

## Procurement & Property Division Policy Memorandum

<b>Subject: Acquisition of Commercial Items</b>		<b>Number:</b>  <b>12-01</b>
<b>Distribution: ARS PAOs, FD, PPD</b>	<b>Date: July 19, 1999</b>	<b>This Replaces: N/A</b>

### Background

In accordance with the Federal Acquisition Streamlining Act (FASA) and as implemented by the Federal Acquisition Regulation (FAR), Part 12 was completely revised to address both the policies and procedures for the acquisition of COMMERCIAL ITEMS. FASA strongly encouraged the government to acquire commercial products and services to satisfy the Government's minimum needs. FAR 2.101 defines COMMERCIAL ITEMS in such a broad manner that virtually everything the Government acquires could satisfy that definition. FASA established acquisition policies more closely resembling those of the commercial marketplace and encouraged the acquisition of COMMERCIAL ITEMS and components.

To further demonstrate the progressive definition of COMMERCIAL ITEMS, the second paragraph states if the item has evolved from something that already meets the test for a COMMERCIAL ITEM and will be available for use by the general public, it can be considered a COMMERCIAL ITEM. This further definition of COMMERCIAL ITEMS allows the Government to take advantage of evolving technology and product improvements in cases where an item is not currently available to the public in time to meet the delivery schedule of the Government, it can be considered a COMMERCIAL ITEM.

To summarize, the eight parts of the COMMERCIAL ITEMS definition are as follows: Parts (1), (2), and (3) relate to the capability of the product (be it hardware or software) to meet the user's performance needs and the capability of the contractor to meet the user's schedule and quantity needs. Part (4) indicates we can mix and match commercial hardware, software and services and still have a

COMMERCIAL ITEM. Part (5) is a reminder that services in support of a COMMERCIAL ITEM are also COMMERCIAL ITEMS. Part (6) establishes that services of a type totally unrelated to parts (1) through (5) are also COMMERCIAL ITEMS if stated conditions are met. Finally, we see that a COMMERCIAL ITEM retains its identity as it moves around a contractor's facilities, Part (7) and that in certain instances a nondevelopment item, Part (8) can be a COMMERCIAL ITEM.

The Contracting Officer has been given considerable freedom to write contract language or to tailor clauses/provisions to their acquisitions which will ensure that customary commercial market practices are being used. The new regulations place considerable emphasis on the procurement of COMMERCIAL ITEMS. Contracting Officer's have been empowered to use commercial practices to tailor solicitations, use the commercial inspection and testing procedures and processes, use the commercial warranties, the commercial distribution, and support capabilities. It should be noted that the only exception from using customary market practices in acquiring COMMERCIAL ITEMS is through a waiver approved by the Head of the Contracting Activity Designee (HCAD) (AGAR 412.302).

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Policy Guidance

FAR 12.101 states:

“Agencies shall--

- (a) Conduct market research to determine whether COMMERCIAL ITEMS or nondevelopmental items are available that could meet the agency's requirements;
- (b) Acquire commercial items or nondevelopmental items when they are available to meet the needs of the agency; and
- (c) Require prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, COMMERCIAL ITEMS or nondevelopmental items as components of items supplied to the agency.”

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Action Required by  
REE Contracting  
Officers

Ensure that requirements for supplies and services are defined so that COMMERCIAL ITEMS may be procured to the maximum extent practicable, in accordance with the guidance provided in this Policy Memorandum, all statutes, Federal, departmental, and REE regulations.

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PPD Point of Contact

Policy Branch, 301-504-1725

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Approved

\_\_\_\_\_/s/\_\_\_\_\_  
Richard G. Irwin, Director  
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Enclosure

## COMMERCIAL ITEMS

This document provides the procedures for the acquisition of COMMERCIAL ITEMS.

### TABLE OF CONTENTS

#### PROCEDURES

STEP 1	MARKET RESEARCH AND DESCRIPTION OF AGENCY NEED	1
STEP 2	DEVELOPING REQUIREMENTS DOCUMENTS (REQUIREMENTS ANALYSIS)	2
STEP 3	PUBLICIZING CONTRACT ACTIONS	4
STEP 4	SOLICITATION	5
	TAILORING PROVISIONS AND CLAUSES	6
STEP 5	SUBMISSION OF BIDS/OFFERS	9
STEP 6	RESPONSE TIME	10
STEP 7	EVALUATION	11
STEP 8	PRICE REASONABLENESS DETERMINATION	13
STEP 9	SELECTION FOR AWARD	15
STEP 10	INSPECTION AND ACCEPTANCE	16
	- CUSTOMARY COMMERCIAL ACCEPTANCE TERMS	16
	- POST-ACCEPTANCE RIGHTS	17
	- REJECTION	17
	- FAILURE TO REJECT	18
	- DETERMINATION OF REASONABLE TIME	19
STEP 11	PAYMENT	20

#### OTHER ACTIVITIES THAT ARE APPLICABLE TO COMMERCIAL ITEMS

WARRANTIES		21
	EXPRESS WARRANTIES	21

IMPLIED WARRANTIES	22
<b>TERMINATIONS</b>	
TERMINATION FOR CAUSE	24
TERMINATION FOR THE GOVERNMENT’S CONVENIENCE	24
EXCUSABLE DELAY	25
TERMINATIONS FOR CAUSE	25
PROCEDURES TO TERMINATE FOR CAUSE	26
TERMINATIONS FOR CONVENIENCE	26
PROCEDURES FOR TERMINATIONS FOR CONVENIENCE	26
LIQUIDATED DAMAGES	27
<b>TECHNICAL DATA AND COMPUTER SOFTWARE</b>	
COMMERCIAL COMPUTER SOFTWARE	28
<b>CONTRACT FINANCING</b>	
COMMERCIAL ADVANCE PAYMENT	30
DELIVERY PAYMENT	30
COMMERCIAL INTERIM PAYMENT	30
INSTALLMENT PAYMENTS	30
<b>SUBCONTRACTING PLANS FOR COMPANIES SUPPLYING COMMERCIAL ITEMS</b>	31
<b>STREAMLINED PROCEDURES FOR SOLICITATION AND EVALUATION OF COMMERCIAL ITEMS</b>	33
<b>DEFINITIONS</b>	35

## PROCEDURES

### Step 1. Market Research and Description of Agency Need: See FAR Part 10, Market Research

*Market Research is defined as collecting and analyzing information about the capabilities within the market to satisfy agency needs.*

The results of Market Research will determine if commercial items or to what extent commercial items are suitable to meet the agency's needs. This first step, Market Research, is the most important and key to determining whether the Government's need can be satisfied by a Commercial Item. Market Research must be conducted before developing new requirement documents for a procurement, soliciting any offers/bids for procurements in excess of the Simplified Acquisition Threshold (SAT), and soliciting any offers/bids for procurements below SAT; only when adequate information is not available and when the circumstances involved justify the expense.

Market Research may take the form of (a) contacting knowledgeable individuals in Government and industry regarding market capabilities to meet requirements; (b) reviews of recent Market Research of similar or identical requirements; (c) formal requests in technical or scientific journals or business publications; (d) querying Government databases; (e) querying industry, acquisition personnel, and customers; (f) source lists from other agencies, trade associations, or other sources; (g) review catalogs, product literature; and/or (h) conducting interchange meetings or holding presolicitation conferences.

*Market Research Techniques:*

- # *Industry Publications*
- # *Periodicals*
- # *Vendor Associations*
- # *Trade Journals*
- # *Marketing Organizations*
- # *Trade Shows*
- # *Commerce Business Daily*
- # *Discussions with individuals in private and public sectors*
- # *Internet*

In accordance with FAR 10.002(e), Market Research should be documented in a manner appropriate to the size and complexity of the proposed acquisition.

## **Step 2. Developing Requirements Documents (Requirements Analysis)**

*Requirements Analysis is the process used to identify what key characteristics a yet-to-be identified item or service must possess to meet the user's need.*

Using the first step, the product attributes, the market's production and distribution capabilities, the availability in the marketplace to meet the user's needs as well as, commercial business practices having been identified. Requirements Analysis will be used to establish the key characteristics that a yet-to-be-identified item or service must have to meet the user's need. Agency needs will be stated in performance terms to the maximum extent practicable so as to encourage offerors to supply commercial items. There must be consistency between the mission to be performed and the key characteristics (requirements) identified to achieve the mission.

*State requirements in terms of:*

- # functions to be performed (what the item is to do)*
- # performance required (how well it is to do it); or*
- # essential physical characteristics (environmental/interfaces - what it has to interface with)*

In accordance with FAR 7.102(a), "Agencies shall perform acquisition planning and conduct Market Research 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, to the maximum extent practicable, and (2) Full and Open competition 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.”

*Requirements shall be defined in terms that encourage commercial items (first choice), nondevelopmental items (second choice), and developmental items (third choice).*

Challenge unique requirements, unjustified, uncommon or fringe requirements, they have a tendency to drive an acquisition from commercial to new developmental solutions. A reasonableness check would be to ensure consistency between the mission to be performed and the key requirements, which were identified to achieve the mission.

*To challenge unique requirements, ask yourself:*

*# Have we overstated what it takes to meet the mission?*

*# Have we stated characteristics that are not required to meet the mission?*

*It should be noted that these questions would also be appropriate for schedule and quantity needs.*

When new development is the only way to satisfy the agency’s need, contractor’s should be encouraged to incorporate commercial and nondevelopmental items as components of the new development.

Requirements analysis will identify the key characteristics. These key characteristics will provide the functional/performance factors that the user will expect of the yet unidentified item as well as information on the operational environment in which the user will use it. In requirements analysis, we are trying to



determine what a yet-to-be-identified item or service has to do to meet the Government's minimum requirements. We are not trying to decide which item/product will meet the user's need. The comparison of requirements analysis to Market Research is performed by comparing functions, performance, and interfaces (attributes). After the completion of requirements analysis, we will be ready to capture the essential functions that a system must

perform to meet the need and how well each function must be performed. The translation of the requirements into a COMMERCIAL ITEM description or a performance specification will be much easier.

*Requirements Analysis is the result of the analysis of the capabilities of the marketplace to meet the need (Market Research) and the analysis of the key characteristics an item must possess to meet the need (Describing Agency Needs).*

In accordance with FAR 12.207, firm fixed price or fixed price with economic price adjustment type of contracts shall be used. If indefinite delivery type contracts are anticipated, only those with established firm fixed prices or fixed prices with economic price adjustment shall be used. Any other type of contract for the acquisition of commercial items is **prohibited**.

*Contract Type: Firm Fixed Price or Fixed Price with Economic Price Adjustment*

### **Step 3. Publicizing Contract Actions**

In accordance with FAR 5.203(a)(1) and (2), proposed contract actions for COMMERCIAL ITEMS may establish a shorter period (less than 15 days) for issuance of the solicitation, or use the combined Commerce Business Daily (CBD) synopsis/solicitation procedures, FAR 12.603. A response time of less than 30 days is permissible for COMMERCIAL ITEMS. The synopsis shall be completed in accordance with the format stated in FAR 5.207.

*CBD notices: If the Government does not intend to acquire COMMERCIAL ITEMS using FAR Part 12, the synopsis shall refer to Numbered Note 26.*

#### **Step 4. Solicitation**

In preparing the solicitation, the policies which are unique to the acquisition of COMMERCIAL ITEMS (FAR Part 12) must be used in conjunction with the policies and procedures for solicitations as they pertain to Simplified Acquisition Procedures (FAR Part 13), Sealed Bidding (FAR Part 14), and Contracting by Negotiation (FAR Part 15). It should be noted that FAR Part 12 takes precedence over other parts of the FAR when there is an inconsistency.

*When there is an inconsistency between FAR Part 12 and other parts of FAR and you are acquiring COMMERCIAL ITEMS, FAR Part 12 has precedence.*

FAR 12.204 states that Standard Form 1449, Solicitation/Contract/Order for Commercial Items shall be used, when:

1. the acquisition is expected to exceed the simplified acquisition threshold;
2. a paper solicitation or contract will be issued; and
3. the streamlined acquisition procedures for COMMERCIAL ITEMS are not being used, (FAR 12.603).

*It should be noted that the use of the Standard Form 1449 is nonmandatory but ENCOURAGED for commercial acquisitions not exceeding the simplified acquisition threshold.*

If the bid or offer is not submitted on the Standard Form 1449, a statement specifying the extent of agreement with all terms, conditions, and provisions should be included in the solicitation. It should be noted that bids or offers that fail to furnish the required representations of information or that request the terms and conditions of the solicitation **may** be excluded from consideration.

*FAR 12.303 provides the format for the acquisition of COMMERCIAL ITEMS prepared in accordance with FAR Part 12.*

FAR 13.106-1(c) authorizes the soliciting of oral quotations to the maximum extent practicable.

Tailoring Provisions and Clauses. The Contracting Officer has a great deal of latitude in the writing of the contract language for the solicitation; however, tailoring must be consistent with customary practices unless a waiver is approved by the HCAD, AGAR 412.302.

*FAR 12.302(c) states: “The Contracting Officer shall not tailor any clause or otherwise include any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance with agency procedures.”*

When tailoring terms and conditions, as permitted, it should be based on the results of market research, done by an addendum to the SF 1449, and consistent with the standard terms and conditions of the solicitation.

In accordance with FAR 12.3, commercial item acquisition provisions and/or clauses with the explanatory notes are as follows:

PROVISION/CLAUSE	EXPLANATORY NOTES
52.212-1 Instructions to Offerors - Commercial Items	This provision provides streamlined instructions to offerors. This clause is incorporated by reference.
	The Contracting Officer <b>may</b> tailor these instructions or provide additional instructions tailored to the specific acquisition.
52.212-2 Evaluation - Commercial Items	The Contracting Officer may use this provision or a similar one when the use of evaluation factors is appropriate.
52.212-3 Offeror Representations and Certifications - Commercial Items	This provision provides a single, consolidated 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 may <b>not</b> tailor this clause without a FAR deviation, FAR Subpart 1.4.
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. This clause is incorporated by reference.
	The Contracting Officer <b>may</b> tailor this clause in accordance with FAR 12.302.
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 may <b>not</b> tailor this clause.

52.244-6 Subcontracts for Commercial Items and Commercial Components	Notwithstanding any other clause in the prime contract, only those clauses identified in the FAR clause at 52.244-6 are required to be in subcontracts for commercial items or components.
Discretionary Use of FAR Provisions and Clauses	In accordance with FAR 12.301(e), the Contracting Officer may include in solicitations and contracts by addendum, other FAR provisions and clauses when their use is consistent with the limitations contained in FAR 12.302, i.e., appropriate clauses when an indefinite delivery type of contract will be used, appropriate clauses or provisions when options will be used.

### Step 5. Submission of Bids/Offers

In accordance with FAR Clause 52.212-1 Instructions To Offerors - Commercial Items, the submission of bids/offers may take many forms, such as, Standard Form 1449, letterhead stationery, or as otherwise specified in the solicitation. Submissions at a minimum must include:

- (1) the solicitation number;
- (2) time specified in the solicitation for the receipt of bids or offers;
- (3) name, address, and telephone number of the bidder or offeror;
- (4) technical description of the items being offered in sufficient detail to evaluate compliance with the requirements in the solicitation. This description may include such items as descriptive literature or other documents, if necessary;
- (5) terms of any express warranty;
- (6) price and any discount terms;
- (7) "Remit to" address, if different than mailing address;
- (8) completed copy of the representations and certifications at FAR 52.212-3, Offeror Representations and Certifications - Commercial Items;
- (9) acknowledgment of solicitation amendments;
- (10) past performance information, when included as an evaluation factor, to include recent and relevant contracts for the same or similar items and other references (including contract numbers), points of contact with telephone numbers, and

- other relevant information); and
- (11) if the bid or offer is not submitted on the Standard Form 1449, include a statement specifying the extent of agreement with all terms, conditions, and provisions included in the solicitation.

*Contracting Officers should and are encouraged to allow offerors to propose more than one product that will meet a Government's need in response to solicitations for commercial items. The Contracting Officer shall evaluate each product as a separate offer.*

*Bids or offers that fail to furnish the required representations or information--or that reject the terms and conditions of the solicitation--may be excluded from consideration.*

*When tailoring, remember these three basic rules:*

- # Tailoring must be based on Market Research*
- # Tailoring is done by addendum to the SF 1449*
- # Always check for language elsewhere in the standard terms and conditions that is inconsistent or conflicting with the addendum.*

*The Contracting Officer shall indicate in Block 26 of the Standard Form 1449 if addenda are attached.*

## **Step 6. Response Time**

In accordance with FAR 5.203(b) and (c), Contracting Officer's may allow fewer than 30 days response time for receipt of bids or offers for commercial items. The Contracting Officer should consider the circumstances of the individual acquisition, such as complexity of requirement, commerciality, availability, degree of urgency, whether use was made of presolicitation notices, and/or anticipated extent of subcontracting when establishing the solicitation response time.

*Contracting Officer's may allow fewer than 30 days response time for receipt of bids or offers for commercial items.*

A bidder or offeror must agree to hold the prices in its bid or offer firm for 30 calendar days from the date specified for receipt of bids or offers, unless another time period is specified in an addendum to the solicitation.

## **Step 7. Evaluation**

When evaluating proposals, the Contracting Officer shall use the policies and procedures as stated in FAR Part 12 - Acquisition of Commercial Items; however, consideration should be given to the appropriate procedures for the acquisition of commercial items as prescribed in FAR Part 13 - Simplified Acquisition Procedures, FAR Part 14 - Sealed Bidding, or FAR Part 15 - Contracting by Negotiation.

One area of possible evaluation is terms and conditions. This idea of "customary commercial practice" is a whole new concept for the Government. The possibilities that may be offered by offerors for consideration are endless. One example is warranty. Company A offers a one-year warranty while Company B offers a higher price but includes a two-year warranty. The Contracting Officer and the requirements personnel will have to consider whether the additional 12 months of warranty coverage is worth the higher price.

*Customary commercial practice with regards to evaluation provides challenges to Government Contracting Officers.*

*The Contracting Officer must insert the significant evaluation factors, as a starting point for the use of standard factors, such as (i) technical capability of the item offered to meet the Government's requirement; (ii) price; and (iii) past performance. Additionally, the relative order of importance of the evaluation factors must be specified, such as "in descending order of importance."*

Past performance shall be an important element of every evaluation and contract award, commercial items are not excluded. Past performance data should be obtained and considered from a wide variety of sources from both the commercial industry and Government agencies in accordance with FAR Part 9 - Contractor Qualifications, FAR Part 15 - Contracting by Negotiation and OFPP Policy Letter 92-5 - Past Performance Information.

FAR Subpart 42.15, Contractor Performance Information, provides the policies and procedures for recording and maintaining contractor performance information. An evaluation of the contractor's performance for each contract in excess of \$1,000,000 and each contract in excess of \$100,000 beginning not later than January 1, 1998 is required in accordance with FAR Subpart 15.3. The National Institutes of Health (NIH) Contractor Performance System (CPS) shall be utilized by procurement personnel to obtain past performance information and the input of past performance information resulting from performance evaluations.

*Past performance should be an important element of every evaluation and contract award for commercial item acquisitions.*



FAR Clause 52.212-2 - Evaluation - Commercial Items may be used when evaluation factors are appropriate for the acquisition. The Contracting Officer may include a similar provision containing all evaluation factors which are required by FAR 13.106, Subpart 14.2, or Subpart 15.3. This similar provision will be provided as an addendum to the solicitation. In accordance with the FAR clause, the Government may award a contract resulting from the solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered. The clause requires the Contracting Officer to list the significant evaluation factors which will be used to evaluate the offers. The factors must be ranked in relative order of importance and the relative importance of technical and past performance, when combined, when compared to price, must be disclosed.

*When contracting by negotiation, the Contracting Officer may insert FAR Clause 52.212-2 or a provision substantially the same.*

A technical evaluation for commercial items normally includes an examination of such information as product literature, product samples, technical features, and warranty provisions. FAR encourages Contracting Officers to use an offeror's existing product literature to show product capabilities, rather than unique technical proposals. Typically, existing commercial product literature contains a wealth of information on capabilities, statistics, and performance that can be used to determine whether an offered item satisfies the requirement. That same literature can also be used to compare competing products.

Past performance must be evaluated in accordance with FAR Subpart 15.3, as applicable. Contracting Officers should consider past performance data from a wide variety of sources both inside and outside the Federal Government, in accordance with FAR 12.206. The FAR Clause 52.212-1 requires offerors to include, at a minimum, contract numbers, points of contact with telephone numbers, and other relevant information.

The Contracting Officer must ensure that the instructions provided in the provision at FAR 52.212-1, Instructions to Offerors - Commercial Items, and the evaluation criteria provided in the provisions at FAR 52.212-2, Evaluation - Commercial Items, are in agreement.

Contracting Officers should allow offerors to propose more than one product that will meet the Government's need in response to solicitations for commercial items. The Contracting Officer shall evaluate each product as a separate offer.

*Contractors are allowed to submit more than one product, each will be evaluated individually.*

The Contracting Officer shall incorporate in the contract file a determination as a result of the evaluation.

### **Step 8. Price Reasonableness Determination**

When contracting by negotiation for commercial items, follow the policies and procedures in FAR Part 15 to establish the reasonableness of prices. The provisions and clauses prescribed in this part for the acquisition of commercial items do not include the provisions and clauses prescribed in FAR Part 15 because they assume prices for commercial items will either (1) not be subject to the Truth in Negotiations Act (TINA) because the contract price is below the dollar threshold for application of the Act; or (2) be based upon one of the exceptions to cost or pricing data requirements contained in FAR 15.403-1(b).

*Contracting Officer shall not obtain more information than is necessary to establish a fair and reasonable price. FAR 15.403-1 provides the exceptions to cost or pricing data.*

No additional information should generally be obtained from the offeror if the price is based on adequate price competition. The following provides the basis of adequate price competition:

- \* a price is based on adequate price competition if 2 or more responsible offerors, competing independently, submit priced offers responsive to the Government's expressed requirement;
  
- \* award will be made to the responsible offeror whose proposal offers either (1) the greatest value to the Government and price is a substantial factor in source selection; or (2) there is no finding that the price of the otherwise successful offeror is unreasonable; and

- \* there is considered to be adequate price competition when only one offer is received under the following circumstances:
  - \* adequate price competition exists if there was a reasonable expectation, based on market research or other assessment, that two or more responsible offerors, competing independently, would submit priced offers responsive to the solicitation's expressed requirement (even though only one offer was received);
  - \* the Contracting Officer can reasonably conclude that the offer was submitted with the expectation of competition; and

The written determination that the proposed price is based on adequate price competition and is reasonable should be approved at a level above the Contracting Officer.

If adequate price competition is **not** present, the Contracting Officer may obtain “information other than cost or pricing data”; and in descending order of priority, the following:

- \* price information available with the Government;
- \* price information obtained from sources other than the offeror;
- \* price information obtained from the offeror; and
- \* cost information which does not need to be certified.

*The Contracting Officer must use every means available to ascertain a fair and reasonable price before requesting cost or pricing data.*

*The most important provision in FARA provides an exception to the Truth in Negotiations Act (TINA) for “the acquisition of a commercial item.” This provision eliminates cost or pricing data requirements for commercial items.*

### **Step 9. Selection for Award**

After completing the evaluation, the Contracting Officer must select the offer that is most advantageous to the Government based on the factors contained in the solicitation. The Contracting Officer must fully document the rationale for the selection of the successful offeror, including discussions of any trade-offs considered. 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.

***REMEMBER*** *The Standard Form 1449 is required for solicitation and award. Offerors are not required to use the form to submit their offers, letterhead is acceptable. However, any award for commercial items must be made on the Standard Form 1449.*  
***NOTE:*** *A deviation has been issued by the Department to allow for the use of forms other than the Standard Form 1449.*

### **Step 10. Inspection and Acceptance**

*FAR Clause 52.212-4, Contract Terms and Conditions --Commercial Items provides the guidance on Inspection and Acceptance.*

No Government inspection is allowed before the contractor tenders items for delivery unless in-process inspection is customary commercial practice for the item being acquired. The Government can still inspect (after tender), and can still reject nonconforming supplies. If it is customary commercial practice, then our contract can allow us to conduct those same in-process inspections. Formal inspection of supplies is likely to become increasingly less commonplace under the new rules. The Government will rely on the integrity of our contractors to deliver acceptable products - yet retain contractual protections for those instances where we later find unacceptable ones.

*The Government is essentially out of the business of in-process quality assurance. The Government will rely on the integrity of our contractors to deliver acceptable products--yet retain contractual protections for those instances where we later find unacceptable ones.*

Customary Commercial Acceptance Terms. Acceptance may take place before delivery, at the time of delivery, or after delivery--depending upon contract terms and conditions.

*Standard Form 1449, Solicitation/Contract/Order for Commercial Items may be used to document receipt, inspection and acceptance of commercial items.*

Post-Acceptance Rights. FAR Clause 52.212-4(a) states the Government must exercise its post-acceptance rights (1) within a reasonable time after the defect was discovered or should have been discovered; and (2) before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

*Some factors that are relevant in determining "reasonable time" are: difficulty of discovery of the defect; perishability of the goods.*

*An example of “Substantial Change” caused by a defect is: A defective steering mechanism causes driver of car to lose control after having driven 14,680 miles. The car is a total loss. Substantial Change in condition of the car was caused by the defect in the goods.*

Although FAR 12.402(a) does not address the issue of rejection, the Government always has the right to refuse acceptance of nonconforming items. If alternative inspection procedures are used, they must be included in an addendum and assure that the post-award remedies adequately protect the Government’s interest.

*When contracting for complex commercial items or commercial items to be used in critical applications, alternative inspection procedures may be used.*

Rejection. The standard commercial practices for rejecting nonconforming supplies or services are:

- (a) If the goods fail in any respect to conform, the buyer may --
  - (i) reject the goods or,
  - (ii) opt to accept the goods in spite of the non-conformity.

Further, buyer may accept any commercial unit and reject the rest.

- (b) Seller has right to cure (repair or replace); and
- (c) Practices consistent with FAR Clause 52.212-4 procedures.

The steps of rejection are: (1) Rejection of goods must be within a reasonable time after their delivery

or tender; and (2) the seller could have cured, if stated reasonably.

*The Seller has the right to cure non-conforming goods when: (a) time for performance has not expired (b) time for performance has expired.*

Examples of right to cure non-conforming goods are:

(a) Time for Performance Has Not Expired. Where any delivery is rejected because goods are non-conforming and the time for performance has not yet expired, seller (1) may reasonably notify buyer of his intention to cure and (2) may then within the contract time make a conforming delivery.

(b) Time for Performance Has Expired. Where buyer rejects a non-conforming tender, which seller had reasonable grounds to believe would be acceptable, seller may, if seller reasonably notifies buyer, have a further reasonable time to substitute a conforming tender.

Failure to Reject. A tender or delivery of goods made pursuant to a contract of sale, even though non-conforming, requires affirmative action by the buyer to avoid acceptance. Accordingly, once the buyer has had a reasonable opportunity to inspect the goods, if the buyer fails to make an effective rejection, this is, the rejection must be within a reasonable time after delivery or tender and the buyer must reasonably notify seller, acceptance of the goods occurs. In this situation, the buyer's untimely rejection is said to be ineffective.

*Determining "reasonable time"*

- (a) Difficulty of discovery of the defect*
- (b) The contract terms*
- (c) Perishability of the goods*

The Government can reject accepted items found subsequently to be defective only if it acts:

- (a) Within a reasonable time after the defect was discovered or should have

- been discovered; and
- (b) Before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

It is more difficult for a buyer to revoke acceptance of goods than to have rejected them prior to acceptance for two reasons:

- (a) The longer the buyer has the goods, the higher the probability that the alleged defect was caused by or aggravated by the buyer's failure to maintain the goods properly.
- (b) The longer the buyer holds the goods (if they are used), the greater the benefit the buyer will have derived from them.

*Requirements for Revocation:*

- \* *Non-conformity must substantially impair value of the goods.*
- \* *Buyer must have accepted the goods:*
  - \* *On the assumption that non-conformity would be cured and it has not been, or*
  - \* *Without discovery if discovery was difficult or acceptance was based on seller's assurances.*
- \* *Revocation must occur within a reasonable time after buyer discovered or should have discovered defects.*
  - \* *Revocation must occur before any substantial change in condition of the goods not caused by defects.*

Determination of Reasonable Time. Since revocation of acceptance generally will be exercised only after attempts at adjustment have failed, the reasonable time period should extend in most cases beyond



the time in which notification of breach must be given and beyond the time for rejection after tender.

### **Step 11. Payment**

FAR Clause 52.212-4, Contract Terms and Conditions--Commercial Items provides information on the submission of the invoice and payment procedures. In accordance with the clause, the contractor must submit an original invoice and 3 copies (or an electronic invoice, if authorized) to the addressee designated in the contract to receive invoices. Invoices shall be handled and payment made in accordance with the Prompt Payment Act of 1982.

*An invoice must include:*

- # name and address of the contractor;*
- # invoice date;*
- # contract number, contract line item number, and if applicable, the order number;*
- # the description, quantity, unit of measure, unit price and extended price of the items delivered;*
- # the shipping number and date of shipment, including the bill of lading number and the weight of the shipment if shipped on Government bill of lading;*
- # the terms of any prompt payment discount offered;*
- # the name and address of the official to whom payment is to be sent; and*
- # the name, title, and telephone number of the person to be notified in the event of a defective invoice.*

**Other activities that are applicable to *Commercial Items* on a case by case basis are: Warranties, Terminations, Technical Data and Computer Software, Contract Financing, and Subcontracting Plans.**

Guidance is provided below on each of these activities:

**WARRANTIES:** Express Warranties. The Federal Acquisition Streamlining Act (FASA) of 1994 requires Contracting Officers to take advantage of commercial warranties. 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.

*Any express warranty the Government intends to rely upon must meet the needs of the Government.*

The Contracting Officer should analyze any commercial warranty to determine if:

- \* The warranty is adequate to protect the needs of the Government, e.g., items covered by the warranty and length of warranty;
- \* The terms allow the Government effective post-award administration of the warranty to include the identification of warranted items, procedures for the return of warranted items to the contractor for repair or replacement, and collection of product performance information; and
- \* The warranty is cost effective.

The Contracting Officer must ensure that the express warranty provides for the repair or replacement of defective items discovered within a reasonable period of time after acceptance. An example would be, it may be customary commercial practice for contractors to exclude or limit the implied warranties contained in FAR 52.212-4. The Government's rights must be protected by ensuring that the express warranty covers the repair or replacement of the item.

*Express warranties shall be included in the contract by addendum.*

*Contracting Officer's should consult with legal counsel prior to asserting any claim for a breach of an implied warranty.*

The seller's express warranties rest on negotiated aspects of an individual bargain. The warranties and an example of each are as follows:

- \* Goods shall conform to any affirmation of fact made by the seller to the buyer which relates to the goods.  
Example: "The goods are 100 percent wool."
- \* Goods shall conform to any promise made by seller to buyer which relates to the goods.  
Example: "The color of the cloth supplied by the seller under this contract will not fade."
- \* Goods shall conform to any description of the goods.  
Example: "Seller agrees to supply to buyer goods of the following description (describe the goods)."
- \* The whole of the goods shall conform to any sample of the goods.  
Example: "Seller agrees to supply the buyer with goods according to the sample supplied by the buyer."

Implied Warranties. The Government's post-award rights include implied warranties of:

Merchantability: Item is reasonably fit for ordinary purposes for which such items are used, is of average grade, and comparable in quality to others in the trade or market of that description.

Fitness: Item is fit for the particular purpose for which the Government will use it.

*The Government may rely upon an implied warranty of fitness for a particular purpose when:*

*\* the seller knows the particular purpose for which the Government intends to use the item; and*

*\* the Government relied upon the Contractor's skill and judgment that the item would be appropriate for the particular purpose.*

The relationship of express warranties to implied warranties are:

- \* Both are warranties of quality.
- \* For an express warranty to be created, an affirmation, promise, description, or sample must become "part of the basis of the bargain."
- \* Implied warranties rest on a common factual situation or set of conditions that no particular language or action is necessary to evidence them.
- \* It may be customary commercial practice for contractors to exclude or limit the implied warranties contained in the FAR provisions of an express warranty. The Contracting Officer shall ensure that the express warranty provides for the repair or replacement of defective items discovered within a reasonable period of time after acceptance.

*Under the Magnuson-Moss Federal Warranty Act, certain written consumer product warranties must fully and conspicuously disclose terms and conditions of the warranty, including whether such warranty is "full" or "limited".*

**TERMINATIONS.** In accordance with FAR Clause 52.212-4, the Government is permitted to terminate a contract for commercial items either for the convenience of the Government or for cause.

*Terminating Contracts Under FAR Part 12*

- # *The Government reserves the right to terminate both for cause and convenience.*
- # *Contracting Officers may continue to use Part 49 as guidance ONLY to the extent that Part 49 does not conflict with Part 12 and the language of the termination paragraphs, FAR 52.212-4(l) and (m).*

**Termination for Cause.** When a termination for cause is appropriate, the Contracting Officer shall send the contractor a written notification regarding the termination. At a minimum, this notification shall include the following:

- (i) Indicate the contract is terminated for cause;
- (ii) Specify the reasons for the termination;
- (iii) Indicate which remedies the Government intends to seek or provide a date by which the Government will inform the contractor of the remedy; and
- (iv) State that the notice constitutes the final decision of the Contracting Officer and that the contractor has the right of appeal under the Disputes clause.

**Termination for the Government's Convenience.** When the Contracting Officer terminates a contract for commercial items for the Government's convenience, the contractor shall be paid:

- (i) The percentage of the contract price reflecting the percentage of the work performed prior to the notice of the termination; and
- (ii) Any changes the contractor can demonstrate directly resulted from the termination.

**Excusable Delay.** 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.*

Determining what is an excusable delay?

- a. Occurrences beyond the reasonable control of the Contractor.
- b. Without contractor fault or negligence.
- c. Contractor requirement to notify the Contracting Officer as soon as it is reasonably possible after the commencement of any excusable delay.
- d. Contractor requirement to remedy such occurrence with all reasonable dispatch.
- e. Contractor requirement to promptly notify the Contracting Officer of the cessation of excusable delay.
- f. Contracting Officer to ascertain the facts and extent of the failure.
- g. Issue modification to delivery schedule.

Terminations for Cause. The Government may terminate for cause under FAR Clause 52.212-4:

- \* In the event of any default by the contractor,
- \* if the contractor fails to comply with any contract terms and conditions,
- \* if the contractor fails to provide the Government, upon request, with adequate assurances of future performance, or
- \* any and all rights and remedies provided by law.

### Procedures to Terminate for Cause:

- \* Cure notices are still required prior to terminating a contractor for a reason other than late delivery.
- \* Show #cause notices are not required but are permitted.
- \* Contracting Officers must terminate for cause by sending a written notice to the contractor. The notification shall include:
  - (1) Indicate the contract is terminated for cause;
  - (2) Specify the reasons for the termination;
  - (3) Indicate which remedies the Government intends to seek or to provide a date by which the Government will inform the contractor of the remedy, and
  - (4) State that the notice constitutes a final decision of the Contracting Officer and that the contractor has the right to appeal under the Disputes Clause.

### Terminations for Convenience, FAR Part 12.

- (1) The Government has the right to fully or partially terminate for its sole convenience.
- (2) Avoid at all costs -- because it will cost.
- (3) Contractor requirement to stop work causes its suppliers and subcontractors to stop work.
- (4) FAR Clause 52.212-4 establishes a new basis for convenience termination settlements.
- (5) Do not pay the contractor for any work performed or costs incurred "which reasonably could have been avoided."
- (6) Contractor is not required to comply with the cost accounting standards nor with any contract cost principle.
- (7) Government does not have a right to audit contractor's records.

### Procedures for Terminations for Convenience:

- \* Provide written notice to contractor specifying the extent of termination (total or partial) and the effective date.
- \* Determine termination charge based on percentage of work performed.
- \* Determine reasonable costs of settlement.
- \* Settle all outstanding liabilities and termination settlement proposals.

*The contractor is not required to comply with the cost accounting standards or contract cost principles to demonstrate termination charges. The Government also does not have the right to audit the contractor's records.*

Liquidated Damages. Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in light of:

- (1) the anticipated or actual harm caused by the breach,
- (2) the difficulties of proof of loss, and
- (3) the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.

**TECHNICAL DATA and COMPUTER SOFTWARE.** Except as provided by agency-specific statutes, 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.

*When acquiring the data, assume that the data delivered was developed exclusively at private expense.*

*If technical data is required, include the appropriate provisions and clauses, as an addendum to the solicitation, delineating the rights in the technical data.*

Commercial Computer Software or commercial computer software documentation must 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.

Offerors shall not be required to:

- (1) Furnish technical information related to commercial computer software or commercial computer software documentation that is not customarily provided to the public; or



- (2) Relinquish to, or otherwise provide, the Government's rights to use, modify, reproduce, release, perform, display, or disclose software documentation except as mutually agreed to by the parties.

*With respect to commercial computer software and documentation, the regulations provide that they shall be acquired pursuant to the licenses customarily provided to the public, which shall be specified in an addendum to the contract. While the Government is free to negotiate greater rights, it shall not require greater information or rights than are customarily provided to the public.*

Market Research shall be conducted to determine if commercial items are available to meet the Government's needs (computer software). However, there is no need in defining the Government's needs based on the commercial brand name(s) of software. The Government's need should be described in terms of functions to be performed, performance required, or essential physical characteristics.

**CONTRACT FINANCING:** FASA changed the prior law which discouraged Contracting Officer's from offering contract financing (i.e., advance payments, interim payments, installment payments) for commercial item acquisitions. FASA authorized commercial item contract financing on terms and conditions appropriate or customary in the commercial marketplace.

*Customary market prices for some commercial items may include buyer contract financing. In such instances, the Contracting Officer may offer Government financing in accordance with the policies and procedures in FAR Part 32.*

The new rules authorized commercial item financing if the following conditions were met:

- (a) The contract item to be financed is a commercial supply or service.
- (b) The contract price exceeds the simplified acquisition threshold.
- (c) The Contracting Officer determines that it is appropriate or customary in the commercial marketplace to make financing payments for the item.
- (d) Authorizing this form of financing payment is in the best interests of the Government.
- (e) Adequate security is obtained.
- (f) Prior to any performance of work under the contract, the aggregate of commercial advance payments does not exceed 15 percent of the contract price.
- (g) The contract is awarded on the basis of competitive procedures, or, if only one offer is solicited, adequate consideration is obtained.
- (h) The Contracting Officer obtains concurrence from the payment office concerning liquidation provisions when required.

*Unlike the use of installment payment financing, the use of alternative financing arrangements requires Contracting Officers and commercial item contractors to negotiate individualized contract terms and conditions (including payment amounts).*

Commercial Advance Payment. A payment made before any performance of work under the contract. The aggregate of these payments shall not exceed 15 percent of the contract price.

Delivery Payment. A payment for accepted supplies or services, including payments for accepted partial deliveries. Commercial financing payments are liquidated by deduction from these payments. Delivery payments are invoiced for prompt payment purposes.

Commercial Interim Payment. Any payment that is not a commercial advance payment or a delivery payment. A commercial interim payment is given to the contractor after some work has been done, whereas a commercial advance payment is given to the contractor when no work has been done.

Installment Payment. A payment by the Government to a contractor of a fixed number of equal interim financing payments prior to delivery and acceptance of a contract item.

*FAR Clause 52.232-30, Installment Payments can be used in accordance with agency procedures, **only**.*

*Customary market practice for some commercial items may include buyer contract financing.*

## **SUBCONTRACTING PLANS FOR COMPANIES SUPPLYING COMMERCIAL ITEMS**

The Office of Federal Procurement Policy issued Policy Letter 95-1 dated October 28, 1995, entitled Subcontracting Plans for Companies Supplying Commercial Items. This policy letter established the policy for subcontracting plans for companies supplying commercial items. It should be noted that the requirement for subcontracting plans does not apply to small businesses.

The following provides guidance as stated in Policy Letter 95-1:

A commercial plan is defined as a subcontracting plan covering the offeror's fiscal year and which is applicable to the entire production of commercial items sold by either the entire company or portion thereof (e.g., corporation, company, division, plant or product line).

Congress was concerned that the implementing policies would not ease the burden of Government-unique requirements on companies supplying commercial items. In response to this concern, the policy on subcontracting plans was revised to reduce the burden of Government unique requirements on prime contractors and subcontractors that supply commercial items.

When the requirement for a subcontracting plan under section 8(d) of the Small Business Act applies, annual commercial subcontracting plans that relate to a company's commercial and noncommercial production are authorized as follows:

- a. prime contracts for commercial items; or
- b. subcontractors that provide commercial items under a prime contract, whether or not the prime contractor is supplying a commercial item.

*FAR Clause 52.219-9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, paragraph (g) states that a commercial plan is the preferred type of subcontracting plan for contractors supplying commercial items.*

The responsibilities of the Contracting Officer are:

(1) These provisions for subcontracting plans for commercial item contractors do not in any way relieve Contracting Officers, prime contractors or subcontractors of their responsibilities for assuring that Small, Small Disadvantaged and Women-Owned small businesses have the maximum practicable opportunity to participate in contracts awarded by Federal agencies.

(2) The use of a commercial subcontracting plan does not relieve a contractor of the requirement to make a good faith effort to comply with the requirements of the subcontracting plan.

(3) Contracting Officers should impose liquidated damages as applicable when contractors fail to comply with subcontracting plans.

(4) When a contractor has a commercial plan previously approved by another agency's contracting activity or another Federal agency for the company's fiscal year, the Contracting Officer shall obtain a copy of the plan and the approval document from the contractor. The documents shall be incorporated into the contract.

(5) Since a commercial plan may be applicable to contracts awarded by more than one contracting activity or Federal agency, Contracting Officers must ensure that the commercial plan is not allowed to expire prior to the negotiation of a new commercial plan. This eventuality may occur when the contract of the Contracting Officer monitoring the plan is completed and no new contract is awarded to that contractor during the contractor's fiscal year. To prevent such an occurrence, 30 days prior to contract completion, the Contracting Officer monitoring the commercial plan shall obtain from the contractor the name of the Contracting Officer administering the contract with the latest completion date and arrange for the transfer of the monitoring responsibilities to the Contracting Officer.

(6) If a commercial plan is applicable, a Standard Form 294 - Subcontracting Report for Individual Contracts is not required. In addition, a Standard Form 295 - Summary Subcontract Report is only required annually on October 30 for the previous fiscal year.

## **STREAMLINED PROCEDURES FOR SOLICITATION AND EVALUATION OF COMMERCIAL ITEMS**

FAR Subpart 12.6 contains descriptions on two new streamlined procedures for the contracting of Commercial Items. The streamlined procedures are (1) streamlined evaluation of offers for commercial items; and (2) streamlined synopsis/solicitation of offers for commercial items. For acquisition of commercial items exceeding the simplified acquisition threshold but not exceeding \$5,000,000, including options, the simplified procedures authorized by FAR Subpart 13.5 Test Program for Certain Commercial Items shall be used to the maximum extent practicable.

*These new procedures are intended to simplify and speed up the procurement process.*

Each procedure is further explained, as follows:

(1) **STREAMLINED EVALUATION of OFFERS.** When evaluation factors are used and an award based on best value is contemplated, the Contracting Officer may use a clause similar to FAR 52.212-2, Evaluation--Commercial Items. Suggested evaluation criteria are technical capability, price and past performance provided in their relative order of importance, normally descending order of importance.

*The technical evaluation would normally include examination of product literature, product samples, and warranty provisions.*

**Technical capability.** Technical capability may be evaluated by how well the proposed products meet the Government's requirement instead of predetermined subfactors.

**Past performance.** Past performance shall be evaluated in accordance with the procedures in FAR 13.106 and Subpart 15.3.

The offeror selected shall be the one most advantageous to the Government. The rationale for selection shall be fully documented.

(2) STREAMLINED SYNOPSIS/SOLICITATION of OFFERS. To reduce solicitation time, the Contracting Officer may use a streamlined procedure that combines the required CBD synopsis and the issuance of the solicitation into one document. FAR 5.207 and 12.603 limits the submission in the CBD to 12,000 textual characters (approximately 3 1/2 single spaced pages).

*The use of the combined synopsis/solicitation is only appropriate where the solicitation is relatively simple.*

Contracting Officers should allow at least 15 days response time. Copies of the synopsis/solicitation should be posted as usual. If an amendment is required, it should be published in the same manner.

*Note: If the requirement is for a commercial item and the Government does not intend to acquire using FAR Part 12, the synopsis shall refer to Numbered Note 26.*

In accordance with FAR 12.603, the synopsis shall be prepared as described in FAR 5.207 for Items 1 through 16. FAR 12.603(c)(2) states Item 17, Description shall include this statement:

“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. This announcement constitutes the only solicitation; proposals are being requested and a written solicitation will not be issued.”

In addition, FAR 12.603(c)(2) provides a list of 17 items that need to be included in the synopsis/solicitation.

## DEFINITIONS

TERM	DEFINITION
Commercial Item	(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; See FAR 2.101(b) for more information.
Commercial Component	Any component that is a commercial item.
Market Research	Collecting and analyzing information about capabilities within the market to satisfy agency needs.
Nondevelopmental Item	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. Any supply item being produced that does not qualify as a “previously developed supply item” or as a “modified previously developed supply item” solely because the item is not yet in use. See FAR 2.101(b) for more information.
Commercially Available Item	Any item (other than real property) of a type customarily used for nongovernmental purposes and which: * has been sold, leased, or licensed to the general public, or * has been offered for sale, lease, license to the general public.
Item Not Yet Available Commercially	Any item that evolved from a “commercially available item” through the commercial marketplace and will be available commercially in time to satisfy the delivery requirements under a Government solicitation.
Minor Modification	A modification which does not: * significantly alter the nongovernmental function or essential physical characteristics of an item or component , or * change the purpose of a process.

Modification	<p>Any item that would qualify as a “commercially available item” or as an item which evolved from a “commercially available item” but for --</p> <ul style="list-style-type: none"> <li>* modification of a type customarily available in the commercial marketplace, or</li> <li>* minor modification of a type not customarily available in the commercial marketplace but made to meet Government requirements.</li> </ul>
Requirements Analysis	The process used to identify what key characteristics a yet-to-be identified item or service must possess to meet the user’s need.
Acquisition Planning	<p>The process by which the efforts of all personnel responsible for an acquisition are coordinated and integrated through a comprehensive plan for fulfilling the agency need in a timely manner and at a reasonable cost. It includes developing the overall strategy for managing the acquisition.</p> <p>See FAR 7.101 for more information.</p>
Cost or Pricing Data	<p>Cost of pricing data is defined as all facts that, as of the date of price agreement or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price, prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are data requiring certification in accordance with FAR 15.406-2. Cost or pricing data are factual, not judgmental; and are verifiable.</p> <p>See FAR 15.401 for more information.</p>
Information Other Than Cost or Pricing Data	Any type of information that is not required to be certified in accordance with 15.406-2 and is necessary to determine price reasonableness or cost realism. For example, such information may include pricing, sales, or cost information, and includes cost or pricing data for which certification is determined inapplicable after submission.
Market Acceptance	An agency’s requirement that an item must have performed in a certain way in a specified environment that approximates or reasonably relates to the agency’s intended application. It is a way of assuring that the products offered have the maturity, (reliability), and performance to meet the agency’s need.
Commercial Plan	A subcontracting plan covering the offeror’s fiscal year and which is applicable to the entire production of commercial items sold by either the entire company or portion thereof (e.g., corporation, company, division, plant or product line).



Customary Commercial Practice	Customary Commercial Practice is a discretionary decision of the Contracting Officer, made within the context of each individual situation. Adequate market research and full understanding of the commercial marketplace associated with a particular acquisition will form the bases for determining what is and what is not customary commercial practice.
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