Subpart 12.2 - Special Requirements for the Acquisition of Commercial Products and Commercial Services

Parent topic: Part 12 - Acquisition of Commercial Products and Commercial Services

12.201 General.

This subpart identifies special requirements for the *acquisition* of *commercial products* and *commercial services* intended to more closely resemble those customarily used in the commercial marketplace, as well as other considerations necessary for proper planning, *solicitation*, evaluation, and award of contracts for *commercial products* and *commercial services*.

12.202 Market research and description of agency need.

(a) *Market research* (see 10.001) is an essential element of building an effective strategy for the *acquisition* of *commercial products* and *commercial services* and establishes the foundation for the agency description of need (see part 11), the *solicitation*, and resulting contract.

(b) The description of agency need *must* contain sufficient detail for potential *offerors* of *commercial products* or *commercial services* to know which *commercial products* or *commercial services may* be suitable. Generally, for *acquisitions* in excess of the *simplified acquisition threshold*, an agency's statement of need for a *commercial product* or *commercial service* will describe the type of *commercial product* or *commercial service* to be acquired and explain how the agency intends to use the product or service in terms of function to be performed, performance requirement or essential physical characteristics. Describing the agency's needs in these terms allows *offerors* to propose methods that will best meet the needs of the Government.

(c) Follow the procedures in subpart 11.2 regarding the identification and availability of specifications, standards and commercial item descriptions.

(d) Requirements documents *shall* identify the applicable *information and communication technology* accessibility standards at 36 CFR 1194.1 (see 11.002(f) and subpart 39.2).

(e) When acquiring *information technology* using Internet Protocol, agencies *must* include the appropriate Internet Protocol compliance requirements in accordance with 11.002(g).

12.203 Procedures for solicitation, evaluation, and award.

(a) *Contracting officers shall* use the policies unique to the *acquisition* of *commercial products* and *commercial services* prescribed in this part in conjunction with the policies and procedures for *solicitation*, evaluation and award prescribed in part 13, *Simplified Acquisition Procedures*; part 14 Sealed Bidding; or part 15, *Contracting* by Negotiation, as appropriate for the particular *acquisition*. The *contracting officer may* use the streamlined procedure for soliciting *offers* for

commercial product or *commercial service* prescribed in 12.603. For *acquisitions* of *commercial products* or *commercial services* exceeding the *simplified acquisition threshold* but not exceeding $9 million ($15 million for *acquisitions* as described in 13.500 (c)), including *options*, *contracting activities may* use any of the simplified procedures authorized by subpart 13.5.

(b) *Contracting officers shall* ensure the criteria at 15.101-2(c) are met when using the lowest price technically acceptable source selection process.

12.204 Solicitation/contract form.

(a)

(1) The *contracting officer shall* use the Standard Form 1449, *Solicitation*/Contract/Order for *Commercial Products* and *Commercial Services*, if—

(i)The *acquisition* is expected to exceed the *simplified acquisition threshold*;

(ii)A paper *solicitation* or contract is being issued; and

(iii)Procedures at 12.603 are not being used.

(2)Use of the SF 1449 is nonmandatory but encouraged for commercial *acquisitions* not exceeding the *simplified acquisition threshold*.

(b) Consistent with the requirements at 5.203(a) and (h), the *contracting officer may* allow fewer than 15 days before issuance of the *solicitation*.

12.205 Offers.

(a) Where technical information is necessary for evaluation of *offers*, agencies *should*, as part of *market research*, review existing literature generally available in the industry to determine its adequacy for purposes of evaluation. If adequate, *contracting officers shall* request existing product or service literature from *offerors* of *commercial products* or *commercial services* in lieu of unique technical proposals.

(b) *Contracting officers should* allow *offerors* to propose multiple *offers* that will meet a Government need in response to *solicitations* for *commercial products* or *commercial services*. The *contracting officer shall* evaluate each *offer* separately.

(c) Consistent with the requirements at 5.203(b), the *contracting officer may* allow fewer than 30 days response time for receipt of *offers* for *commercial products* or *commercial services*, unless the *acquisition* is covered by the World Trade Organization Government *Procurement* Agreement or a Free Trade Agreement (see 5.203(h)).

12.206 Use of past performance.

Past performance should be an important element of every evaluation and contract award for *commercial products* and *commercial services*. *Contracting officers should* consider *past performance* data from a wide variety of sources both inside and outside the Federal Government in accordance with the policies and procedures contained in subpart 9.1,13.106, or subpart 15.3, as applicable.

12.207 Contract type.

(a) Except as provided in paragraph (b) of this section, agencies *shall* use firm-fixed-price contracts or fixed-price contracts with economic price adjustment for the *acquisition* of *commercial products* or *commercial services*.

(b)

(1) A time-and-materials contract or labor-hour contract (see subpart 16.6) *may* be used for the *acquisition* of *commercial services* when-

(i) The service is acquired under a contract awarded using-

(A) Competitive procedures (*e.g.*, the procedures in 6.102, the set-aside procedures in subpart 19.5, or competition conducted in accordance with part 13);

(B) The procedures for other than *full and open competition* in 6.3 provided the agency receives *offers* that satisfy the Government's expressed requirement from two or more responsible *offerors*; or

(C) The fair opportunity procedures in 16.505 (including discretionary small business set-asides under 16.505(b)(2)(i)(F)), if placing an order under a multiple-award delivery-order contract; and

(ii) The *contracting officer*-

(A) Executes a determination and findings (D&F) for the contract, in accordance with paragraph (b)(2) of this section (but see paragraph (c) of this section for indefinite-delivery contracts), that no other contract type authorized by this subpart is suitable;

(B) Includes a ceiling price in the contract or order that the contractor exceeds at its own risk; and

(C) Prior to increasing the ceiling price of a time-and-materials or labor-hour contract or order, *shall*-

(1) Conduct an analysis of *pricing* and other relevant factors to determine if the action is in the best interest of the Government;

(2) Document the decision in the contract or order file; and

(3) When making a change that modifies the general scope of-

(i) A contract, follow the procedures at 6.303;

(ii) An order issued under the Federal Supply Schedules, follow the procedures at 8.405-6; or

(iii) An order issued under multiple award task and *delivery order* contracts, follow the procedures at 16.505(b)(2).

(2) Each D&F required by paragraph (b)(1)(ii)(A) of this section *shall* contain sufficient facts and rationale to justify that no other contract type authorized by this subpart is suitable. At a minimum, the D&F *shall*-

(i) Include a description of the *market research* conducted (see 10.002(e));

(ii) Establish that it is not possible at the time of placing the contract or order to accurately estimate the extent or duration of the work or to anticipate costs with any reasonable degree of confidence;

(iii) Establish that the requirement has been structured to maximize the use of firm-fixed-price or fixed-price with economic price adjustment contracts (*e.g.*, by limiting the value or length of the time-and-material/labor-hour contract or order; establishing fixed prices for portions of the requirement) on future *acquisitions* for the same or similar requirements; and

(iv) Describe actions planned to maximize the use of firm-fixed-price or fixed-price with economic price adjustment contracts on future *acquisitions* for the same requirements.

(3) See 16.601(d)(1) for additional approval required for contracts expected to extend beyond three years.

(4) See 8.404(h) for the requirement for determination and findings when using Federal Supply Schedules.

(c)

(1) Indefinite-delivery contracts (see subpart 16.5) *may* be used when-

(i) The prices are established based on a firm-fixed-price or fixed-price with economic price adjustment; or

(ii) Rates are established for *commercial services* acquired on a time-and-materials or labor-hour basis.

(2) When an indefinite-delivery contract is awarded with services priced on a time-and-materials or labor-hour basis, *contracting officers shall*, to the maximum extent practicable, also structure the contract to allow issuance of orders on a firm-fixed-price or fixed-price with economic price adjustment basis. For such contracts, the *contracting officer shall* execute the D&F required by paragraph (b)(2) of this section, for each order placed on a time-and-materials or labor-hour basis. Placement of orders *shall* be in accordance with subpart 8.4 or 16.5, as applicable.

(3) If an indefinite-delivery contract only allows for the issuance of orders on a time-and-materials or labor-hour basis, the D&F required by paragraph (b)(2) of this section *shall* be executed to support the basic contract and *shall* also explain why providing for an alternative firm-fixed-price or fixed-price with economic price adjustment *pricing* structure is not practicable. The D&F for this contract *shall* be approved one level above the *contracting officer*. Placement of orders *shall* be in accordance with subpart 16.5.

(d) The contract types authorized by this subpart *may* be used in conjunction with an award fee and performance or delivery incentives when the award fee or incentive is based solely on factors other than cost (see 16.202-1 and 16.203-1).

(e) Use of any contract type other than those authorized by this subpart to acquire *commercial products* or *commercial services* is prohibited.

12.208 Contract quality assurance.

Contracts for *commercial products shall* rely on contractors' existing quality assurance systems as a substitute for Government *inspection* and testing before tender for acceptance unless customary market practices for the *commercial product* being acquired include in-process *inspection*. Any in-process *inspection* by the Government *shall* be conducted in a manner consistent with commercial practice. The Government *shall* rely on the contractor to accomplish all *inspection* and testing needed to ensure that *commercial services* acquired conform to contract requirements before they are tendered to the Government.

12.209 Determination of price reasonableness.

While the *contracting officer must* establish price reasonableness in accordance with 13.106-3,14.408-2, or subpart 15.4, as applicable, the *contracting officer should* be aware of customary *commercial products* and *commercial services* and conditions when *pricing commercial products* and *commercial services*. *Commercial product* and *commercial service* prices are affected by factors that include, but are not limited to, speed of delivery, length and extent of *warranty*, limitations of seller’s liability, quantities ordered, length of the performance period, and specific performance requirements. The *contracting officer must* ensure that contract terms, conditions, and prices are commensurate with the Government’s need.

12.210 Contract financing.

Customary market practice for some *commercial products* and *commercial services may* include buyer contract financing. The *contracting officer may offer* Government financing in accordance with the policies and procedures in part 32.

12.211 Technical data.

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 product* or process. The *contracting officer shall* presume that data delivered under a contract for *commercial products* was developed exclusively at private expense. When a contract for *commercial products* requires the delivery of *technical data*, the *contracting officer shall* include appropriate provisions and clauses delineating the rights in the *technical data* in addenda to the *solicitation* and contract (see part 27 or agency FAR supplements).

12.212 Computer software.

(a) *Commercial computer software* or commercial *computer software documentation shall* be acquired under licenses customarily provided to the public to the extent such licenses are consistent with Federal law and otherwise satisfy the Government's needs. Generally, *offerors* and contractors *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 rights to use, modify, reproduce, release, perform, display, or disclose *commercial computer software* or commercial *computer software documentation* except as mutually agreed to by the parties.

(b) With regard to *commercial computer software* and commercial *computer software documentation*, the Government *shall* have only those rights specified in the license contained in any addendum to the contract. For additional guidance regarding the use and negotiation of license agreements for *commercial computer software*, see 27.405-3.

12.213 Other commercial practices.

It is a common practice in the commercial marketplace for both the buyer and seller to propose terms and conditions written from their particular perspectives. The terms and conditions prescribed in this part seek to balance the interests of both the buyer and seller. These terms and conditions are generally appropriate for use in a wide range of *acquisitions*. However, *market research may* indicate other commercial practices that are appropriate for the *acquisition* of the particular item. These practices *should* be considered for incorporation into the *solicitation* and contract if the *contracting officer* determines them appropriate in concluding a business arrangement satisfactory to both parties and not otherwise precluded by law or Executive order.

12.214 Cost Accounting Standards.

Cost Accounting Standards (CAS) do not apply to contracts and *subcontracts* for the *acquisition* of *commercial products* or *commercial services* when these contracts and *subcontracts* are firm-fixed-price or fixed-price with economic price adjustment (provided that the price adjustment is not based on actual costs incurred). See 30.201-1 for CAS applicability to fixed-price with economic price adjustment contracts and *subcontracts* for *commercial products* or *commercial services* when the price adjustment is based on actual costs incurred. When CAS applies, the *contracting officer shall* insert the appropriate provisions and clauses as prescribed in 30.201.

12.215 Notification of overpayment.

If the contractor notifies the *contracting officer* of a duplicate payment or that the Government has otherwise overpaid, the *contracting officer shall* follow the procedures at 32.604.

12.216 Unenforceability of unauthorized obligations.

Many *supplies* or services are acquired subject to supplier license agreements. These are particularly common in *information technology acquisitions*, but they *may* apply to any supply or service. For example, *computer software* and services delivered through the internet (web services) are often subject to license agreements, referred to as End User License Agreements (EULA), Terms of Service (TOS), or other similar legal instruments or agreements. Many of these agreements contain indemnification clauses that are inconsistent with Federal law and unenforceable, but which could create a violation of the Anti-Deficiency Act (31 U.S.C. 1341) if agreed to by the Government. Paragraph (u) of the clause at 52.212-4 prevents any such violations.