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11.000 Scope of part.

This part prescribes policies and procedures for describing agency needs.

11.001 Definitions.

As used in this part-

Reconditioned means restored to the original normal operating condition by readjustments and material replacement.

Remanufactured means factory rebuilt to original specifications.

11.002 Policy.

(a) In fulfilling requirements of 10 U.S.C. 3206(a), 10 U.S.C. 3453, 41 U.S.C. 3306(a), and 41 U.S.C.3307, agencies *shall*-

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

(i) Promote *full and open competition* (see part 6), or maximum practicable competition when using *simplified acquisition procedures*, with due regard to the nature of the *supplies* or services to be acquired; and

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

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

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

(A) Functions to be performed;

(B) Performance required; or

(C) Essential physical characteristics;

(ii) Define requirements in terms that enable and encourage *offerors* to supply *commercial products* or *commercial services* or, to the extent that *commercial products* suitable to meet the agency's needs are not available, *nondevelopmental items*, in response to the agency *solicitations*;

(iii) Provide *offerors* of *commercial products*, *commercial services*, and *nondevelopmental items* an opportunity to compete in any *acquisition* to fill such requirements;

(iv) Require prime contractors and subcontractors at all tiers under the agency contracts to incorporate *commercial products*, *commercial services*, or *nondevelopmental items* as *components* of items supplied to the agency; and

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

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

(c) To the extent practicable and consistent with subpart 9.5, potential *offerors should* be given an opportunity to comment on agency requirements or to recommend application and tailoring of requirements documents and alternative approaches. Requiring agencies *should* apply specifications, standards, and related documents initially for guidance only, making final decisions on the application and tailoring of these documents as a product of the design and development process. Requiring agencies *should* not dictate detailed design solutions prematurely (see 7.101 and 7.105(a)(8)).

(d)

(1) Agencies *shall* procure *sustainable products and services* (as defined in 2.101) in accordance with subpart 23.1).

(2) Unless it is not practicable (see 23.104(a)) or an exception or exemption applies (see 23.105 and 23.106, respectively), agencies *shall* incorporate the use of *sustainable products and services* when—

(i) Developing, reviewing, or revising Federal and military specifications, product descriptions (including commercial item descriptions) and standards;

(ii) Describing Government requirements for *products* and services; and

(iii) Developing source-selection factors.

(3) The Green *Procurement* Compilation (GPC) available at *https://sftool.gov/greenprocurement* provides a comprehensive list of *sustainable products and services* and other related *sustainable acquisition* guidance. Agencies *should*—

(i) Consult the GPC when determining which purchasing programs apply to a specific product or service; and

(ii) Incorporate into agency requirements any required standards, specifications, or ecolabels identified in the GPC for a specific product or service.

(e) Some or all of the performance levels or performance specifications in a *solicitation may* be identified as targets rather than as fixed or minimum requirements.

(f) In accordance with section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), the *contracting officer shall* obtain from the requiring activity the requirement documents, which *must* identify—

(1) The needs of current and future users with disabilities to determine how–

(i) Users with disabilities will perform the functions supported by the *information and communication technology (ICT*);

(ii) The ICT will be developed, installed, configured and maintained to support users with disabilities;

(2) The applicable ICT accessibility standards (see subpart 39.2); and

(3) Any ICT accessibility standards that cannot be met due to an exception or an exemption for any *component* or portion of the product (see 7.105(b)(5)(iv), 39.204, and 39.205).

(g) Unless the agency Chief Information Officer waives the requirement, when acquiring *information technology* using Internet Protocol, the requirements documents *must* include reference to the appropriate technical capabilities defined in the USGv6 Profile (NIST Special Publication 500-267) and the corresponding declarations of conformance defined in the USGv6 Test Program. The applicability of IPv6 to agency networks, infrastructure, and applications specific to individual *acquisitions* will be in accordance with the agency's Enterprise Architecture (see OMB Memorandum M-05-22 dated August 2, 2005).

(h) Agencies *shall* not include in a *solicitation* a requirement that prohibits an *offeror* from permitting its employees to telecommute unless the *contracting officer* executes a written

determination in accordance with FAR 7.108(a).

Subpart 11.1 - Selecting and Developing Requirements Documents

11.101 Order of precedence for requirements documents.

(a) Agencies *may* select from existing requirements documents, modify or combine existing requirements documents, or create new requirements documents to meet agency needs, consistent with the following order of precedence:

(1) Documents mandated for use by law.

(2) Performance-oriented documents (*e.g.,* a PWS or SOO). (See 2.101.)

(3) Detailed design-oriented documents.

(4) Standards, specifications and related publications issued by the Government outside the Defense or Federal series for the non-repetitive *acquisition* of items.

(b) In accordance with OMB Circular A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities," and Section 12(d) of the National Technology Transfer and Advancement Act of 1995, Pub. L. 104-113 (15 U.S.C. 272 note), agencies *must* use voluntary consensus standards, when they exist, in lieu of Government-unique standards, except where inconsistent with law or otherwise impractical. The private sector manages and administers voluntary consensus standards. Such standards are not mandated by law (*e.g.*, industry standards such as ISO 9000, and IEEE 1680).

11.102 Standardization program.

Agencies *shall* select existing requirements documents or develop new requirements documents that meet the needs of the agency in accordance with the guidance contained in the Federal Standardization Manual, FSPM-0001; for DoD *components*, DoD Manual 4120.24, Defense Standardization Program (DSP) Procedures; and for IT standards and guidance, the Federal Information Processing Standards Publications (FIPS PUBS). The Federal Standardization Manual *may* be obtained from the General Services Administration (see address in 11.201(d)(1)). DoD Manual 4120.24 *may* be obtained from DoD (https://www.esd.whs.mil/Directives/Issuances/dodm or see 11.201(d)(2) or (3)). FIPS PUBS *may* be obtained from the Government Publishing Office (GPO), or the Department of Commerce's National Technical Information Service (NTIS) (see address in 11.201(d)(4)).

11.103 Market acceptance.

(a) 41 U.S.C. 3307(e) provides that, in accordance with agency procedures, the head of an agency *may*, under appropriate circumstances, require *offerors* to demonstrate that the items offered-

(1) Have either-

(i) Achieved commercial market acceptance; or

(ii) Been satisfactorily supplied to an agency under current or recent contracts for the same or similar requirements; and

(2) Otherwise meet the item description, specifications, or other criteria prescribed in the public notice and *solicitation*.

(b) Appropriate circumstances *may*, for example, include situations where the agency's minimum need is for an item that has a demonstrated reliability, performance or product support record in a specified environment. Use of market acceptance is inappropriate when new or evolving items *may* meet the agency's needs.

(c) In developing criteria for demonstrating that an item has achieved commercial market acceptance, the *contracting officer shall* ensure the criteria in the *solicitation*-

(1) Reflect the minimum need of the agency and are reasonably related to the demonstration of an item's acceptability to meet the agency's minimum need;

(2) Relate to an item's performance and intended use, not an *offeror*'s capability;

(3) Are supported by *market research*;

(4) Include consideration of items supplied satisfactorily under recent or current Government contracts, for the same or similar items; and

(5) Consider the entire relevant commercial market, including small business concerns.

(d) Commercial market acceptance *shall* not be used as a sole criterion to evaluate whether an item meets the Government's requirements.

(e) When commercial market acceptance is used, the *contracting officer shall* document the file to-

(1) Describe the circumstances justifying the use of commercial market acceptance criteria; and

(2) Support the specific criteria being used.

11.104 Use of brand name or equal purchase descriptions.

(a) While the use of performance specifications is preferred to encourage *offerors* to propose innovative solutions, the use of brand name or equal purchase descriptions *may* be advantageous under certain circumstances.

(b) Brand name or equal purchase descriptions *must* include, in addition to the brand name, a general description of those salient physical, functional, or performance characteristics of the brand name item that an "equal" item *must* meet to be acceptable for award. Use brand name or equal descriptions when the salient characteristics are firm requirements.

11.105 Items peculiar to one manufacturer.

Agency requirements *shall* not be written so as to require a particular brand name, product, or a feature of a product, peculiar to one manufacturer, thereby precluding consideration of a product manufactured by another company, unless-

(a)

(1) The particular brand name, product, or feature is essential to the Government's requirements, and *market research* indicates other companies' similar *products*, or *products* lacking the particular feature, do not meet, or cannot be modified to meet, the agency's needs;

(2)

(i) The authority to contract without providing for *full and open competition* is supported by the required justifications and approvals (see 6.302-1); or

(ii) The basis for not providing for maximum practicable competition is documented in the file (see 13.106-1(b)) or justified (see 13.501) when the *acquisition* is awarded using *simplified acquisition procedures*.

(3) The documentation or justification is posted for *acquisitions* over $25,000. (See 5.102(a)(6).)

(b) For multiple award schedule orders, see 8.405-6.

(c) For orders under indefinite-quantity contracts, see 16.505(a)(4).

11.106 Purchase descriptions for service contracts.

In drafting purchase descriptions for service contracts, agency requiring activities *shall* ensure that *inherently governmental functions* (see subpart 7.5) are not assigned to a contractor. These purchase descriptions *shall*-

(a) Reserve final determination for Government officials;

(b) Require proper identification of contractor personnel who attend meetings, answer Government telephones, or work in situations where their actions could be construed as acts of Government officials unless, in the judgment of the agency, no harm can come from failing to identify themselves; and

(c) Require suitable marking of all documents or reports produced by contractors.

11.107 Solicitation provision.

(a) Insert the provision at 52.211-6, Brand Name or Equal, when brand name or equal purchase descriptions are included in a *solicitation*.

(b) Insert the provision at 52.211-7, Alternatives to Government-Unique Standards, in *solicitations*

that use Government-unique standards when the agency uses the transaction-based reporting method to report its use of voluntary consensus standards to the National Institute of Standards and Technology (see OMB Circular A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities"). Use of the provision is optional for agencies that report their use of voluntary consensus standards to the National Institute of Standards and Technology using the categorical reporting method. Agencies that manage their specifications on a contract-by-contract basis use the transaction-based method of reporting. Agencies that manage their specifications centrally use the categorical method of reporting. Agency regulations regarding specification management describe which method is used.

Subpart 11.2 - Using and Maintaining Requirements Documents

11.201 Identification and availability of specifications.

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

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

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

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

(b) *Contracting offices shall* clearly identify in the *solicitation* any pertinent documents not listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions or ASSIST. Such documents *shall* be furnished with the *solicitation* or specific instructions *shall* be furnished for obtaining or examining such documents.

(c) When documents refer to other documents, such references *shall*–

(1) Be restricted to documents, or appropriate portions of documents, that apply in the *acquisition*;

(2) Cite the extent of their applicability;

(3) Not conflict with other documents and provisions of the *solicitation*; and

(4) Identify all applicable first tier references.

(d)

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

Part 101–29, *may* be viewed at the ASSIST website at https://assist.dla.mil.

(2) Most unclassified Defense specifications and standards *may* be downloaded from the ASSIST website at https://assist.dla.mil.

(3) Defense documents not available from the ASSIST website *may* be ordered from the Defense Standardization Program Office by—

(i) Using the ASSIST feedback module at https://assist.dla.mil/feedback; or

(ii) Contacting the Defense Standardization Program Office by telephone at 571–767–6888 or email at assisthelp@dla.mil.

(4) The FIPS PUBS *may* be obtained from—

http://www.itl.nist.gov/fipspubs/, or purchased from the-

Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, Telephone (202) 512-1800, Facsimile (202) 512-2250; or

National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161, Telephone (703) 605-6000, Facsimile (703) 605-6900, Email: orders@ntis.gov.

(e) Agencies *may* purchase some nongovernment standards, including voluntary consensus standards, from the National Technical Information Service's Fedworld Information Network. Agencies *may* also obtain nongovernment standards from the standards developing organization responsible for the preparation, publication, or maintenance of the standard, or from an authorized document reseller. The National Institute of Standards and Technology can assist agencies in identifying sources for, and content of, nongovernment standards. DoD activities *may* obtain from the Defense Standardization Program Office those nongovernment standards, including voluntary consensus standards, adopted for use by defense activities.

11.202 Maintenance of standardization documents.

(a) Recommendations for changes to standardization documents listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions *should* be submitted to the-

General Services Administration Federal Supply Service Office of *Acquisition* Washington, DC 20406.

Agencies *shall* submit recommendations for changes to standardization documents available at the ASSIST website to the cognizant preparing activity.

(b) When an agency cites an existing standardization document but modifies it to meet its needs, the agency *shall* follow the guidance in Federal Standardization Manual and, for Defense *components*, DoD Manual 4120.24, Defense Standardization Program (DSP) Procedures.

11.203 Customer satisfaction.

Acquisition organizations *shall* communicate with customers to determine how well the

requirements document reflects the customer's needs and to obtain suggestions for corrective actions. Whenever practicable, the agency *may* provide affected industry an opportunity to comment on the requirements documents.

11.204 Solicitation provisions.

(a) The *contracting officer shall* insert the provision at 52.211-1, Availability of Specifications Listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions, FPMR Part 101-29, in *solicitations* that cite specifications listed in the Index that are not furnished with the *solicitation*.

(b) The *contracting officer shall* insert the provision at 52.211-2, Availability of Defense Specifications, Standards, and Data Item Descriptions in the *Acquisition* Streamlining and Standardization Information System (ASSIST) website, in *solicitations* that cite specifications available in ASSIST that are not furnished with the *solicitation*.

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

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

Subpart 11.3 - Acceptable Material

11.301 Policy.

(a) Agencies *must* not require *virgin material* or *supplies* composed of or manufactured using *virgin material* unless compelled by law or regulation or unless *virgin material* is vital for safety or meeting performance requirements of the contract.

(b)

(1) When acquiring *products* other than *commercial products* as defined in 2.101, agencies *must* require *offerors* to identify used, *reconditioned*, or *remanufactured supplies*; or unused former Government *surplus property* proposed for use under the contract. These *supplies* or property *may* not be used in contract performance unless authorized by the *contracting officer*.

(2) When acquiring *commercial products*, the *contracting officer must* consider the customary practices in the industry for the product being acquired. The *contracting officer may* require *offerors* to provide information on used, *reconditioned*, or *remanufactured supplies*, or unused former Government *surplus property* proposed for use under the contract. The request for the information *must* be included in the *solicitation*, and to the maximum extent practicable *must* be limited to

information or standards consistent with normal commercial practices.

(c)

(1) When the *contracting officer* needs additional information to determine whether *supplies* meet minimum *recovered material* or biobased standards stated in the *solicitation*, the *contracting officer may* require *offerors* to submit additional information on the recycled or biobased content or related standards. The request for the information *must* be included in the *solicitation*. When acquiring *commercial products*, limit the information to the maximum extent practicable to that available under normal commercial practices.

(2) For *biobased products*, agencies *may* not require, as a condition of purchase of such *products*, the vendor or manufacturer to provide more data than would typically be provided by other business entities offering *products* for sale to the agency, other than data confirming the biobased content of a product (see 7 CFR 3201.8).

11.302 Contract clause.

Insert the clause at 52.211-5, Material Requirements, in *solicitations* and contracts for *supplies* that are not *commercial products*.

Subpart 11.4 - Delivery or Performance Schedules

11.401 General.

(a) The time of delivery or performance is an essential contract element and *shall* be clearly stated in *solicitations*. *Contracting officers shall* ensure that delivery or performance schedules are realistic and meet the requirements of the *acquisition*. Schedules that are unnecessarily short or difficult to attain-

(1) Tend to restrict competition,

(2) Are inconsistent with small business policies, and

(3) *May* result in higher contract prices.

(b) *Solicitations shall*, except when clearly unnecessary, inform bidders or *offerors* of the basis on which their bids or proposals will be evaluated with respect to time of delivery or performance.

(c) If timely delivery or performance is unusually important to the Government, liquidated damages clauses *may* be used (see subpart 11.5).

11.402 Factors to consider in establishing schedules.

(a) *Supplies or services.* When establishing a contract delivery or performance schedule, consideration *shall* be given to applicable factors such as the-

(1) Urgency of need;

(2) Industry practices;

(3) Market conditions;

(4) Transportation time;

(5) Production time;

(6) Capabilities of small business concerns;

(7) Administrative time for obtaining and evaluating *offers* and for awarding contracts;

(8) Time for contractors to comply with any conditions precedent to contract performance; and

(9) Time for the Government to perform its obligations under the contract; *e.g.,* furnishing Government property.

(b) *Construction*. When scheduling the time for completion of a *construction* contract, the *contracting officer shall* consider applicable factors such as the-

(1) Nature and complexity of the project;

(2) *Construction* seasons involved;

(3) Required completion date;

(4) Availability of materials and equipment;

(5) Capacity of the contractor to perform; and

(6) Use of multiple completion dates. (In any given contract, separate completion dates *may* be established for separable items of work. When multiple completion dates are used, requests for extension of time *must* be evaluated with respect to each item, and the affected completion dates modified when appropriate.)

11.403 Supplies or services.

(a) The *contracting officer may* express contract delivery or performance schedules in terms of-

(1) Specific calendar dates;

(2) Specific periods from the date of the contract; *i.e.,* from the date of award or acceptance by the Government, or from the date shown as the effective date of the contract;

(3) Specific periods from the date of receipt by the contractor of the notice of award or acceptance by the Government (including notice by receipt of contract document executed by the Government); or

(4) Specific time for delivery after receipt by the contractor of each individual order issued under the contract, as in indefinite delivery type contracts and GSA schedules.

(b) The time specified for contract performance *should* not be curtailed to the prejudice of the contractor because of delay by the Government in giving notice of award.

(c) If the delivery schedule is based on the date of the contract, the *contracting officer shall* mail or otherwise furnish to the contractor the contract, notice of award, acceptance of proposal, or other contract document not later than the date of the contract.

(d) If the delivery schedule is based on the date the contractor receives the notice of award, or if the delivery schedule is expressed in terms of specific calendar dates on the assumption that the notice of award will be received by a specified date, the *contracting officer shall* send the contract, notice of award, acceptance of proposal, or other contract document by certified mail, return receipt requested, or by any other method that will provide evidence of the date of receipt.

(e) In invitations for bids, if the delivery schedule is based on the date of the contract, and a bid *offers* delivery based on the date the contractor receives the contract or notice of award, the *contracting officer shall* evaluate the bid by adding 5 calendar days (as representing the normal time for arrival through ordinary mail). If the contract or notice of award will be transmitted electronically, (1) the *solicitation shall* so state; and (2) the *contracting officer shall* evaluate delivery schedule based on the date of contract receipt or notice of award, by adding oneworking *day*. (The term "working *day*" excludes weekends and U.S. Federal holidays.) If the offered delivery date computed with mailing or transmittal time is later than the delivery date required by the invitation for bids, the bid *shall* be considered nonresponsive and rejected. If award is made, the delivery date will be the number of days offered in the bid after the contractor actually receives the notice of award.

11.404 Contract clauses.

(a) *Supplies* or services.

(1) The *contracting officer may* use a time of delivery clause to set forth a required delivery schedule and to allow an *offeror* to propose an alternative delivery schedule. The clauses and their *alternates may* be used in *solicitations* and contracts for other than *construction* and architect-engineering substantially as shown, or they *may* be changed or new clauses written.

(2) The *contracting officer may* insert in *solicitations* and contracts other than those for *construction* and architect-engineering, a clause substantially the same as the clause at 52.211-8, Time of Delivery, if the Government requires delivery by a particular time and the delivery schedule is to be based on the date of the contract. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on an assumed date of award, the *contracting officer may* use the clause with its *Alternate* I. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on an assumed date the contractor will receive notice of award, the *contracting officer may* use the clause with its *Alternate* II. If the delivery schedule is to be based on the actual date the contractor receives a written notice of award, the *contracting officer may* use the clause with its *Alternate* III.

(3) The *contracting officer may* insert in *solicitations* and contracts other than those for *construction* and architect-engineering, a clause substantially the same as the clause at 52.211-9, Desired and Required Time of Delivery, if the Government desires delivery by a certain time but requires delivery by a specified later time, and the delivery schedule is to be based on the date of the contract. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on

an assumed date of award, the *contracting officer may* use the clause with its *Alternate* I. If the delivery schedule is expressed in terms of specific calendar dates or specific periods and is based on an assumed date the contractor will receive notice of award, the *contracting officer may* use the clause with its *Alternate* II. If the delivery schedule is to be based on the actual date the contractor receives a written notice of award, the *contracting officer may* use the clause with its *Alternate* III.

(b) *Construction*. The *contracting officer shall* insert the clause at 52.211-10, Commencement, Prosecution, and Completion of Work, in *solicitations* and contracts when a fixed-price *construction* contract is contemplated. The clause *may* be changed to accommodate the issuance of orders under indefinite-delivery contracts. If the completion date is expressed as a specific calendar date, computed on the basis of the contractor receiving the notice to proceed by a certain *day*, the *contracting officer may* use the clause with its *Alternate* I.

Subpart 11.5 - Liquidated Damages

11.500 Scope.

(a) This subpart prescribes policies and procedures for using liquidated damages clauses in *solicitations* and contracts for *supplies*, services, research and development, and *construction*.

(b) This subpart does not apply to liquidated damages-

(1) For subcontracting plans (see 19.705-7);

(2) Related to the Contract Work Hours and Safety Standards statute (see subpart 22.3); or

(3) Related to paid sick leave for Federal contractors (see subpart 22.21).

11.501 Policy.

(a) The *contracting officer must* consider the potential impact on *pricing*, competition, and contract administration before using a liquidated damages clause. Use liquidated damages clauses only when-

(1) The time of delivery or timely performance is so important that the Government *may* reasonably expect to suffer damage if the delivery or performance is delinquent; and

(2) The extent or amount of such damage would be difficult or impossible to estimate accurately or prove.

(b) Liquidated damages are not punitive and are not negative performance incentives (see 16.402-2). Liquidated damages are used to compensate the Government for probable damages. Therefore, the liquidated damages rate *must* be a reasonable forecast of just compensation for the harm that is caused by late delivery or untimely performance of the particular contract. Use a maximum amount or a maximum period for assessing liquidated damages if these limits reflect the maximum probable damage to the Government. Also, the *contracting officer may* use more than one liquidated damages rate when the *contracting officer* expects the probable damage to the Government to change over the contract period of performance.

(c) The *contracting officer must* take all reasonable steps to mitigate liquidated damages. If the contract contains a liquidated damages clause and the *contracting officer* is considering terminating the contract for default, the *contracting officer should* seek expeditiously to obtain performance by the contractor or terminate the contract and repurchase (see subpart 49.4). Prompt *contracting officer* action will prevent excessive loss to defaulting contractors and protect the interests of the Government.

(d) The *head of the agency may* reduce or waive the amount of liquidated damages assessed under a contract, if the Commissioner, Financial Management Service, or designee approves (see Treasury Order 145-10).

11.502 Procedures.

(a) Include the applicable liquidated damages clause and liquidated damages rates in *solicitations* when the contract will contain liquidated damages provisions.

(b) *Construction* contracts with liquidated damages provisions *must* describe the rate(s) of liquidated damages assessed per *day* of delay. The rate(s) *should* include the estimated daily cost of Government *inspection* and superintendence. The rate(s) *should* also include an amount for other expected expenses associated with delayed completion such as-

(1) Renting substitute property; or

(2) Paying additional allowance for living quarters.

11.503 Contract clauses.

(a) Use the clause at 52.211-11, Liquidated Damages-*Supplies*, Services, or Research and Development, in fixed-price *solicitations* and contracts for *supplies*, services, or research and development when the *contracting officer* determines that liquidated damages are appropriate (see 11.501(a)).

(b) Use the clause at 52.211-12, Liquidated Damages-*Construction*, in *solicitations* and contracts for *construction*, other than cost-plus-fixed-fee, when the *contracting officer* determines that liquidated damages are appropriate (see 11.501(a)). If the contract specifies more than one completion date for separate parts or stages of the work, revise paragraph (a) of the clause to state the amount of liquidated damages for delay of each separate part or stage of the work.

(c) Use the clause at 52.211-13, Time Extensions, in *solicitations* and contracts for *construction* that use the clause at 52.211-12, Liquidated Damages-*Construction*, when that clause has been revised as provided in paragraph (b) of this section.

Subpart 11.6 - Priorities and Allocations

11.600 Scope of subpart.

This subpart implements the Defense Priorities and Allocations System (DPAS), a Department of

Commerce regulation in support of approved *national defense*, *emergency* preparedness, and energy programs (see 15 CFR part 700).

11.601 Definitions.

As used in this subpart-

Approved program means a program determined as necessary or appropriate for priorities and allocations support to promote the *national defense* by the Secretary of Defense, the Secretary of Energy, or the Secretary of Homeland Security, under the authority of the Defense Production Act, the Stafford Act, and Executive Order 12919, or the Selective Service Act and related statutes and Executive Order 12742.

Delegate Agency means a Government agency authorized by delegation from the Department of Commerce to place priority ratings on contracts or orders needed to support *approved programs*.

National defense means programs for military and energy production or *construction*, military assistance to any foreign nation, stockpiling, space, and any directly related activity. Such term includes *emergency* preparedness activities conducted pursuant to title VI of The Robert T. Stafford Disaster Relief and *Emergency* Assistance Act (42 U.S.C. 5195 *et seq*.) and critical infrastructure protection and restoration. (50 U.S.C. App. § 2152).

Rated order means a prime contract, a subcontract, or a *purchase order* in support of an *approved program* issued in accordance with the provisions of the DPAS regulation (15 CFR part 700).

11.602 General.

(a) Under Title I of the Defense Production Act of 1950 (50 U.S.C. App.2061, *et seq*.), the President is authorized to require preferential acceptance and performance of contracts and orders supporting certain approved *national defense* and energy programs and to allocate materials, services, and facilities in such a manner as to promote these *approved programs*.

(b) The President delegated the priorities and allocations authorities of the Defense Production Act in Executive Order 12919. As part of that delegation, the President designated the Secretary of Commerce to administer the DPAS. For more information, check the DPAS website at: https://www.bis.doc.gov/index.php/other-areas/strategic-industries-and-economic-security-sies/defense-priorities-a-allocations-system-program-dpas.

11.603 Procedures.

(a) There are two levels of priority for *rated orders* established by the DPAS, identified by the rating symbols "DO" and "DX". All DO *rated orders* have equal priority with each other and take preference over unrated orders. All DX *rated orders* have equal priority with each other and take preference over DO rated and unrated orders (see 15 CFR 700.11). The DPAS regulation contains provisions concerning the elements of a *rated order* (see 15 CFR 700.12); acceptance and rejection of *rated orders* (see 15 CFR 700.13); preferential scheduling (see 15 CFR 700.14); extension of priority ratings (flowdown) (see 15 CFR 700.15); changes or cancellations of priority ratings and *rated orders* (see 15 CFR 700.16); use of *rated orders* (see 15 CFR 700.17); and limitations on placing

rated orders (see 15 CFR 700.18).

(b) The *Delegate Agencies* have been given authority by the Department of Commerce to place *rated orders* in support of *approved programs* (see Schedule I of the DPAS). Other U.S. Government agencies, Canada, and foreign nations *may* apply for priority rating authority.

(c) *Rated orders shall* be placed in accordance with the provisions of the DPAS.

(d) *Agency heads shall* ensure compliance with the DPAS by *contracting activities* within their agencies.

(e) *Agency heads shall* provide *contracting activities* with specific guidance on the issuance of *rated orders* in support of approved agency programs, including the general limitations and jurisdictional limitations on placing *rated orders* (see 15 CFR 700.18 and Executive Order 12919).

(f) *Contracting officers shall* follow agency procedural instructions concerning the use of *rated orders* in support of approved agency programs.

(g) *Contracting officers*, contractors, or subcontractors at any tier, that experience difficulty placing *rated orders*, obtaining timely delivery under *rated orders*, locating a contractor or supplier to fill a *rated order*, ensuring that *rated orders* receive preferential treatment by contractors or suppliers, or require rating authority for items not automatically ratable under the DPAS, *should* promptly seek special priorities assistance in accordance with agency procedures (see 15 CFR 700.50-700.55 and 700.80).

(h) The Department of Commerce *may* take specific official actions (Ratings Authorizations, Directives, Letters of Understanding, Administrative Subpoenas, Demands for Information, and *Inspection* Authorizations) to implement or enforce the provisions of the DPAS (see 15 CFR 700.60-700.71).

(i) *Contracting officers shall* report promptly any violations of the DPAS in accordance with agency procedures to the Office of Strategic Industries and Economic Security, U.S. Department of Commerce, Room 3876, Washington, DC 20230, Ref: DPAS; telephone: (202) 482-3634 or fax: (202) 482-5650.

11.604 Solicitation provision and contract clause.

(a) *Contracting officers shall* insert the provision at 52.211-14, Notice of Priority Rating for *National Defense*, *Emergency* Preparedness, and Energy Program Use, in *solicitations* when the contract to be awarded will be a *rated order*.

(b) *Contracting officers shall* insert the clause at 52.211-15, Defense Priority and Allocation Requirements, in contracts that are *rated orders*.

Subpart 11.7 - Variation in Quantity

11.701 Supply contracts.

(a) A fixed-price supply contract *may* authorize Government acceptance of a variation in the quantity of items called for if the variation is caused by conditions of loading, shipping, or packing, or by allowances in manufacturing processes. Any permissible variation *shall* be stated as a percentage and it *may* be an increase, a decrease, or a combination of both; however, contracts for subsistence items *may* use other applicable terms of variation in quantity.

(b) There *should* be no standard or usual variation percentage. The overrun or underrun permitted in each contract *should* be based upon the normal commercial practices of a particular industry for a particular item, and the permitted percentage *should* be no larger than is necessary to afford a contractor reasonable protection. The permissible variation *shall* not exceed plus or minus 10 percent unless a different limitation is established in agency regulations. Consideration *shall* be given to the quantity to which the percentage variation applies. For example, when delivery will be made to multiple destinations and it is desired that the quantity variation apply to the item quantity for each destination, this requirement *must* be stated in the contract.

(c) Contractors are responsible for delivery of the specified quantity of items in a fixed-price contract, within allowable variations, if any. If a contractor delivers a quantity of items in excess of the contract requirements plus any allowable variation in quantity, particularly small dollar value overshipments, it results in unnecessary administrative costs to the Government in determining disposition of the excess quantity. Accordingly, the contract *may* include the clause at 52.211-17, Delivery of Excess Quantities, to provide that-

(1) Excess quantities of items totaling up to $250 in value *may* be retained without compensating the contractor; and

(2) Excess quantities of items totaling over $250 in value *may*, at the Government's *option*, be either returned at the contractor's expense or retained and paid for at the contract unit price.

11.702 Construction contracts.

Construction contracts *may* authorize a variation in estimated quantities of unit-priced items. When the variation between the estimated quantity and the actual quantity of a unit-priced item is more than plus or minus 15 percent, an equitable adjustment in the contract price *shall* be made upon the demand of either the Government or the contractor. The contractor *may* request an extension of time if the quantity variation is such as to cause an increase in the time necessary for completion. The *contracting officer must* receive the request *in writing* within 10 days from the beginning of the period of delay. However, the *contracting officer may* extend this time limit before the date of final settlement of the contract. The *contracting officer shall* ascertain the facts and make any adjustment for extending the completion date that the findings justify.

11.703 Contract clauses.

(a) The *contracting officer shall* insert the clause at 52.211-16, Variation in Quantity, in *solicitations* and contracts, if authorizing a variation in quantity in fixed-price contracts for *supplies* or for services that involve the furnishing of *supplies*.

(b) The *contracting officer may* insert the clause at 52.211-17, Delivery of Excess Quantities, in *solicitations* and contracts when a fixed-price supply contract is contemplated.

(c) The *contracting officer shall* insert the clause at 52.211-18, Variation in Estimated Quantity, in *solicitations* and contracts when a fixed-price *construction* contract is contemplated that authorizes a variation in the estimated quantity of unit-priced items.

Subpart 11.8 - Testing

11.801 Preaward in-use evaluation.

Supplies may be evaluated under comparable in-use conditions without a further test plan, provided *offerors* are so advised in the *solicitation*. The results of such tests or demonstrations *may* be used to rate the proposal, to determine technical acceptability, or otherwise to evaluate the proposal (see 15.305).