PART 12 – ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

SUBPART 12.1 – ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

12.102 Applicability.

SUBPART 12.2 – SPECIAL REQUIREMENTS FOR THE ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

12.208 Contract quality assurance.

SUBPART 12.3 – SOLICITATION PROVISIONS AND CONTRACT CLAUSES FOR THE ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

12.301 Solicitation provisions and contract clauses for acquisition(s) of commercial products and commercial services .

12.302 Tailoring of provisions and clauses for the acquisition of commercial products and commercial services .

SUBPART 12.4 – UNIQUE REQUIREMENTS REGARDING TERMS AND CONDITIONS FOR COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

12.403 Termination.

SUBPART 12.5 – APPLICABILITY OF CERTAIN LAWS TO THE ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

12.504 Applicability of certain laws to subcontracts for the acquisition of commercial products and commercial services.

SUBPART 12.1 – ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

(Revised June 10, 2020 through PROCLTR 2020-08)

12.102 Applicability.

(a)(S-90) Part 12 is mandatory for the acquisition of commercial products and commercial services, except for the exemptions at FAR 12.102(e). Part 12 cannot be used when—

(1) The material master indicates the item is not commercial.

(2) The material master does not indicate whether the item is commercial, but the item is clearly Government-unique.

(3) The acquisition is conducted using an automated procurement system that does not include FAR Part 12 terms and conditions.

(4) An order is issued against a pre-existing non-Part 12 contract.

(5) The following conditions apply:

(i) The material master does not indicate whether the item is commercial;

(ii) It is unclear whether the item is a type that is used by non-Government customers;

(iii) The acquisition is valued under the SAT; and

(iv) It is not cost-effective to conduct market research (reference FAR 10.001(a)(2)(iii)).

(S-91) Contracting officers shall use the Market Research for Commerciality Determination Memorandum (MRCDM) format at 53.9012(a) for acquisitions above the SAT to document the market research the procuring organization conducted to determine whether the product or service is or is not commercial. Contracting Officers may use a format substantially the same as that cited at 53.9012(a) for any CIDs made on acquisitions at or below the SAT. All CIDs must be uploaded to the DoD database in the PIEE per DFARS PGI 212.102(a)(iii)(C). Each procuring organization may add supplemental information only by appending it at the end of the MRCDM format, in order to foster uniform presentation across the Agency.

(S-92) The contracting officer – not the offeror or contractor – has the individual authority and responsibility to determine if a or product service meets the commercial definition in FAR 2.101.

(1) The contracting officer must ensure adequate market research was conducted and supporting documentation obtained to support a positive commercial determination.

(i) Inclusion of a product or service in a catalog or on a GSA schedule is insufficient rationale by itself to support a positive commercial item determination.

(ii) To support a representation that an item meets paragraph (3)(i) of the commercial item definition, the offeror or contractor is responsible for demonstrating a modification is of a type customarily available in the commercial marketplace. Modifications to meet Government-specific requirements are not “customarily available in the commercial marketplace.”

(iii) The offeror or contractor is responsible for providing documentation or information supporting a representation that a modification is minor and meets paragraph (3)(ii) of the commercial item definition. This paragraph of the definition is intended to address minor modifications such as Government-unique paint color, special packaging, and minor changes in length, diameter, or headstyle of fasteners.

(2) The contracting officer must provide the commerciality determination to the product specialist, who will update the material master. This excludes items not managed by DLA (e.g. items acquired by DLR activities). A statement on the PR trailer will alert the contracting officer that a commercial item determination has been made.

(3) Contracts for commercial items must require that items added to catalogs after award are subject to a determination of commerciality.

(S-93) For AbilityOne acquisitions (reference FAR Subpart 8.7), use of Part 12 is discretionary.

(S-94) When the Government application for an item is different than the commercial application, the contracting officer must minimize risk to the Government by retaining Government-specific requirements (such as quality assurance, configuration control, preservation, packing, packaging, or marking), unless changes have been coordinated with the product specialist and any other appropriate personnel.

(S-95) The contracting officer must be able to demonstrate that the determination is reasonable, and the determination must be documented consistent with the size and complexity of the acquisition. If a commerciality determination is challenged, GAO considers the broad statutory and regulatory framework for defining a commercial item, the requirements of a specific solicitation, the substantive features of the item proposed, and the agency's contemporaneous evaluation and source selection record.

(S-96) The contracting officer makes the final determination of commerciality but is required to request and consider the advice of appropriate specialists (see FAR 1.602-2(c)). DCMA personnel can also provide assistance in obtaining information to help support the contracting officer's determination. If a requirement includes NSNs managed by another buying activity, the contracting officer must request and consider the advice of technical specialists at the managing activity. If technical advice from the managing activity is inconsistent with technical advice from the buying activity, the contracting officer must determine the reasons for the discrepancy and document how it was resolved. The contracting officer may make a determination of commerciality on the basis of that recommendation, unless there is some reason to question it. Buying activities are only required to conduct market research to the extent "appropriate to the circumstances," in accordance with FAR 10.001.

(S-97) To determine that an item is commercial pursuant to the definition, the contracting officer shall obtain appropriate documentation as necessary, such as commercial product literature, technical opinion as to the effect of a modification, etc. The following guidance may be used when applicable with regard to the noted subsections of the definition:

(i) Subsection (2). For items that upgrade frequently, through product updates, model changes, and product improvements (for example, new versions of software), buying activities could demonstrate that the item will be available in time to satisfy the Government requirement by, for example, obtaining an announcement documenting when the new product will be available to the public.

(ii) Subsections (1) and (3). When making a determination that the item is commercial pursuant to the definition, risk to the Government is lowest if the contracting officer can obtain sufficient technical documentation to demonstrate direct traceability from the modified item. If that is not possible, the contracting officer may attempt to demonstrate commerciality by documenting that the offeror or contractor manufactures the Government-unique items on an integrated production line, with little differentiation between the commercial and Government items. Alternatively, the contracting officer may attempt to demonstrate commerciality by documenting that the Government-unique item and comparable commercial items have similar characteristics and are made with similar manufacturing processes.

(A) To support a representation that an item is commercial pursuant to the definition, the offeror or contractor must demonstrate that a modification is of a type customarily available in the commercial marketplace. A modification can be a "major" modification. If an offeror or contractor claims their item meets the definition, the contracting officer must conduct appropriate market research to confirm this. Modifications made for the purpose of meeting Federal Government requirements (i.e., Government-unique modifications) are not, by definition, "customarily available in the commercial marketplace."

(B) The offeror or contractor must demonstrate that a modification is a minor modification made for the Government. If an offeror or contractor claims a modification is minor, the contracting officer must ensure an engineering analysis is conducted and/or technical judgment is exercised to confirm this claim. This portion of the definition is intended to address modifications such as Government-unique paint color; special packaging; ruggedization; and minor changes in length, diameter, or headstyle of fasteners. In making a determination whether a modification is minor, the contracting officer should consider the technical complexity of the change and the degree of risk associated with it. Risk can be gauged by the extent to which a change affects the contractor's operation and the price impact of the change. If the price of a modified item is significantly more than the price of the commercial item, this may indicate that the modification involves a substantial amount of risk and may not be minor.

(iii) Subsections (1) and (2) of commercial service definition. Services acquired by the Government do not have to be identical to those provided to commercial customers, if there are sufficient common characteristics between the commercial services and those required by the agency/activity. The established market price does not have to be published or written so long as it can be ascertained and documented as required by the definition. It is a current price that is established in the course of ordinary and usual trade between buyers and sellers free to bargain and that can be substantiated by data from sources independent of the offeror. A price is based on a catalog or market price if the service being purchased is sufficiently similar to the catalog-priced or market-priced commercial service to ensure that any difference in prices can be identified and justified without using cost analysis.

(iv) Subsection (6) of commercial product definition. An item does not have to be developed at private expense to be commercial; except that nondevelopmental items must have been developed exclusively at private expense to be considered commercial. Even if the Government paid for development of a product, or if a product has a military origin, a commercial market can subsequently develop for that item. The issue of who paid for development should factor into the contract negotiations but is not part of the commercial item determination.

(S-98) *Potential indicators of commerciality.* The following guidance addresses some conditions that contracting officers may consider as indicators that an product or service is potentially commercial. In most cases, contracting officers will need to conduct additional market research to determine commerciality when these conditions exist.

(i) Commercial sales history.

(ii) Notices or brochures announcing new products or services.

(iii) Listing in catalogs or brochures.

(iv) *Distributors.* The existence of distributors may indicate a product or service is commercial. However, the contracting officer must determine the nature of the relationship between the manufacturer and the distributor, since some manufacturers use a distributor to handle Government sales. However, this does not necessarily mean the items or services are commercial.

(v) Components of commercial end items. If an end product has been determined to be commercial, many of the components of that end item are likely to be commercial. However, every component of a commercial end item cannot be presumed to be a commercial item. One way for the contracting officer to determine if all the components of a commercial end item can reasonably be considered commercial is to determine the basis for the commerciality determination of the end item. If an end item is a commercially available off-the-shelf (COTS) item, the contracting officer could reasonably

make a determination that all the components of that end item are commercial. Generally, however, information on the end item alone will be insufficient to determine commerciality of the components, and information will be needed on the components themselves. This information could include sales and technical data.

(vi) *Prior agency or department determinations.*If the contracting officer cannot locate a prior determination in the DoD Commercial Item Database, other evidence may be utilized to document that FAR part 12 procedures were previously used to acquire the same product or service. Examples of other evidence may include a prior CID memorandum (e.g. MRCDM), a prior FAR part 12 contract, or a current PR trailer that contains a statement or code as support for a prior CID. Any prior contract that relied on DFARS 212.102(a)(i)(B) as the basis for utilizing FAR part 12 procedures cannot serve as a prior CID. The preference is to accept a prior CID , unless the contracting officer questions a prior determination to use FAR part 12 procedures per DFARS 212.102(a)(ii)(B)(2).

(vii) *Contractor/subcontractor determinations.* Only the Government has the authority to determine if a product or service meets the commercial definition at FAR 2.101. Contracting officers should consider contractor or subcontractor determinations as potential indicators of commerciality and must conduct market research to an appropriate extent to determine if such a prior commerciality designation can be applied to a current buy.

(viii) *Predominantly commercial facilities.* When contracting officers have evidence that an item is produced in a facility that is predominantly engaged in producing similar items for the commercial market, this should be considered a potential indicator of commerciality. Contracting officers must conduct market research to an appropriate extent to determine if sufficient documentation can be obtained on which to base a commerciality determination. It cannot be presumed that all items in a predominantly commercial facility are commercial, because some facilities produce both commercial and Government-unique items that are manufactured independently. However, products manufactured on integrated production lines with little differentiation between the commercial and Government products can generally be considered commercial.

(S-99) If a prospective contractor offers any item other than the exact item cited in the item description, the alternate item must be evaluated for technical acceptability. Quoters or offerors must comply with the requirement in FAR 52.212-1 to provide a technical description of the items being offered in sufficient detail to evaluate compliance with solicitation requirements.

(S-100) The contracting officer may negotiate the Part 12 terms and conditions into the purchase order or contract when the conditions described below apply. (This is not a solicitation amendment, because all parties receiving the synopsis notice and/or the solicitation had the same opportunity to identify and offer an alternate item, including a commercial product.)

(i) The solicitation was not issued in accordance with Part 12, because the agency had not identified any commercial product that could meet the Government’s need (see FAR 10.002(d)(2)); and

(ii) A product offered that is determined by the agency to meet the definition of a commercial product at FAR 2.101 and to be technically acceptable in time for award under the instant acquisition.

(f)(1) The HCA is delegated the authority to make the determination that items will be used to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. This determination should be placed in the contract file.

SUBPART 12.2 – SPECIAL REQUIREMENTS FOR THE ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

(Revised December 27, 2016 through PROCLTR 2017-08)

12.208 Contract quality assurance.

Quality assurance practices, such as in-process, in-plant inspection for critical application or complex items, are considered consistent with customary commercial practice when market research indicates they are at least sometimes used in the industry for items that are the same as or similar to the ones being acquired**.** When Government inspection and testing before tender for acceptance are determined necessary and cannot be considered consistent with customary commercial practices, the contracting officer must request a waiver (reference FAR and DLAD 12.302 Tailoring of provisions and clauses for the acquisition of commercial products and commercial services .(c)). When the Government needs to inspect before tender or deviate in any other way from FAR 52.212-4(a) with regard to quality assurance, tailor the solicitation/contract by attaching an addendum (reference FAR 12.302(d)). If the tailoring invokes contract terms and conditions that are consistent with customary commercial practice, a waiver is not required (reference FAR 12.302(c)); although an addendum is necessary to change the terms of the solicitation/contract. If FAR 52.212-4 is incorporated in the solicitation or contract reference with no addendum, the Government has only the rights explicitly stated in FAR 52.212-4(a).

SUBPART 12.3 – SOLICITATION PROVISIONS AND CONTRACT CLAUSES FOR THE ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

(Revised May 17, 2018 through PROCLTR 2018-07)

12.301 Solicitation provisions and contract clauses for acquisition(s) of commercial products and commercial services .

(e) *Discretionary use of FAR provisions and clauses*. Pursuant to FAR 12.301 and 12.302, contracting officers must use their authority to tailor the standard FAR Part 12 terms and conditions as necessary to meet the Government's needs. (See 12.208 Contract quality assurance. concerning how to tailor FAR 52.212-4(a), Inspection/ Acceptance.) Subject to the procedures in FAR and DLAD 12.302, the contracting officer may include other DLAD provisions, clauses and procurement notes; and if necessary, make accompanying changes to the provision FAR 52.212-1 and clause FAR 52.212-4.

(f) The DLA SPE has approved supplementation of the provisions and clauses in FAR Part 12 to require use of the following provisions, clauses, and procurement notes, when applicable:

(S-90) Reserved.

(S-91) Procurement notes C01, Superseded Part Numbered Items, as prescribed in 11.391 Part numbered items.(a); L04, Offers for Part Numbered Items, as prescribed in 11.391 Part numbered items.(b); and M06, Evaluation of Offers of Alternate Product for Part Numbered Items, as prescribed in 11.391 Part numbered items.(b).

(S-92) Provisions and clauses below, as prescribed in FAR 16.203-4(a), 16.506(a)-(f), and 17.208(c):

(i) FAR 52.216-2, Economic Price Adjustment – Standard Supplies;

(ii) FAR 52.216-18, Ordering;

(iii) FAR 52.216-19, Order Limitations;

(iv) FAR 52.216-20, Definite Quantity;

(v) FAR 52.216-21, Requirements;

(vi) FAR 52.216-22, Indefinite Quantity;

(vii) FAR 52.216-27, Single or Multiple Awards; and

(viii) FAR 52.217-5, Evaluation of Options.

(S-93) Provision FAR 52.215-20, Requirements for Certified Cost or Pricing Data and Data Other Than Cost or Pricing Data, as prescribed in FAR 15.408(l); and clause 52.215-21, Requirements for Certified Cost or Pricing Data and Data Other Than Cost or Pricing Data – Modifications, as prescribed in FAR 15.408(m).

(S-94) Procurement note C02, Manufacturing Phase Out or Discontinuation of Production, Diminishing Sources, and Obsolete Materials or Components, as prescribed in 11.9001 Notification of product phase–out.(a).

(S-95) Procurement note C03, Contractor Retention of Supply Chain Traceability Documentation, as prescribed in 4.703 Policy.(a).

(S-96) Provision DFARS 252.209-7002, Disclosure of Ownership or Control by a Foreign Government, as prescribed in DFARS 209.104-70.

(S-97) Procurement note H04, Sourcing for Critical Safety Items as prescribed in 9.270-3 Policy.(a).

(S-98) Procurement note E05, Product Verification Testing, as prescribed in 46.292.

(S-99) Procurement note E06, Inspection and Acceptance at Source, as prescribed in 46.402.

(S-100) Clause FAR 52.211-5, Material Requirements, as prescribed in FAR 11.304; procurement note C04, Unused Former Government Surplus Property, as prescribed in 11.390 Unused former Government surplus property.(a); and procurement note M05, Evaluation Factor for Unused Former Government Surplus Property, as prescribed in 11.390 Unused former Government surplus property.(b)(1).

(S-101) Procurement notes H01, Qualified Products List (QPL) for Federal Supply Class (FSC) 5935 Connector Assemblies and Contacts, as prescribed in 9.202 Policy.(a)(2)(i); H02, Component

Qualified Products List (QPL)/Qualified Manufacturers List (QML), as prescribed in 9.202 Policy.(a)(2)(v); M01, Qualified Suppliers for Federal Supply Class (FSC) 5961 Semiconductors and Hardware Devices and FSC 5962 Electronic Microcircuits, as prescribed in 9.202 Policy.(a)(2)(ii); and M03, Qualified Suppliers List for Manufacturers (QSLM)/Qualified Suppliers List for Distributors (QSLD) for Troop Support, as prescribed in 9.202 Policy.(a)(2)(iv).

(S-102) Procurement notes L01, Electronic Award Transmission; and L02, Electronic Order Transmission, as prescribed in 4.502 Policy.(b).

(S-103) Procurement note C05, Changes to Key Personnel, as prescribed in 37.103 Contracting officer responsibility.(S-90).

(S-104) Reserved.

(S-105) Clause FAR 52.232-17, Interest, as prescribed in FAR 32.611.

(S-106) Clause FAR 52.242-13, Bankruptcy, as prescribed in FAR 42.903.

(S-107) Clause FAR 52.242-15, Stop Work Order, as prescribed in FAR 42.1305(b)(1).

(S-108) Provision 52.233-9001, Disputes – Agreement to Use Alternative Dispute Resolution (ADR), as prescribed in 33.214 Alternative dispute resolution (ADR).; and procurement note L06, Agency Protests, as prescribed in 33.103 Protests to the agency.(d)(4).

(S-109) Procurement note L07, Site Visit Instructions, as prescribed in 37.110 Solicitation provisions and contract clauses.(a).

(S-110) Procurement notes E01, Supplemental First Article Exhibit Disposition – Contractor Maintained, and E02, Supplemental First Article Exhibit Disposition – Government Maintained, as prescribed in 9.306 Solicitation requirements.(h); procurement note E08, First Article Testing Requirements H03, Supplemental First Article Testing Requirements, as prescribed in 9.306 Solicitation requirements.(S-90); and procurement note M04, Evaluation Factor for Government Testing of First Articles, as prescribed in 9.306 Solicitation requirements.(i).

(S-111) Procurement note L08, Use of Supplier Performance Risk System (SPRS) in Past Performance Evaluations, as prescribed in 15.303 Responsibilities.(c)(3)(i).

(S-112) Procurement notes L09, Reverse Auction, as prescribed in 15.407-90 Reverse Auction.(c); and L10, Competing Individual Delivery Orders Through Reverse Auctions, as prescribed in 15.407-90 Reverse Auction.(d).

(S-113) Clauses FAR 52.246-11, Higher-Level Contract Quality Requirement, as prescribed in 46.311; and 52.246-2, Inspection of Supplies – Fixed Price, as prescribed in 46.302.

(S-114) Procurement notes E03, Production Lot Testing – Contractor, as prescribed in 46.291(a); and E04, Production Lot Testing – Government, as prescribed in 46.291(b).

12.302 Tailoring of provisions and clauses for the acquisition of commercial products and commercial services .

(a) Terms and conditions that can reasonably be presumed to have application in both Government

and commercial markets (e.g., shipping instructions for extreme climates) may be included in solicitations and contracts for commercial product and commercial services without conducting additional market research.

(b) *Tailoring 52.212-4, Contract Terms and Conditions – Commercial Products and Commeical Services.*

(3) When fast payment procedures are authorized (see Subpart SUBPART 12.3 – SOLICITATION PROVISIONS AND CONTRACT CLAUSES FOR THE ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES), contracting officers may tailor the paragraph at FAR 52.212-4 (i), Payment, as necessary, to reflect fast payment procedure, which are authorized when specified conditions are met pursuant to the Prompt Payment Act and OMB Circular A-125.

(c) *Tailoring inconsistent with customary commercial practice.* Approval authority for waivers under FAR 12.302(c) is delegated to one level above the contracting officer.

(S-90) Contracting officers may delete from solicitations and contracts the portions of the provision at FAR 52.212-3 and the clause at FAR 52.212-5 that do not apply and replace them with applicable language, if any.

(S-91) Contracting officers must use their authority to tailor the standard FAR Part 12 terms and conditions as necessary to meet the Government's needs (see 12.301 Solicitation provisions and contract clauses for acquisition(s) of commercial products and commercial services .(e)).

SUBPART 12.4 – UNIQUE REQUIREMENTS REGARDING TERMS AND CONDITIONS FOR COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

(Revised December 27, 2016 through PROCLTR 2017-08)

12.403 Termination.

(c) *Termination for cause.* The FAPIIS point of contact shall report contract terminations via email to the DLA Procurement Process and Systems Division FAPIIS POC within three (3) business days after the termination is reported to FAPIIS. The email shall be sent to FAPIISInbox@dla.mil and include the contract number, date and type of termination, any change, and date data was reported to FAPIIS.

SUBPART 12.5 – APPLICABILITY OF CERTAIN LAWS TO THE ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

(Revised December 27, 2016 through PROCLTR 2017-08)

12.504 Applicability of certain laws to subcontracts for the acquisition of commercial products and commercial services.

(S-90) For the purposes of flowdown requirements pursuant to Part 12, treat Distribution and Pricing Agreements (DAPA) as subcontracts (reference FAR 52.212-5(e) and 52.244-6(c)).