

Chapter 10
**Commercial Item
Acquisition**



2014 Contract Attorneys Deskbook

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CHAPTER 10

COMMERCIAL ITEMS

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CHAPTER 10

COMMERCIAL ITEMS

I. INTRODUCTION

Following this block of instruction, the students should:

1. Understand the government's emphasis on purchasing commercial items.
2. Understand the FAR definition of a commercial item.
3. Understand the methods that can be used to acquire commercial items.
4. Understand that the acquisition of commercial items streamlines all contracting methods.

II. REFERENCES

1. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994) [hereinafter FASA].
2. Federal Acquisition Reform (Clinger-Cohen) Act of 1996, Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186,642-79 (1996) [hereinafter FARA].
3. Federal Acquisition Regulation (FAR) Part 8, Required Sources of Supplies and Services; FAR Part 12, Acquisition of Commercial Items; FAR Part 13, Simplified Acquisition Procedures.
4. Assistant Secretary of Defense (Command, Control, Communications & Intelligence) and Under Secretary of Defense (Acquisition, Technology & Logistics), COMMERCIAL ITEM ACQUISITIONS: CONSIDERATIONS AND LESSONS LEARNED (June 26, 2000); <http://www.acq.osd.mil/dpap/Docs/cotsreport.pdf>.

DOD's Commercial Item Handbook, Version 1.0, November 2001 <http://www.acq.osd.mil/dpap/Docs/cihandbooks.pdf> (last visited June 13, 2013). *See also* Commercial Item Handbook, Version 2.0 (draft) available at <http://www.acq.osd.mil/dpap/cpic/draftcihandbook08012011.docx> (last visited June 13, 2014).

III. GENERAL COMMERCIAL ITEMS POLICY.

- A. The Federal Government Prefers to Buy Commercial Items.
- B. FASA. Title VIII of the Federal Acquisition Streamlining Act of 1994 (“FASA,” Public Law 103-355) states a preference for government acquisition of commercial items. The purchase of proven products such as commercial and non-developmental items can eliminate the need for research and development, minimize acquisition lead-time, and reduce the need for detailed design specifications or expensive product testing. S. Rep. No. 103-258, at 5 (1994), reprinted in 1994 U.S.C.C.A.N. 2561, 2566.
- C. FAR Part 12. If a supply or service meets the definition of a commercial item, then agencies SHALL use the procedures outlined in FAR Part 12. FAR 12.102(a).
- D. Market Research. Agencies shall conduct market research to determine whether commercial items or non-developmental items are available, that can meet the agency's requirements. FAR 12.101(a).
- E. Contracts for the acquisition of commercial items are subject to the policies in other parts of the FAR. However, if parts of the FAR conflict, FAR Part 12 takes precedence for the acquisition of commercial items. FAR 12.102(c).
- F. Required Sources of Supplies or Services (RSS), FAR Part 8. As with all acquisitions (including the acquisition of Commercial Items), FAR Part 8 provides a priority listing of Required Sources. Prior to executing a commercial items acquisition, agencies must attempt to meet their needs through the Required Sources of Supplies and Services (including commercial items) listed in FAR Part 8.¹
- G. Contracting Officers and Commercial Items Acquisitions. Contracting officers shall use the policies of Part 12 in conjunction with the policies and procedures for solicitation, evaluation, and award prescribed under Part 13, Simplified Acquisition Procedures; Part 14, Sealed Bidding; and Part 15, Contracting by Negotiation as appropriate for the particular acquisition. FAR 12.102(b).
- H. Contractors. The Government shall require prime contractors and sub-contractors to incorporate, to the maximum extent practicable, commercial items or non-developmental items as components of items supplied to the agency. FAR 12.101(c).
- I. Required Contract Types. FAR 12.207(a). In general, agencies shall use firm-fixed-price (FFP) contracts or fixed price contracts with economic price

¹ See Simplified Acquisitions chapter of this desk book for a more detailed explanation of FAR Part 8 and required sources of supply.

adjustments (FP/EPA) for the acquisition of commercial items. *See Northrop Grumman Technical Services, Inc.*, B-406523, June 22, 2012, CPD ¶ 197; Northrop Grumman protested the terms of an Air Force solicitation on the grounds that the solicitation unduly restricted competition and deviated from customary commercial practices. The protester argued that the RFP deviated from standard commercial practice by requiring a 90-day transition period and fixed-price CLINs, while excluding an economic price adjustment clause. GAO denied the protest.²

1. Award fees and performance or delivery incentives in FFP and FP/EPA contracts are permitted if based solely on factors other than cost. FAR 12.207(d).
2. Indefinite-delivery contracts may be used as specified in FAR 12.207(c) when:
 - a. The prices are established based on a FFP or FP with EPA basis, OR
 - b. Rates are established for commercial services acquired on a time-and-materials (T&M) or labor-hour (LH) basis.
 - (1) Contracting Officers shall, to the maximum extent practicable, also structure the contract to allow issuance of orders on a FFP or FP w/EPA basis.
 - (2) Each T&M or LH order requires a Determination & Finding (D&F) as specified at FAR 12.207(b).
 - (3) If the ID/IQ only allows for T&M or LH orders, a D&F is required to support why providing for an alternative FFP or FP w/EPA pricing structure is not practicable. The D&F shall be approved one level above the contracting officer. *See infra*, III.A.3. and FAR 12.207(b)(2) for detailed guidance on specific D&F requirements.
3. A T&M or LH contract may be used as specified in FAR 12.207(b), but only when several criteria are met.

² Although the protester argued that some RFI respondents had suggested using a time-and-materials CLIN, government policy disfavors this acquisition approach unless no other contract type is suitable. In this case, Northrop Grumman failed to show that a fixed-price CLIN was unsuitable under the circumstances. GAO also rejected Northrop Grumman's argument that the RFP was flawed because it is standard commercial practice to fix prices for one year and include an economic price adjustment for later years. GAO stated that an agency's decision regarding whether or not to include an economic price adjustment clause is reviewed only where it is shown to be arbitrary and capricious. Moreover, although the FAR favors the use of these clauses, they are not mandatory. Given that the agency's market research informed its formation of the RFP, GAO found that exclusion of an economic price adjustment clause did not violate commercial practice.

- a. Among these criteria, the contracting officer must execute a determinations and findings (D&F) document certifying that no other contract type is suitable for the requirements, the contract or task order must include a ceiling price that the contractor exceeds at its own risk, and that ceiling price cannot be increased unless the contracting officer executes another D&F establishing that the change is in the best interest of the procuring agency. FAR 12.207(b)(ii).
- b. Congress further restricted DoD's use of T&M or LH contracts in §805 of the NDAA for FY2008 (Pub. L. 110-181). DFARS 212.207 implements these restrictions by limiting use of these contract types to only the following:
 - (1) Services acquired for support of commercial items, as described in paragraph (5) of the definition of commercial item at FAR 2.101 (installation, maintenance, repair, and training services related to other commercial items).
 - (2) Emergency Repair Services.
 - (3) Any other commercial services only to the extent that the Head of the Agency approves a written D&F finding that:
 - (a) The services are commercial services as defined in paragraph (6) of the commercial item definition;
 - (b) The offeror has submitted sufficient information³ for the contracting officer to comply with FAR 15.403-1(c)(3)(ii);
 - (c) Such services are commonly sold to the general public through use of T&M and LH; and
 - (d) The use of a T&M and LH type contract is in the best interest of the government. *See* DFARS 212.207(b).

³ FAR 15.403-1(c)(3) outlines a general exception for cost and pricing data if supplies or services meet the definition of "Commercial Item" prescribed in FAR 2.101. However, legislative changes have eroded this general exception for commercial items, particularly for those items that are not sold in substantial quantities in the commercial market place and items that include "minor" modifications. In both cases, cost and pricing data may in fact be required to aid the contracting officer in a determination of price reasonableness.

IV. DEFINITIONS

41 U.S.C. § 103; FAR 2.101.

- A. General. The definition of “commercial item” at FAR 2.101 includes both supplies and services. To aid understanding, section IV. B describes items, and section IV.C. below, describes services. Note that FAR 12.102(f) expands the definition of “commercial items” at FAR 2.101 to include certain supplies or services related to defense or recovery from nuclear, biological, chemical, or radiological attack. FAR 12.102(g) expands the definition of “commercial items” even further, to include certain performance-based services.
- B. Commercial Items. *See* FAR 2.101.
1. Any item, other than real property, that is of a type⁴ customarily used by the general public or by non-governmental entities for purposes other than governmental purposes; and:
 - a. Has been sold, leased, or licensed to the general public; or
 - b. Has been offered for sale, lease, or license to the general public. *See* Matter of Coherent, Inc., B-270998, May 7, 1996, 96-1 CPD ¶ 214 (actual sale or license to general public not required for commercial item classification; determination of commercial item status is discretionary agency decision).
 2. Any item that evolved from an item described in subsection 1 of this section (above) through advances in technology or performance and is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements specified in the Government solicitation.
 - a. Any item that would satisfy a criterion expressed in subsection 1 and/or 2 of this section (above) but for:

⁴ There has been a great deal of criticism regarding the language “of a type.” Many critics argue that this language is too broad and allows the government to procure various goods and services that are in no way “commercial.” Critics contend that broadening the scope of commercial items undercuts the ability of contracting officers to assess price reasonableness since commercial item acquisitions are generally exempt from the requirements to submit cost and pricing data (*see* note 3 *supra*). Further, these questionable commercial items are not truly subject to the forces of a competitive market place, and as such, the government is likely to overpay for these items. The 2007 Report of the Acquisition Advisory Panel (available at <https://www.acquisition.gov/comp/aap/documents/Chapter1.pdf>) in fact, recommended that the “definition of standalone commercial services in FAR 2.101 should be amended to delete the phrase ‘of a type’ in the first sentence of the definition.” Recent attempts to revise the definition to address the concerns related to “of a type” commercial items have failed. It remains to be seen whether Congress will amend the current definition.

- b. Modifications of a type customarily available in the commercial marketplace. *See* NABCO, Inc., B-293027, B-293027.2, Jan. 15, 2004, 2004 CPD ¶ 15 (protest denied where solicitation required door modification on proposed commercial item explosive ordinance disposal containment vessel was made previously available to awardee's other commercial customers, therefore meeting the definition's "of a type" requirement).
- c. Minor modifications of a type not customarily available in the commercial marketplace made to meet federal government requirements.⁵
 - (1) "Minor" modifications are modifications that do not significantly alter the non-governmental function or essential physical characteristics of an item or component, or change the purpose of a process. Matter of Canberra Indus., Inc., B-271016, June 5, 1996, 96-1 CPD ¶ 269 (combining commercial hardware with commercial software in new configuration, never before offered, did not alter "non-governmental function or essential physical characteristics").
 - (2) Factors to be considered in determining whether a modification is minor include the value and size of the modification, and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor.⁶
- 3. Any combination of items meeting the criteria expressed in subsections (1), (2), or (3) above, that are of a type customarily combined and sold in combination to the general public.
- 4. A non-developmental item (NDI), if the agency determines it was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple state and local governments. Non-developmental items include:

⁵ Modifications of this type may require the submission of cost and pricing data if the acquisition is funded by DoD, NASA, or the Coast Guard, and the cost of the modification exceeds specified thresholds or percentages. *See* FAR 15.403-1(c)(3)(iii).

⁶ *See, e.g.*, DoD IG Report D-2004-064, Acquisition of the Boeing KC-767A Tanker Aircraft, Mar. 29, 2004, for an example of the analysis and potential controversy that may arise as a result of classifying a modification as a "minor modification of a type not customarily available in the commercial marketplace" (available at <http://www.dodig.mil/audit/reports/fy04/04-064.pdf>).

- a. Any previously developed item of supply used exclusively for governmental purposes by a federal agency, a state or local government, or a foreign government with which the United States has a mutual defense cooperation agreement; (See Matter of: Avtron Manufacturing, Inc. B-280758, (Nov. 16, 1998); (see Matter of: Trimble Navigation, Ltd. B-271882; B-271882.2 Aug. 1996) or
- b. Any item described in paragraph a. above 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; (See Lucent Technologies World Services Inc., Mar. 2005) (With regard to the definition of NDI, the parties agree that the TETRA devices are commercial items, in that they are sold commercially. The parties dispute, however, whether the TETRA devices are NDI, as that term is used in the FAR.) or
- c. Any item of supply being produced that does not meet the requirements of paragraph a. or b. above solely because the item is not yet in use. Trimble Navigation, Ltd., B-271882, August 26, 1996, 96-2 CPD ¶ 102 (award improper where awardee offered a GPS receiver that required major design and development work to meet a material requirement of the solicitation that the receiver be a NDI).
- d. **DFARS Case 2011-D03, Pilot Program for Acquisition of Military-Purpose Nondevelopmental Items (DFARS Case 2011D034)**, Final rule, 77 Fed. Reg. 2653, January 19, 2012. DoD adopted as final, without change, an interim rule amending the DFARS establishing a pilot program to assess the feasibility and advisability of acquiring military-purpose nondevelopmental items in accordance with streamlined procedures.⁷
- e. **DFARS Case 2014-D007, Defense Federal Acquisition Regulation Supplement: Extension of Pilot Program on**

⁷ Under the pilot program, DoD may enter into contracts with nontraditional defense contractors for the purpose of: enabling DoD to acquire items that otherwise might not have been available to DoD; assisting DoD in the rapid acquisition and fielding of capabilities needed to meet urgent operational needs; and, protecting the interests of the United States in paying fair and reasonable prices for the items or items acquired. The purpose is to test whether streamlined procedures similar to those available for Commercial Items, can be an effective incentive for nontraditional contractors to channel investment and innovation into areas useful to DoD and provide items developed exclusively at private expense to meet validated military requirements. There is a statutory definition of the term nontraditional contractor at 10 U.S.C. 2302, which outlines the criteria that must be met by a prospective contractor to be eligible for the pilot program, and includes the criterion that the entity may not be currently performing, or has performed, “any contract or subcontracts” for DoD subject to full coverage under the cost accounting standards.

Acquisition of Military-Purpose Nondevelopmental Items (DFARS Case 2014-D007). Amends DFARS 212.7102-3 to implement section 866 of the NDAA for Fiscal Year 2014 by extending expiration date of the pilot program for acquisition of military-purpose nondevelopmental items from January 6, 2016, to December 31, 2019.

C. Commercial Services Defined as Commercial Items.

1. Definition. There are several types of services that qualify as commercial items.
 - a. Installation services, maintenance services, repair services, training services, and other services, IF
 - (1) Those services are procured for support of an item (other than real property and NDI's) that otherwise meets the definition of a commercial item (see above). It does not matter whether the services are provided by the same source or at the same time as the item;

AND
 - (2) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the federal government. FAR 2.101 (See Sletager, Inc., B-237676, 90-1 CPD ¶ 298 at 3, Mar. 15, 1990 (finding painting and surface preparation services can be a commercial item because they are sold to the general public in the course of normal business operations based on market prices)).
 - b. 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 or specific outcomes to be achieved and under standard commercial terms and conditions.
 - (1) This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed. See Envirocare of Utah, Inc. v. United States, 44 Fed. Cl. 474 (1999) (holding there was no market price for radioactive waste disposal services).

- (2) “Catalog price” means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public.
- (3) “Market prices” means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

2. When purchasing services that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are **of a type** offered and sold competitively in substantial quantities in the commercial marketplace, **they may be considered commercial items ONLY** if the contracting officer determines in writing that the offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price of such services. FAR 15.403-1(c)(3)(ii); Section 868, Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2009, Pub. L. 110-417, 14 Oct 2008. *See* Contract Pricing outline for more information on how contracting officers are to make this determination
3. The exception for performance-based services contract expired November 24, 2013.⁸

D. Nuclear, Biological, Chemical, or Radiological Defense or Attack. Per FAR 12.102(f), in addition to the definitions of commercial items and commercial services above, contracting officers may treat **any** acquisition of supplies or services that, as determined by the head of the agency, are to be used to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack, as an acquisition of commercial items. *See* FAR 12.102(f)(2) for limitations.

⁸ 41 U.S.C. 2310 as implemented in FAR 12.102(g), authorized commercial item treatment for a services contract or a task order for the procurement of non-commercial services if the action:

- i. Is entered into on or before November 24, 2013;
- ii. Has a value of \$29.5 million or less;
- iii. Meets the definition of performance-based acquisition at FAR 2.101;
- iv. Uses a quality assurance surveillance plan;
- v. Includes performance incentives where appropriate;
- vi. Specifies a firm-fixed price for specific tasks to be performed or outcomes to be achieved; and
- vii. Is awarded to an entity that provides similar services to the general public under terms and conditions similar to those in the contract or task order.

E. Over-Reliance on Commercial Items Definition – Documentation Requirement.

1. On September 29, 2006, the DoD Office of the Inspector (IG) general issued a reported criticizing the DoD's reliance on the very broad definition of "commercial item" to purchase defense systems. Among the many identified problems, the IG found that contracting officers were not adequately justifying the commercial nature of their contracts. U.S. Dep't of Def., Off. Of the Inspector Gen., D-2006-115, Commercial Contracting for the Acquisition of Defense Systems (Sept. 29, 2006).
2. In response to this finding, the Office of Defense Procurement and Acquisition Policy (DPAP) issued a memorandum directing that contracting officers shall document in writing their determinations that the commercial items definition has been met for all acquisition using FAR Part 12 that exceed \$1 million. Memorandum, Director, Defense Procurement and Acquisition Policy, Subject: Commercial Item Determination (Mar. 2, 2007).
3. DoD issued a final rule amending the DFARS to require approval by one level above the contracting officer for commercial item determinations for acquisitions exceeding \$1 million when the determination is based on "of a type" or "offered for sale" language in the definition of commercial items in FAR 2.101. The rule also clarifies approval requirements for determinations for acquisitions of services exceeding \$1 million using FAR Part 12 procedures but which do not meet the definition of services covered in the definition of commercial items. 77 Fed. Reg. 14480 (Mar. 12, 2012).
4. DFARS 212.102 was updated effective 12 March 2012. The updated section strengthens the requirement to document in writing, a determination that an item or service in excess of \$1 million meets the commercial item definition. In particular, it now specifically requires such determinations that rely on subsections (1)(ii) ["offered for sale"], (3) ["minor modifications"], (4)[items that when combined meet other aspects of the definition], and (6)[services of a type offered for sale"], of the commercial items definition in FAR 2.101, to be approved at one level above the contracting officer. This requirement is now implemented through DFARS 212.102 and DoD PGI 212.102.
5. **New Construction is generally NOT a Commercial Item.** The Administrator of the Office of Federal Procurement Policy issued a July 3, 2003 memorandum indicating commercial item acquisition policies in FAR Part 12 "*should rarely, if ever, be used for new construction acquisitions or non-routine alteration and repair services.*" See Appendix A. FAR Part 12 lacks clauses for handling

critical circumstances common to construction efforts, especially those involving new construction or non-routine alteration and repair services. Agencies are reminded that when they proceed with a construction acquisition under *either* Part 36 or Part 12, they must adhere to the policies of FAR Subpart 22.4.

- F. Commercially Available Off-the-Shelf Item (COTS). A COTS item is a commercial item that has not been modified in any way from its commercial design when it is sold to the government. FAR 2.101. In effect, COTS are a subset of commercial items in that they are:
1. A commercial item of supply;
 2. Sold in substantial quantities in the commercial marketplace; and
 3. Offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace. See Chant Engineering Co., Inc., B-281521, Feb. 22, 1999, 99-1 CPD ¶ 45 (“[n]ew equipment like Chant’s proposed test station, which may only become commercially available as a result of the instant procurement, clearly does not satisfy the RFP requirement for commercial-off-the-shelf (existing) equipment.”).
- G. Component. Any item supplied to the federal government as part of an end item or of another component. FAR 2.101.

V. **COMMERCIAL ITEM TEST PROGRAM (CITP)**

- A. Authority
1. Congress created CITP to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors. 10 U.S.C. § 2304(g)(1). *See also American Eurocopter Corporation*, B-283700, Dec. 16, 1999, 1999 U.S. Comp. Gen. LEXIS 222 (agency used authority of FAR 13.5 to purchase a Bell Helicopter).
 2. The CITP is located in FAR 13.5 – Test Program for Certain Commercial Items. For the period of the test, contracting activities must use simplified acquisition procedures to the maximum extent practicable when purchasing supplies or services that meet the commercial items definition. FAR 13.500(b).
 3. Congress created the authority for agencies to use simplified acquisition procedures to purchase commercial item supplies and

services⁹ for amounts greater than the simplified acquisition threshold but not greater than \$6,500,000. FAR 13.500(a).

4. For a **contingency operation** or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States, the \$6,500,000 commercial item test program threshold is **\$12,000,000**.
5. For Fiscal Year 2012, Congress did not renew and extend the CITP, allowing the sunset provision to go into effect on 1 January 2012 and effectively eliminating the CITP as a tool in Contracting Officers' toolboxes.
6. However, Congress included a renewal and extension of the CITP in the FY 2013 NDAA, which was signed into law by the President on 2 January 2013. Section 821 of the FY 2013 NDAA renewed the CITP while including a new sunset provision for 1 January 2015, unless otherwise renewed or extended.
7. The CITP can be found at FAR 13.5.

B. Contract File Documentation Requirements for Commercial Items Acquisitions. In addition to other documentation requirements outlined in FAR Part 13 and FAR 13.501(b) requires that the contract file shall include:

1. A brief written description of the procedures used in awarding the contract, including the fact that the test procedures in FAR 13.5 were used;
2. The number of offers received;
3. An explanation, tailored to the size and complexity of the acquisition, of the basis for the contract award decision; and
4. Any approved justification to conduct a sole-source acquisition. *See* FAR 13.501(a) below.
5. A fully and adequately documented market research and rationale to support a conclusion that the solicitation is for a commercial item, as defined in FAR 2.101. Particular care must be taken to document determinations involving:
 - a. "Modifications of a type customarily available in the marketplace," and

⁹ National Defense Authorization Act of 1996, Pub. L. No. 104-106, § 4202(a)(1)(A) (codified at 10 U.S.C. § 2304(g)(1)(B)). FAR 13.5.

- b. Items only “offered for sale, lease, or license to the general public,” but not yet actually sold, leased, or licenses to the general public. DoD PGI 212.102.

C. Justification & Approval Requirements for “Sole Source” or Brand Name Commercial Items Acquisitions.

- 1. Sole Source Policy. Acquisitions conducted under simplified acquisition procedures are exempt from the competition requirements of FAR Part 6. Contracting officers, however, shall not conduct sole source acquisitions, as defined in FAR 6.003, unless the need to do so is justified in writing and approved at the levels specified in FAR 13.501(a).
 - a. A Justification & Approval (J&A) is required for brand name acquisitions of commercial items. FAR 13.501(a). The requirements are the same as for sole source acquisitions (discussed above).
 - b. Kindgomware Technologies, B-407757, Jan. 31, 2013 (finding that VA’s limited source justification was reasonable where the agency adequately documented its need for emergency communication software that performed a number of required functions and was compatible with a system used by the Navy).
 - c. American Eurocopter Corporation, B-283700, Dec. 16, 1999 (finding that DOE was reasonable in restricting a commercial item competition to a specific make and model of helicopter, where, given the nature of the agency’s flight mission and its organization, standardization of the agency’s fleet was necessary for safety reasons.)
- 2. Documentation requirements when conducting a Sole Source Commercial Items Acquisition:
 - a. For a proposed contract exceeding \$150,000, but not exceeding \$650,000, the contracting officer’s certification that the justification is accurate and complete to the best of the contracting officer’s knowledge and belief will serve as approval, unless a higher approval level is established in agency procedures.
 - b. For a proposed contract exceeding \$650,000 but not exceeding \$12.5 million, the approval authority is the competition advocate for the procuring activity, the head of the procuring activity, or a designee who is a general or flag officer, a civilian serving in a grade above GS-15, or the senior

procurement executive of the agency. This authority is not delegable further.

- c. For amounts greater than \$12.5 million, but not exceeding \$62.5 million, (See FAR 13.501, (a) & (b), or for DoD, NASA, and the Coast Guard, not exceeding \$85.5 million, the head of the procuring activity or the official described in [6.304\(a\)\(3\)](#) or (a)(4) must approve the justification and approval. This authority is not delegable.
- d. For a proposed contract exceeding \$62.5 million, or, for DoD, NASA, and the Coast Guard, \$85.5 million, the official described in [6.304\(a\)\(4\)](#) must approve the justification and approval. This authority is not delegable except as provided in [6.304\(a\)\(4\)](#).
- e. Contracts file documentation. The contract file must include -- (1) A brief written description of the procedures used in awarding the contract, including the fact that the test procedures in FAR [subpart 13.5](#) were used; (2) The number of offers received; (3) An explanation, tailored to the size and complexity of the acquisition, of the basis for the contract award decision; and (4) Any justification approved under paragraph (a) of this section.

VI. COMPETITION PROCEDURES.

- A. Streamlined Solicitation of Commercial Items. Streamlined procedures allow the contracting officer to expedite¹⁰ the acquisition process of preparing and issuing solicitations and evaluating offers when purchasing commercial items. FAR 12.601.

¹⁰ A November 24, 2010 DPAP memo (Improving Competition in Defense Procurements) and an April 27, 2011 memo amplifying the original memo, lays out additional requirements in certain cases *above the SAT* when only one offer is received. The guidance applies to “all competitive procurements of supplies and services above the SAT including commercial items and construction.” Specifically, it covers procurements conducted under FAR parts/subparts 8.4 (Federal Supply Schedules), 12 (Commercial Items), 13.5 (Commercial Items Test Program), 14 (Sealed Bidding), 15 (Contracting by Negotiation), and 16.5 (Indefinite Delivery Contracts). The memos provide that: unless an exception applies or a waiver is granted: [1] if the solicitation was advertised for fewer than 30 days and only one offer is received, then the contracting officer shall cancel the solicitation and resolicit for an additional period of at least 30 days; or [2] if a solicitation allowed at least 30 days for receipt of offers and only one offer was received, then the contracting officer shall not depend on the standard at FAR 15.403-1(c)(1)(ii) (expectation of adequate price competition) in determining price to be fair and reasonable, instead using FAR 15.404-1 (price and cost analysis) to make that determination. Authority to waive this requirement has been delegated to the HCA, and can be further delegated no lower than one level above the contracting officer. Memos *available at* <http://www.acq.osd.mil/dpap/policy/policyvault/USA002080-11-DPAP.pdf>.

1. Whenever agencies are required to publish notice of contract actions under FAR 5.201, the contracting officer may issue a solicitation less than 15 days after publishing notice. FAR 5.203(a)(1); or,
2. Use a combined synopsis/solicitation procedure under FAR 12.603.
 - (1) The combined synopsis/solicitation is only appropriate where the solicitation is relatively simple. It is not recommended for use when lengthy addenda to the solicitation are necessary.
 - (2) Do not use the Standard Form 1449 when issuing the solicitation.
 - (3) Amendments to the solicitation are published in the same manner as the initial synopsis/solicitation. FAR 12.603(c)(4).
3. Response time. FAR 5.203(b).
 - a. The contracting officer shall establish a solicitation response time that affords potential offerors a reasonable opportunity to respond to commercial item acquisitions. *See American Artisan Productions, Inc., B-281409, Dec. 21, 1998, 98-2 CPD ¶ 155 (finding fifteen day response period reasonable); GIBBCO LLC, B-401890, Dec. 14, 2009 (finding 22 day response period reasonable)*
 - b. The contracting officer should consider the circumstances of the individual acquisition, such as its complexity, commerciality, availability, and urgency, when establishing the solicitation response time.

B. Streamlined Evaluation of Offers. FAR 12.602

1. When evaluation factors are used, the contracting officer may insert a provision substantially the same as the provision at FAR 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. When using Part 13 procedures in conjunction with Part 12, contracting officers are not required to describe the relative importance of evaluation factors.
 - a. For many commercial items, proper evaluation will only require consideration of an item's technical capability (the ability of the item to meet the agency's need), price, and past performance.

- (1) Technical capability may be evaluated by how well the proposed product meets the Government requirement instead of predetermined subfactors.
 - (2) A technical evaluation would normally include examination of such things as product literature, product samples (if requested), technical features, and warranty provisions.
 - b. Past performance shall be evaluated in accordance with the procedures in FAR 13.106 or subpart 15.3, as applicable.
- C. Award. 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. FAR 12.602(c).
1. Universal Building Maintenance, Inc., B-282456, July 15, 1999, 99-2 CPD § 32 (GSA failed to document its source selection decision; failed to conduct a proper cost/technical tradeoff in selecting the awardee's proposal; and improperly attributed the past performance of the awardee's parent company to the awardee, since the record did not establish that the parent company would be involved in the performance of the contract).¹¹
 2. Midland Supply, Inc., B298720; B-298720.2, Nov. 29, 2006 (protest sustained by GAO under a best value procurement where selection of lower technically rated, lower-priced proposal was determined to be improper where the record showed that the selection decision was based on a mechanical comparison of offerors' total point scores and lacked any documentation indicating that a price/technical tradeoff was made.)
 3. Reverse Auctions. Reverse auctions¹² use the Internet to allow on-line suppliers to compete in real-time for contracts by lowering their prices until the lowest bidder prevails. Reverse auctions can further streamline the already abbreviated simplified acquisition procedures.
 4. Commercial item acquisitions lend themselves to reverse auctions because technical information is not needed unless the contracting officer deems it necessary. Even in those instances, existing product literature may suffice.

¹¹ See also: Tiger Enterprises, Inc., B-293951, July 26, 2004; Checchi and Co. Consulting, Inc., B-285777, Oct. 10, 2000, 2001 CPD 132 at 6; Matrix Intl Logistics, Inc., B-272388, B-272388.2, Dec. 9, 1996, 97-2 CPD 89 at 5

¹² See also, discussion of Reverse Auctions in the Simplified Acquisitions Chapter of this Desk Book.

5. Commercial item acquisitions lend themselves to reverse auctions because the contracting officer has only to ensure that an offeror's product is generally suitable for agency needs and that the offeror's past performance indicates that the offeror is a responsible source.

VII. CONTRACT CLAUSES FOR COMMERCIAL ITEMS

- A. FAR 12.301 -- Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items. (a) In accordance with 41 U.S.C. 3307 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.
 1. 52.212-1 Instructions to Offerors -- Commercial Items. This provision provides a single, consolidated list of representations and certifications for the acquisition of commercial items and is attached to the solicitation for offerors to complete. This provision may not be tailored except in accordance with Subpart 1.4. Use the provision with its Alternate I in solicitations issued by DoD, NASA, or the Coast Guard. Use the provision with its Alternate II in solicitations for acquisitions for which small disadvantaged business procurement mechanisms are authorized on a regional basis.
 2. Evaluation Factors: The contracting officer can use 52.212-2 Evaluation – Commercial items, which is as provision that provides a list of evaluation factors and is a fill-in format for evaluation factors for the acquisition of commercial items; OR the contracting officer may include a similar provision containing all evaluation factors required by 13.106, Subpart 14.2 or Subpart 15.3, as an addendum (see 12.302(d)).
 - a. See Also DFARS 212.602 Streamlined evaluation of offers. (b)(i) For the acquisition of transportation and transportation-related services, also consider evaluating offers in accordance with the criteria at 247.206(1). (ii) For the acquisition of transportation in supply contracts that will include a significant requirement for transportation of items outside the contiguous United States, also evaluate offers in accordance with the criterion at 247.301-71. (iii) For the direct purchase of ocean transportation services, also evaluate offers in accordance with the criteria at 247.573-2(c).
 - b. The Contracting Officer has tremendous discretion to identify and include significant evaluation factors, such as: Technical capability of the item offered to meet the Government's

requirement/s; price; past performance (see FAR 15.304); small disadvantaged business participation; and include them in the relative order of importance of the evaluation factors, such as in descending order of importance.

- c. A written notice of award or acceptance of an offer.
3. 52.212-3 -- Offeror Representations and Certifications -- *Commercial Items*. This provision provides a single, consolidated list of representations and certifications for the acquisition of commercial items and is attached to the solicitation for offerors to complete. This provision may not be tailored except in accordance with Subpart 1.4. Use the provision with its Alternate I in solicitations issued by DoD, NASA, or the Coast Guard.
 - a. DFAR 212.301,(ii) -- Commercial Items, in all solicitations for commercial items exceeding the simplified acquisition threshold. If an exception to 10 U.S.C. 2410i applies to a solicitation exceeding the simplified acquisition threshold (see [225.7603](#)), indicate on an addendum that “The certification in paragraph (b) of the provision at [252.212-7000](#) does not apply to this solicitation.”
 - b. DFAR 212.301, (iii) Use the clause at [252.212-7001](#), Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items, in all solicitations and contracts for commercial items, completing paragraphs (a) and (b), as appropriate.
 4. 52.212-4 – Contract Terms and Conditions – Commercial Items. This clause includes terms and conditions which are, to the maximum extent practicable, consistent with customary commercial practices and is incorporated in the solicitation and contract by reference (see Block 27, SF 1449). Use this clause with its Alternate I when a time-and-materials or labor-hour contract will be awarded. The contracting officer may tailor this clause in accordance with [12.302](#).
 5. 52.212-5-- Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercial Items. This clause incorporates by reference only those clauses required to implement provisions of law or Executive orders applicable to the acquisition of commercial items. The contracting officer shall attach this clause to the solicitation and contract and, using the appropriate clause prescriptions, indicate which, if any, of the additional clauses cited in [52.212-5\(b\)](#) or (c) are applicable to the specific acquisition. Some of the clauses require fill-in; the fill-in language should be inserted as

directed by [52.104\(d\)](#). When cost information is obtained pursuant to [Part 15](#) to establish the reasonableness of prices for commercial items, the contracting officer shall insert the clauses prescribed for this purpose in an addendum to the solicitation and contract. This clause may not be tailored.

6. Tailoring of provisions and clauses. Before a contracting officer tailors a clause or includes a term or condition that is inconsistent with customary commercial practice for the acquisition, he must obtain a waiver under agency procedures. FAR 12.302(c). The request for waiver must describe the customary practice, support the need to include the inconsistent term, and include a determination that use of the customary practice is inconsistent with the government's needs. A waiver can be requested for an individual or class of contracts for an item. For DoD, the Head of the Contracting Activity is the approval authority for waivers under FAR 12.302(c). DFARS 212.302(c).
 - a. Tailoring shall be executed by adding an addendum to both the solicitation and the contract. See FAR 12.302(d); see also *Diebold, Inc.*, B-404823, June 2, 2011 (“a contracting officer exercising the authority to change the terms and conditions must do so in manner that gives all offerors an equal opportunity to compete by publishing the tailored clauses in the initial solicitation’s addenda or by providing an amendment to the solicitation to include revised terms and conditions”).
 - b. Certain clauses of FAR 52.212-4 implement statutory requirements and shall not be tailored by the contracting officer include: Assignments Clause, Disputes Clause Payment Clause, Invoices Clause, Other Compliances Clause, and Compliance with laws unique to Government contracts Clause. See *Smelkinson Sysco Food Services*, B-281631, Mar. 15, 1999, 99-1 CPD ¶ 57 (protest sustained where agency failed to conduct market research before incorporating an “interorganizational transfers clause”). Contracting officers are to include only those clauses that are required to implement provisions of law or executive orders applicable to commercial items, or are deemed to be consistent with customary commercial practice. FAR 12.301(a).¹³ See, *CW Government Travel, Inc. v. U.S. and Concur Technologies*, No. 11-298C, (Fed. Cl., 2011) (holding that the government’s insistence on a fixed, 15-year pricing schedule was inconsistent with customary commercial practice, was in violation of FAR 12.301(a), and was unsupported by market research).

¹³ DFARS 212.301(f) lists numerous provisions and clauses unique to DoD solicitations and contracts for the acquisition of commercial items.

- c. **See Also DFARS 212.302 - Tailoring inconsistent with customary commercial practice.** The head of the contracting activity is the approval authority within the DoD for waivers under FAR 12.302(c).

B. Use of DFARs clauses for Commercial Items.

- a. DFARS 212.301¹⁴ has several clauses and provisions that the contracting officer shall consider.
- b. When using FAR part 12 procedures for acquisitions exceeding \$1 million in value, except for acquisitions made pursuant to FAR 12.102(f)(1), the contracting officer **shall**— (A) Determine in writing that the acquisition meets the commercial item definition in FAR 2.101 or meets the criteria at FAR 12.102(g)(1); (B) Include the written determination in the contract file; and (C) Obtain approval at one level above the contracting officer when a commercial item determination relies on subsections (1)(ii), (3), (4), or (6) of the “commercial item” definition at FAR 2.101. (ii) Follow the procedures at [PGI 212.102\(a\)](#) regarding file documentation. (See DFAR 212.102)
- c.

VIII. UNIQUE TERMS AND CONDITIONS FOR COMMERCIAL ITEMS.

A. Acceptance FAR 12.402; FAR 52.212-4.

- 1. Generally, the government relies on a contractor’s assurance that commercial items conform to contract requirements. The government always retains right to reject nonconforming items.
- 2. Other acceptance procedures may be appropriate for the acquisition of complex commercial items, or items used in critical applications. The contracting officer should include alternative inspection procedures in an addendum to the SF 1449, and must examine closely the terms of any express warranty.

¹⁴ See DoD Class Deviation 2013-O0019, Commercial Item Omnibus Clause for Acquisitions Using the Standard Procurement System, issued September 25, 2013. This class deviation allows the contracting officer to use the SPS clause logic capability to automatically select the clauses that are applicable to the specific solicitation and contract. The contracting officer shall ensure that the deviation clause is incorporated into these solicitations and contracts because the deviation clause fulfills the statutory requirements on auditing and subcontract clauses applicable to commercial items. The deviation also authorizes adjustments to the deviation clause required by future changes to the clause at 52.212-5 that are published in the FAR. This deviation is effective for five years, or until otherwise rescinded.

B. Termination.¹⁵

1. FAR Clause 52.212-4, Contract Terms and Conditions - Commercial Items, permits government termination of a commercial items contract either for convenience of the government or for cause. *See* FAR 12.403(c)-(d).
2. This clause contains termination concepts different from the standard FAR Part 49 termination clauses.
 - a. Contracting officers may use FAR Part 49 as guidance to the extent Part 49 does not conflict with FAR Part 12 and the termination language in FAR 52.212-4.
 - b. AFARS 5112.403 - **5112.403 Termination** Submit PGI 212.403 reports no later than 10 calendar days after issuance of any notice of termination for cause or default, to the Army Contracting and Transformation Enterprise Systems Directorate , SAAL-PX, at the address included in 5101.290(b)(5). Electronic submissions are authorized.

C. Warranties. The government's post-award rights contained in 52.212-4 include the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. FAR 12.404 provides guidance for both implied warranties¹⁶ and express warranties.

1. Implied warranty of merchantability. Provides that an item is reasonably fit for the ordinary purposes for which such items are used.
2. Implied Warranty of Fitness for a Particular Purpose. Provides that an item is fit for use for the particular purpose for which the government will use the item. The seller must know the purpose for which the government will use the item, and the government must have relied upon the contractor's skill and judgment that the item would be appropriate for that purpose.
3. Express warranties. Contracting officers are required to take advantage of commercial warranties.
 - a. Solicitations 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.

¹⁵ *See* the Termination for Default and Termination for Convenience Chapters of this Desk Book for more information. Also note that termination for default of a commercial contract are called Terminations for Cause.

¹⁶ FAR 12.404(a)(3) directs contracting officers to consult with legal counsel prior to asserting any claim for breach of an implied warranty.

- b. Solicitations may specify minimum warranty terms.
 - c. Express warranties the Government intends to rely on must meet the needs of the Government and therefore should be analyzed by the contracting officer for adequacy of coverage (e.g. scope of coverage and length of warranty), effectiveness of post-award administration, and cost effectiveness.
- D. Contract Financing. If customary market practice includes buyer contract financing, the contracting officer may offer government financing IAW FAR Part 32. FAR 12.210.
- E. Technical Data. FAR Part 27. *See* the Intellectual Property Outline for more information.
- 1. “Technical Data” means recorded information of a scientific or technical nature (including computer databases and computer software documentation). This term does **not** include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. It includes recorded information of scientific or technical nature that is included in computer databases. FAR 2.101
 - 2. Policy. The government shall acquire only the technical data and the rights in that data customarily provided to the public with a commercial item or process. FAR 12.211.¹⁷
 - a. The contracting officer shall presume that data delivered under a contract for commercial items was developed exclusively at private expense. *Id.* By statute, Congress has established the presumption that commercial items are developed at private expense. 10 USC 2320(b)(1).
 - b. DFAR 212.7003 -- **Technical data and computer software**. For purposes of establishing delivery requirements and license rights for technical data under 227.7102 and for computer software under 227.7202, there shall be a rebuttable presumption that items or processes acquired under a contract or subcontract awarded in accordance with 212.7002 were developed in part with Federal funds and in part at private expense (i.e., mixed funding)
 - c. The Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics puts out a very helpful pamphlet on intellectual property entitled, “Intellectual Property: Navigating Through Commercial Waters.” *See*

¹⁷ *See* DFARS 227.7102 and 212.211 for DoD policy for acquiring technical data for commercial items.

<http://www.acq.osd.mil/dpap/specificpolicy/intelprop.pdf> (last visited June 2014).

F. Commercial Computer Software¹⁸

1. Definition. Any computer software that is a commercial item. FAR 2.101.
2. Commercial computer software or commercial computer software documentation shall be acquired under licenses customarily provided to the public to the extent such licenses are consistent with Federal law and otherwise satisfy the government's needs. FAR 12.212(a).

IX. INFORMATION TECHNOLOGY.

A. References.

1. Clinger-Cohen Act of 1996 (formerly called Information Technology Management Reform Act (ITMRA)), 40 U.S.C. § 1401
2. Sec 803 of the Duncan Hunter National Defense Authorization Act of Fiscal Year 2009 (Pub. L. 110-417), Oct. 14, 2008.
3. FAR Part 39, Acquisition of Information Technology; FAR Part 27, Patents, Data, and Copyrights
4. OMB Circular No. A-127, Financial Management Systems.
5. OMB circular No. A-130, Management of Federal Information Resources (Nov. 28, 2000).
6. OMB Memo, Software Acquisition, July 1, 2004.
7. OMB SmartBUY Policy, 2003-16, "Reducing Cost and Improving Quality in Federal Purchases of Commercial Software," Jun 5, 2003.
8. Department of Defense Directive (DODD) 8000.01, Management of the Department of Defense Information Enterprise, Feb. 10, 2009 (note the Feb. 2002 version is canceled);
9. DODD 5144.1, Asst. Sec. of Def. for Networks and Information Integration/DoD Chief Information Officer (ASD(NII)/DoD CIO), May 2, 2005;
10. DODD 5000.01, The Defense Acquisition System, May 12, 2003.

¹⁸ See, Intellectual Property Chapter of this Desk Book for more information.

11. Department of Defense Instruction (DODI) 4630.8, Procedures for Interoperability and Supportability of Information Technology (IT) and National Security Systems (NSS), June 30, 2004;
 12. DoDI 5000.02, Operation of the Defense Acquisition System, Dec. 8, 2008.
 13. Note: DoDD 8100.01, Global Information Grid (GIG) Overarching Policy, (Sept. 19, 2000) is CANCELED.
 14. Assistance Secretary of the Defense (ASD) Memo, DOD Chief Information Officer (CIO) Guidance and Policy Memorandum – Acquiring Commercially Available Software, July 26, 2000. See Memo at <http://www.esi.mil> (resource library; policy corner).
 15. ASD Memo, DoD support for the Smart BUY Initiative, Dec. 22, 2005 (SmartBUY is a government-wide enterprise software initiative led by OMB to streamline the acquisition process and provide best priced, standards-compliant commercial software).
 16. DFARS 239, Acquisition of Information Technology; DFARS 208.74, Enterprise Software Agreements; DoD Procedures, Guidance and Information (PGI) 208.7403; DFARS 212.212, Special Requirements for Acquisition of Commercial Items.
 17. Army Regulations 25-1, Army Knowledge Management and Information Technology, 4 Dec 2008; Department of the Army Pamphlet 25-1-1, Information Technology Support and Services, 25 October 2006; the Army's Computer Hardware Enterprise Software and Solutions (CHESS) website contains a wealth of information and should be checked for the most up to date references, <https://chess.army.mil> (last visited June 2013).
 18. DA Memo, Enterprise Software Agreements, Dec. 29, 2006.
 19. 40 U.S.C. §11302; 10 USC §2223 and §2224; 29 USC §794d;
- B. Definition: Information Technology means any equipment or interconnected system(s) or sub-system(s) of equipment that is used in the automatic acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the agency. FAR 2.101.
1. For purposes of this definition, equipment is used by an agency if it is used by the agency directly or is used by a contractor under a contract with the agency that requires its use or to a significant extent, its use in the performance of a service, or in the furnishing of a product.

2. It includes computers, ancillary equipment (including peripherals, input, output, and storage devices necessary for security and surveillance), peripheral equipment designed to be controlled by the central processing unit of a computer, software, firmware and similar procedures, services (including support services), and related resources.
3. It does not include any equipment that is acquired by a contractor incidental to a contract; or that contains embedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. For example, HVAC (heating, ventilation, and air conditioning) equipment, such as thermostats or temperature control devices, and medical equipment where information technology is integral to its operation, are not information technology. FAR 2.101.
4. Information technology includes financial management systems. FAR 39.000(a).

C. Overview. There are numerous statutes, rules and policy memos for buying Information Technology that vary by agency and by service. This guidance changes often, so you will need to check the most current guidance. Close communications with technical experts, staff sections (G-6), and end-users, is especially important in this area. The general framework is listed below.

1. The Director of the Office of Management and Budget (OMB) is statutorily responsible for promoting and improving the acquisition, use, security, and disposal of IT by the federal government. The Director also designates one or more heads of executive agencies as the executive agent for government-wide acquisitions of information technology. 40 U.S.C. 11302.
 - a. SmartBUY Initiative. SmartBUY is a government-wide enterprise software initiative led by OMB to streamline the acquisition process and provide best-priced, standards-compliant, commercial software.
 - (1) SmartBUY does not mandate the use of a particular brand, rather, it mandates the use of the cost-effective common vehicle when an agency decides to purchase the software of a designated brand.
 - (2) The General Services Administration (GSA) is designated as the executive agent for the SmartBUY

initiative and leads the interagency team in negotiating government-wide enterprise agreements for software.

2. Department of Defense.

- a. By statute, Congress has directed DoD to ensure that contracting officials identify and evaluate, at all stages of the acquisition process (including concept refinement, concept decision, and technology development), opportunities for the use of commercial computer software and other non-developmental software. Sec. 803, Duncan Hunter NDAA for FY 2009, Oct. 14, 2008 (Pub.L. 110-417); DFARS 212.212.
- b. DOD implements OMB's SmartBUY initiative through the DoD Enterprise Software Initiative (DoD ESI). Since approximately 1998, DOD has mandated that its departments and agencies fulfill requirements for commercial software and related services, such as software maintenance, in accordance with the DoD Enterprise Software Initiative (ESI). *See* Web Site at <http://www.esi.mil> (last visited June 2012). OSD Memo, SmartBUY, Dec. 22, 2005.
 - (1) The ESI program is managed by the DoD Chief Information Officer (CIO), whose stated vision for the program is "point and click information technology shopping at lowest cost."
 - (2) ESI promotes the use of enterprise software agreements (ESAs) with contractors that allow DoD to obtain favorable terms and pricing for commercial software and related services. ESI does not dictate the products or services to be acquired. DFARS 208.7402.
 - (3) DoD ESI allows DoD Components to enter into Enterprise software agreements (ESAs) that manage the acquisition of commercially available software in a manner that reduces the cost of acquiring and maintaining software products.
 - (4) DoD must acquire commercial software from one of the existing ESI or SmartBUY agreements listed on the ESI web site (<http://www.esi.mil>).
 - (a) If software or services are available from a DoD ESA, requiring activities must purchase their item from DoD, provided the prices represent the best value to the Government.

- (b) If the existing ESAs do not represent the best value, the software product manager (SPM) shall be given an opportunity to provide the same or a better value to the Government under the ESAs before the contracting officer may continue with alternate acquisition methods. PGI 208.7403.
- (c) If there is no ESI or SmartBUY agreement yet in place for the commercial software your agency wants to purchase, then consult with the ESI Team prior to negotiating directly with software publishers or resellers for large requirement.

3. Department of the Army (DA)

- a. The Army implements DoD's ESI program through its Information Technology, E-Commerce and Commercial Contracting Center (ITEC4). ITEC4 provides worldwide information technology contracting support and procures enterprise information technology support and equipment for Army and DoD activities. ITEC4 falls under the Army Contracting Command's National Capital Region (ACC-NCR). The Army mandates (*see* AR 25-1) use of its Computer Hardware, Enterprise, Software & Solutions (CHESS) (formerly the Army Small Computer Program (ASCP)) as the primary source for Army commercial IT purchases including commercial COTS software, desktops, notebook computers and video teleconferencing equipment, regardless of dollar value. The CHESS enterprise solutions consists of various multiple-award contract suites applicable to different categories of IT services. *See* CHESS Overview and History, available at https://chess.army.mil/CMS/a/ABTCHESS_HIS (last Accessed June 2014).
- b. Waivers. U.S. Army organizations wishing to use a non-CHESS source may request a waiver through the CHESS website at <https://chess.army.mil>. Justifications for waivers must provide a rationale to explain the extenuating circumstances or unique configurations required by mission and not available through CHESS contracts.

4. Department of the Navy (DON)

- a. DON CIO Message DTG 021419Z FEB 99, DON Information Technology Enterprise Wide Investment Policy;

- b. Asst. Sec. of the Navy (Research, Development and Acquisition) Memo, Department of Defense ESI and Microsoft Server Enterprise Agreement, Jan. 29, 2001;
 - c. DON Memo, Navy Shore-Based Oracle Database Enterprise License Agreement, 29 Sept. 2004;
 - d. OPNAV Instruction 5230.26, Information Technology (IT) Budget Stewardship Review Execution and Funding Realignment Recommendation Policy, 17 Mar. 2008.
5. Department of the Air Force. *See* Department of the Air Force Memo, Air Force Policy for DoD ESI Agreement Use, 15 April 2001.

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APPENDIX



OFFICE OF FEDERAL
PROCUREMENT POLICY

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D. C. 20503

July 3, 2003

MEMORANDUM FOR AGENCY SENIOR PROCUREMENT EXECUTIVES

FROM:

Angela B. Styles
Administrator

A handwritten signature in black ink, appearing to read "Angela B. Styles", written over the printed name.

SUBJECT:

Applicability of FAR Part 12 to Construction Acquisitions

Questions periodically arise as to whether construction needs may be acquired using the policies of FAR Part 12, which addresses the acquisition of commercial items. For the reasons discussed below, Part 12, as currently promulgated, should rarely, if ever, be used for new construction acquisitions or non-routine alteration and repair services. In accordance with long-standing practice, agencies should apply the policies of FAR Part 36 to these acquisitions. Part 36 incorporates provisions and clauses that are generally consistent with customary commercial practices in the construction industry. Part 12 could be used in limited circumstances involving construction contracting -- primarily for routine alteration and repair services as well as for acquisitions of commercial construction materials and associated ancillary services.

The provisions and clauses in FAR Part 36 address all fundamental aspects of construction contracting. Part 36 applies well-established commercial principles that are designed to result in an equitable distribution of risk between the government and contractors. In doing so, Part 36 enables agencies to gain easy access to marketplace capabilities.

By contrast, FAR Part 12 lacks clauses for handling critical circumstances common to construction efforts, especially those involving new construction or non-routine alteration and repair services. Clauses that would typically be expected in these efforts include those addressing differing site conditions, change orders, and suspension of work. The gap in coverage reflects the fact that construction contracting was not generally contemplated when Part 12 was promulgated. New construction projects and complex alteration and repair, in particular, involve a high degree of variability, including innumerable combinations of site requirements, weather and physical conditions, labor availability, and schedules. The current coverage in Part 12 fails to allocate risk in a manner that takes into account the nature of these activities.

Contracting for new construction or complex alternations and repair work without the protections of the Part 36 provisions and clauses would likely force contractors to include contingencies in their offers that would unnecessarily drive up construction costs

borne by the taxpayer. Increased risk also could discourage contractors from bidding on federal projects. Small businesses, who may lack the financial ability to take on higher levels of risk, may find participation in federal construction contracting to be especially difficult which, in turn, could deprive agencies of the innovation and ingenuity that small businesses offer when given the chance to compete. Simply put, if Part 36 is not used, an agency may be hard pressed to obtain the marketplace competition needed to negotiate fair and reasonable prices on these construction projects.

This memorandum is not intended to limit the goal of FAR Part 12, which is to ensure agencies are effectively positioned to take full advantage of the commercial marketplace and the value and efficiencies the marketplace generates. In fact, Part 12 clauses generally are suited for certain types of construction activities that lack the level of variability found in new construction and complex alteration and repair. In particular, Part 12 generally may be suited for routine painting or carpeting, simple hanging of drywall, everyday electrical or plumbing work, and similar noncomplex services, as well as for purchases of commercial construction material and associated ancillary services. Of course, as part of acquisition planning, contracting officers need to consider the particular circumstances of a given acquisition (e.g., the likelihood of a differing site condition) to determine if the current clauses in Part 12 properly allocate risk.

Agencies are reminded that when they proceed with a construction acquisition under *either* Part 36 or Part 12, they must adhere to the policies of FAR Subpart 22.4. This subpart addresses labor standards for contracts involving construction.

I appreciate your careful consideration of this memorandum and ask that you distribute the memorandum widely to contracting, program, legal, and other agency personnel responsible for construction contracting within your agency. I also ask that you promptly review any agency guidance on the applicability of FAR Part 12 to construction acquisitions and change or rescind agency guidance, as necessary, to ensure consistency with this memorandum. Questions regarding this memorandum may be referred to Mathew Blum of my staff at (202) 395-4953.