Subpart 12.5 - Applicability of Certain Laws to the Acquisition of Commercial Products, Commercial Services and Commercially Available Off-the-Shelf Items

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

12.500 Scope of subpart.

(a) As required by 41 U.S.C. 1906 and 1907, this subpart lists provisions of law that are not applicable to-

(1) Contracts for the *acquisition* of *commercial products* or *commercial services*;

(2) *Subcontracts*, at any tier, for the *acquisition* of *commercial products* or *commercial services*; and

(3) Contracts and *subcontracts*, at any tier, for the *acquisition* of commercially available off-the-shelf (COTS) items.

(b) This subpart also lists provisions of law that have been amended to eliminate or modify their applicability to either contracts or *subcontracts* for the *acquisition* of *commercial products* or *commercial services*.

12.501 Applicability.

(a) This subpart applies to any contract or *subcontract* at any tier for the *acquisition* of *commercial products* or *commercial services*.

(b) Nothing in this subpart *shall* be construed to authorize the waiver of any provision of law with respect to any *subcontract* if the prime contractor is reselling or distributing *commercial products* or *commercial services* of another contractor without adding value. This limitation is intended to preclude establishment of unusual contractual arrangements solely for the purpose of Government sales.

(c) For purposes of this subpart, contractors awarded *subcontracts* under subpart 19.8, *Contracting* with the Small Business Administration (the 8(a) Program), *shall* be considered prime contractors.

12.502 Procedures.

(a) The FAR prescription for the provision or clause for each of the laws listed in 12.503 has been revised in the appropriate part to reflect its proper application to prime contracts for the *acquisition* of *commercial products* or *commercial services*.

(b) For *subcontracts* for the *acquisition* of *commercial products* or *commercial services*, the clauses at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—*Commercial Products* and *Commercial Services*, and 52.244-6, *Subcontracts* for *Commercial Products* and *Commercial Services*, reflect the applicability of the laws listed in 12.504 by identifying the only provisions and clauses that are required to be included in a *subcontract* at any tier for the *acquisition* of *commercial products* or *commercial services*.

(c) The FAR prescription for the provision or clause for each of the laws listed in 12.505 has been revised in the appropriate part to reflect its proper application to contracts and *subcontracts* for the *acquisition* of COTS items.

12.503 Applicability of certain laws to Executive agency contracts for the acquisition of commercial products and commercial services.

(a) The following laws are not applicable to *Executive agency* contracts for the *acquisition* of *commercial products* or *commercial services*:

(1) 10 U.S.C. 983, Institutions of Higher Education that Prevent ROTC Access or Military Recruiting on Campus: Denial of Grants and Contracts from Department of Defense, Department of Education, and Certain Other Departments and Agencies (see 9.110).

(2) 31 U.S.C. 1354(a), Limitation on Use of Appropriated Funds for Contracts with Entities Not Meeting Veterans' Employment Reporting Requirements (see 22.1302).

(3) 41 U.S.C. 1708(e)(3), Minimum Response Time for *Offers* (see 5.203).

(4) 41 U.S.C. 2303(b), Policy on Personal Conflicts of Interest by Contractor Employees (see subpart 3.11).

(5) 41 U.S.C. 3901(b) and 10 U.S.C. 3321(b), Contingent Fees (see 3.404).

(6) 41 U.S.C. 4706(d)(1) and 10 U.S.C. 3841(d)(1), GAO Access to Contractor Employees, section 871 of Public Law 110-417 (see 52.214-26 and 52.212-2).

(7) 41 U.S.C. chapter 65, Contracts for Materials, *Supplies*, Articles, and Equipment Exceeding $10,000 (see subpart 22.6).

(8) 41 U.S.C. chapter 81, *Drug-Free Workplace* (see 26.501).

(9) Section 806(a)(3) of Public Law 102-190, as amended by sections 2091 and 8105 of Public Law 103-355 (10 U.S.C. 4601 note prec.), Payment Protections for Subcontractors and Suppliers (see 28.106-6).

(10) 15 U.S.C. 644(w), *Solicitation* Notice Regarding Administration of *Change Orders* for *Construction* (see 36.211).

(b) Certain requirements of the following laws are not applicable to *executive agency* contracts for the *acquisition* of commercial *products* and *commercial services*:

(1) 22 U.S.C. 2593e, Requirement for a certification under Measures Against Persons Involved in Activities that Violate Arms Control Treaties or Agreements with the *United States* (see 9.109).

(2) 40 U.S.C.chapter 37, Requirement for a certificate and clause under the Contract Work Hours and Safety Standards statute (see 22.305).

(3) 41 U.S.C. 8703 and 8703, Requirement for a clause and certain other requirements related to kickbacks (see 3.502).

(4) 49 U.S.C.40118, Requirement for a clause under provisions of the Government-financed air transportation statute, commonly referred to as the Fly America Act, except that 49 U.S.C.40118(g) is applicable to the *acquisition* of *commercial services* (see 47.405).

(c) The applicability of the following laws have been modified in regard to *Executive agency* contracts for the *acquisition* of *commercial products* and *commercial services*:

(1) 41 U.S.C.4704 and 10 U.S.C. 4655, Prohibition on Limiting Subcontractor Direct Sales to the *United States* (see 3.503).

(2) 41 U.S.C.chapter 35, and 10 U.S.C. chapter 271, Truthful *Cost or Pricing Data* (see 15.403).

(3) 41 U.S.C.chapter 15, Cost Accounting Standards (48 CFR Chapter 99) (see 12.214).

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

(a) The following laws are not applicable to *subcontracts* at any tier for the *acquisition* of *commercial products* or *commercial services* at any tier:

(1) 10 U.S.C. 2631, Transportation of *Supplies* by Sea (except for the types of *subcontracts* listed at 47.504(d)).

(2) 15 U.S.C. 644(d), Requirements relative to *labor surplus areas* under the Small Business Act (see subpart 19.2).

(3) [Reserved]

(4) 41 U.S.C. chapter 65, Contracts for Materials, *Supplies*, Articles, and Equipment Exceeding $10,000 (see subpart 22.6).

(5) 41 U.S.C. 4703, Validation of Proprietary Data restrictions (see subpart 27.4).

(6) 41 U.S.C. 3901(b) and 10 U.S.C. 3321(b), Contingent Fees (see subpart 3.4).

(7) 41 U.S.C. 4706(d) and 10 U.S.C. 3841(d), Examination of Records of Contractor, when a subcontractor is not required to provide *certified cost or pricing data* (see 15.209(b)), unless using funds appropriated or otherwise made available by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5).

(8) 41 U.S.C. 1708(e)(3), Minimum Response Time for *Offers* (see subpart 5.2).

(9) 41 U.S.C. 2302, Rights in *Technical Data* (see subpart 27.4).

(10) 41 U.S.C. chapter 81, *Drug-Free Workplace* Act (see subpart 26.5).

(11) 46 U.S.C.App.1241(b), Transportation in American Vessels of Government Personnel and Certain Cargo (see subpart 47.5) (except for the types of *subcontracts* listed at 47.504(d)).

(12) 49 U.S.C. 40118, Fly American provisions (see subpart 47.4).

(13) Section 806(a)(3) of Pub. L. 102-190, as amended by Sections 2091 and 8105 of Pub. L. 103-355 (10 U.S.C. 4601 note prec.), Payment Protections for Subcontractors and Suppliers (see 28.106-6).

(b) The requirements for a certificate and clause under the Contract Work Hours and Safety Standards statute, 40 U.S.C. 37, (see subpart 22.3) are not applicable to *subcontracts* at any tier for the *acquisition* of *commercial products* or *commercial services* or *commercial components*.

(c) The applicability of the following laws has been modified in regard to *subcontracts* at any tier for the *acquisition* of *commercial products* or *commercial services*:

(1) 41 U.S.C. 4704 and 10 U.S.C. 4655, Prohibition on Limiting Subcontractor Direct Sales to the *United States* (see subpart 3.5).

(2) 41 U.S.C. chapter 35, and 10 U.S.C. chapter 271, Truthful *Cost or Pricing Data* (see subpart 15.4).

(3) 41 U.S.C. chapter 15, Cost Accounting Standards (48 CFR Chapter 99) (see 12.214).

12.505 Applicability of certain laws to contracts for the acquisition of COTS items.

COTS items are a subset of *commercial products*. Therefore, any laws listed in sections 12.503 and 12.504 are also inapplicable or modified in their applicability to contracts or *subcontracts* for the *acquisition* of COTS items. In addition, the following laws are not applicable to contracts for the *acquisition* of COTS items:

(a)

(1) The portion of 41 U.S.C. 8302 , American Materials Required for Public Use, paragraph (a)(1) that reads “substantially all from articles, materials, or *supplies* mined, produced, or manufactured in the *United States*,” Buy American—*Supplies*, domestic content test, except as provided in 25.101(a)(2)(ii) (see 52.225-1 and 52.225-3).

(2)The portion of 41 U.S.C. 8303, Contracts for Public Works, paragraph (a)(2) that reads “substantially all from articles, materials, or *supplies* mined, produced, or manufactured in the *United States*,” Buy American—*Construction* Materials, domestic content test, except as provided in 25.201(b)(2)(ii)(see 52.225-9 and 52.225-11).

(b) 42 U.S.C. 69 62(c)(3)(A), Certification and Estimate of Percentage of *Recovered Material*.

(c) Compliance Plan and Certification Requirement, section 1703 of the *National Defense* Authorization Act for Fiscal Year 2013 (Pub. L. 112-239), Title XVII, Ending trafficking in Government *Contracting* (see 52.222-50(h) and 52.222-56).