

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Chapter 1**

[FAR Case 94-790]

RIN 9000-AG38

**Federal Acquisition Regulation;
Acquisition of Commercial Items**

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: This proposed rule is issued pursuant to the Federal Acquisition Streamlining Act of 1994 to implement the revised statutory authorities for the acquisition of commercial items and components by Federal Government agencies as well as contractors and subcontractors at all levels. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

DATES: Comments should be submitted on or before May 1, 1995 to be considered in the formulation of a final rule.

Public Meeting: March 17, 1995, 9:30 a.m. at the following location: General Services Administration, Auditorium, 18th & F Streets, NW., Washington, DC 20405.

Written and Oral Statements: Statements prepared for oral presentation must be sent to the FAR Secretariat at the address given below, not later than March 13, 1995.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW., room 4037, Washington, DC 20405. Please cite FAR case 94-790 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Colonel Laurence M. Trowel, Commercial Item Team Leader, at (703) 695-3858 in reference to this FAR case. For general information, contact the FAR Secretariat, room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAR case 94-790.

SUPPLEMENTARY INFORMATION:**A. Background**

The Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, provides

authorities that streamline the acquisition process and minimize burdensome Government-unique requirements. Major changes that can be expected in the acquisition process as a result of Federal Acquisition Streamlining Act implementation include changes in the areas of Commercial Item Acquisition, Simplified Acquisition Procedures, the Truth in Negotiations Act, and Introduction of the Federal Acquisition Computer Network (FACNET).

This notice announces FAR revisions developed under FAR case 94-790, Acquisition of Commercial Items, which encourage the acquisition of commercial end items and components by Federal Government agencies as well as contractors and subcontractors at all levels. The Commercial Item Drafting Team was organized and tasked with reviewing Title VIII of the Act and preparing implementing language for the FAR. The proposed revisions make changes throughout the FAR to incorporate the provisions of Title VIII. The most significant proposed revisions are in the following FAR parts:

FAR Part 2 has been amended to incorporate the definitions of "commercial item," "component," "commercial component" and "nondevelopmental item" from the Act with only minor revisions for clarification. The clause at 52.202-1, Definitions, has been similarly revised to make the definitions available to prime and subcontractors.

FAR Part 10 has been completely revised to address market research. It contains some language taken from the current FAR Part 11. This new part establishes the requirement for market research as the first step in the acquisition process. Market research is an essential element in the later steps of describing the agency's need, developing the overall acquisition strategy and identifying terms and conditions unique to the item being acquired.

FAR Part 11 has been completely revised to address the process of describing agency needs. It contains some of the language on specifications and standards formerly found in FAR Part 10, but takes a more streamlined approach. In addition, the revised Part 11 establishes the Government's order of precedence for requirements documents and addresses the concept of market acceptance contained in the Act. The revised Part 11 also contains coverage on Delivery or Performance Schedules, Liquidated Damages, Priorities and Allocations, and Variations in Quantity taken from the current Part 12 with only minor editorial revisions. The current

FAR Part 12 coverage on Suspension of Work, Stop Work Orders, and Government Delay of Work has been moved to Subpart 42.13 with only minor editorial revisions.

FAR Part 12 has been revised to address the acquisition of commercial items. The Team created this entirely new coverage to address in one FAR part both the policies and procedures for the acquisition of commercial items. FAR Part 12 was chosen to reinforce the expected sequence of events in approaching a given acquisition * * * market research (FAR Part 10), description of agency need (FAR Part 11), acquisition of commercial items, if they meet the agency's needs (FAR Part 12); and acquisition of other than commercial items using current FAR procedures (FAR Parts 13, 14 and 15). The Team also believes that moving the policies and procedures for the acquisition of commercial items to FAR Part 12 creates a clean break with past policies and procedures such as the Acquisition and Distribution of Commercial Products (ADCOP) program initiated in 1978 and currently described in FAR Part 11, and the DFARS 211 implementation of Section 824(b) of the 1990-1991 DOD Authorization Act.

—48 CFR Part 12, FAR Subpart 12.1 states that the policies and procedures in the revised FAR Part 12 are applicable to all acquisitions of commercial items above the micro-purchase threshold. The requirements of other parts of the FAR apply to commercial items to the extent they are not inconsistent with FAR Part 12;

—48 CFR Part 12, FAR Subpart 12.2 identifies special requirements for the acquisition of commercial items.

These requirements generally reflect the requirements of Title VIII.

—48 CFR Part 12, FAR Subpart 12.3 establishes standard provisions and clauses for use in the acquisition of commercial items. The Team believes this approach is essential to meet the requirements of the statute and offers contracting officers and industry an easy to use, simplified method for acquiring commercial items. However, the Team also recognizes that it is essential that contracting officers be allowed to tailor solicitations and contracts to meet the needs of the particular acquisition and the market place for that item. Subpart 12.3 gives contracting officers broad authority to tailor solicitations and contracts, a practice itself that is consistent with commercial practices. The Act requires that some constraints be placed on this authority

- to tailor, and that has also been accommodated in this subpart.
- The Team proposes the establishment of a new form, the Standard Form XXXX, Solicitation/Contract/Order for Commercial Items. The proposed SF XXXX combines features of the SF 33, Solicitation, Offer and Award; the SF 1447, Solicitation/Contract; and the DD 1155, Order for Supplies and Services. The most significant element is the addition of acceptance blocks at the bottom of the form (patterned after the DD Form 1155). This will allow suppliers of commercial items to utilize the SF XXXX to document receipt of the supplies or services by the government avoiding the need for preparation of separate receipt/acceptance forms.
 - 48 CFR Part 12, FAR Subpart 12.4 identifies the applicability of certain laws to the acquisition of commercial items. This subpart is intended to meet the requirements of Section 8003(a) of the Act which requires that the FAR contain a list of laws determined to be inapplicable to prime contracts for commercial items.
 - FAR 12.402 contains the list of laws determined to be not applicable to executive agency prime contracts for acquisition of commercial items. This list has been expanded to also include those laws that have been revised in some manner to modify their applicability to commercial items. In each instance, the specific prescriptive language elsewhere in the FAR has been revised to reflect this modified applicability. FAR 12.402 only includes those laws that apply to prime contracts awarded by both DOD and civilian agencies. Agency unique laws determined to be not applicable to prime contracts are not addressed in this rule and may be addressed separately by the respective agencies.
 - FAR 12.403 contains the list of laws determined to be not applicable to subcontracts for commercial items. This list has been expanded to also include those laws that have been revised in some manner to modify their applicability to subcontracts for commercial items. The list of laws to be included in 12.403 are contained in FAR case 94-791 which is currently under agency review and coordination. The list will be published in the **Federal Register** for public comment upon completion.
 - 48 CFR Part 12, FAR Subpart 12.6 identifies two streamlined procedures for the solicitation and award of contracts for commercial items. These procedures may be used at the discretion of the contracting officer.
- FAR Part 52 has been revised to include several new provisions and clauses to be inserted in all solicitations and contracts for the acquisition of commercial items:
- 52.212-1, Instructions to Offerors—Commercial Items, contains solicitation instructions unique to Government procurement and is based upon existing FAR language. The information has been simplified and tailored to meet the requirements of commercial items. For the most part, the simplified paragraphs in the new provision do not contain new concepts.
 - 52.212-2, Evaluation—Commercial Items, contains evaluation information that has been simplified and tailored to meet the requirements of commercial items. Again, this provision does not contain new concepts and is generally based upon provisions prescribed in FAR Parts 14 and 15. This provision may be used at the discretion of the contracting officer. It requires the contracting officer to establish specific evaluation factors and the order of importance for each acquisition.
 - 52.212-3, Offeror Representations and Certifications—Commercial Items, includes the certifications required to comply with laws or Executive orders. Instead of using the numerous certifications contained in the FAR, the Team drafted a single provision containing all the requirements that may apply to the acquisition of commercial items.
 - 52.212-4, Contract Terms and Conditions—Commercial Items, contains the terms and conditions the Team believes are consistent with customary commercial practice by addressing general areas that previous studies have identified as the “core” areas covered by commercial contracts. Several concepts included in the clause at 52.212-4 represent significant changes from standard Government practices to commercial practices.
 - 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive orders—Commercial Items, implements provisions of law or executive orders applicable to Government acquisitions of commercial items or commercial components. The Team believes the clause at 52.212-5 represents the minimum number of clauses required to implement statutes. Certain clauses may apply depending upon the circumstances; the contracting officer will indicate which of these clauses apply for the
- specific acquisition. In addition, this clause provides that the contractor is not required to include any FAR provision or clause in its subcontracts other than those listed in paragraph (d) of the clause. The clauses to be included on this list and flowed down to subcontractors for commercial items are currently under agency review and coordination. The list will be published in the **Federal Register** for public comment once coordination is complete.
- 52.244-XX, Subcontracts for Commercial Items and Commercial Components, implements the preference for the acquisition of commercial items or nondevelopmental items other than commercial items as components of items to be supplied under Federal contracts. This clause will be inserted in all solicitations and contracts for supplies and services other than commercial items. It provides that the contractor is not required to include in its subcontracts for commercial items any FAR provision or clause, other than those listed in the clause. The clauses to be included on this list and flowed down to subcontractors for commercial items are contained in FAR case 94-791 which is currently in agency review and coordination. This list will be published in the **Federal Register** for public comment once coordination is complete.
- Public Meeting.* The FAR Council is interested in an exchange of ideas and opinions on this rule. For that reason, the FAR Council is conducting a series of public meetings. A public meeting will be held on March 17, 1995, to enable the public to present its views on this rule. This rule will only be discussed at the public meeting session. Any subsequent public meetings will be devoted to other revisions to the FAR. The public is encouraged to furnish its views; the Council anticipates that public comments will be very helpful in formulating final rules.
- Persons or organizations wishing to make presentations will be allowed 10 minutes each, provided they notify the FAR Secretariat at (202) 501-4755 and submit written statements of the presentation by March 13, 1995. Persons or organizations with similar positions are encouraged to select a common spokesman for presentation of their views. This meeting, in conjunction with the **Federal Register** notice soliciting public comments on the rule, will be the only opportunity for the public to present its views.

B. Regulatory Flexibility Act

The proposed language will have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et. seq.* This rule will have this impact as a result of the following:

(1) It establishes a much broader definition of "commercial items" compared to the language of either FAR Part 11 or by including certain modifications to existing items and by including certain commercial services. In both cases, small business is very likely to benefit from this expanded definition;

(2) It establishes a requirement for conducting market research in certain circumstances before issuing solicitations which should benefit small business by ensuring the contracting activity has conducted sufficient research to be aware of the availability of commercial items and the practices used in the commercial market place to acquire them. The rule also cautions contracting officers not to require potential sources to submit more than the minimum information necessary as a part of market research.

(3) It establishes a clear preference for the acquisition of commercial items thereby enabling more small businesses that offer commercial items to participate in Government acquisition;

(4) It establishes a clear preference for stating Government requirements in terms of functions to be performed, performance required, or essential physical characteristics rather than detailed, Government-unique design specifications thereby allowing a broader range of products of small businesses to satisfy the Government need;

(5) It establishes the Government order of precedence for requirements documents emphasizing performance-oriented documents and nongovernment standards rather than Federal/Military-unique standards thereby allowing a broader range of small businesses to participate in Government acquisitions;

(6) It allows contracting officers the flexibility to use either the solicitation, evaluation and award procedures in the revised Part 12 for acquiring commercial items, or the procedures in Part 13, 14 or 15 if they are more streamlined and beneficial thereby allowing maximum flexibility for contracting with small businesses;

(7) It allows the use of the streamlined terms and conditions for acquiring commercial items for every acquisition above the micropurchase threshold thereby allowing the maximum number

of small businesses to benefit from these procedures;

(8) It requires that, except in unique circumstances, that the Government utilize the contractor's quality assurance system thereby allowing small businesses to utilize their own quality system when selling commercial items rather than a Government-specified system;

(9) It requires that, when acquiring commercial items, the contracting officer may only use the solicitation provisions and contract clauses specifically established for acquiring commercial items and may only tailor those provisions and clauses when the customary practices in the market dictate the use of other terms and conditions; and

(10) By significantly limiting the flow down of Government-unique terms and conditions to subcontractors at all levels thereby minimizing the burden on a significant number of small businesses.

An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and will be provided to the Chief Counsel for Advocacy for the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. Comments are invited. Comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR Case 94-790), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96-511) is deemed to apply because the proposed rule contains information collection requirements. Accordingly, a request for approval of a new information collection requirement concerning Acquisition of Commercial Items is being submitted to the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* Public comments concerning this request are invited in a **Federal Register** notice which appears elsewhere in this issue.

List of Subjects in 48 CFR Chapter 1

Government procurement.

Dated: February 17, 1995.

Edward C. Loeb,

Deputy Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.

Therefore, it is proposed that 48 CFR Chapter 1 be amended as set forth below:

1. The authority citation for 48 CFR Chapter 1 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2. Section 2.101 is amended by adding in alphabetical order the definitions "Commercial component", "Commercial item", "Component", "Market research", and "Nondevelopmental item" to read as follows:

2.101 Definitions.

* * * * *

Commercial component means any component that is a commercial item.

Commercial item means—

(a) Any item, other than real property, that is of a type customarily used for nongovernmental purposes and that—

(1) Has been sold, leased, or licensed to the general public; or,

(2) Has been offered for sale, lease, or license to the general public;

(b) Any item that evolved from an item described in paragraph (a) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(c) Any item that would satisfy a criterion expressed in paragraph (a) or (b) of this definition, but for—

(1) Modifications of a type customarily available in the commercial marketplace; or

(2) Minor modifications of a type not customarily available in the commercial market place made to meet Federal Government requirements. Such modifications are considered minor if the change does not significantly alter a commercial item's function or essential physical characteristics. Minor is not defined by the specific dollar value or percentage basis of the change;

(d) Any combination of items meeting the requirements of paragraph (a), (b), (c), or (e) of this definition that are of a type customarily combined and sold in combination to the general public;

(e) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in paragraph (a), (b), (c), or (d) of this definition, and if the source of such services—

(1) Offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and

(2) Offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public;

(f) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without a fixed catalog price for a specific service performed;

(g) Any item, combination of items, or service referred to in paragraphs (a) through (f), notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

(h) A nondevelopmental item, if the procuring agency determines that the item was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.

Component means any item supplied to the Federal Government as part of an end item or of another component.

Market research means collecting and analyzing information about capabilities within the market to satisfy agency needs.

Nondevelopmental item means—

(a) Any commercial item;
 (b) Any previously developed item of supply that is in use by a department or agency of the United States, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;

(c) Any item described in paragraphs (a) or (b) of this definition that requires only minor modification or modifications of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency; or

(d) Any item of supply being produced that does not meet the requirements of paragraph (a), (b), or (c) solely because the item is not yet in use.

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3. Section 3.404 is amended by removing “or” from the end of paragraph (b)(4); by redesignating paragraph (b)(5) as (b)(6) and adding a new paragraph (b)(5); and by revising paragraph (c) to read as follows:

3.404 Solicitation provision and contract clause.

(b) * * *
 (5) The solicitation is for a commercial item (see parts 2 and 12); or

(c) The contracting officer shall insert the clause at 52.203-5, Covenant Against Contingent Fees, in all solicitations and contracts exceeding the simplified acquisition threshold other than those for commercial items (see parts 2 and 12).

4. Section 3.502-2 is amended by revising the introductory text of paragraph (i) to read as follows:

3.502-2 General.

(i) Requires each contracting agency to include in each prime contract, except contracts for commercial items (see part 12), a requirement that the prime contractor shall—

5. Section 3.502-3 is revised to read as follows:

3.502-3 Contract clause.

The contracting officer shall insert the clause at 52.203-7, Anti-Kickback Procedures, in all solicitations and contracts exceeding the simplified acquisition threshold (see part 13) other than those for commercial items (see part 12).

6. Section 3.503-2 is revised to read as follows:

3.503-2 Contract clause.

The contracting officer shall insert the clause at 52.203-6, Restrictions on Subcontractor Sales to the Government, in solicitations and contracts exceeding the simplified acquisition threshold in part 13. For procurements of commercial items, the contracting officer shall use the clause with its Alternate I.

PART 5—PUBLICIZING CONTRACT ACTIONS

7. Section 5.203 is amended by revising paragraphs (a), (b), and (c) to read as follows:

5.203 Publicizing and response time.

(a) A notice of contract action shall be published in the CBD at least 15 days before issuance of a solicitation except when the combined CBD synopsis/solicitation procedure for acquisition of commercial items is used (see 12.603).

(b) For each contract action in an amount estimated to be greater than \$25,000 but not greater than the simplified acquisition threshold, or for the acquisition of commercial items, the

contracting officer shall establish a response time which will afford potential offerors a reasonable opportunity to respond.

(c) Agencies shall allow at least a 30 day response time for receipt of bids or proposals from the date of issuance of a solicitation, if the contract action is expected to exceed the simplified acquisition threshold or is for other than the acquisition of commercial items (see part 12).

PART 6—COMPETITION REQUIREMENTS

8. Section 6.303-2 is amended by revising paragraph (a)(8) to read as follows:

6.303-2 Content.

(8) A description of the market research conducted (see part 10) and the results or a statement of the reason market research was not conducted.

9. Section 6.502 is revised to read as follows:

6.502 Duties and responsibilities.

(a) Agency and procuring activity competition advocates are responsible for promoting the acquisition of commercial items, promoting full and open competition, challenging requirements that are not stated in terms of functions to be performed, performance required or essential physical characteristics, and challenging barriers to the acquisition of commercial items and full and open competition such as unnecessarily restrictive statements of work, unnecessarily detailed specifications, and unnecessarily burdensome contract clauses.

(b) Agency competition advocates shall—

(1) Review the contracting operations of the agency and identify and report to the agency senior procurement executive—

(i) Opportunities and actions taken to acquire commercial items to meet the needs of the agency;

(ii) Opportunities and actions taken to achieve full and open competition in the contracting operations of the agency;

(iii) Actions taken to challenge requirements that are not stated in terms of functions to be performed, performance required or essential physical characteristics;

(iv) Any condition or action that has the effect of unnecessarily restricting the acquisition of commercial items or competition in the contracting actions of the agency;

(2) Prepare and submit an annual report to the agency senior procurement executive, in accordance with agency procedures, describing—

- (i) Such advocate's activities under this subpart;
- (ii) New initiatives required to increase the acquisition of commercial items;
- (iii) New initiatives required to increase competition;
- (iv) New initiatives to ensure requirements are stated in terms of functions to be performed, performance required or essential physical characteristics;
- (v) Any barriers to the acquisition of commercial items or competition that remain; and
- (vi) Other ways in which the agency has emphasized the acquisition of commercial items and competition in areas such as acquisition training and research.

(3) Recommend to the senior procurement executive of the agency goals and plans for increasing competition on a fiscal year basis; and

(4) Recommend to the senior procurement executive of the agency a system of personal and organizational accountability for competition, which may include the use of recognition and awards to motivate program managers, contracting officers, and others in authority to promote competition in acquisition.

PART 7—ACQUISITION PLANNING

7.101 [Amended]

10. Section 7.101 is amended by removing the definition "Market survey".

11. Section 7.102 is revised to read as follows:

7.102 Policy.

(a) Agencies shall perform acquisition planning and conduct market research (see part 10) for all acquisitions in order to promote and provide for—

- (1) Acquisition of commercial items or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items other than commercial items, to the maximum extent practicable (10 U.S.C. 2377 and 41 U.S.C. 251 *et seq.*); and
- (2) Full and open competition (see part 6) or, when full and open competition is not required in accordance with part 6, to obtain competition to the maximum extent practicable, with due regard to the nature of the supplies or services to be acquired (10 U.S.C. 2301(a)(5) and 41 U.S.C. 253a(a)(1)); and

(b) This planning shall integrate the efforts of all personnel responsible for

significant aspects of the acquisition. The purpose of this planning is to ensure that the Government meets its needs in the most effective, economical, and timely manner. Agencies that have a detailed acquisition planning system in place that generally meets the requirements of 7.104 and 7.105 need not revise their system to specifically meet all of these requirements.

12. Section 7.103 is amended by revising paragraph (b); redesignating paragraphs (c) through (l) as (d) through (m) and adding a new paragraph (c); and in newly designated (m) by removing "10.002(c)" and inserting "11.001(b)" to read as follows:

7.103 Agency-head responsibilities.

* * * * *

(b) Encouraging offerors to supply commercial items, or to the extent that commercial items suitable to meet the agency needs are not available, nondevelopmental items other than commercial items in response to agency solicitations (10 U.S.C. 2377 and 41 U.S.C. 251, *et seq.*); and

(c) Promoting and providing for full and open competition with due regard to the nature of the supplies and services to be acquired (10 U.S.C. 2305(a)(1)(A) and 41 U.S.C. 253a(a)(1) (see parts 6 and 11).

* * * * *

13. Section 7.105 is amended in paragraph (a)(8)(iii) by revising the parenthetical to read "(see 11.001(d))"; by revising paragraph (b)(1); and by revising paragraph (b)(12)(i) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) *Plan of action*—(1) *Sources.* Indicate the prospective sources of supplies and/or services that can meet the need. Consider required sources of supplies or services (see part 8). Include considerations of small business and small disadvantaged business concerns (see part 19). Address the extent and results of the market research and indicate their impact on the various elements of the plan.

* * * * *

(12) * * *

(i) The assumptions determining contractor or agency support, both initially and over the life of the acquisition, including consideration of contractor or agency maintenance and servicing (see subpart 7.3) and distribution of commercial items (see part 11);

* * * * *

PART 9—CONTRACTOR QUALIFICATIONS

14. Section 9.106-1 is amended by revising paragraph (a) to read as follows:

9.106-1 Conditions for preaward surveys.

(a) A preaward survey is normally required when the information on hand or readily available to the contracting officer is not sufficient to make a determination regarding responsibility. However, if the contemplated contract will have a fixed price at or below the simplified acquisition threshold or will involve the acquisition of commercial items (see part 12), the contracting officer should not request a preaward survey unless circumstances justify its cost.

* * * * *

15. Section 9.306 is amended in paragraph (f) introductory text by revising the parenthetical to read "(see 11.404)".

16. Part 10 is revised to read as follows:

PART 10—MARKET RESEARCH

Sec.

- 10.000 Scope of part.
- 10.001 Policy.
- 10.002 Procedures.

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

10.000 Scope of part.

This part prescribes policies and procedures for conducting market research to arrive at the most suitable approach to acquiring, distributing, and supporting supplies and services. This part implements requirements of 41 U.S.C. 253a(a)(1), 41 U.S.C. 264b, and 10 U.S.C. 2377.

10.001 Policy.

- (a) The head of an agency shall—
 - (1) Ensure that, in coordination with customers, legitimate needs are identified and trade-offs evaluated to acquire items which meet those needs;
 - (2) Conduct market research appropriate to the circumstances—
 - (i) Before developing new requirements documents for an acquisition by that agency;
 - (ii) Before soliciting offers for acquisitions with an estimated value in excess of the simplified acquisition threshold; and
 - (iii) Before soliciting offers for acquisitions with an estimated value less than the simplified acquisition threshold when adequate information is not available and the circumstances justify its cost.
 - (3) Use the results of market research to determine—

(i) If commercial items or, to the extent commercial items suitable to meet the agency's needs are not available, nondevelopmental items other than commercial items are available that—

(A) Meet the agency's requirements;

(B) Could be modified to meet the agency's requirements; or

(C) Could meet the agency's requirements if those requirements were modified to a reasonable extent; and

(ii) Practices of firms engaged in producing, distributing, and supporting commercial items, such as terms for warranties, buyer financing, maintenance and packaging, and marking; and

(iii) Sources capable of satisfying the agency's requirements exist.

(b) When conducting market research, the head of an agency should not require potential sources to submit more than the minimum information necessary.

10.002 Procedures.

(a) Acquisitions begin with a description of the Government's needs stated in general terms sufficient to allow conduct of market research.

(b) Market research is then conducted to ascertain the availability of commercial items, as well as distribution and logistics support to meet those needs, and to identify market practices.

(c) The extent of market research will vary, depending on such factors as urgency, estimated dollar value, complexity, and past experience. Market research involves obtaining information such as—

(1) The availability of commercial items suitable as is or that could be modified to meet the agency's requirements;

(2) Customary practices regarding customizing, modifying or tailoring of items to meet customer needs and associated costs;

(3) Customary practices, including warranty, buyer financing, discounts, etc., under which commercial sales of the products are made;

(4) The requirements of any laws and regulations unique to the item being acquired; and

(5) The distribution and support capabilities of potential suppliers, including alternative arrangements and cost estimates.

(d) Techniques for conducting market research may include any or all of the following:

(1) Contacting experts regarding market capabilities to meet requirements.

(2) Reviewing the results of recent market research undertaken to meet similar or identical requirements.

(3) Publishing formal requests for information in appropriate technical and scientific journals.

(4) Querying Government data bases that provide information relevant to agency procurements.

(5) Participating in interactive, on-line communication among industry, acquisition personnel, and customers.

(6) Obtaining source lists of similar items from other contracting activities or agencies, trade associations or other sources.

(7) Reviewing catalogs and other generally available product literature, much of which are available on-line, published by manufacturers, distributors, and dealers.

(8) Holding presolicitation conferences.

(e) When initial market research indicates commercial or nondevelopmental items other than commercial items might not be available to satisfy agency needs, reevaluate the need and determine whether it can be restated to permit commercial or nondevelopmental items other than commercial items to satisfy the agency's needs.

17. and 18. Sections 11.000 and 11.001 are revised to read as follows:

11.000 Scope of part.

This part prescribes policies and procedures for describing agency needs and related considerations of acquisition streamlining.

11.001 Policy.

(a) In fulfilling requirements of 10 U.S.C. 2305(a)(1), 10 U.S.C. 2377, 41 U.S.C. 253a(a), and 41 U.S.C. 264b, agencies shall—

(1) Specify needs using market research in a manner designed to—

(i) Promote full and open competition (see part 6), with due regard to the nature of the supplies or services to be acquired; and

(ii) Only include restrictive provisions or conditions to the extent necessary to satisfy the minimum needs of the agency or as authorized by law.

(2) To the maximum extent practicable, ensure that acquisition officials—

(i) State requirements with respect to an acquisition of supplies or services in terms of—

(A) Functions to be performed;

(B) Performance required; or

(C) Essential physical characteristics;

(ii) Define requirements in terms that enable and encourage offerors to supply commercial items, or, to the extent that

commercial items suitable to meet the agency's needs are not available, nondevelopmental items other than commercial items, in response to the agency solicitations;

(iii) Provide offerors of commercial items and nondevelopmental items other than commercial items an opportunity to compete in any procurement to fill such requirements;

(iv) Require prime contractors and subcontractors at all levels under the agency contracts to incorporate commercial items or nondevelopmental items other than commercial items as components of items supplied to the agency; and

(v) Modify requirements in appropriate cases to ensure that the requirements can be met by commercial items or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items other than commercial items.

(b) The Metric Conversion Act of 1975, as amended by the Omnibus Trade and Competitiveness Act of 1988 (15 U.S.C. 205a, et seq.), designates the metric system of measurement as the preferred system of weights and measures for United States trade and commerce and it requires that each agency use the metric system of measurement in its procurements, except to the extent that such use is impracticable or is likely to cause significant inefficiencies or loss of markets to United States firms. Requiring activities are responsible for establishing guidance implementing this policy in formulating their requirements for acquisitions.

(c) To the extent practicable, contractors should be involved in recommending application and tailoring of requirements. Requiring agencies should apply specifications, standards, and related documents initially for guidance only, making final decisions on the application and tailoring of these documents as a product of the design and development process. Requiring agencies should not dictate detailed design solutions prematurely (see 7.101 and 7.105(a)(8)).

11.002 through 11.007 [Removed]

19. Sections 11.002 through 11.007 are removed.

20. Subparts 11.1 through 11.3 are added to read as follows:

Subpart 11.1—Selecting and Developing Requirements Documents

11.101 Order of precedence.

Agencies may select from existing requirements documents, modify or

combine existing requirements documents, or create new requirements documents to meet agency needs, consistent with the following order of precedence:

- (a) Documents mandated for use by law or regulation pursuant to law.
- (b) Performance-oriented documents:
 - (1) Nongovernment standards.
 - (2) Commercial item descriptions.
 - (3) Federal specifications and standards.
 - (4) Military specifications and standards.
- (c) Design-based documents:
 - (1) Nongovernment standards.
 - (2) Federal specifications and standards.
 - (3) Military specifications and standards.
- (d) Agency-unique standards, specifications and related publications issued by the government outside the military or Federal series for the non-repetitive acquisition of nondevelopmental items.

11.102 Standardization program.

Agencies shall select existing requirements documents or develop new requirements documents that meet the needs of the agency in accordance with the guidance contained in the Federal Standardization Manual and DOD 4120.3-M, Defense Standardization Program Policies and Procedures.

11.103 Market acceptance.

(a) Section 8002(c) of Pub. L. 103-355 provides that in accordance with agency procedures, the head of an agency may, under appropriate circumstances, require offerors to demonstrate that the items offered—

- (1) Have either—
 - (i) Achieved commercial market acceptance; or
 - (ii) Been satisfactorily supplied to an agency under current or recent contracts for the same or similar requirements; and
- (2) Otherwise meet the item description, specifications, or other criteria prescribed in the public notice and solicitation.

(b) The criteria to be considered in determining commercial market acceptance include—

- (1) The minimum need of the agency concerned; and
- (2) The entire relevant commercial market, including small business.

11.104 Items peculiar to one manufacturer.

Agency requirements shall not be written so as to specify a particular brand-name, product, or a feature of a product, peculiar to one manufacturer,

thereby precluding consideration of a product manufactured by another company, unless—

- (a) The particular brand-name, product, or feature is essential to the Government's requirements, and market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or can not be modified to meet, the agency's minimum needs; and
- (b) The authority to contract without providing for full and open competition is supported by the required justifications and approvals (see 6.302-1).

Subpart 11.2—Using Requirements Documents

11.201 Identification and availability of specifications.

(a) Solicitations citing requirements documents listed in the General Services Administration (GSA) Index of Federal Specifications, Standards and Commercial Item Descriptions, the DoD Index of Specifications and Standards (DoDISS), or other agency index shall identify each document's approval date and the dates of any applicable amendments and revisions. Do not use general identification references, such as "the issue in effect on the date of the solicitation." Contracting offices will not normally furnish these cited documents with the solicitation, except when—

(1) The requirements document must be furnished with the solicitation to enable prospective contractors to make a competent evaluation of the solicitation;

(2) In the judgment of the contracting officer, it would be impracticable for prospective contractors to obtain the documents in reasonable time to respond to the solicitation; or

(3) A prospective contractor requests a copy of the requirements document.

(b) Contracting offices shall clearly identify in the solicitation any pertinent documents not listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions or DoDISS. Such documents shall be furnished with the solicitation.

(c) When documents refer to other documents, such references shall: (1) Be restricted to documents, or appropriate portions of documents, that apply in the acquisition; (2) cite the extent of their applicability; (3) not conflict with other documents and provisions of the solicitation; and (4) identify all applicable first tier references.

(d) The GSA Index of Federal Specifications, Standards and Commercial Item Descriptions and

DoDISS may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

11.202 Acquiring used or reconditioned material, former Government surplus property and residual inventory.

(a) Generally, all contractually furnished supplies and their components, including former Government property, will be new, including recycled (see 48 CFR part 23, FAR subpart 23.4 for policy on recovered materials). However, agencies may acquire used or reconditioned material, former Government surplus property, or residual inventory conforming to the solicitation's requirements, if the contracting officer determines that it is acceptable. When acquiring commercial items, the contracting officer should determine the customary practice in the industry before including a requirement for new materials. When such a determination is made, the solicitation shall clearly identify the supplies or their components that need not be new, along with the necessary details on their acceptability. Offerors wishing to provide such used or reconditioned material, former Government surplus property, or residual inventory shall do so in accordance with the clause at 52.211-5, New Material, or the provision at 52.211-6, Listing of Used or Reconditioned Material, Residual Inventory, and Former Government Surplus Property, and the clause at 52.211-7, Used or Reconditioned Material, Residual Inventory, and Former Government Surplus Property, as appropriate.

(b) Contracting officers shall consider the following when determining whether used or reconditioned materials, former Government surplus property, or residual inventory are acceptable:

- (1) Safety of persons or property.
- (2) Total cost to the Government (including maintenance, inspection, testing, and useful life).
- (3) Performance requirements.
- (4) Availability and cost of new materials and components.

(c) With regard to former Government surplus property, the contracting officer shall ensure that the prices paid for such items are reasonable considering overall cost savings to the Government. When a contract calls for material to be furnished at cost, the allowable charge for former Government surplus property shall not exceed the cost at which the contractor acquired the property.

11.203 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the provision at 52.211-1, Availability of Specifications Listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions, in solicitations that (1) are issued by civilian agency contracting offices and (2) cite specifications listed in the Index that are not furnished with the solicitation.

(b) The contracting officer shall insert the provision at 52.211-2, Availability of Specifications Listed in the DOD Index of Specifications and Standards (DoDISS), in solicitations that (1) are issued by DOD contracting offices and (2) cite specifications listed in the DoDISS that are not furnished with the solicitation.

(c) The contracting officer shall insert a provision substantially the same as the provision at 52.211-3, Availability of Specifications Not Listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions, in solicitations that cite specifications that are not listed in the Index and are not furnished with the solicitation, but may be obtained from a designated source.

(d) The contracting officer shall insert a provision substantially the same as the provision at 52.211-4, Availability for Examination of Specifications Not Listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions, in solicitations that cite specifications that are not listed in the Index and are available for examination at a specified location.

(e)(1) The contracting officer may insert the clause at 52.211-5, New Material, in solicitations and contracts for supplies. The clause shall not be used if it would be contrary to customary commercial practices for the item being acquired.

(2) The contracting officer may insert the clause in solicitations and contracts for services that may involve the incidental furnishing of parts.

(f)(1) The contracting officer may insert the provision at 52.211-6, Listing of Used or Reconditioned Material, Residual Inventory, and Former Government Surplus Property, in solicitations for supplies. The provision shall not be used if it would be contrary to customary commercial practice for the item being acquired.

(2) The contracting officer may insert the provision in solicitations for services that may involve the incidental furnishing of parts.

(g)(1) The contracting officer may insert the clause at 52.211-7, Used or

Reconditioned Material, Residual Inventory, and Former Government Surplus Property, in solicitations and contracts for supplies. The clause shall not be used if it would be contrary to customary commercial practice for the item being acquired.

(2) The contracting officer may insert the clause in solicitations and contracts for services that may involve the incidental furnishing of parts.

Subpart 11.3—Maintenance of Requirements Documents**11.301 Customer satisfaction.**

Acquisition organizations shall communicate with customers to determine how well the requirements document reflects the customer's needs and to obtain suggestions for corrective actions. Whenever practicable, the agency may provide affected industry an opportunity to comment on the requirements documents.

11.302 Maintenance of standardization documents.

(a) Agencies shall submit recommendations for changes to standardization documents listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions to the General Services Administration, Federal Supply Service, Office of Commodity Management, Washington, DC 20406. Agencies shall submit recommendations for changes to standardization documents listed in the DoDISS to the cognizant preparing activity.

(b) When an agency cites an existing standardization document but modifies it to meet its needs, the agency shall follow the guidance in Federal Standardization Manual and DOD 4120.3-M, Defense Standardization Program Policies and Procedures.

Subpart 11.4 [Redesignated from Subpart 12.1]

21. Subpart 12.1 is redesignated as Subpart 11.4 and sections 12.101 through 12.104 are redesignated as sections 11.401 through 11.404, respectively.

Subpart 11.4 Delivery or Performance Schedules

22. Newly designated section 11.401 is amended in paragraph (a) by revising the last sentence; and in the parenthetical of paragraph (c) by removing "subpart 12.2" and inserting "subpart 11.5". The revised text reads as follows:

11.401 General.

(a) * * * Schedules that are unreasonably tight or difficult to attain (1) tend to restrict competition, (2) are inconsistent with small business policies, and (3) may result in higher contract prices.

* * * * *

23. Newly designated section 11.402 is amended by revising paragraphs (a)(2) and (5) to read as follows:

11.402 Factors to consider in establishing schedules.

(a) * * *

(2) Industry practices;

* * * * *

(5) Production time;

* * * * *

11.404 [Amended]

24. Newly designated section 11.404 is amended in paragraph (a)(2) by removing "52.212-1" and inserting "52.211-8"; in paragraph (a)(3) by removing "52.212-2" and inserting "52.211-9"; and in paragraph (b) by removing "52.211-3" and inserting "52.211-10".

Subpart 11.5 [Redesignated]

25. Subpart 12.2 is redesignated as Subpart 11.5 and sections 11.501 through 11.504 are redesignated from sections 12.201 through 12.204.

11.504 [Amended]

26. Newly designated section 11.504 is amended in paragraph (a) by removing "52.212-4" and inserting "52.211-11"; in paragraph (b) by removing "52.212-5" and inserting "52.211-12"; and in paragraph (c) by removing "52.212-6" and inserting "52.211-13".

Subpart 11.6 [Redesignated from 12.3]

27. Subpart 12.3 is redesignated as Subpart 11.6 and sections 12.300 through 12.304 are redesignated as sections 11.600 through 11.604, respectively.

11.604 [Amended]

28. Newly designated section 11.604 is amended in paragraph (a) by removing "52.212-7" and inserting "52.211-14"; and in paragraph (b) by removing "52.212-8" and inserting "52.211-15".

Subpart 11.7 [Redesignated from 12.4]

29. Subpart 12.4 is redesignated as Subpart 11.7 and sections 12.401 through 12.403 are redesignated as 11.701 through 11.703, respectively.

11.703 [Amended]

30. Newly designated section 11.703 is amended in paragraph (a) by removing "52.212-9" and inserting "52.211-16"; in paragraph (b) by removing "52.212-10" and inserting "52.211-17"; and in paragraph (c) by removing "52.212-11" and inserting "52.211-18".

31. Subpart 12.5 is redesignated as subpart 42.13 and sections 12.501 through 12.505 are redesignated as sections 42.1301 through 42.1305, respectively.

31a. Part 12 is revised to read as follows:

PART 12—ACQUISITION OF COMMERCIAL ITEMS

Sec.

- 12.000 Scope of part.
- 12.001 Definition.

Subpart 12.1—Acquisition of Commercial Items—General

- 12.101 Policy.
- 12.102 Applicability.

Subpart 12.2—Special Requirements for the Acquisition of Commercial Items

- 12.201 General.
- 12.202 Market research and description of agency need.
- 12.203 Solicitation, evaluation, and award.
- 12.204 Solicitation/contract form.
- 12.205 Offers.
- 12.206 Use of past performance.
- 12.207 Contract type.
- 12.208 Contract quality assurance.
- 12.209 Warranties.
- 12.210 Contract financing methods.
- 12.211 Technical data.
- 12.212 Other customary commercial practices.

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

- 12.301 Scope of subpart.
- 12.302 Solicitation provisions and contract clauses for the acquisition of commercial items.
- 12.303 Tailoring of provisions and clauses for the acquisition of commercial items.

Subpart 12.4—Applicability of Certain Laws to the Acquisition of Commercial Items

- 12.400 Scope of subpart.
- 12.401 Applicability.
- 12.402 Applicability of certain laws to Executive agency contracts for the acquisition of commercial items.

Subpart 12.5—Unique Requirements for the Administration of Contracts for Commercial Items

- 12.501 General.
- 12.502 Pricing of changes.
- 12.503 Acceptance.
- 12.504 Termination.

Subpart 12.6—Streamlined Procedures for Solicitation and Award of Contracts for Commercial Items

- 12.601 General.
- 12.602 Streamlined evaluation of offers.
- 12.603 Streamlined solicitation for commercial items.

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

12.000 Scope of part.

This part prescribes policies and procedures unique to the acquisition of commercial items. It implements the Federal Government's preference for the acquisition of commercial items contained in Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355) by establishing acquisition policies more closely resembling those of the commercial market place and encouraging the acquisition of commercial items and components at all levels.

12.001 Definition.

Subcontract, as used in this part, includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

Subpart 12.1—Acquisition of Commercial Items—General

12.101 Policy.

Agencies shall—

(a) Conduct market research to determine whether commercial items or nondevelopmental items other than commercial items are available that could meet the agency's requirements;

(b) Acquire commercial items or nondevelopmental items other than commercial items when they are available to meet the needs of the agency; and

(c) Require prime contractors and subcontractors at all levels to incorporate, to the maximum extent practicable, commercial items or nondevelopmental items other than commercial items as components of items supplied to the agency.

12.102 Applicability.

(a) This part shall be used for the acquisition of—

(1) Commercial items; and

(2) Nondevelopmental items other than commercial items, but only when competing with commercial items under the same terms, conditions and evaluation/award criteria (i.e., when at least one offer is received for a commercial item under the same solicitation).

(b) Contracts for the acquisition of commercial items are subject to the requirements in other parts of this

chapter. When a requirement in this part is inconsistent with a requirement in another part of this chapter, this part 12 shall take precedence for the acquisition of commercial items.

(c) This part shall not apply to the acquisition of commercial items at or below the micro-purchase threshold (see 48 CFR part 13, FAR subpart 13.6).

Subpart 12.2—Special Requirements for the Acquisition of Commercial Items

12.201 General.

Public Law 103-355 establishes special requirements for the acquisition of commercial items intended to more closely resemble those customarily used in the commercial market place. This subpart identifies those special requirements as well as other considerations necessary for proper planning, solicitation, evaluation and award of contracts for commercial items.

12.202 Market research and description of agency need.

(a) Market research is an essential element of building an effective strategy for the acquisition of commercial items and establishes the foundation for the agency description of need (see part 11), the solicitation, and resulting contract.

(b) The description of agency need must contain sufficient detail for potential offerors of commercial items to know which commercial products or services to offer. Generally, an agency's statement of need for a commercial item will describe the product or service to be acquired and explain how the agency intends to use the product or service in terms of function to be performed, performance requirement or essential physical characteristics. Describing the agency's need in these terms allows offerors to propose methods that will best meet the needs of the Government.

12.203 Solicitation, evaluation, and award.

(a) Contracting officers may use the procedures in parts 13, Simplified Acquisition Procedures; 14, Sealed Bidding; or 15, Contracting by Negotiation, as appropriate, for the acquisition of commercial items. However, regardless of the procedures being used, when a requirement in this part is inconsistent with a requirement in another part of this chapter, this part 12 shall take precedence.

(b) Where FACNET is available, it may be used to solicit and award contracts for commercial items (see part 4).

12.204 Solicitation/contract form.

The Standard Form XXXX, Solicitation/Contract/Order for Commercial Items, shall be used by the contracting officer when soliciting offers and awarding contracts for commercial items. This form contains the information necessary for solicitations and contracts as well as documenting receipt, inspection and acceptance of commercial items. Other Standard Forms are not compatible with the policies for the acquisition of commercial items in that they contain references to the Uniform Contract Format and certain FAR clauses that are not applicable to the acquisition of commercial items.

12.205 Offers.

(a) Contracting officers should, as part of market research, review existing product literature generally available in the industry to determine its adequacy for purposes of evaluation. If adequate, contracting officers shall use existing product literature from offerors of commercial items in lieu of requesting unique technical proposals.

(b) Contracting officers should allow offerors to propose more than one product that will meet a Government need in response to solicitations for commercial items. The contracting officer shall evaluate each product as a separate offer.

(c) Contracting officers may allow fewer than 30 days response time for receipt of offers for commercial items. The response time shall afford potential offerors a reasonable opportunity to respond to ensure adequate competition (see 5.203).

12.206 Use of past performance.

Past performance should be an important element of every evaluation and contract award for commercial items. Contracting officers should consider past performance data from a wide variety of sources both inside and outside the Federal Government in accordance with the policies and procedures contained in 48 CFR Part 9, (FAR) subpart 9.1 and 48 CFR Part 15, (FAR) subpart 15.6.

12.207 Contract type.

Firm fixed price contracts or fixed price contracts with economic price adjustment shall be used for the acquisition of commercial items. Use of any other contract type to acquire commercial items is prohibited.

12.208 Contract quality assurance.

Solicitations and contracts for commercial items shall use contractors' existing quality assurance systems as a

substitute for Government inspection and testing before tendering for acceptance unless customary market practices for the commercial item being acquired permits in-process inspection.

12.209 Warranties.

(a) To the maximum extent practicable, solicitations for commercial items shall require offerors to offer the Government at least the same warranty terms, including offers of extended warranties, offered to the general public in customary commercial practice. Solicitations may specify minimum warranty terms, such as minimum duration, appropriate for the Government's intended use of the item.

(b) Agencies shall consider warranties offered in light of established systems for their administration. When necessary, agencies shall establish procedures to permit the effective administration of commercial warranties to include identifying warranted items and warranty periods, facilitating return of warranted commercial items to the contractor for repair or replacement and collection of product performance information.

12.210 Contract financing methods.

Customary industry practice for some commercial items may include a form of buyer financing such as advance (pre-performance) payments or incremental (pre-delivery) payments based on time or specified performance milestones. If market research confirms that buyer financing is the customary industry practice for the commercial item to be acquired, the contracting officer may offer Government financing. Such financing shall be consistent with customary industry practices and the requirements and limitations of part 32.

12.211 Technical data.

Generally, the Government will acquire only the technical data customarily provided to the public. (See part 27.)

12.212 Other customary commercial practices.

Market research may indicate other customary 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 essential to concluding a satisfactory business arrangement, in the Government's best interest, and not otherwise precluded by law or executive order.

Subpart 12.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items.**12.301 Scope of subpart.**

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

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

(a) In accordance with Section 8002 of Pub. L. 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) To implement this Act, the contracting officer shall 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 26, SF XXXX). The contracting officer is not required to use any other provision. The contracting officer may tailor these instructions or provide additional instructions tailored to the specific acquisition in accordance with 12.303;

(2) *The provision at 52.212-3, Offeror Representations and Certifications—Commercial Items.* This provision provides a single, consolidated and streamlined list of certifications and representations for the acquisition of commercial items and is attached to the solicitation for offerors to complete and return with their offer. The contracting officer is not required to use any other provision containing a certification or representation. This provision may not be tailored except in accordance with subpart 1.4;

(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 26, SF XXXX). The contracting officer is not required to use any other clause except as provided in 12.302(b)(4). The

contracting officer may tailor this clause in accordance with 12.303; and

(4) *The clause at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.* This clause includes 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 indicate which, if any, of the additional clauses cited in 52.212-5 are applicable to the specific acquisition. When either 15.804-2(b) or the exception at 15.804-1(a)(2) apply, the contracting officer shall include the appropriate clauses prescribed by part 15. The contracting officer is not required to include any other FAR clause in the contract. This clause may not be tailored except in accordance with 48 CFR part 1, subpart 1.4.

(c) The contracting officer may insert the provision at 52.212-2, Evaluation—Commercial Items, in solicitations for commercial items (see 12.602). If this provision is not used, a similar provision containing all evaluation factors required by 48 CFR part 14, subpart 14.2 or 48 CFR part 15, subpart 15.6 shall be included in the solicitation as an addendum (see 12.303(c)).

(d) Notwithstanding prescriptions contained elsewhere in the FAR, only the provisions and clauses prescribed in this subpart shall be required for use in solicitations and contracts for the acquisition of commercial items. The provisions and clauses in this part shall be revised by the FAR Council, as necessary, to reflect the applicability of future statutes and executive orders to contracts for the acquisition of commercial items in accordance with Section 34 of the Office of Federal Procurement Policy Act.

(e) Agencies shall supplement these provisions and clauses as necessary to reflect agency unique statutes.

12.303 Tailoring of provisions and clauses for the acquisition of commercial items.

(a) The provisions and clauses established in this subpart are intended to address, to the maximum extent practicable, customary commercial market place 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 and the variations in customary commercial practices across the entire market place, contracting officers may, 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) Contracting officers shall not tailor the clause at 52.212-4, Contract Terms and Conditions—Commercial Items, or otherwise include any additional terms or conditions in a solicitation or contract for commercial items that are 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 market place, 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.

(c) Tailoring shall be by addenda to the solicitation and contract. The contracting officer shall indicate in Block 26 of the SF XXXX 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 XXXX; a continuation of the description of the supplies/services being acquired; further elaboration of any other item(s) on the SF XXXX; any other terms or conditions necessary for the performance of the proposed contract (such as options, ordering procedures for indefinite-delivery type contracts, warranties, contract financing arrangements, etc.).

Subpart 12.4—Applicability of Certain Laws to the Acquisition of Commercial Items

12.400 Scope of subpart.

As required by Section 34 of the Office of Federal Procurement Policy Act (41 U.S.C. 430), this subpart lists provisions of laws that (a) Are not applicable to contracts for the acquisition of commercial items, or (b) are not applicable to subcontracts, at any level, for the acquisition of a commercial item. This subpart also lists provisions of law that have been amended to eliminate or modify their applicability to either contracts or subcontracts for the acquisition of commercial items.

12.401 Applicability.

(a) This subpart applies to any contract or subcontract at any level for the acquisition of commercial items.

(b) Nothing in this subpart shall be construed to authorize the waiver of any provision of law with respect to any subcontract if the prime contractor is reselling or distributing commercial items of another contractor without adding value.

12.402 Applicability of certain laws to Executive agency contracts for the acquisition of commercial items.

(a) The following laws are not applicable to executive agency contracts for the acquisition of commercial items:

(1) 41 U.S.C. 43, Walsh-Healey Act (see 48 CFR part 22, subpart 22.6).

(2) 41 U.S.C. 254(a) and 10 U.S.C. 2306(b), Contingent Fees (see 3.404).

(3) 41 U.S.C. 416(a)(6), Minimum Response Time for Offers under Office of Federal Procurement Policy Act (see 5.203).

(4) 41 U.S.C. 701 *et seq.*, Drug-Free Workplace Act of 1988 (see 23.501).

(b) Certain requirements of the following laws have been eliminated for executive agency contracts for the acquisition of commercial items:

(1) 33 U.S.C. 1368, Requirement for a certificate and clause under the Federal Water Pollution Control Act (see 23.105);

(2) 40 U.S.C. 327 *et seq.*, Requirement for a certificate and clause under the Contract Work Hours and Safety Standards Act (see 22.305);

(3) 41 U.S.C. 57(a) and (b), and 58, Requirement for a clause and certain other requirements related to the Anti-Kickback Act of 1986 (see 3.502);

(4) 41 U.S.C. 423e(1)(B), Requirement for certain certifications under the Procurement Integrity Act (see 3.104-9);

(5) 42 U.S.C. 7606, Requirements for a certificate and clause under the Clean Air Act (see 23.105);

(6) 49 U.S.C. 40118, Requirement for a certificate and clause Fly American provisions (see 47.405);

(c) The applicability of the following laws have been modified in regards to Executive agency contracts for the acquisition of commercial items:

(1) 41 U.S.C. 253g and 10 U.S.C. 2402, Prohibition on Limiting Subcontractor Direct Sales to the United States (see 3.503);

(2) 41 U.S.C. 254(d) and 10 U.S.C. 2306a, Truth in Negotiations Act (see 15.804);

(3) 41 U.S.C. 422, Cost Accounting Standards (see 48 CFR part 99);

(d) The FAR prescription, provision or clause for each of these statutes has been revised in the appropriate part to reflect their proper application to the acquisition of commercial items.

12.403 Applicability of certain laws to subcontracts for the acquisition of commercial items.

(a) The following laws are not applicable to subcontracts under either a contract for the acquisition of commercial items or a subcontract for the acquisition of commercial items: [list of laws to be published in the **Federal Register** in a future proposed rule under FAR case 94-791]

(b) Certain requirements of the following laws have been eliminated for subcontracts under either a contract for the acquisition of commercial items or subcontract for the acquisition of commercial items: [list of laws to be published in the **Federal Register** in a future proposed rule under FAR case 94-791]

(c) The applicability of the following laws have been modified in regards to subcontracts under either a contract for the acquisition of commercial items or a subcontract for the acquisition of commercial items: [list of laws to be published in the **Federal Register** in a future proposed rule under FAR case 94-791]

(d) The FAR prescription, provision or clause for each of these statutes has been revised in the appropriate part to reflect their proper application to the acquisition of commercial items.

Subpart 12.5—Unique Requirements for the Administration of Contracts for Commercial Items**12.501 General.**

This subpart outlines selected areas where the administration of contracts for commercial items differs substantially from the administration of other Government contracts.

12.502 Pricing of changes.

When the exceptions at 15.804-1(a) do not apply, the contracting officer shall include the appropriate clauses prescribed by part 15.

12.503 Acceptance.

Acceptance under the clause at 52.212-4, Contract Terms and Conditions—Commercial Items, assumes that the Government will rely on the contractor's assurances that commercial items tendered for acceptance conform to the requirements of the contract. The acceptance provision at 52.212-4 includes patent defects as a reason to revoke finality of acceptance.

12.504 Termination.

(a) The clause at 52.212-4, Contract Terms and Conditions—Commercial Items, contains procedures for termination of contracts for commercial

items, either for convenience or for cause, that are consistent with customary commercial practice. The contracting officer should consult with legal counsel prior to terminating any contract for cause.

(b) Contractors are required to notify the Government when there will be an excusable delay. Failure to notify the Government as soon as it is reasonably possible could result in termination for cause.

(c) The remedies available to the Government if a contract is terminated for cause are those available to any buyer in the marketplace and are not limited by part 49. The Government's preferred remedy will be to acquire similar items from another contractor and charge the terminated contractor with any excess procurement costs.

Subpart 12.6—Streamlined Procedures for Solicitation and Award of Contracts for Commercial Items**12.601 General.**

This subpart provides (a) a streamlined procedure for evaluating offers for commercial items; and (b) a streamlined procedure for soliciting offers for commercial items. These procedures are intended to simplify the process of preparing and issuing solicitations, and evaluating offers for commercial items consistent with customary commercial practices. While the procedures described in this subpart are appropriate for many commercial items, other methods of evaluation may also be appropriate. The contracting officer may use these procedures for soliciting offers for commercial items in lieu of procedures contained in parts 13, 14 or 15.

12.602 Streamlined evaluation of offers.

(a) The Contracting officer may insert a provision substantially the same as the provision at 52.212-2, Evaluation—Commercial Items, in solicitations for commercial items. Paragraph (a) of the provision shall be tailored to the specific acquisition to describe the evaluation factors and relative importance of those factors. This provision contemplates an approach designed to select the source whose offer will provide the Government with the greatest value in terms of performance and other factors. Other methods of evaluation and basis for award may be more appropriate for a given acquisition.

(b) Offers shall be evaluated in accordance with the tailored criteria contained in the provision at 52.212-2, Evaluation—Commercial Items, and any addenda. For many commercial items,

the criteria need not be more detailed than technical (capability of the item offered to meet the Agency need), price and past performance. Technical capability may be evaluated by how well the proposed products meet the Government requirement instead of predetermined subfactors. Solicitations for commercial items do not have to contain subfactors for technical capability when the solicitation adequately describes its intended use. A technical evaluation would include examination of such things as product literature, product samples (if requested), technical features and warranty provisions. Past performance shall be evaluated in accordance with the procedures in 48 CFR part 15, subpart 15.6. The contracting officer shall ensure the instructions provided in the provision at 52.212-1, Instructions to Offerors—Commercial Items, and the evaluation criteria provided in the provision at 52.212-2, Evaluation—Commercial Items, are in agreement.

(c) Select the offer that is most advantageous to the Government based on the factors contained in the solicitation. Fully document the rationale for selection of the successful offeror including discussion of any trade-offs considered.

12.603 Streamlined solicitation for commercial items.

(a) To reduce the time required to solicit and award contracts for the acquisition of commercial items, the contracting officer may use this procedure which combines the CBD synopsis required by 5.203 and the issuance of the solicitation into a single document with the following limitations:

(1) FAR 5.207 limits submissions to the CBD to 12,000 textual characters (approximately 3½ single-spaced pages).

(2) This combined CBD synopsis/solicitation is only appropriate where the solicitation is relatively simple and is not recommended for use when lengthy addenda to the solicitation are necessary.

(b) To use these procedures, the contracting officer shall—

(1) Prepare the synopsis as described at 5.207 for items 1-16;

(2) In item 17, Description, include the following additional information:

(i) A statement that this is a combined synopsis/solicitation for commercial items prepared in accordance with the format in subpart 12.6, as supplemented with additional information included in this notice, and that a written solicitation will not be issued.

(ii) A statement that the solicitation document and incorporated provisions and clauses are those in effect through FAC _____.

(iii) A notice of small business or other set-aside, if applicable.

(iv) A list of contract line item number(s) and items, quantities and units of measure, (including option(s), if applicable).

(v) Description of requirements for the items to be acquired.

(vi) Date(s) and place(s) of delivery.

(vii) A statement regarding any addenda to the provision at 52.212-1, Instructions to Offerors—Commercial.

(viii) A statement regarding the applicability of the provision at 52.212-2, Evaluation—Commercial Items, if used, and the specific evaluation criteria to be included in paragraph (a) of that provision. If this provision is not used, describe the evaluation procedures to be used.

(ix) A statement advising offerors to include a completed copy of the provision at 52.212-3, Offeror Representations and Certifications—Commercial Items, with its offer.

(x) A statement regarding any addenda to the clause at 52.212-4, Contract Terms and Conditions—Commercial Items.

(xi) A statement regarding which, if any, of the additional FAR clauses cited in the clause at 52.212-5, Contract Terms and Conditions Required To Implement Statutes Or Executive Orders—Commercial Items, are applicable to the acquisition.

(xii) A statement regarding any additional contract requirement(s) or terms and conditions (such as contract financing arrangements, warranty requirements or GSA Delegation of Procurement Authority (DPA) case number (see FIRMR 201-39.106-4)) determined by the contracting officer to be necessary for this acquisition and consistent with customary commercial practices.

(xiii) A statement regarding any applicable Commerce Business Daily numbered notes.

(xiv) The date, time and place offers are due.

(3) Response time for receipt of offers—

(i) Because the CBD synopsis and solicitation are contained in a single document, it is not necessary to publish a separate CBD synopsis 15 days before the issuance of the solicitation; and

(ii) When using the combined CBD synopsis/solicitation, contracting officers shall allow at least 15 days response time (see 5.203(b)).

(4) Post copies of the combined CBD synopsis/solicitation in accordance with 5.101(a)(2).

(5) Amendments to solicitations shall be published in the same manner as the initial synopsis/solicitation.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

13.501 [Amended]

32. Section 13.501 is amended in paragraph (c) by removing “12.4” and inserting “11.7”.

PART 14—SEALED BIDDING

14.201-2 [Amended]

33. 14.201-2 is amended in the parenthetical of paragraph (c) by removing “part 10, Specifications, Standards, and Other Product Descriptions” and inserting “part 11”; and in the parenthetical of paragraph (d) by removing “10.004(e)” and inserting “part 11”.

14.404-1 [Amended]

34. Section 14.404-1 is amended in paragraph (b) by removing “10.008” and inserting “11.201”.

PART 15—CONTRACTING BY NEGOTIATION

15.406-2 [Amended]

35. Section 15.406-2 is amended in the parenthetical of paragraph (c) by removing “part 10, Specifications, Standards, and Other Product Descriptions” and inserting “part 11”; and in the parenthetical of paragraph (d) by removing “10.004(e)” and inserting “part 11”.

36. Section 15.501 is amended by revising the definition “Commercial product offer” to read as follows:

15.501 Definitions.

* * * * *

Commercial item offer means an offer of a commercial item the vendor wishes to see introduced in the Government’s supply system as an alternate or replacement for an existing supply item.

* * * * *

15.503 [Amended]

37. Section 15.503 is amended in paragraph (b) by removing the word “product” and inserting “item”.

38. Section 15.704 is amended by revising the second sentence to read as follows:

15.704 Items and work included.

* * * Raw materials, commercial items (see 2.101), and off-the-shelf items (see 46.101) shall not be included, unless their potential impact on contract cost or schedule is critical. * * *

PART 16—TYPES OF CONTRACTS

39. Section 16.201 is amended by adding a sentence at the end of the paragraph to read as follows:

16.201 General.

* * * The contracting officer shall use firm-fixed price or fixed-price with economic price adjustment contracts when acquiring commercial items.

40. Section 16.202-2 is amended by revising the introductory paragraph to read as follows:

16.202-2 Application.

A firm-fixed price contract is suitable for acquiring commercial items (see parts 2 and 12) or for acquiring other supplies or services on the basis of reasonably definite functional or detailed specifications (see part 11) when the contracting officer can establish fair and reasonable prices at the outset, such as when—

* * * * *

41. Section 16.301-3 is amended by redesignating paragraphs (a) through (c) as paragraphs (a)(1) through (a)(3), respectively, designating the introductory text as paragraph (a) introductory text; and adding paragraph (b) to read as follows:

16.301-3 Limitations.

(a) A cost-reimbursement contract may be used only when—

* * * * *

(b) The use of cost-reimbursement contracts is prohibited for the acquisition of commercial items (see parts 2 and 12).

16.603-2 [Amended]

42. Section 16.603-2 is amended in paragraph (e) by removing “12.304” and inserting “11.604”.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

43. Section 22.305 is amended by redesignating paragraph (h) as (i) and adding a new paragraph (h) to read as follows:

22.305 Contract clause.

* * * * *

(h) Contracts for commercial items (see parts 2 and 12).

* * * * *

44. Section 22.604-1 is amended by revising paragraph (a) to read as follows:

22.604-1 Statutory exemptions.

* * * * *

(a) Any item in those situations where the contracting officer is authorized by the express language of a statute to

purchase "in the open market" generally (such as commercial items, see part 12); or where a specific purchase is made under the conditions described in 6.302-2 in circumstances where immediate delivery is required by the public exigency.

* * * * *

PART 23—ENVIRONMENTAL, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

45. Section 23.105 is amended at the end of paragraph (b)(2) by removing "or"; by redesignating paragraphs (b)(3) and (4) as (b)(4) and (5), respectively; and adding a new paragraph (b)(3) to read as follows:

23.105 Solicitation provision and contract clause.

* * * * *

(b) * * *

(3) The contract is for other than commercial items; or

* * * * *

46. Section 23.501 is amended by redesignating paragraphs (b) through (d) as (c) through (e) respectively, and adding a new paragraph (b) to read as follows:

23.501 Applicability.

* * * * *

(b) Contracts for the acquisition of commercial items (see part 12);

* * * * *

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

36.206 [Amended]

47. Section 36.206 is amended by removing "12.202" and inserting "11.502".

36.303 [Amended]

48. Section 36.303 is amended in paragraph (c)(4) by removing "12.1" and inserting "48 CFR part 11, subpart 11.4".

PART 42—CONTRACT ADMINISTRATION

42.1105 [Amended]

49. and 50. Section 42.1105 is amended by removing the reference "subpart 12.3" and inserting "48 CFR part 11, subpart 11.6".

Subpart 42.13 [Redesignated from subpart 12.5]

42.1304 [Amended]

51. Newly designated section 42.1304 (redesignated from 12.504) is amended in paragraph (a) by removing "52.212-15" and inserting "52.242-17".

42.1305 [Amended]

52. Newly designated section 42.1305 (redesignated from 12.505) is amended in paragraph (a) by removing "52.212-12" and inserting "52.242-14"; in paragraph (b)(1) by removing "52.212-13" and inserting "52.242-15"; in paragraph (c) by removing "52.212-14" and inserting "52.242-16"; and in paragraph (d) by removing "52.212-15" and inserting "52.242-17".

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

53. Subpart 44.4, consisting of sections 44.400 through 44.403, is added to read as follows:

Subpart 44.4—Subcontracts for Commercial Items and Commercial Components

Sec.

44.400 Scope of subpart.

44.401 Applicability.

44.402 Policy requirements.

44.403 Contract clause.

Subpart 44.4—Subcontracts for Commercial Items and Commercial Components

44.400 Scope of subpart.

This subpart prescribes the policies limiting the contract clauses a prime contractor may be required to apply to any subcontractors that are furnishing commercial items or commercial components in accordance with Section 8002(b)(2) (Pub. L. 103-355).

44.401 Applicability.

This subpart applies to all contracts and subcontracts. For the purpose of this subpart, the term "subcontract" has the same meaning as defined in part 12.

44.402 Policy requirements.

(a) To the maximum extent practicable—

(1) Contractors and subcontractors at all levels shall incorporate commercial items or nondevelopmental items other than commercial items as components of items delivered to the Government; and

(2) Agencies shall not require prime contractors to apply to any of its divisions, subsidiaries, affiliates, subcontractors or suppliers that are furnishing commercial items or commercial components any clause, except those—

(i) Required to implement provisions of law or executive orders applicable to subcontractors furnishing commercial items or commercial components; or

(ii) Determined to be consistent with customary commercial practice for the item being acquired.

(b) The clause at 52.244-XX, Subcontracts for Commercial Items and Commercial Components, implements the policy in paragraph (a) of this section. Notwithstanding any other clause in the prime contract, only those clauses identified in the clause at 52.244-XX are required to be in subcontracts for commercial items or commercial components.

(c) Agencies shall supplement the clause at 52.244-XX, as necessary to reflect agency unique statutes.

44.403 Contract clause.

The contracting officer shall insert the clause at 52.244-XX, Subcontracts for Commercial Items and Commercial Components, in solicitations and contracts for supplies or services other than commercial items.

PART 46—QUALITY ASSURANCE

54. Section 46.101 is amended by adding in alphabetical order the definition "Commercial item" to read as follows:

46.101 Definitions.

* * * * *

Commercial item (see 2.101).

* * * * *

55. Section 46.102 is amended by redesignating paragraph (f) as (g) and adding a new paragraph (f) to read as follows:

46.102 Policy.

* * * * *

(f) For the acquisition of commercial items, contractors are permitted to use their existing quality assurance system as a substitute for compliance with Government-specified requirements unless customary market practice for the commercial item being acquired permits in-process inspection (Pub. L. 103-355);

* * * * *

Subpart 46.2—Contract Quality Requirements

46.202 [Amended]

56. Section 46.202 is amended by removing "three" and inserting "four".

57. Sections 46.202-1 through 46.202-3 are redesignated as 46.202-2 through 46.202-4 respectively, and a new 46.202-1 is added to read as follows:

46.202-1 Contracts for commercial items.

When acquiring commercial items (see part 12), the Government shall use contractors' existing quality assurance system as a substitute for Government inspection and testing before tendering for acceptance unless customary market

practices for the commercial item being acquired permits in-process inspection.

58. Section 46.203 is amended by revising paragraph (a)(1); at the end of paragraph (a)(2) by removing the semicolon and "or" and inserting a period; and by removing paragraph (a)(3). The revised text reads as follows:

46.203 Criteria for use of contract quality requirements.

* * * * *

(a) * * *

(1) Commercial (described in commercial catalogs, drawing, or industrial standards; see part 2); or

* * * * *

46.204 [Removed and reserved]

59. Section 46.204 is removed and reserved.

60. Section 46.709 is revised to read as follows:

46.709 Warranties of commercial items.

The contracting officer should take advantage of commercial warranties, including extended warranties (where appropriate and in the Government's best interests), offered by the contractor for the repair and replacement of commercial items (see part 12).

58. Section 46.710 is amended by revising the first sentence of the introductory paragraph; by removing paragraphs (a)(2) and (b)(2) and redesignating paragraphs (a)(3) through (a)(6) as (a)(2) through (a)(5), and paragraphs (b)(3) through (b)(5) as (b)(2) through (b)(4), respectively. The revised text reads as follows:

46.710 Contract clauses.

The clauses and alternates prescribed in this section may be used in solicitations and contracts in which inclusion of a warranty is appropriate (see 46.709 for warranties for commercial items). * * *

* * * * *

61. Section 47.405 is amended by revising the last sentence to read as follows:

47.405 Contract clause.

* * * This clause does not apply to contracts awarded using the simplified acquisition procedures in part 13 or contracts for commercial items (see part 12).

PART 49—TERMINATION OF CONTRACTS

62. Section 49.501 is revised to read as follows:

49.501 General.

This subpart prescribes the principal contract termination clauses. For

contracts for the acquisition of commercial items, this part provides administrative guidance which may be followed when it is consistent with the requirements and procedures in the clause at 52.212-4, Contract Terms and Conditions—Commercial Items. In appropriate cases, agencies may authorize the use of special purpose clauses, if consistent with this chapter.

49.607 [Amended]

63. Section 49.607 is amended by removing "12.5" in the introductory text and inserting "48 CFR part 42, subpart 42.13".

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

64. Section 52.202-1 is amended by revising the date of the clause; by redesignating paragraphs (b) and (c) as (e) and (f), and adding new paragraphs (b), (c) and (d) to read as follows:

52.202-1 Definitions.

* * * * *

Definitions (Date)

* * * * *

(b) *Commercial component* means any component that is a commercial item.

(c) *Commercial item* means

(1) Any item, other than real property, that is of a type customarily used for nongovernmental purposes and that—

(i) Has been sold, leased, or licensed to the general public; or,

(ii) Has been offered for sale, lease, or license to the general public;

(2) Any item that evolved from an item described in paragraph (c)(1) of this clause through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(3) Any item that would satisfy a criterion expressed in paragraphs (c)(1) or (c)(2) of this clause, but for—

(i) Modifications of a type customarily available in the commercial marketplace; or

(ii) Minor modifications of a type not customarily available in the commercial market place made to meet Federal Government requirements. Such modifications are considered minor if the change does not significantly alter a commercial item's function or essential physical characteristics. Minor is not defined by the specific dollar value or percentage basis of the change;

(4) Any combination of items meeting the requirements of paragraphs (c)(1), (2), (3), or (5) of this clause that are of a type customarily combined and sold in combination to the general public;

(5) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in paragraphs (c)(1), (2), (3), or (4) of this clause, and if the source of such services—

(i) Offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and

(ii) Offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public;

(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without a fixed price for a specific service performed;

(7) Any item, combination of items, or service referred to in subparagraphs (c)(1) through (c)(6), notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a Contractor; or

(8) A nondevelopmental item, if the procuring agency determines that the item was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local Governments.

(d) *Component* means any item supplied to the Federal Government as part of an end item or of another component.

* * * * *

(End of clause)

65. Section 52.203-6 is amended by revising the clause date; and by adding an Alternate I following paragraph (c)(5) to read as follows:

52.203-6 Restrictions on Subcontractor Sales to the Government.

* * * * *

Restrictions on Subcontractor Sales to the Government (Date)

* * * * *

Alternate I (DATE). As prescribed in 3.503-2, substitute the following paragraph in place of paragraph (b) of the basic clause:

(b) The prohibition in paragraph (a) of this clause does not preclude the Contractor from asserting rights that are otherwise authorized by law or regulation. For procurements of commercial items, the prohibition in paragraph (a) applies only to the extent that any agreement restricting sales by subcontractors results in the Federal Government being treated differently from any other prospective purchaser for the sale of the commercial item(s).

52.210-1 through 52.210-7 [Redesignated]

66. Sections 52.210-1 through 52.210-7 are redesignated as 52.211-1 through 52.211-7, respectively.

52.212-1 through 52.212-11 [Redesignated]

67. Sections 52.212-1 through 52.212-11 are redesignated as 52.211-8 through 52.211-18, respectively.

52.212-12 through 52.212-15
[Redesignated]

68. Sections 52.212-12 through 52.212-15 are redesignated as 52.242-14 through 52.242-17.

69. 52.212-1 through 52.212-5 Added.

52.212-1 through 52.242-15 [Added]

70. Part 52 is amended by adding new sections 52.212-1 through 52.212-5, to read as follows:

Sec.

52.212-1 Instructions to Offerors—
Commercial Items.

52.212-2 Evaluation—Commercial Items.

52.212-3 Offeror Representations and
Certifications—Commercial Items.

52.212-4 Contract Terms and Conditions—
Commercial Items.

52.212-5 Contract Terms and Conditions
Required to Implement Statutes or
Executive Orders—Commercial Items.

**52.212-1 Instructions to Offerors—
Commercial Items.**

As prescribed in 12.302(b)(1), insert the following provision:

**Instructions to Offerors—Commercial Items
(Date)**

Standard Industrial Classification (SIC) Code and Small Business Size Standard. The SIC code and small business size standard for this acquisition appear in Block 10 of the solicitation cover sheet (SF XXXX). However, the small business size standard for a concern which submits an offer in its own name, but which proposes to furnish an item which it did not itself manufacture, is 500 employees.

Submission of Offers. Submit offers to the office specified in this solicitation at or before the exact time specified in this solicitation. Offers may be submitted on the SF XXXX, letterhead stationery, or as otherwise specified in the solicitation. As a minimum, offers must show—

- (a) The solicitation number;
- (b) The time specified for receipt;
- (c) The name and address of the offeror;
- (d) A technical description of the items being offered in sufficient detail to determine compliance with the requirements in the solicitation. This may include product literature, warranty provisions, or other documents, if necessary;
- (e) Price;
- (f) "Remit to" address, if different than mailing address;
- (g) A completed copy of the representations and certifications at FAR 52.212-3;
- (h) Acknowledgment of Solicitation Amendments;
- (i) Past performance information, when included as an evaluation factor, to include recent and relevant contracts for the same or similar items and other references. At a minimum, this should include contract numbers, points of contact with telephone numbers and other relevant information; and
- (j) If the offer is not submitted on the SF XXXX, include a statement specifying the extent of agreement with all terms,

conditions, and provisions included in the solicitation. Offers that fail to furnish required representations or information, or take exception to the terms and conditions of the solicitation may be excluded from consideration.

Offered Prices. The offeror agrees to hold the prices in its offer firm for 30 calendar days from the date specified for receipt of offers, unless another time period is specified in an addendum to the solicitation.

Product Samples. When required by the solicitation, product samples shall be submitted at or prior to the time specified for receipt of offers. Unless otherwise specified in this solicitation, these samples shall be submitted at no expense to the Government, and returned at the sender's request and expense, unless they are destroyed during preaward testing.

Multiple Offers. Offerors are encouraged to submit multiple offers presenting alternative commercial items for satisfying the requirements of this solicitation. Each offer submitted will be evaluated separately.

Late Offers. Offers or modifications of offers received at the address specified for the receipt of offers after the exact time specified for receipt of offers will not be considered.

Contract Award. The Government intends to evaluate offers and award a contract without discussions with offerors. Therefore, the offeror's initial offer should contain the offeror's best terms from a price and technical standpoint. However, the Government reserves the right to conduct discussions if later determined by the Contracting Officer to be necessary. The Government may reject any or all offers if such action is in the public interest; accept other than the lowest offer; and waive informalities and minor irregularities in offers received.

Multiple Awards. The Government may accept any item or group of items of an offer, unless the offeror qualifies the offer by specific limitations. Unless otherwise provided in the Schedule, offers may not be submitted for quantities less than those specified. The Government reserves the right to make an award on any item for a quantity less than the quantity offered, at the unit prices offered, unless the offeror specifies otherwise in the offer.

(End of provision)

52.212-2 Evaluation—Commercial Items.

As prescribed in 12.602(c), the Contracting Officer may insert a provision substantially as follows:

Evaluation—Commercial Items (Date)

(a) The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered. The following factors [Contracting Officer insert relative order of importance (see 15.605)] shall be used to evaluate offers:

[Contracting Officer insert the significant evaluation factors and subfactors, such as (i) technical capability of the item offered to meet the Government requirement; (ii) price; (iii) past performance (see 15.605)].

Technical and past performance, when combined, are [Contracting Officer insert relative importance of evaluation factors (see 15.605)].

(b) *Options.* The Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. Evaluation of options shall not obligate the Government to exercise the option(s).

(c) The Government may determine that an offer is unacceptable if the prices proposed are materially unbalanced between line items or subline items.

(d) A written award or acceptance of offer mailed or otherwise furnished to the successful offeror within the time for acceptance specified in the offer shall result in a binding contract without further action by either party. Before the offer's specified expiration time, the Government may accept an offer (or part of an offer), whether or not there are negotiations after its receipt, unless a written notice of withdrawal is received before award.

(End of Provision)

**52.212-3 Offeror Representations and
Certifications—Commercial Items.**

As prescribed in 12.302(b)(2), insert the following provision:

**Offeror Representations and Certifications—
Commercial Items (Date)**

(a) *Definitions.* As used in this provision:

Emerging small business means a small business concern whose size is no greater than 50 percent of the numerical size standard for the standard industrial classification code designated.

Small business concern means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria and size standards in this solicitation.

Small disadvantaged business concern means a small business concern that—

(1) Is at least 51 percent unconditionally owned by one or more individuals who are both socially and economically disadvantaged or a publicly owned business, having at least 51 percent of its stock unconditionally owned by one or more socially and economically disadvantaged individuals; and

(2) Has its management and daily business controlled by one or more such individuals.

This term also means a small business concern that is at least 51 percent unconditionally owned by an economically disadvantaged Indian tribe or Native Hawaiian organization, or publicly owned business having at least 51 percent of its stock unconditionally owned by one or more of these entities which has its management and daily business controlled by members of an economically disadvantaged Indian tribe or Native Hawaiian organization and which meets the requirements of 13 CFR part 124.

Women-owned small business concern means a small business concern at least 51 percent owned by a woman or women or, in the case of any publicly owned business, at least 51 percent of the stock is owned by one

or more women; and whose management and daily business operations are controlled by one or more women.

Women-owned business concern means a concern which is at least 51 percent owned by one or more women; or in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and whose management and daily business operations are controlled by one or more women.

(b) *Taxpayer Identification Number (TIN) (26 U.S.C. 6050M)*. (1) The offeror's TIN is _____. If the offeror does not have a TIN, provide an explanation with your offer. If the offeror is owned or controlled by a common parent that files its Federal income tax returns on a consolidated basis including the offeror, provide the name and TIN of the common parent—

Name _____
TIN _____

(2) *Type of Business Organization*. The offeror represents—

(i) If the offeror is a U.S. entity, it operates as: _____ a corporation incorporated under the laws of the State of _____ providing medical and health care services, or engaged in the billing and collecting of payments for such services; _____ an other corporate entity; _____ a sole proprietorship; _____ a partnership; _____ a hospital or extended care facility described in 26 CFR 501(c)(3) that is exempt from taxation under 26 CFR 501(a).

(ii) If the offeror is a foreign entity, it operates as: _____ an agency or instrumentality of a foreign government; or agency or instrumentality of a Federal, state or local Government.

(c) Representations required to implement provisions of the Small Business Act (15 U.S.C. 631 *et seq.*):

Note: Offerors must complete this paragraph (c) only if the resulting contract is to be performed inside the United States, its territories or possessions, Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia.

(1) *Small Business Concern*. The offeror represents and certifies as part of its offer that it is, is not a small business concern.

(2) *Small Disadvantaged Business Concern*. The offeror represents and certifies that it is, is not a small disadvantaged business concern.

(3) *Women-Owned Small Business Concern*. The offeror represents that it is, is not a women-owned small business concern.

Note: Complete paragraphs (c)(4) and (c)(5) only if this solicitation is expected to exceed the simplified acquisition threshold.

(4) *Women-Owned Business Concern*. The offeror represents that it is, is not, a women-owned business concern.

(5) *Priority for Labor Surplus Area Concerns*. Offeror identify the labor surplus areas in which costs to be incurred on account of manufacturing or production (by offeror or first-tier subcontractors) amount to more than 50 percent of the contract price:

(6) *Small Business Size for the Small Business Competitiveness Demonstration*

Program and for the Targeted Industry Categories under the Small Business Competitiveness Demonstration Program. [Complete only if the offeror has certified itself to be a small business concern under the size standards for this solicitation.]

(i) [Complete only for solicitations in the four designated industry groups.] The offeror represents and certifies as part of its offer that it is, is not an emerging small business.

(ii) [Complete only for solicitations in targeted industry categories expected to result in an award in excess of \$25,000.] Offeror represents and certifies as follows:

(A) Offeror's number of employees for the past 12 months (check this column if size standard stated in the solicitation is expressed in terms of number of employees); or

(B) Offeror's average annual gross revenue for the last 3 fiscal years (check this column if size standard stated in the solicitation is expressed in terms of annual receipts)

(Check one of the following):

Employees	Average annual gross number of revenues
_____ 50 or fewer.	_____ \$1 million or less.
_____ 51–100.	_____ 1,000,001–2 million.
_____ 101–250.	_____ 2,000,001–3.5 million.
_____ 251–500.	_____ 3,500,001–5 million.
_____ 501–750.	_____ 5,000,001–10 million.
_____ 751–1,000.	_____ 10,000,001–17 million.
_____ Over 1,000.	_____ Over 17 million.

(d) Certifications and representations required to implement provisions of Executive Order 11246—

(1) *Certification of Non-segregated Facilities*. (Applies only if the contract amount is expected to exceed \$10,000)—

By submission of this offer, the offeror certifies that it does not and will not maintain or provide for its employees, any facilities that are segregated on the basis of race, color, religion, or national origin because of habit, local custom, or otherwise and that it does not and will not permit its employees to perform their services at any location where segregated facilities are maintained. The offeror agrees that a breach of this certification is a violation of the Equal Opportunity clause in the contract.

(2) *Previous Contracts and Compliance*. The offeror represents that—

(i) It has, has not, participated in a previous contract or subcontract subject either to the Equal Opportunity clause of this solicitation, the clause originally contained in Section 310 of Executive Order 10925, or the clause contained in Section 201 of Executive Order 11114; and

(ii) It has, has not, filed all required compliance reports

(3) *Affirmative Action Compliance*. The offeror represents that—

(i) It has developed and has on file, has not developed and does not have on file,

at each establishment, affirmative action programs required by rules and regulations of the Secretary of Labor (41 CFR subparts 60–1 and 60–2), or

(ii) It has not previously had contracts subject to the written affirmative action programs requirement of the rules and regulations of the Secretary of Labor.

(e) *Certification Regarding Payments to Influence Federal Transactions (31 U.S.C. 1352)*. (Applies only if the contract is expected to exceed \$100,000.) By submission of its offer, the offeror certifies to the best of its knowledge and belief that no Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress or an employee of a Member of Congress on his or her behalf in connection with the award of any resultant contract.

(f) *Buy American Act—Trade Agreements—Balance of Payments Program Certificate*. (Applies only if FAR clause 52.225–9, Buy American Act—Trade Agreement—Balance of Payments Program, is included in this solicitation.)

(1) The offeror hereby certifies that each end product, except those listed in paragraph (f)(2) of this provision, is a domestic end product (as defined in the clause entitled "Buy American Act—Trade Agreements—Balance of Payments Program") and that components of unknown origin have been considered to have been mined, produced, or manufactured outside the United States, a designated country, a North American Free Trade Agreement (NAFTA) country, or a Caribbean Basin country, as defined in section 25.401 of the Federal Acquisition Regulation.

(2) *Excluded End Products:*

Line Item No.
Country of Origin
(List as necessary)

(3) Offers will be evaluated by giving certain preferences to domestic end products, designated country end products, NAFTA country end products, and Caribbean Basin country end products over other end products. In order to obtain these preferences in the evaluation of each excluded end product listed in paragraph (f)(2) of this provision, offerors must identify and certify below those excluded end products that are designated or NAFTA country end products, or Caribbean Basin country end products. Products that are not identified and certified below will not be deemed designated country end products, NAFTA country end products, or Caribbean Basin country end products. Offerors must certify by inserting the applicable line item numbers in the following:

(i) The offeror certifies that the following supplies qualify as "designated or NAFTA country end products" as those terms are defined in the clause entitled "Buy American Act—Trade Agreements—Balance of Payments Program:"

(Insert line item numbers)

(ii) The offeror certifies that the following supplies qualify as "Caribbean Basin country end products" as that term is defined in the

clause entitled "Buy American Act—Trade Agreements—Balance of Payments Program": (Insert line item numbers)

(4) Offers will be evaluated in accordance with part 25 of the Federal Acquisition Regulation.

(g) *Buy American Act—North American Free Trade Agreement (NAFTA) Implementation Act—Balance of Payments Program Certificate.* (Applies only if FAR clause 52.225-21, Buy American Act—North American Free Trade Agreement (NAFTA) Implementation Act—Balance of Payments Program, is included in this solicitation.)

(1) The offeror hereby certifies that each end product, except those listed in paragraph (g)(2) of this provision, is a domestic end product (as defined in the clause entitled "Buy American Act—North American Free Trade Agreement (NAFTA) Implementation Act—Balance of Payments Program" and that components of unknown origin have been considered to have been mined, produced, or manufactured outside the United States.

(2) Excluded End Products:

Line Item No.
Country of Origin
(List as necessary)

(3) Offers will be evaluated by giving certain preferences to domestic end products or NAFTA country end products over other end products. In order to obtain these preferences in the evaluation of each excluded end product listed in paragraph (g)(2) of this provision, offerors must identify and certify below those excluded end products that are NAFTA country end products. Products that are not identified and certified below will not be deemed NAFTA country end products. Offerors must certify by inserting the applicable line item numbers in the following:

The offeror certifies that the following supplies qualify as "NAFTA country end products" as that term is defined in the clause entitled "Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program:"

(Insert line item numbers)

(4) Offers will be evaluated in accordance with FAR part 25.

(h) *Procurement Integrity Certification (41 U.S.C. 423).* (Applies only if the contract is expected to exceed \$100,000.)

I, the undersigned, am the officer or employee responsible for the preparation of this offer. I certify, to the best of my knowledge and belief, that either—

_____ I have no information, or
_____ I have disclosed information to the Contracting Officer concerning a violation or possible violation of subsection (a), (b), (d) or (f) of 41 U.S.C. 423, Procurement Integrity, or its implementing regulations that may have occurred during the conduct of this procurement.

Signature of the officer or employee responsible for the offer and date.

(End of Certification)

(End of Provision)

52.212-4 Contract Terms and Conditions—Commercial Items.

As prescribed in 12.302(b)(3), insert the following clause:

Contract Terms and Conditions—Commercial Items (Date)

Acceptance. The Contractor shall tender to the Government for acceptance only supplies or services that the Contractor has inspected in accordance with its commercial inspection system and found to be in conformity with contract requirements. The Government has the right to inspect or test all supplies or services after they have been tendered for acceptance. Acceptance shall be conclusive except for patent defects, latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract. The Government may require correction or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price, or require an adjustment to the contract price to reflect the reduced value of the nonconforming supplies or services. Revocation of acceptance shall occur (1) within a reasonable time after the defect was discovered or should have been discovered; and (2) before substantial change occurs in the condition of the item. This limitation does not apply to changes in condition caused by the defect.

Assignment. The Contractor or its assignee, may, when done in accordance with the provisions of the Assignment of Claims Act (31 U.S.C. 3727), assign its rights to be paid amounts due as a result of performance of this contract to a bank, trust company, or other financing institution, including any Federal lending agency.

Changes. Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

Disputes. This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference.

Definitions. The clause at FAR 52.202-1, Definitions, is incorporated herein by reference.

Excusable Delays. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

Invoice. The Contractor shall submit an original invoice and three copies to the

address designated in the contract to receive invoices. An invoice must include—

- (1) Name and address of the Contractor;
- (2) Invoice date;
- (3) Contract number, contract line item number and, if applicable, the order number;
- (4) Description, quantity, unit of measure, unit price and extended price of the items delivered;
- (5) Shipping number and date of shipment including the bill of lading number and weight of shipment if shipped on Government bill of lading;
- (6) Terms of any prompt payment discount offered;
- (7) Name and address of official to whom payment is to be sent; and
- (8) Name, title, and phone number of person to be notified in event of defective invoice.

If the invoice does not comply with these requirements, the Contractor will be notified of the defect within 7 days after receipt of the invoice at the designated office.

Patent Indemnity. The Contractor shall indemnify the Government and its officers, employees and agents against liability, including costs, for actual or alleged direct or contributory infringement of, or inducement to infringe, any United States or foreign patent, trademark or copyright, arising out of the performance of this contract, provided the Contractor is reasonably notified of such claims and proceedings.

Payment. Payment shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract. The Government will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Office of Management and Budget (OMB) Circular A-125, Prompt Payment.

In connection with any discount offered for early payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the date on which an electronic funds transfer was made.

Risk of Loss. Unless the contract specifically provides otherwise, risk of loss or damage shall remain with the Contractor until, and shall pass to the Government upon:

- (1) Delivery of the item(s) to a carrier, if transportation is f.o.b. origin; or
- (2) Acceptance by the Government or delivery of the item(s) to the Government at the destination specified in the contract, whichever is later, if transportation is f.o.b. destination.

Taxes. The contract price includes all applicable Federal, State, and local taxes and duties.

Termination. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a reasonable termination charge considering the percentage of the contract price reflecting the

percentage of the work performed prior to the notice of termination, plus actual direct costs that the Contractor can demonstrate have resulted from the termination. The Contractor shall not be paid for any work done after receipt of the termination notice, nor for any costs incurred by the Contractor's suppliers or subcontractors which the Contractor could reasonably have avoided.

Termination for Cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it should be determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

Title. Unless specified elsewhere in this contract, title to items furnished under this contract shall pass to the Government upon final acceptance, regardless of when or where the Government takes physical possession, unless the contract specifically provides for earlier passage of title.

Warranty. Except as expressly set forth elsewhere in this contract and except for the implied warranty of merchantability, there are no warranties express or implied. In no event will the Contractor be liable to the Government for consequential damages resulting from the seller's breach including—

(a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) Injury to person or property proximately resulting from any breach of warranty.

Other Compliances. The Contractor agrees to comply with all applicable Federal, State and local laws, executive orders, and regulations thereunder and amendments thereto, including, without limitation, 15 U.S.C 2601 *et seq.*, the Federal Occupational Safety and Health Act of 1970; 42 U.S.C. 7401 *et seq.*, the Clean Air Act; 15 U.S.C. 2601 *et seq.*, the Toxic Substances Control Act; and 33 U.S.C. 1251 *et seq.*, and the Federal Water Pollution Control Act.

Compliance with Laws Unique to Government Contracts. The Contractor agrees to comply with 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracting; 18

U.S.C. 431 relating to officials not to benefit; 40 U.S.C 327 *et seq.*, Contract Work Hours and Safety Standards Act; 41 U.S.C. 51–58, Anti-Kickback Act of 1986; 41 U.S.C. 251 related to whistle blower protections; and 49 U.S.C 40118, Fly American.

Order of Precedence. Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order: (a) addenda to this solicitation or contract; (b) solicitation provisions; (c) contract clauses; (d) Standard Form XXXX; (e) Other documents, exhibits, and attachment; and (f) the specification. (End of Clause)

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

As prescribed in 12.302(b)(4), insert the following clause:

Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (Date)

(a) The Contractor agrees to comply with the following FAR clauses, which are incorporated in this contract by reference, to implement provisions of law or executive orders applicable to acquisitions of commercial items:

- (1) 52.219–8, Utilization of Small Business Concerns and Small Disadvantaged Business Concerns (15 U.S.C. 637 (d)(2) and (3)).
- (2) 52.222–3, Convict Labor (E.O. 11755)
- (3) 52.233–3, Protest After Award (31 U.S.C 3553 and 40 U.S.C. 759)

(b) The Contractor agrees to comply with the following FAR and FIRM clauses in this paragraph (b) that are indicated as being incorporated in this contract by reference to implement provisions of law or executive orders applicable to acquisitions of commercial items or components:

- (1) 52.203–6, Restrictions on Subcontractor Sales to the Government, with Alternate I (41 U.S.C. 253g and 10 U.S.C. 2402).
- (2) 52.203–10, Price or Fee Adjustment for Illegal or Improper Activity (41 U.S.C. 423).
- (3) 52.219–14, Limitation on Subcontracting (15 U.S.C. 637(a)(14)).
- (4) 52.222–26, Equal Opportunity (E.O. 11246).
- (5) 52.222–35, Affirmative Action for Special Disabled and Vietnam Era Veterans (38 U.S.C. 2012).
- (6) 52.222–36, Affirmative Action for Handicapped Workers (29 U.S.C. 793).
- (7) 52.222–37, Employment Reports on Special Disabled Veterans and Veterans of the Vietnam Era (38 U.S.C. 2012).
- (8) 52.225–3, Buy American Act—Supplies (41 U.S.C. 10).
- (9) 52.225–9, Buy American Act—Trade Agreements Act—Balance of Payments Program (41 U.S.C. 10, 19 U.S.C. 2501–2582).

(10) 52.225–17, Buy American Act—Supplies Under European Community Sanctions for End Products (E.O. 12849).

(11) 52.225–18, European Community Sanctions for End Products (E.O. 12849).

(12) 52.225–19, European Community Sanctions for Services (E.O. 12849).

(13) 52.225–21, Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program (41 U.S.C 10, Pub. L. 103–187).

(14) 52.247–64, Preference for Privately Owned US Flagged Commercial Vessels (46 U.S.C. 1241).

(15) 201–39.5202–3, Procurement Authority (FIRM).

(This acquisition is being conducted under _____ delegation of GSA's exclusive procurement authority for FIP resources. The specific GSA DPA case number is _____).

(c) The Contractor agrees to comply with the following FAR clauses in this paragraph (c), applicable to commercial services, that are indicated as being incorporated in this contract by reference to implement provisions of law or executive orders applicable to acquisitions of commercial items or components:

- (1) 52.222–41, Service Contract Act of 1965, As amended (41 U.S.C. 351, *et seq.*).
- (2) 52.222–42, Statement of Equivalent Rates for Federal Hires (29 U.S.C. 206 and 41 U.S.C. 351, *et seq.*).
- (3) 52.222–43, Fair Labor Standards Act and Service Contract Act—Price Adjustment (Multiple Year and Option Contracts) (29 U.S.C. 206 and 41 U.S.C. 351 *et seq.*).
- (4) 52.222–44, Fair Labor Standards Act and Service Contract Act—Price Adjustment (29 U.S.C. 206 and 41 U.S.C. 351 *et seq.*).
- (5) 52.222–47, SCA Minimum Wages and Fringe Benefits Applicable to Successor Contract Pursuant to Predecessor Contractor Collective Bargaining Agreement (CBA) (41 U.S.C. 351 *et seq.*).

(d) Notwithstanding the requirements of the clauses in paragraphs (a), (b) or (c) of this clause, the Contractor is not required to include any FAR clause, other than those listed below, in a subcontract for commercial items or commercial components—[list of clauses to be published in the **Federal Register** in a future proposed rule under FAR case 94–791]

(End of clause)

71. In the list of newly redesignated sections below, for each clause or provision indicated in the left column, remove the reference listed in the middle column and insert the reference listed in the right column:

Clause/provision	Remove	Insert
52.211–1	10.011(a)	11.203(a)
52.211–2	10.011(b)	11.203(b)
52.211–3	10.011(c)	11.203(c)
52.211–4	10.011(d)	11.203(d)
52.211–5	10.011(e)	11.203(e)
52.211–6	10.011(f)	11.203(f)
52.211–7	10.011(g)	11.203(g)

Clause/provision	Remove	Insert
52.211-8	12.104(a)(2)	11.404(a)(2)
52.211-9	12.104(a)(3)	11.404(a)(3)
52.211-10	12.104(b)	11.404(b)
52.211-11	12.204(a)	11.504(a)
52.211-11	12.202	11.502(b)
52.211-12	12.204(b)	11.504(b)
52.211-13	12.204(c)	11.504(c)
52.211-14	12.304(a)	11.604(a)
52.211-15	12.304(b)	11.604(b)
52.211-16	12.403(a)	11.703(a)
52.211-17	12.403(b)	11.703(b)
52.211-18	12.403(c)	11.703(c)
52.242-14	12.505(a)	42.1305(a)
52.242-15	12.505(b)	42.1305(b)
52.242-16	12.505(c)	42.1305(c)
52.242-17	12.505(d)	42.1305(d)

72. Section 52.244-xx is added to read as follows:

52.244-XX Subcontracts for Commercial Items and Commercial Components

As prescribed in 44.403, insert the following clause:

Subcontracts for Commercial Items and Commercial Components (Date)

(a) Definition.

Commercial item, as used in this clause, has the meaning contained in the clause at 52.202-1, Definitions.

Subcontract, as used in this clause, includes a transfer of commercial items between divisions, subsidiaries, or affiliates of the Contractor or subcontractor.

(b) To the maximum extent practicable, the Contractor shall incorporate, and require its subcontractors at all levels to incorporate, commercial items or nondevelopmental

items other than commercial items, as components of items to be supplied under this contract.

(c) If in awarding a subcontract for commercial items, an exception under 15.804-1(a) does not apply, the subcontractor may be required to submit cost or pricing data and comply with the appropriate clauses prescribed in FAR part 15.

(d) Notwithstanding any other clause of this contract, the Contractor is not required to include any FAR provision or clause, other than those listed below and as may be required by paragraph (c) of this clause, in a subcontract for commercial items or commercial components: [list to be published in the **Federal Register** in a future proposed rule under FAR case 94-791]

(e) The Contractor shall include the terms of this clause, including this paragraph (e), in subcontracts awarded under this contract.

(End of clause)

PART 53—FORMS

73. Section 53.212 is added to read as follows:

53.212 Acquisition of commercial items.

SF XXXX (XX/95), Solicitation/Contract/Order for Commercial Items. SF XXXX is prescribed for use in solicitations and contracts for commercial items. Agencies may prescribe additional detailed instructions for use of the form.

53.301 [Amended]

74. Section 53.301-xxxx is added to read as follows:

SF XXXX (xx/95), Solicitation/Contract/Order for Commercial Items.

BILLING CODE 6820-34D-M

SOLICITATION/CONTRACT/ORDER FOR COMMERCIAL ITEMS <i>OFFEROR TO COMPLETE BLOCKS 12, 18, 22, 23, & 29.</i>				1. REQUISITION NUMBER		PAGE 1 OF	
2. CONTRACT NO.		3. AWARD/EFFECTIVE DATE	4. ORDER NUMBER		5. SOLICITATION NUMBER		6. SOLICITATION ISSUE DATE
7. FOR SOLICITATION INFORMATION CALL:			A. NAME			B. TELEPHONE NUMBER (No collect calls)	8. OFFER DUE DATE
9. ISSUED BY		CODE	10. THIS ACQUISITION IS			11. DELIVERY FOR FOB DESTINATION UNLESS BLOCK IS MARKED	12. DISCOUNT TERMS
			<input type="checkbox"/> UNRESTRICTED <input type="checkbox"/> SET ASIDE: % FOR <input type="checkbox"/> SMALL BUSINESS <input type="checkbox"/> SMALL DRADV. BUSINESS <input type="checkbox"/> 8(A) SIC: SIZE STANDARD:			<input type="checkbox"/> SEE SCHEDULE <input type="checkbox"/> 13A. THIS CONTRACT IS A RATED ORDER UNDER DPAS (18 CFR 700)	13B. RATING
14. DELIVER TO		CODE	18. ADMINISTERED BY				CODE
16A. CONTRACTOR/OFFEROR		CODE	FACILITY CODE	17A. PAYMENT WILL BE MADE BY			CODE
TELEPHONE NO.		17B. SUBMIT INVOICES TO ADDRESS SHOWN IN BLOCK 17 UNLESS BLOCK BELOW IS CHECKED					
<input type="checkbox"/> 16B. CHECK IF REMITTANCE IS DIFFERENT AND PUT SUCH ADDRESS IN OFFER		<input type="checkbox"/> SEE ADDENDUM					
18. ITEM NO.	19. SCHEDULE OF SUPPLIES/SERVICES			20. QUANTITY	21. UNIT	22. UNIT PRICE	23. AMOUNT
(Attach Additional Sheets as Necessary)							
24. ACCOUNTING AND APPROPRIATION DATA						25. TOTAL AWARD AMOUNT (For Govt. Use Only)	
<input type="checkbox"/> 26A. SOLICITATION INCORPORATES BY REFERENCE FAR 52.212-1, 52.212-4, FAR 52.212-3 AND 52.212-6 ARE ATTACHED. ADDENDA <input type="checkbox"/> ARE <input type="checkbox"/> ARE NOT ATTACHED. <input type="checkbox"/> 26B. CONTRACT/PURCHASE ORDER INCORPORATES BY REFERENCE FAR 52.212-4, FAR 52.212-6 IS ATTACHED. ADDENDA <input type="checkbox"/> ARE <input type="checkbox"/> ARE NOT ATTACHED.							
27. CONTRACTOR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN TO ISSUING OFFICE. CONTRACTOR AGREES TO FURNISH AND DELIVER ALL ITEMS SET FORTH OR OTHERWISE IDENTIFIED ABOVE AND ON ANY ADDITIONAL SHEETS SUBJECT TO THE TERMS AND CONDITIONS SPECIFIED HEREIN.				28. AWARDS OF CONTRACT: REFERENCE OFFER DATED . . . YOUR OFFER ON SOLICITATION (BLOCK 8), INCLUDING ANY ADDITIONS OR CHANGES WHICH ARE SET FORTH HEREIN, IS ACCEPTED AS TO ITEMS:			
29A. SIGNATURE OF OFFEROR/CONTRACTOR				30A. UNITED STATES OF AMERICA (SIGNATURE OF CONTRACTING OFFICER)			
29B. NAME AND TITLE OF SIGNER (TYPE OR PRINT)		29C. DATE SIGNED		30B. NAME OF CONTRACTING OFFICER (TYPE OR PRINT)		30C. DATE SIGNED	
31A. QUANTITY IN COLUMN 20 HAS BEEN				32. SHIP NUMBER		33. DD VOUCHER NUMBER	34. AMOUNT VERIFIED CORRECT FOR
<input type="checkbox"/> RECEIVED <input type="checkbox"/> INSPECTED <input type="checkbox"/> ACCEPTED, AND CONFORMS TO THE CONTRACT, EXCEPT AS NOTED				PARTIAL <input type="checkbox"/> FINAL <input type="checkbox"/>			
31B. SIGNATURE OF AUTHORIZED GOVT. REPRESENTATIVE		31C. DATE		35. PAYMENT			36. CHECK NUMBER
				<input type="checkbox"/> COMPLETE <input type="checkbox"/> PARTIAL <input type="checkbox"/> FINAL			
40A. I CERTIFY THIS ACCOUNT IS CORRECT AND PROPER FOR PAYMENT		40B. SIGNATURE AND TITLE OF CERTIFYING OFFICER		37. S/R ACCOUNT NUMBER		38. S/R VOUCHER NUMBER	39. PAID BY
				41A. RECEIVED BY (Print)			
				41B. RECEIVED AT (Location)			
				41C. DATE REC'D (YY/MM/DD)		41D. TOTAL CONTAINERS	

AUTHORIZED FOR LOCAL REPRODUCTION

STANDARD FORM XXXX
Prescribed by GSA
FAR (48 CFR) 53.212