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## **212.001 Definitions. As used in this part—**

“Market research” means a review of existing systems, subsystems, capabilities, and technologies that are available or could be made available to meet the needs of DoD in whole or in part. The review shall include, at a minimum, contacting knowledgeable individuals in Government and industry regarding existing market capabilities and pricing information, and may include any of the techniques for conducting market research provided in FAR 10.002(b)(2) (section 855 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92)).

## **SUBPART 212.1 —ACQUISITION OF COMMERCIAL ITEMS - GENERAL**

### **212.102 Applicability.**

(a)(i) Commercial item determination. When using FAR part 12 procedures for acquisitions exceeding \$1 million in value, except for acquisitions made pursuant to FAR 12.102(f)(1), the contracting officer shall—

(A) Determine in writing that the acquisition meets the commercial item definition in FAR 2.101;

(B) Include the written determination in the contract file; and

(C) Obtain approval at one level above the contracting officer when a commercial item determination relies on subsections (1)(ii), (3), (4), or (6) of the “commercial item” definition at FAR 2.101.

(D) Follow the procedures and guidance at PGI [212.102](#) (a)(i) regarding file documentation and commercial item determinations.

(ii) *Prior commercial item determination.* This section implements 10 U.S.C. 2306a(b)(4) and 10 U.S.C. 2380(b).

(A) The contracting officer may presume that a prior commercial item determination made by a military department, a defense agency, or another component of DoD shall serve as a determination for subsequent procurements of such item. See PGI [212.102](#) (a)(ii) for information about items that the Department has historically acquired as military unique, noncommercial items.

(B) If the contracting officer does not make the presumption that a prior commercial item determination is valid, and instead chooses to proceed with a procurement of an item previously determined to be a commercial item using procedures other than the procedures authorized for the procurement of a commercial item, the contracting officer shall request a review of the commercial item determination by the head of the contracting activity that will conduct the procurement. Not later than 30 days after receiving a request for review of a commercial item determination, the head of a contracting activity shall—

(1) Confirm that the prior determination was appropriate and still applicable; or

(2) Issue a determination that the prior use of FAR part 12 procedures was improper or that it is no longer appropriate to acquire the item using FAR part 12 procedures, with a written explanation of the basis for the determination (see 212.70).

(iii) *Nontraditional defense contractors.* In accordance with 10 U.S.C. 2380a, contracting officers may treat supplies and services provided by nontraditional defense contractors as commercial items. This permissive authority is intended to enhance defense innovation and investment, enable DoD to acquire items that otherwise might not have been available, and create incentives for nontraditional defense contractors to do business with DoD. It is not intended to recategorize current noncommercial items, however, when appropriate, contracting officers may consider applying commercial item procedures to the procurement of supplies and services from business segments that meet the definition of “nontraditional defense contractor” even though they have been established under traditional defense contractors. The decision to apply commercial item procedures to the procurement of supplies and services from nontraditional defense contractors does not require a commercial item determination and does not mean the item is commercial.

## **SUBPART 212.2 —SPECIAL REQUIREMENTS FOR THE ACQUISITION OF COMMERCIAL ITEMS**

See DoD Class Deviation 2018-00016, Defense Commercial Solutions Opening Pilot Program, issued June 26, 2018. This class deviation allows the contracting officer to acquire innovative commercial items, technologies, or services using the competitive procedure outlined in the class

deviation called a commercial solutions opening (CSO). Use of a CSO is authorized by section 879 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328). Under a CSO, DoD may competitively select proposals received in response to a general solicitation, similar to a broad agency announcement, based on a review of proposals by scientific, technological, or other subject matter experts. This class deviation remains in effect until September 30, 2022.

### **212.203 Procedures for solicitation, evaluation, and award.**

(1) See [215.101-2-70](#) for the limitations and prohibitions on the use of the lowest price technically acceptable source selection process, which are applicable to the acquisition of commercial items.

(2) See [217.7801](#) for the prohibition on the use of reverse auctions for personal protective equipment and aviation critical safety items.

### **212.205 Offers.**

(c) When using competitive procedures, if only one offer is received, the contracting officer shall follow the procedures at [215.371](#) .

### **212.207 Contract type.**

(b) In accordance with section 805 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181), use of time-and-materials and labor-hour contracts for the acquisition of commercial items is authorized only for the following:

(i) Services acquired for support of a commercial item, as described in paragraph (5) of the definition of “commercial item” at FAR 2.101 (41 U.S.C. 103).

(ii) Emergency repair services.

(iii) Any other commercial services only to the extent that the head of the agency concerned approves a written determination by the contracting officer that—

(A) The services to be acquired are commercial services as defined in paragraph (6) of the definition of “commercial item” at FAR 2.101 (41 U.S.C. 103);

(B) If the services to be acquired are subject to FAR 15.403-1(c)(3)(ii), the offeror of the services has submitted sufficient information in accordance with that subsection;

(C) Such services are commonly sold to the general public through use of time-and-materials or labor-hour contracts; and

(D) The use of a time-and-materials or labor-hour contract type is in the best interest of the Government.

## **212.209 Determination of price reasonableness.**

(a) In accordance with 10 U.S.C. 2377(d), agencies shall conduct or obtain market research to support the determination of the reasonableness of price for commercial items contained in any bid or offer submitted in response to an agency solicitation. To the extent necessary to support such market research, the contracting officer—

(1) In the case of major weapon systems items acquired as commercial items in accordance with subpart 234.70, shall use information submitted under [234.7002\(d\)](#); and

(2) In the case of other items, may require the offeror to submit other relevant information

(b) If the contracting officer determines that the information obtained through market research pursuant to paragraph (a) of this section, is insufficient to determine the reasonableness of price, the contracting officer shall consider information submitted by the offeror of recent purchase prices paid by the Government and commercial customers for the same or similar commercial items under comparable terms and conditions in establishing price reasonableness on a subsequent purchase if the contracting officer is satisfied that the prices previously paid remain a valid reference for comparison. In assessing whether the prices previously paid remain a valid reference for comparison, the contracting officer shall consider the totality of other relevant factors such as the time elapsed since the prior purchase and any differences in the quantities purchased (10 U.S.C. 2306a(b)).

(c) If the contracting officer determines that the offeror cannot provide sufficient information as described in paragraph (b) of this section to determine the reasonableness of price, the contracting officer should request the offeror to submit information on—

(1) Prices paid for the same or similar items sold under different terms and conditions;

(2) Prices paid for similar levels of work or effort on related products or services;

(3) Prices paid for alternative solutions or approaches; and

(4) Other relevant information that can serve as the basis for determining the reasonableness of price.

(d) Nothing in this section shall be construed to preclude the contracting officer from requiring the contractor to supply information that is sufficient to determine the reasonableness of price, regardless of whether or not the contractor was required to provide such information in connection with any earlier procurement. If the contracting officer determines that the pricing information submitted is not sufficient to determine the reasonableness of price, the contracting officer may request other relevant information regarding the basis for price or cost, including uncertified cost data such as labor costs, material costs, and other direct and indirect costs.

## **212.211 Technical data.**

The DoD policy for acquiring technical data for commercial items is at [227.7102](#) .

## **212.212 Computer software.**

(1) Departments and agencies shall identify and evaluate, at all stages of the acquisition process (including concept refinement, concept decision, and technology development), opportunities for the use of commercial computer software and other non-developmental software in accordance with Section 803 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417).

(2) See Subpart 208.74 when acquiring commercial software or software maintenance. See [227.7202](#) for policy on the acquisition of commercial computer software and commercial computer software documentation.

## **212.270 Major weapon systems as commercial items.**

The DoD policy for acquiring major weapon systems as commercial items is in Subpart 234.70.

## **212.271 Limitation on acquisition of right-hand drive passenger sedans.**

10 U.S.C. 2253(a)(2) limits the authority to purchase right-hand drive passenger sedans to a cost of not more than \$40,000 per vehicle.

## **212.272 Preference for certain commercial products and services.**

(a) As required by section 855 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92), for requirements relating to the acquisition of commercial information technology products and services, see [239.101](#) .

(b)(1) As required by section 876 of the National Defense Authorization Act of Fiscal Year 2017 (Pub. L. 114-328), a contracting officer may not enter into a contract above the simplified acquisition threshold for facilities-related services, knowledge-based services (except engineering services), medical services, or transportation services that are not commercial services unless the appropriate official specified in paragraph (b)(2) of this section determines in writing that no commercial services are suitable to meet the agency's needs as provided in section 10 U.S.C. 2377(c)(2).

(2) The following officials are authorized to make the determination specified in paragraph (b)(1) of this section:

(i) For contracts above \$10 million, the head of the contracting activity, the combatant commander of the combatant command concerned, or the Under Secretary of Defense for Acquisition and Sustainment (as applicable).

(ii) For contracts in an amount above the simplified acquisition threshold and at or below \$10 million, the contracting officer.

# **SUBPART 212.3 –SOLICITATION PROVISIONS AND CONTRACT CLAUSES FOR THE ACQUISITION OF COMMERCIAL ITEMS**

## **212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

See DoD Class Deviation 2018-00021, Commercial Item Omnibus Clause for Acquisitions Using the Standard Procurement System, issued October 1, 2018. This class deviation allows the contracting officer to use the SPS clause logic capability to automatically select the clauses that are applicable to the specific solicitation and contract. The contracting officer shall ensure that the deviation clause is incorporated into these solicitations and contracts because the deviation clause fulfills the statutory requirements on auditing and subcontract clauses applicable to commercial items. The deviation also authorizes adjustments to the deviation clause required by future changes to the clause at 52.212-5 that are published in the FAR. This deviation is effective for five years, or until otherwise rescinded.

(c) Include an evaluation factor regarding supply chain risk (see subpart 239.73) when acquiring information technology, whether as a service or as a supply, that is a covered system, is a part of a covered system, or is in support of a covered system, as defined in [239.7301](#).

(f) The following additional provisions and clauses apply to DoD solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items. If the offeror has completed any of the following provisions listed in this paragraph electronically as part of its annual representations and certifications at <https://www.acquisition.gov>, the contracting officer shall consider this information instead of requiring the offeror to complete these provisions for a particular solicitation.

(i) *Part 203 - Improper Business Practices and Personal Conflicts of Interest.*

(A) Use the FAR clause at 52.203-3, Gratuities, as prescribed in FAR 3.202, to comply with 10 U.S.C. 2207.

(B) Use the clause at [252.203-7000](#), Requirements Relating to Compensation of Former DoD Officials, as prescribed in 203.171-4(a), to comply with section 847 of Pub. L. 110-181.

(C) Use the clause at [252.203-7003](#), Agency Office of the Inspector General, as prescribed in [203.1004](#)(a), to comply with section 6101 of Pub. L. 110-252 and 41 U.S.C. 3509.

(D) Use the provision at [252.203-7005](#), Representation Relating to Compensation of Former DoD Officials, as prescribed in [203.171-4](#)(b).

(ii) *Part 204-Administrative and Information Matters.*

(A) Use the clause at [252.204-7004](#), Antiterrorism Awareness Training for Contractors, as prescribed in [204.7203](#).

(B) Use the provision at [252.204-7008](#), Compliance with Safeguarding Covered Defense Information Controls, as prescribed in [204.7304](#)(a).

(C) Use the clause at [252.204-7009](#), Limitations on the Use or Disclosure of Third-Party Contractor Reported Cyber Incident Information, as prescribed in [204.7304\(b\)](#).

(D) Use the clause at [252.204-7012](#), Safeguarding Covered Defense Information and Cyber Incident Reporting, as prescribed in [204.7304\(c\)](#).

(E) Use the clause at [252.204-7014](#), Limitations on the Use or Disclosure of Information by Litigation Support Contractors, as prescribed in [204.7403\(a\)](#), to comply with 10 U.S.C. 129d.

(F) Use the clause at [252.204-7015](#), Notice of Authorized Disclosure of Information for Litigation Support, as prescribed in [204.7403\(b\)](#), to comply with 10 U.S.C. 129d.

(H) Use the provision at [252.204-7016](#), Covered Defense Telecommunications Equipment or Services - Representation, as prescribed in [204.2105\(a\)](#), to comply with section 1656 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91).

(I) Use the provision at [252.204-7017](#), Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services - Representation, as prescribed in [204.2105\(b\)](#), to comply with section 1656 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91).

(J) Use the clause at [252.204-7018](#), Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services, as prescribed in [204.2105\(c\)](#), to comply with section 1656 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91).

(iii) *Part 205 - Publicizing Contract Actions.* Use the clause at [252.205-7000](#), Provision of Information to Cooperative Agreement Holders, as prescribed in [205.470](#), to comply with 10 U.S.C. 2416.

(iv) *Part 211 - Describing Agency Needs.*

(A) Use the clause at [252.211-7003](#), Item Unique Identification and Valuation, as prescribed in [211.274-6\(a\)\(1\)](#).

(B) Use the provision at [252.211-7006](#), Passive Radio Frequency Identification, as prescribed in [211.275-3](#).

(C) Use the clause at [252.211-7007](#), Reporting of Government-Furnished Property, as prescribed in [211.274-6](#).

(D) Use the clause at [252.211-7008](#), Use of Government-Assigned Serial Numbers, as prescribed in [211.274-6\(c\)](#).

(v) *Part 213 - Simplified Acquisition Procedures.* Use the provision at [252.213-7000](#), Notice to Prospective Suppliers on Use of Supplier Performance Risk System in Past Performance Evaluations, as prescribed in [213.106-2-70](#).

(vi) *Part 215 - Contracting by Negotiation.*

(A) Use the provision at [252.215-7003](#), Requirements for Submission of Data Other Than Certified Cost or Pricing Data - Canadian Commercial Corporation, as prescribed at 215.408(2)(i).

(B) Use the clause at [252.215-7004](#), Requirement for Submission of Data other Than Certified Cost



or Pricing Data - Modifications - Canadian Commercial Corporation, as prescribed at 215.408(2)(ii).

(C) Use the provision at [252.215-7007](#), Notice of Intent to Resolicit, as prescribed in [215.371-6](#).

(D) Use the provision [252.215-7008](#), Only One Offer, as prescribed at [215.408\(3\)](#).

(E) Use the provision [252.215-7010](#), Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, as prescribed at [215.408\(5\)\(i\)](#) to comply with section 831 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) and sections 851 and 853 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92).

(1) Use the basic provision as prescribed at [215.408\(5\)\(i\)\(A\)](#).

(2) Use the alternate I provision as prescribed at [215.408\(5\)\(i\)\(B\)](#).

(vii) *Part 219 - Small Business Programs.*

(A) Use the provision at [252.219-7000](#), Advancing Small Business Growth, as prescribed in [219.309\(1\)](#), to comply with 10 U.S.C. 2419.

(B) Use the clause at [252.219-7003](#), Small Business Subcontracting Plan (DoD Contracts), to comply with 15 U.S.C. 637.

(1) Use the basic clause as prescribed in [219.708\(b\)\(1\)\(A\)\(1\)](#).

(2) Use the alternate I clause as prescribed in [219.708\(b\)\(1\)\(A\)\(2\)](#).

(3) Use the alternate II clause as prescribed in [219.708\(b\)\(1\)\(A\)\(3\)](#).

(C) Use the clause at [252.219-7004](#), Small Business Subcontracting Plan (Test Program), as prescribed in [219.708\(b\)\(1\)\(B\)](#), to comply with 15 U.S.C. 637 note.

(D) Use the provision at [252.219-7000](#), Advancing Small Business Growth, as prescribed in [219.309\(1\)](#), to comply with 10 U.S.C. 2419.

(E) Use the provision at [252.219-7012](#), Competition for Religious-Related Services, as prescribed in [219.270-3](#).

(viii) *Part 223 - Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace.* Use the clause at [252.223-7008](#), Prohibition of Hexavalent Chromium, as prescribed in [223.7306](#).

(ix) *Part 225 - Foreign Acquisition.* (A) Use the provision at [252.225-7000](#), Buy American - Balance of Payments Program Certificate, to comply with 41 U.S.C. chapter 83 and Executive Order 10582 of December 17, 1954, Prescribing Uniform Procedures for Certain Determinations Under the Buy-American Act.

(1) Use the basic provision as prescribed in [225.1101\(1\)\(i\)](#).

(2) Use the alternate I provision as prescribed in [225.1101\(1\)\(ii\)](#).

(B) Use the clause at [252.225-7001](#), Buy American and Balance of Payments Program, to comply with 41 U.S.C. chapter 83 and Executive Order 10582 of December 17, 1954, Prescribing Uniform Procedures for Certain Determinations Under the Buy-American Act.

(1) Use the basic clause as prescribed in [225.1101\(2\)\(ii\)](#).

(2) Use the alternate I clause as prescribed in [225.1101\(2\)\(iii\)](#).

(C) Use the clause at [252.225-7006](#), Acquisition of the American Flag, as prescribed in [225.7002-3\(c\)](#), to comply with section 8123 of the DoD Appropriations Act, 2014 (Pub. L. 113-76, division C, title VIII), and the same provision in subsequent DoD appropriations acts.

(D) Use the clause at [252.225-7007](#), Prohibition on Acquisition of Certain Items from Communist Chinese Military Companies, as prescribed in [225.1103\(4\)](#), to comply with section 1211 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2006 (Pub. L. 109-163) as amended by the NDAs for FY 2012 and FY 2017.

(E) Use the clause at [252.225-7008](#), Restriction on Acquisition of Specialty Metals, as prescribed in [225.7003-5\(a\)\(1\)](#), to comply with 10 U.S.C. 2533b.

(F) Use the clause at [252.225-7009](#), Restriction on Acquisition of Certain Articles Containing Specialty Metals, as prescribed in [225.7003-5\(a\)\(2\)](#), to comply with 10 U.S.C. 2533b.

(G) Use the provision at [252.225-7010](#), Commercial Derivative Military Article - Specialty Metals Compliance Certificate, as prescribed in [225.7003-5\(b\)](#), to comply with 10 U.S.C. 2533b.

(H) Use the clause at [252.225-7012](#), Preference for Certain Domestic Commodities, as prescribed in [225.7002-3\(a\)](#), to comply with 10 U.S.C. 2533a.

(I) Use the clause at [252.225-7015](#), Restriction on Acquisition of Hand or Measuring Tools, as prescribed in [225.7002-3\(b\)](#), to comply with 10 U.S.C. 2533a.

(J) Use the clause at [252.225-7016](#), Restriction on Acquisition of Ball and Roller Bearings, as prescribed in [225.7009-5](#), to comply with section 8065 of Pub. L. 107-117 and the same restriction in subsequent DoD appropriations acts.

(K) Use the clause at [252.225-7017](#), Photovoltaic Devices, as prescribed in [225.7017-4\(a\)](#), to comply with section 846 of Public Law 111-383.

(L) Use the provision at [252.225-7018](#), Photovoltaic Devices - Certificate, as prescribed in [225.7017-4\(b\)](#), to comply with section 846 of Public Law 111-383.

(M) Use the provision at [252.225-7020](#), Trade Agreements Certificate, to comply with 19 U.S.C. 2501-2518 and 19 U.S.C. 3301 note. Alternate I also implements section 886 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181).

(1) Use the basic provision as prescribed in [225.1101\(5\)\(i\)](#).

(2) Use the alternate I provision as prescribed in [225.1101\(5\)\(ii\)](#).

(N) Use the clause at [252.225-7021](#), Trade Agreements to comply with 19 U.S.C. 2501-2518 and 19 U.S.C. 3301 note.

(1) Use the basic clause as prescribed in [225.1101\(6\)\(i\)](#).

(2) Use the alternate II clause as prescribed in [225.1101\(6\)\(iii\)](#).

(O) Use the provision at [252.225-7023](#), Preference for Products or Services from Afghanistan, as

prescribed in [225.7703-4\(a\)](#), to comply with section 886 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181).

(P) Use the clause at [252.225-7024](#), Requirement for Products or Services from Afghanistan, as prescribed in [225.7703-4\(b\)](#), to comply with section 886 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181).

(Q) Use the clause at [252.225-7026](#), Acquisition Restricted to Products or Services from Afghanistan, as prescribed in [225.7703-4\(c\)](#), to comply with section 886 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181).

(R) Use the clause at [252.225-7027](#), Restriction on Contingent Fees for Foreign Military Sales, as prescribed in [225.7307\(a\)](#), to comply with 22 U.S.C. 2779.

(S) Use the clause at [252.225-7028](#), Exclusionary Policies and Practices of Foreign Governments, as prescribed in [225.7307\(b\)](#), to comply with 22 U.S.C. 2755.

(T) Use the clause at [252.225-7029](#), Acquisition of Uniform Components for Afghan Military or Afghan National Police, as prescribed in [225.7703-4\(d\)](#).

(U) Use the provision at [252.225-7031](#), Secondary Arab Boycott of Israel, as prescribed in [225.7605](#), to comply with 10 U.S.C. 2410i.

(V) Use the provision at [252.225-7035](#), Buy American - Free Trade Agreements - Balance of Payments Program Certificate, to comply with 41 U.S.C. chapter 83 and 19 U.S.C. 3301 note. Alternates II, III, and V also implement section 886 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181).

(1) Use the basic provision as prescribed in [225.1101\(9\)\(i\)](#).

(2) Use the alternate I provision as prescribed in [225.1101\(9\)\(ii\)](#).

(3) Use the alternate II provision as prescribed in [225.1101\(9\)\(iii\)](#).

(4) Use the alternate III provision as prescribed in [225.1101\(9\)\(iv\)](#).

(5) Use the alternate IV provision as prescribed in [225.1101\(9\)\(v\)](#).

(6) Use the alternate V provision as prescribed in [225.1101\(9\)\(vi\)](#).

(W) Use the clause at [252.225-7036](#), Buy American - Free Trade Agreements - Balance of Payments Program to comply with 41 U.S.C. chapter 83 and 19 U.S.C. 3301 note. Alternates II, III, and V also implement section 886 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181).

(1) Use the basic clause as prescribed in [225.1101\(10\)\(i\)\(A\)](#).

(2) Use the alternate I clause as prescribed in [225.1101\(10\)\(i\)\(B\)](#).

(3) Use the alternate II clause as prescribed in [225.1101\(10\)\(i\)\(C\)](#).

(4) Use the alternate III clause as prescribed in [225.1101\(10\)\(i\)\(D\)](#).

(5) Use the alternate IV clause as prescribed in [225.1101\(10\)\(i\)\(E\)](#).

(6) Use the alternate V clause as prescribed in [225.1101](#)(10)(i)(F).

(X) Use the provision at [252.225-7037](#), Evaluation of Offers for Air Circuit Breakers, as prescribed in [225.7006-4\(a\)](#), to comply with 10 U.S.C. 2534(a)(3).

(Y) Use the clause at [252.225-7038](#), Restriction on Acquisition of Air Circuit Breakers, as prescribed in [225.7006-4\(b\)](#), to comply with 10 U.S.C. 2534(a)(3).

(Z) Use the clause at [252.225-7039](#), Defense Contractors Performing Private Security Functions Outside the United States, as prescribed in [225.302-6](#), to comply with section 2 of Pub. L. 110-181, as amended.

(AA) Use the clause at [252.225-7040](#), Contractor Personnel Supporting U.S. Armed Forces Deployed Outside the United States, as prescribed in [225.371-5\(a\)](#).

(BB) Use the clause at [252.225-7043](#), Antiterrorism/Force Protection Policy for Defense Contractors Outside the United States, as prescribed in [225.372-2](#).

(CC) Use the provision at [252.225-7049](#), Prohibition on Acquisition of Certain Foreign Commercial Satellite Services - Representations, as prescribed in [225.772-5\(a\)](#), to comply with 10 U.S.C. 2279.

(DD) Use the provision at [252.225-7050](#), Disclosure of Ownership or Control by the Government of a Country that is a State Sponsor of Terrorism, as prescribed in [225.771-5](#), to comply with 10 U.S.C. 2327(b).

(EE) Use the clause at [252.225-7051](#), Prohibition on Acquisition for Certain Foreign Commercial Satellite Services, as prescribed in [225.772-5\(b\)](#), to comply with 10 U.S.C. 2279.

(FF) Use the clause at [252.225-7052](#), Restriction on the Acquisition of Certain Magnets and Tungsten, as prescribed in [225.7018-5](#).

(x) *Part 226 - Other Socioeconomic Programs.* (A) Use the clause at [252.226-7001](#), Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns, as prescribed in [226.104](#), to comply with section 8021 of Pub. L. 107-248 and similar sections in subsequent DoD appropriations acts.

(B) Use the provision at [252.226-7002](#), Representation for Demonstration Project for Contractors Employing Persons with Disabilities, as prescribed in [226.7203](#).

(xi) *Part 227 - Patents, Data, and Copyrights.* (A) Use the clause at [252.227-7013](#), Rights in Technical Data-Noncommercial Items, as prescribed in [227.7103-6\(a\)](#). Use the clause with its Alternate I as prescribed in [227.7103-6\(b\)\(1\)](#). Use the clause with its Alternate II as prescribed in [227.7103-6\(b\)\(2\)](#), to comply with 10 U.S.C. 7317 and 17 U.S.C. 1301, *et seq.*

(B) Use the clause at [252.227-7015](#), Technical Data-Commercial Items, as prescribed in [227.7102-4\(a\)\(1\)](#), to comply with 10 U.S.C. 2320. Use the clause with its Alternate I as prescribed in [227.7102-4\(a\)\(2\)](#), to comply with 10 U.S.C. 7317 and 17 U.S.C. 1301, *et seq.*

(C) Use the clause at [252.227-7037](#), Validation of Restrictive Markings on Technical Data, as prescribed in [227.7102-4\(c\)](#).

(xii) *Part 229 - Taxes.* (A) Use the clause at [252.229-7014](#), Taxes - Foreign Contracts in Afghanistan, as prescribed at [229.402-70\(k\)](#).

(B) Use the clause at [252.229-7015](#), Taxes - Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement), as prescribed at [229.402-70\(l\)](#).

(xiii) *Part 232 - Contract Financing.* (A) Use the clause at [252.232-7003](#), Electronic Submission of Payment Requests and Receiving Reports, as prescribed in [232.7004](#), to comply with 10 U.S.C. 2227.

(B) Use the clause at [252.232-7006](#), Wide Area WorkFlow Payment Instructions, as prescribed in [232.7004\(b\)](#).

(C) Use the clause at [252.232-7009](#), Mandatory Payment by Governmentwide Commercial Purchase Card, as prescribed in [232.1110](#).

(D) Use the clause at [252.232-7010](#), Levies on Contract Payments, as prescribed in [232.7102](#).

(E) Use the clause at [252.232-7011](#), Payments in Support of Emergencies and Contingency Operations, as prescribed in 232.908.

(F) Use the provision at [252.232-7014](#), Notification of Payment in Local Currency (Afghanistan), as prescribed in [232.7202](#).

(G) Use the clause at [252.232-7017](#), Accelerating Payments to Small Business Subcontractors - Prohibition on Fees and Consideration, as prescribed in [232.009-2\(2\)](#), to comply with 10 U.S.C. 2307(a).

(xiv) *Part 237 - Service Contracting.* (A) Use the clause at [252.237-7010](#), Prohibition on Interrogation of Detainees by Contractor Personnel, as prescribed in [237.173-5](#), to comply with section 1038 of Pub. L. 111-84.

(B) Use the clause at [252.237-7019](#), Training for Contractor Personnel Interacting with Detainees, as prescribed in [237.171-4](#), to comply with section 1092 of Pub. L. 108-375.

(xv) *Part 239 - Acquisition of Information Technology.* (A) Use the provision [252.239-7009](#), Representation of Use of Cloud Computing, as prescribed in [239.7604\(a\)](#).

(B) Use the clause [252.239-7010](#), Cloud Computing Services, as prescribed in [239.7604\(b\)](#).

(C) Use the provision at [252.239-7017](#), Notice of Supply Chain Risk, as prescribed in [239.7306\(a\)](#), to comply with 10 U.S.C. 2339a.

(D) Use the clause at [252.239-7018](#), Supply Chain Risk, as prescribed in [239.7306\(b\)](#), to comply with 10 U.S.C. 2339a.

(xvi) *Part 243 - Contract Modifications.* Use the clause at [252.243-7002](#), Requests for Equitable Adjustment, as prescribed in [243.205-71](#), to comply with 10 U.S.C. 2410.

(xvii) *Part 244 - Subcontracting Policies and Procedures.* Use the clause at [252.244-7000](#), Subcontracts for Commercial Items, as prescribed in [244.403](#).

(xviii) *Part 246 - Quality Assurance.*

(A) Use the clause at [252.246-7003](#), Notification of Potential Safety Issues, as prescribed in [246.370\(a\)](#).

(B) Use the clause at [252.246-7004](#), Safety of Facilities, Infrastructure, and Equipment for Military

Operations, as prescribed in [246.270-4](#), to comply with section 807 of Pub. L. 111-84.

(C) Use the clause at [252.246-7008](#), Sources of Electronic Parts, as prescribed in [246.870-3\(b\)](#), to comply with section 818(c)(3) of Public Law 112-81, as amended by section 817 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113-291 and section 885 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92).

(xix) *Part 247 - Transportation.*

(A) Use the clause at [252.247-7003](#), Pass-Through of Motor Carrier Fuel Surcharge Adjustment to the Cost Bearer, as prescribed in [247.207](#), to comply with section 884 of Pub. L. 110-417.

(B) Use the provision at [252.247-7022](#), Representation of Extent of Transportation by Sea, as prescribed in [247.574\(a\)](#).

(C) Use the basic or one of the alternates of the clause at [252.247-7023](#), Transportation of Supplies by Sea, as prescribed in [247.574\(b\)](#), to comply with the Cargo Preference Act of 1904 (10 U.S.C. 2631(a)).

(1) Use the basic clause as prescribed in [247.574\(b\)\(1\)](#).

(2) Use the alternate I clause as prescribed in [247.574\(b\)\(2\)](#).

(3) Use the alternate II clause as prescribed in [247.574\(b\)\(3\)](#).

(D) Use the clause [252.247-7025](#), Reflagging or Repair Work, as prescribed in [247.574\(c\)](#), to comply with 10 U.S.C. 2631(b).

(E) Use the provision at [252.247-7026](#), Evaluation Preference for Use of Domestic Shipyards - Applicable to Acquisition of Carriage by Vessel for DoD Cargo in the Coastwise or Noncontiguous Trade, as prescribed in [247.574\(d\)](#), to comply with section 1017 of Pub. L. 109-364.

(F) Use the clause at [252.247-7027](#), Riding Gang Member Requirements, as prescribed in [247.574\(e\)](#), to comply with section 3504 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417).

(G) Use the clause at [252.247-7028](#), Application for U.S. Government Shipping Documentation/Instructions, as prescribed in [247.207](#).

## **212.302 Tailoring of provisions and clauses for the acquisition of commercial items.**

(c) *Tailoring inconsistent with customary commercial practice.*

The head of the contracting activity is the approval authority within the DoD for waivers under FAR 12.302(c).

## **SUBPART 212.5 –APPLICABILITY OF CERTAIN LAWS TO THE ACQUISITION OF COMMERCIAL ITEMS**

### **212.503 Applicability of certain laws to Executive agency contracts for the acquisition of commercial items.**

(a) The following laws are not applicable to contracts for the acquisition of commercial items:

(i) 10 U.S.C. 2306(b), Prohibition on Contingent Fees.

(ii) 10 U.S.C. 2324, Allowable Costs Under Defense Contracts.

(iii) 10 U.S.C. 2384(b), Requirement to Identify Suppliers.

(iv) 10 U.S.C. 2397(a)(1), Reports by Employees or Former Employees of Defense Contractors.

(v) 10 U.S.C. 2397b(f), Limits on Employment for Former DoD Officials.

(vi) 10 U.S.C. 2397c, Defense Contractor Requirements Concerning Former DoD Officials.

(vii) 10 U.S.C. 2408(a), Prohibition on Persons Convicted of Defense Related Felonies.

(viii) 10 U.S.C. 2410b, Contractor Inventory Accounting System Standards (see [252.242-7004](#) ).

(ix) 107 Stat 1720 (Section 843(a), Pub. L. 103-160), Reporting Requirement Regarding Dealings with Terrorist Countries.

(x) Domestic Content Restrictions in the National Defense Appropriations Acts for Fiscal Years 1996 and Subsequent Years, unless the restriction specifically applies to commercial items. For the restriction that specifically applies to commercial ball or roller bearings as end items, see [225.7009-3](#) (section 8065 of Pub. L. 107-117).

(xi) Section 8116 of the Defense Appropriations Act for Fiscal Year 2010 (Pub. L. 111-118) and similar sections in subsequent DoD appropriations acts.

(c) The applicability of the following laws has been modified in regard to contracts for the acquisition of commercial items:

(i) 10 U.S.C. 2402, Prohibition on Limiting Subcontractor Direct Sales to the United States (see FAR 3.503 and 52.203-6).

(ii) 10 U.S.C. 2306a, Truth in Negotiations Act (see FAR 15.403-1(b)(3)).

### **212.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.**

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

- (i) 10 U.S.C. 2306(b), Prohibition on Contingent Fees.
  - (ii) 10 U.S.C. 2313(c), Examination of Records of a Contractor.
  - (iii) 10 U.S.C. 2324, Allowable Costs Under Defense Contracts.
  - (iv) 10 U.S.C. 2327, Reporting Requirement Regarding Dealings with Terrorist Countries.
  - (v) 10 U.S.C. 2384(b), Requirement to Identify Suppliers.
  - (vi) 10 U.S.C. 2391 note, Notification of Substantial Impact on Employment.
  - (vii) 10 U.S.C. 2393, Prohibition Against Doing Business with Certain Offerors or Contractors.
  - (viii) 10 U.S.C. 2397(a)(1), Reports by Employees or Former Employees of Defense Contractors.
  - (ix) 10 U.S.C. 2397b(f), Limits on Employment for Former DoD Officials.
  - (x) 10 U.S.C. 2397c, Defense Contractor Requirements Concerning Former DoD Officials.
  - (xi) 10 U.S.C. 2408(a), Prohibition on Persons Convicted of Defense Related Felonies.
  - (xii) 10 U.S.C. 2410b, Contractor Inventory Accounting System Standards.
  - (xii) 10 U.S.C. 2501 note, Notification of Proposed Program Termination.
  - (xiv) 10 U.S.C. 2534, Miscellaneous Limitations on the Procurement of Goods Other Than United States Goods.
  - (xv) 10 U.S.C. 2631, Transportation of Supplies by Sea (except as provided in the clause at [252.247-7023](#) , Transportation of Supplies by Sea).
  - (xvi) Domestic Content Restrictions in the National Defense Appropriations Acts for Fiscal Years 1996 and Subsequent Years, unless the restriction specifically applies to commercial items. For the restriction that specifically applies to commercial ball or roller bearings as end items, see [225.7009-3](#) (section 8065 of Pub. L. 107-117).
  - (xvii) Section 8116 of the Defense Appropriations Act for Fiscal Year 2010 (Pub. L. 111-118) and similar sections in subsequent DoD appropriations acts.
- (b) Certain requirements of the following laws have been eliminated for subcontracts at any tier for the acquisition of commercial items or commercial components:
- (i) 10 U.S.C. 2393(d), Subcontractor Reports Under Prohibition Against Doing Business with Certain Offerors (see FAR 52.209-6).
  - (ii) 10 U.S.C. 2402, Prohibition on Limiting Subcontractor Direct Sales to the United States (see FAR 3.503 and 52.203-6).

## **212.570 Applicability of certain laws to contracts and subcontracts for the acquisition of commercially available off-the-shelf items.**



Paragraph (a)(1) of 10 U.S.C. 2533b, Requirement to buy strategic materials critical to national security from American sources, is not applicable to contracts and subcontracts for the acquisition of commercially available off-the-shelf items, except as provided at [225.7003-3](#) (b)(2)(i).

## **SUBPART 212.6 –STREAMLINED PROCEDURES FOR EVALUATION AND SOLICITATION FOR COMMERCIAL ITEMS**

### **212.602 Streamlined evaluation of offers.**

(b)(i) For the acquisition of transportation and transportation-related services, also consider evaluating offers in accordance with the criteria at [247.206](#) (1).

(ii) For the acquisition of transportation in supply contracts that will include a significant requirement for transportation of items outside the contiguous United States, also evaluate offers in accordance with the criterion at [247.301-71](#) .

(iii) For the direct purchase of ocean transportation services, also evaluate offers in accordance with the criteria at [247.573-2\(c\)](#).

## **SUBPART 212.70 –LIMITATION ON CONVERSION OF PROCUREMENT FROM COMMERCIAL ACQUISITION PROCEDURES**

### **212.7000 Scope.**

This subpart implements section 856 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92).

### **212.7001 Procedures.**

#### *(a) Limitation.*

(1) For a procurement valued at more than \$1 million, but less than \$100 million, previously procured under a prime contract using FAR part 12 procedures based on a commercial item determination made by a military department, a defense agency, or another DoD component, prior to converting the procurement from commercial acquisition procedures to noncommercial acquisition procedures under FAR part 15, the head of the contracting activity shall determine in writing, upon recommendation from the contracting officer for the procurement that—

(i) The earlier use of commercial acquisition procedures under FAR part 12 was in error or based on inadequate information; and

(ii) DoD will realize a cost savings compared to the cost of procuring a similar quantity or level of such item or service using commercial acquisition procedures.

(2) In the case of a procurement valued at \$100 million or more, a contract may not be awarded pursuant to a conversion of the procurement described in paragraph (a)(1) of this section until a copy of the head of contracting activity determination is provided to the Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics.

(b) In making a determination under paragraph (a) of this section, the determining official shall, at a minimum, consider the following factors:

(1) The estimated cost of research and development to be performed by the existing contractor to improve future products or services.

(2) The costs for DoD and the contractor in assessing and responding to data requests to support a conversion to noncommercial acquisition procedures.

(3) Changes in purchase quantities.

(4) Costs associated with potential procurement delays resulting from the conversion.

(c) The requirements of this subpart terminate November 25, 2020.

## **SUBPART 212.71 —PILOT PROGRAM FOR ACQUISITION OF MILITARY-PURPOSE NONDEVELOPMENTAL ITEMS**

### **212.7100 Scope.**

This subpart establishes the pilot program authorized by section 866 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111-383), as modified by section 892 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92).

### **212.7101 Definitions.**

As used in this subpart—

“Military-purpose nondevelopmental item” means a nondevelopmental item that meets a validated military requirement, as determined in writing by the responsible program manager, and has been developed exclusively at private expense. An item shall not be considered to be developed at private expense if development of the item was paid for in whole or in part through—

(1) Independent research and development costs or bid and proposal costs, per the definition in FAR 31.205-18, that have been reimbursed directly or indirectly by a Federal agency or have been submitted to a Federal agency for reimbursement; or

(2) Foreign government funding.

“Nondevelopmental item” is defined in FAR 2.101 and also includes previously developed items of supply that require modifications other than those customarily available in the commercial marketplace if such modifications are consistent with the requirement at [212.7102-1](#) (c)(1).

## **212.7102 Pilot program.**

### **212.7102-1 Contracts under the program.**

The contracting officer may utilize this pilot program to enter into contracts for the acquisition of military-purpose nondevelopmental items. See PGI [212.7102](#) for file documentation requirements. Each contract entered into under the pilot program shall—

(a) Be a firm-fixed-price contract, or a fixed-price contract with an economic price adjustment clause;

(b) Be in an amount not in excess of \$100 million;

(c) Provide—

(1) For the delivery of an initial lot of production quantities of completed items not later than nine months after the date of the award of such contract; and

(2) That failure to make delivery as provided for under paragraph (c)(1) may result in termination for cause; and

(d) Be—

(1) Exempt from the requirement to submit certified cost or pricing data;

(2) Exempt from the cost accounting standards under 41 U.S.C. 1502; and

(3) Subject to the requirement to provide data other than certified cost or pricing data for the purpose of price reasonableness determinations.

### **212.7102-2 Reporting requirements.**

Departments and agencies shall prepare a consolidated annual report to provide information about contracts awarded under this pilot authority. The report shall be submitted to the Office of the Deputy Director, Defense Procurement and Acquisition Policy (Contract Policy and International Contracting), by October 31 each year in accordance with the procedures at PGI [212.7102](#) . See PGI [212.7102](#) for annual reporting format.

### **212.7102-3 Sunset of the pilot authority.**

(a) The authority to carry out the pilot program described in this subpart expires on December 31, 2019.

(b) The expiration under paragraph (a) of this section of the authority to carry out the pilot

program will not affect the validity of any contract awarded under the pilot program before the expiration of the pilot program under that paragraph.

### **212.7103 Solicitation provision.**

Use the provision at [252.212-7002](#) , Pilot Program for Acquisition of Military-Purpose Nondevelopmental Items, in solicitations when use of the pilot program is planned and the applicability criteria of [212.7102-1](#) are met.