practice in the commercial marketplace for both the buyer and seller to propose terms and conditions written from their particular perspectives. The terms and conditions prescribed in this part seek to balance the interests of both the buyer and seller. These terms and conditions are generally appropriate for use in a wide range of acquisitions. However, market research may indicate other commercial practices that are appropriate for the acquisition of the particular item. These practices should be considered for incorporation into the solicitation and contract if the contracting officer determines them appropriate in concluding a business arrangement satisfactory to both parties and not otherwise precluded by law or Executive order.

[62 FR 264, Jan. 2, 1997]

### 12.214 Cost Accounting Standards.

Cost Accounting Standards (CAS) do not apply to contracts and subcontracts for the acquisition of commercial items when these contracts and subcontracts are firm-fixed-price or fixed-price with economic price adjustment (provided that the price adjustment is not based on actual costs incurred). See 48 CFR 30.201-1 for CAS applicability to fixed-price with economic price adjustment contracts and subcontracts for commercial items when the price adjustment is based on actual costs incurred. When CAS applies, the contracting officer shall insert the appropriate provisions and clauses as prescribed in 48 CFR 30.201.

[63 FR 9054, Feb. 23, 1998]

### 12.215 Notification of overpayment.

If the contractor notifies the contracting officer of a duplicate payment or that the Government has otherwise overpaid, the contracting officer shall follow the procedures at 32.604.

[73 FR 54001, Sept. 17, 2008]

## Subpart 12.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

### 12.300 Scope of subpart.

This subpart establishes provisions and clauses to be used when acquiring commercial items.

### 12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(a) In accordance with Section 8002 of Public Law 103-355 (41 U.S.C 264, note), contracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those clauses—

(1) Required to implement provisions of law or executive orders applicable to the acquisition of commercial items; or

(2) Determined to be consistent with customary commercial practice.

(b) Insert the following provisions in solicitations for the acquisition of commercial items, and clauses in solicitations and contracts for the acquisition of commercial items:

(1) *The provision at 52.212-1, Instructions to Offerors—Commercial Items.* This provision provides a single, streamlined set of instructions to be used when soliciting offers for commercial items and is incorporated in the solicitation by reference (see Block 27a, SF 1449). The contracting officer may tailor these instructions or provide additional instructions tailored to the specific acquisition in accordance with 12.302.

(2) *The provision at 52.212-3, Offeror Representations and Certifications—Commercial Items.* This provision provides a single, consolidated list of representations and certifications for the acquisition of commercial items and is attached to the solicitation for offerors to complete. This provision may not be tailored except in accordance with Subpart 1.4. Use the provision with its Alternate I in solicitations issued by DoD, NASA, or the Coast Guard. Use the provision with its Alternate II in solicitations for acquisitions for which small disadvantaged business procurement mechanisms are authorized on a regional basis.

(3) *The clause at 52.212-4, Contract Terms and Conditions—Commercial Items.* This clause includes terms and conditions which are, to the maximum extent practicable, consistent with customary commercial practices and is incorporated in the solicitation and contract by reference (see Block 27, SF 1449). Use this clause with its Alternate I when a time-and-materials or labor-hour contract will be awarded. The contracting officer may tailor this clause in accordance with 12.302.

(4) *The clause at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.* This clause incorporates by reference only those clauses required to implement provisions of law or Executive orders applicable to the acquisition of commercial items. The contracting officer shall attach this clause to the solicitation and contract and, using the appropriate clause prescriptions, indicate which, if any, of the additional clauses cited in 52.212-5(b) or (c) are applicable to the specific acquisition. Some of the clauses require fill-in; the fill-in language should be inserted as directed by 52.104(d). When cost information is obtained pursuant to Part 15 to establish the reasonableness of prices for commercial items, the contracting officer shall insert the clauses prescribed for this purpose in an addendum to the solicitation and contract. This clause may not be tailored.

(i) Use the clause with its Alternate I when the head of the agency has waived the examination of records by the Comptroller General in accordance with 25.1001.

(ii)(A) If the acquisition will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5), the contracting officer shall use the clause with its Alternate II.

(B)(1) In the case of a bilateral contract modification that will use funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009, the contracting officer shall specify applicability of Alternate II to that modification.

(2) In the case of a task- or delivery-order contract in which not all orders will use funds appropriated or other-

wise made available by the American Recovery and Reinvestment Act of 2009, the contracting officer shall specify the task or delivery orders to which Alternate II applies.

(C) The contracting officer may not use Alternate I when Alternate II applies.

(c) When the use of evaluation factors is appropriate, the contracting officer may—

(1) Insert the provision at 52.212-2, Evaluation—Commercial Items, in solicitations for commercial items (see 12.602); or

(2) Include a similar provision containing all evaluation factors required by section 13.106, subpart 14.2 or subpart 15.3, as an addendum (see 12.302(d)).

(d) *Other required provisions and clauses.* (1) Notwithstanding prescriptions contained elsewhere in the FAR, when acquiring commercial items, contracting officers shall be required to use only those provisions and clauses prescribed in this part. The provisions and clauses prescribed in this part shall be revised, as necessary, to reflect the applicability of statutes and executive orders to the acquisition of commercial items.

(2) Insert the clause at 52.225-19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States, as prescribed in 25.301-4.

(3) Insert the provision at 52.209-7, Information Regarding Responsibility Matters, as prescribed in 9.104-7(b).

(4) Insert the clause at 52.209-8, Updates of Information Regarding Responsibility Matters, as prescribed in 9.104-7(c).

(e) *Discretionary use of FAR provisions and clauses.* The contracting officer may include in solicitations and contracts by addendum other FAR provisions and clauses when their use is consistent with the limitations contained in 12.302. For example:

(1) The contracting officer may include appropriate clauses when an indefinite-delivery type of contract will be used. The clauses prescribed at 16.506 may be used for this purpose.

(2) The contracting officer may include appropriate provisions and

clauses when the use of options is in the Government's interest. The provisions and clauses prescribed in 17.208 may be used for this purpose. If the provision at 52.212-2 is used, paragraph (b) provides for the evaluation of options.

(3) The contracting officer may use the provisions and clauses contained in Part 23 regarding the use of products containing recovered materials and biobased products when appropriate for the item being acquired.

(4) When setting aside under the Stafford Act (Subpart 26.2), include the provision at 52.226-3, Disaster or Emergency Area Representation, in the solicitation. The representation in this provision is not in the Online Representations and Certifications Application (ORCA) Database.

(f) Agencies may supplement the provisions and clauses prescribed in this part (to require use of additional provisions and clauses) only as necessary to reflect agency unique statutes applicable to the acquisition of commercial items or as may be approved by the agency senior procurement executive, or the individual responsible for representing the agency on the FAR Council, without power of delegation.

[60 FR 48241, Sept. 18, 1995]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting section 12.301, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

**12.302 Tailoring of provisions and clauses for the acquisition of commercial items.**

(a) *General.* The provisions and clauses established in this subpart are intended to address, to the maximum extent practicable, commercial market practices for a wide range of potential Government acquisitions of commercial items. However, because of the broad range of commercial items acquired by the Government, variations in commercial practices, and the relative volume of the Government's acquisitions in the specific market, contracting officers may, within the limitations of this subpart, and after conducting appropriate market research, tailor the provision at 52.212-1, Instructions to Offerors-Commercial Items,

and the clause at 52.212-4, Contract Terms and Conditions-Commercial Items, to adapt to the market conditions for each acquisition.

(b) *Tailoring 52.212-4, Contract Terms and Conditions—Commercial Items.* The following paragraphs of the clause at 52.212-4, Contract Terms and Conditions—Commercial Items, implement statutory requirements and shall not be tailored—

- (1) Assignments;
- (2) Disputes;
- (3) Payment (except as provided in subpart 32.11);
- (4) Invoice;
- (5) Other compliances; and
- (6) Compliance with laws unique to Government contracts.

(c) *Tailoring inconsistent with customary commercial practice.* The contracting officer shall not tailor any clause or otherwise include any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance with agency procedures. The request for waiver must describe the customary commercial practice found in the marketplace, support the need to include a term or condition that is inconsistent with that practice and include a determination that use of the customary commercial practice is inconsistent with the needs of the Government. A waiver may be requested for an individual or class of contracts for that specific item.

(d) Tailoring shall be by addenda to the solicitation and contract. The contracting officer shall indicate in Block 27a of the SF 1449 if addenda are attached. These addenda may include, for example, a continuation of the schedule of supplies/services to be acquired from blocks 18 through 21 of the SF 1449; a continuation of the description of the supplies/services being acquired; further elaboration of any other item(s) on the SF 1449; any other terms or conditions necessary for the performance of the proposed contract (such as options, ordering procedures for indefinite-delivery type contracts,