The "Buyer's 10 Commandments"

for Procuring Commercial Items

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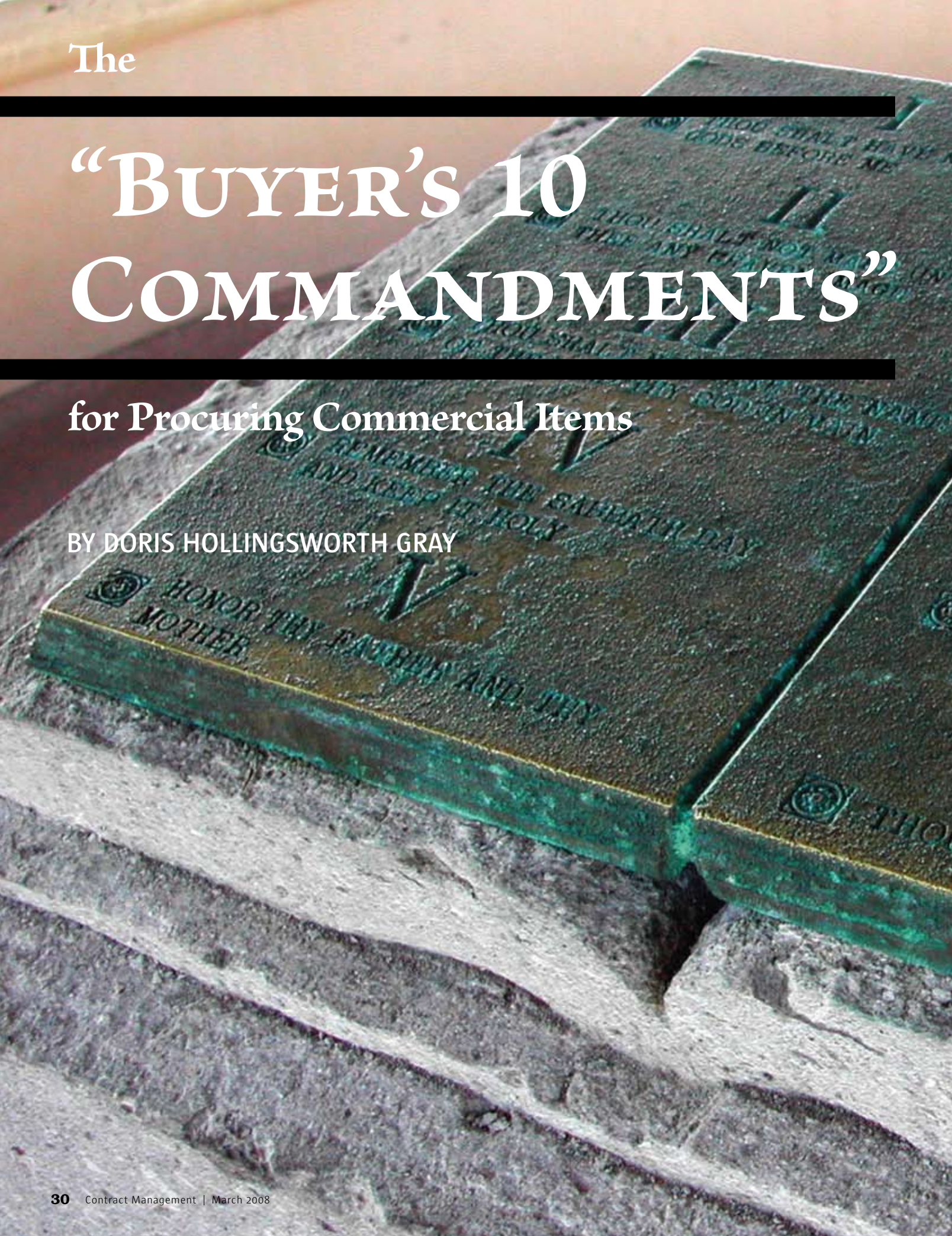

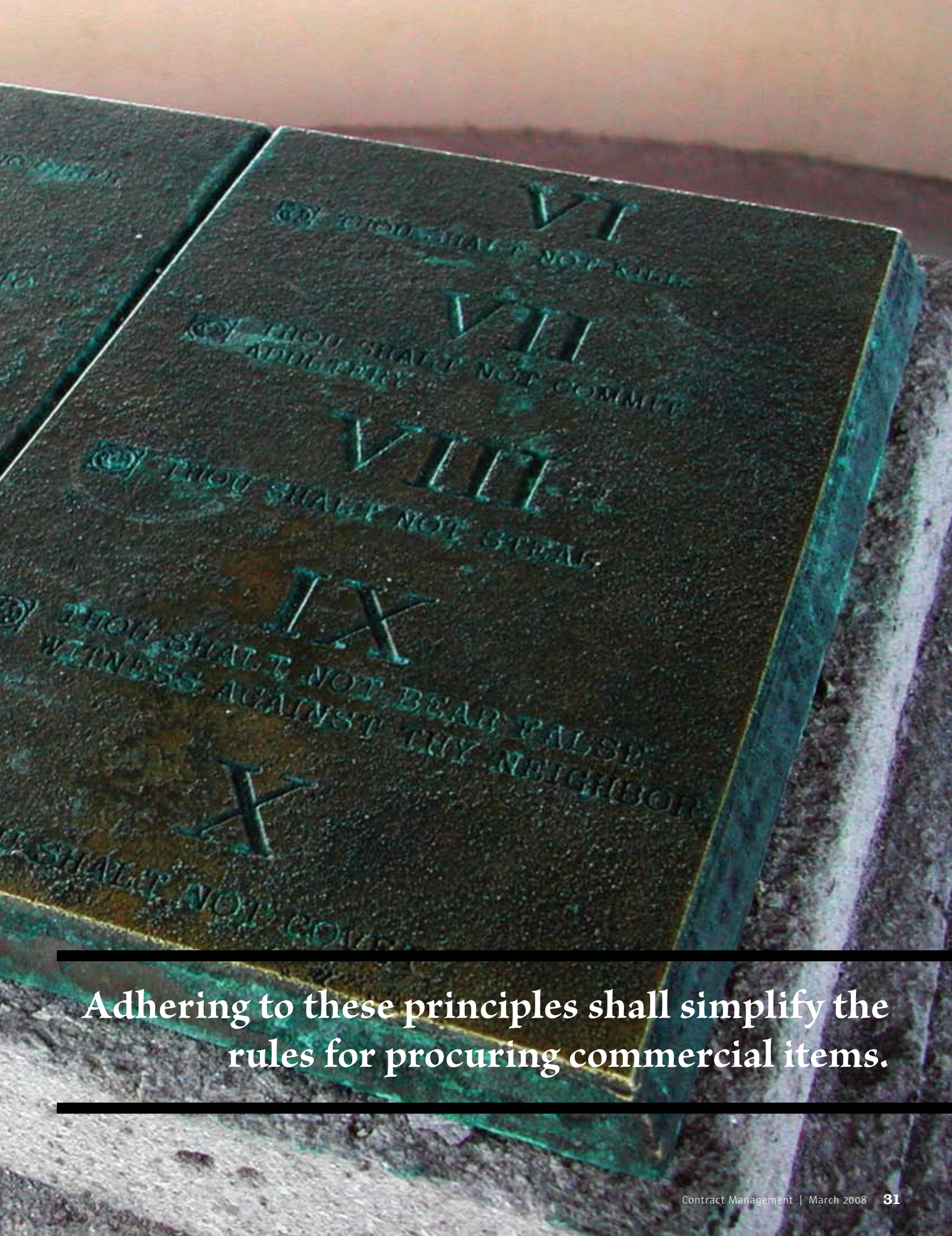

Adhering to these principles shall simplify the rules for procuring commercial items.

For over 35 years, the Department of Defense (DOD) has emphasized procurement reforms necessary to increase the use of commercial products.

Numerous studies have been conducted and acquisitions panels have been formed since the 1970s that have each advocated greater use of commercial items and practices by the military complex in order to reduce defense acquisition costs and lead times.[1] The evidentiary basis for this shift rests on the rate of advances in technology, the declining DOD industrial base, DOD's need for the latest technology, and the ability of commercially developed components and subsystems to better satisfy the government's requirements in many instances.[2]

The Federal Acquisition Streamlining Act (FASA) established a preference primarily for the acquisition of commercial items and secondarily for the acquisition of non-developmental items.

FASA led the government's major procurement reform efforts by:

- Expanding the definition of the term "commercial item,"
- Directing the *Federal Acquisition Regulation* (*FAR*) to contain a list of contract clauses to be included in contracts and subcontracts for the acquisition of commercial items, and
- Eliminating many government-unique laws and clauses.

The 90-32 *Federal Acquisition Circular*, 10/1/95, promulgated three *FAR* clauses in order to implement the directive of 8002(b)(1) of FASA. These clauses are:

- FAR 52.212-4, Contract Terms and Conditions—Commercial Items;
- 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items; and
- 52.244-6, Subcontracts for Commercial Items.

The Clinger-Cohen Act of 1996 exempted procurements for commercial items from Cost Accounting Standards (CAS) and clarified the Truth in Negotiations Act (TINA) exemption for certified cost or pricing data.

After more than a decade since the introduction of FASA and the Clinger-Cohen Act, commercial suppliers are still wrestling with the unreasonable demands to accept flow downs that are contrary to the mandatory requirements of FASA and *FAR* policy concerning the acquisition of commercial items. More commercial suppliers would be willing to participate in the federal market if the mandates of FASA and the Clinger-Cohen Act could be fully realized.

These "Buyer's Ten Commandments" for procuring commercial items attempt to simplify a few of the rules pertaining to commercial acquisitions. The primary intent of FASA is to use commercial products at all tiers in order to satisfy government requirements to the maximum extent practicable. Although these mandates apply to contracts between executive agencies and their prime contractors, for the intent of FASA to be fully realized, contractors must be willing to apply these principles to their subcontracts for commercial items. Because of the lack of privity of contracts between the government and subcontractors, the framers of FASA were apparently reluctant to interfere with the contractor and subcontractor relationship, believing that the dynamics of the commercial marketplace would force contractors to use terms consistent with commercial practices.

The word "shall" denotes the imperative[3] —a command or obligation that precludes discretionary action.[4] The use of this word indicates that the requirement is mandatory.[5] When the word "shall" is used in the *FAR* provisions, the contractor's flexibility is intentionally taken away.

I

FAR Part 12, Acquisition of Commercial Items, *shall* be used for the acquisition of supplies and services that meet the definition of "commercial items" at FAR 2.101.[6]

All agencies are required to follow the guidance of Part 12 in this regard. Furthermore, contractors and subcontractors cannot be required to procure these items using their standard boilerplate—which includes *FAR* and other provisions that are inapplicable to or inconsistent with commercial practices, and that violate *FAR* policy.[7]

II

Agencies, contractors, and subcontractors at all tiers *shall* be required, to the maximum extent practicable, to incorporate commercial items or non-developmental items as components of items delivered to the government.[8]

After more than a decade since the introduction of FASA and the Clinger-Cohen Act, commercial suppliers are still wrestling with the unreasonable demands to accept flow downs that are contrary to the mandatory requirements of FASA and *FAR* policy concerning the acquisition of commercial items.

This mandate is impossible to implement if contractors insist on procuring commercial items using noncommercial terms and conditions, or refuse to recognize any item as being commercial unless it is a commercial-off-the-shelf (COTS) product. The commercial item definition at FAR 2.101 recognizes eight subsets of such items. Contractors must become familiar with all types of commercial and non-developmental items that are covered by the *FAR*'s definition. Without this understanding, it is virtually impossible to achieve the government's goal of utilizing commercial items to the "maximum extent practicable."

III

Contracts for commercial items *shall* rely on a contractor's existing quality assurance systems in lieu of the government's inspection and testing prior to acceptance, unless customary market practices for the item being procured include in-process inspections.[9]

Agencies are more likely to violate this mandate when there is a modification made to a commercial item. If the type of modification does not hinder the item from falling within the definition defined at FAR 2.101, testing and inspection prior to acceptance is unwarranted unless such pre-acceptance procedures are customarily done for the commercial item being acquired.

IV

The government *shall* acquire only technical data and the rights in the data customarily provided to the public with a commercial item or process. Moreover, the contracting officer (CO) *shall* presume that the technical data being delivered under a contract for a commercial item was developed exclusively at private expense.[10]

Neither the government nor contractors can expect to obtain extensive technical data packages and unlimited rights in technical data—or unrestricted rights in software—for commercial items. Prior to FASA, the contractor had to prove that the technical data was developed at private expense in order to limit the government's rights. The presumption in favor of the contractor created by FASA facilitated the DOD's ability to gain access to the most advanced commercially available technology by encouraging commercial suppliers to participate in the federal market. Commercial suppliers can now deliver technical data with limited rights—and computer software with restricted rights—to the government and still maintain their exclusive right to use technical data and software in the commercial market.

V

In accordance with §8002 of Public Law 103-155, contracts for the acquisition of commercial items *shall,* to the maximum extent practicable, only include:

- Clauses required to implement provisions of executive orders applicable to commercial items, or

- Clauses determined to be consistent with customary commercial practices.[11]

This is perhaps the single most flagrantly violated provision of FASA. Section 8102 of FASA clearly states: "No contract for the procurement of a commercial item entered into by the head of the agency shall be subject to any law properly listed in the *Federal Acquisition Regulation* (pursuant to section 34 of the Office of Federal Procurement Policy Act)." For prime contractors, these inapplicable laws are listed at FAR 12.503. Even though Section 8102 specifically addresses contracts between the government and the prime, a list of laws inapplicable to subcontractors can be found at FAR 12.504.

VI

The CO *shall* attach FAR 52.212-4, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, to solicitations and contracts, and use the prescription of the appropriate clause to indicate which of the additional clauses cited in 52.212-5(b) or (c) are applicable to the specific procurement.[12]

The CO may include, by addendum, other *FAR* provisions when their use is consistent with the limitations contained in FAR 12.302, Tailoring of Provisions and Clauses for Acquisition of Commercial Items. However, 12.302 does not give the CO carte blanche to add just any *FAR* provision. The provision added must be consistent with customary commercial practices or the CO will have to obtain a waiver.

VII

The CO *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 procured, unless a waiver is approved in accordance with the agency's procedures.[13]

The request for waiver must describe the customary commercial practice found in the marketplace and must also provide justification for the need to include a term that is inconsistent with the commercial practice. The CO may request an individual waiver or a class waiver of contracts for the particular commercial item the government is acquiring.

VIII

Agencies *shall* use firm-fixed-price or firm-fixed-price with economic price adjustment for the acquisition of commercial items.[14]

This imperative is important because CAS does not apply to contracts or subcontracts for the acquisition of commercial items when acquired on the basis of firm-fixed-price or firm-fixed-price with economic price adjustment.[15] In addition, contractors or subcontractors *shall not* be required to submit certified cost or pricing data in the case of contracts, subcontracts, or modifications to contracts or subcontracts for the acquisition of a commercial item.[16]

The CO must require the submission of data other than certified cost or pricing data to the extent necessary to determine the reasonableness of the price of the contract or subcontract and any modifications. The data should include the appropriate information on prices at which the same or similar items have previously been sold and that is adequate for evaluating the reasonableness of the price.[17]

More commercial suppliers would be willing to participate in the federal market if the mandates of FASA and the Clinger-Cohen Act could be fully realized.

IX

Contractors and subcontractors at all tiers *shall not* be required, to the maximum extent practicable, to apply any of its divisions, subsidiaries, affiliates, subcontractors, or suppliers that are furnishing commercial components any clauses except the following:

- Those required to implement provisions of laws or executive orders applicable to subcontractors furnishing commercial items or commercial components, or
- Those determined to be consistent with customary commercial practices for the item being acquired.[18]

According to *FAR* policy, FAR 52.244-6, Subcontracts for Commercial Items, was intended to implement these requirements. This mandate from 44.402 is more strongly worded than the earlier reference to 12.301(a)(1) and (2) in Commandment 5. Note that 44.402 includes a reference to "subcontractors at all tiers." *FAR* policy further provides that, regardless of any other clauses in the prime contract, only those clauses identified at 52.244-6 are required to be in subcontracts for commercial items or commercial components. Agencies are allowed to supplement this clause only to the extent necessary to reflect agency-unique statutes applicable to the acquisition of commercial items.[19]

However, there is a lot of resistance by government contractors to use this *FAR* provision in their subcontracts for commercial items. When they do use 52.244-6, contractors flow down a host of inapplicable provisions that are inconsistent with commercial practices. One justification used by contractors for this "everything but the kitchen sink" approach to flow downs is paragraph (2) of 52.244-6, which states: "While not required, the contractor may flow down to subcontracts for commercial items a minimal number of additional clauses necessary to satisfy its contractual obligations." However, such an approach is inconsistent with the *FAR* policy statement at 44.402.

For successful implementation of the government's preference for commercial items, FASA requires that the head of the agency *shall* ensure that procurement officials in that agency, to the maximum extent practicable, require training of appropriate personnel in the acquisition of commercial items.[20]

This is perhaps the most important aspect of FASA. While this mandate only applies to the government's procurement officials, this mandate should be expanded to apply to the government's entire supply chain of contractors and subcontractors if the other mandates of FASA are ever going to be fully realized. **CM**

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Send comments about this article to cm@ncmahq.org.

ENDNOTES

1. Michael E. Heberling and Tracy J. Houpt, "What is and What is Not a Commercial Item," *Contract Management*, August 1995.
2. Gregory Saunders, Director of DSPO, "COTS in Military Systems—A Ten Year Perspective."
3. FAR 2.101.
4. *Southern California Edison v. United States*, Unites States Court of Federal Claims, No. 02-1953-C, October, 2003, 58 Fed. Cl. 313.
5. *Record Steel and Construction, Inc. v. United States*, United States Court of Federal Claims, No. 03 2274-C, October 19, 2004, 62 Fed. Cl. 508.
6. FAR 12.102(a).
7. See FAR 44.402 policy requirements.
8. FAR 12.101 and 44.402(a)(1).
9. FAR 12.208.
10. FAR 12.211.
11. FAR 12.301(a)(1) and (2).
12. FAR 12.301(b)(4).
13. FAR 12.302(c).
14. FAR 12.207.
15. FAR 12.214.
16. Clinger-Cohen Act of 1996 (Public Law 104-106), Section 4201, Commercial Item Exception to Requirement for Certified Cost or Pricing Data.
17. Section 4201(d)(1) of Clinger-Cohen Act.
18. FAR 44.402(a)(2)(i) and (ii).
19. FAR 44.402(c).
20. Section 8104 §2375(b)(6) of Federal Acquisition Streamlining Act (FASA).