**DFARS Case 2017-D010**

**Inapplicability of Certain Laws and Regulations to Commercial Items**

**Final Rule**

**PART 212—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES**

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**SUBPART 212.3—SOLICITATION PROVISIONS AND CONTRACT CLAUSES FOR THE ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES**

**212.301 Solicitation provisions and contract clauses for the acquisition of commercial products and commercial services.**

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(f) The following additional provisions and clauses apply to DoD solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services. 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.sam.gov*](https://www.sam.gov), the contracting officer shall consider this information instead of requiring the offeror to complete these provisions for a particular solicitation. **[The contracting officer shall not use other FAR or DFARS provisions and clauses unless required by the FAR or DFARS or consistent with customary commercial practices (section 874(b)(1)(A),** **Pub. L. 114-328).]**

**\* \* \* \* \***

**[212.370 Inapplicability of certain provisions and clauses to contracts and subcontracts for the acquisition of commercial products, commercial services, and commercially available off-the-shelf items.**

**The following provisions and clauses, not expressly authorized in law, are not applicable to contracts for the acquisition of commercial products and commercial services:**

**(a) FAR 52.204-22, Alternative Line Item Proposal.**

**(b) Reserved.**

**212.371 Inapplicability of certain provisions and clauses to contracts for the acquisition of commercially available off-the-shelf items.**

**Commercially available off-the-shelf (COTS) items are a subset of commercial products. Therefore, the provisions and clauses listed in 212.370 as not applicable to contracts or subcontracts for the acquisition of commercial products are also not applicable to contracts or subcontracts for the acquisition of COTS items. In addition, the following provisions and clauses published after January 1, 2015, not expressly authorized in law, are not applicable to contracts for the acquisition of COTS items:**

**(a) FAR 52.204-21, Basic Safeguarding of Covered Contractor Information Systems.**

**(b) Reserved.]**

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**SUBPART 212.5—APPLICABILITY OF CERTAIN LAWS TO THE ACQUISITION OF COMMERCIAL PRODUCTS, COMMERCIAL SERVICES, AND COMMERCIALLY AVAILABLE OFF-THE-SHELF ITEMS**

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

**[Commercially available off-the-shelf (COTS) items are a subset of commercial products. Therefore, any laws listed at FAR 12.503, FAR 12.504, 212.503, or 212.504 are also not applicable or modified in their applicability to contracts for the acquisition of COTS items. In addition to the laws listed at FAR 12.505 as specifically not applicable to COTS items, the following laws are not applicable to contracts for the acquisition of COTS items:**

**(1)** **10 U.S.C. 391, Reporting on Cyber Incidents with Respect to Networks and Information Systems of Operationally Critical Contractors and Certain Other Contractors, and 10 U.S.C. 393, Reporting on Penetrations of Networks and Information Systems of Certain Contractors.]**

(~~a~~**[2]**) Paragraph (a)(1) of 10 U.S.C. 4863, 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](http://www.acq.osd.mil/dpap/dars/dfars/html/current/225_70.htm#225.7003-3)(b)(2)(i).

(~~b~~**[3]**) Paragraph (a)(1) of 10 U.S.C. 4872, Prohibition on acquisition of sensitive materials from non-allied foreign nations, ~~is not applicable to contracts and subcontracts for the acquisition of commercially available off-the-shelf items,~~ except as provided at 225.7018-3(c)(1).

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**PART 219—SMALL BUSINESS PROGRAMS**

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**219.811-3 Contract clauses.**

**\* \* \* \* \***

(2) Use the clause at 252.219-7010, Notification of Competition Limited to Eligible 8(a) Participants—Partnership Agreement, in lieu of the clause at FAR 52.219-18, Notification of Competition Limited to Eligible 8(a) Participants, in competitive solicitations and contracts**[, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services,]** when the acquisition is accomplished using the procedures of FAR 19.805 and processed in accordance with the PA cited in 219.800.

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**PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

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**SUBPART 252.2—TEXT OF PROVISIONS AND CLAUSES**

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**252.244-7000 Subcontracts for Commercial Products or Commercial Services.**

As prescribed in [244.403](http://www.acq.osd.mil/dpap/dars/dfars/html/current/244_4.htm#244.403), use the following clause:

SUBCONTRACTS FOR COMMERCIAL PRODUCTS OR COMMERCIAL SERVICES (~~JAN 2023~~**[NOV 2023]**)

(a) The Contractor ~~is not required to~~ **[shall not include]**~~flow down~~ the terms of any **[Federal Acquisition Regulation (FAR) clause or]** Defense Federal Acquisition Regulation Supplement (DFARS) clause in subcontracts for commercial products or commercial services at any tier under this contract, unless**[—**

**(1) For DFARS clauses, it is]** so specified in the particular clause~~.~~**[; or**

**(2) For FAR clauses, the clause is listed at FAR 12.301(d) or it is so specified in paragraph (e)(1) of the clause at FAR 52.212-5 or paragraph (b)(1) of the clause at FAR 52.244-6, as applicable. (Section 847(b)(1)(B), Pub. L. 114-328)]**

~~(b) While not required, the Contractor may flow down to subcontracts for commercial products or commercial services a minimal number of additional clauses necessary to satisfy its contractual obligation.~~

(~~c~~**[b]**)(1) In accordance with 10 U.S.C. 3457(c), the Contractor shall treat as commercial products ~~or commercial services~~ any items valued at less than $10,000 per item that were purchased by the Contractor for use in the performance of multiple contracts with the Department of Defense and other parties and are not identifiable to any particular contract when purchased.

(2) The Contractor shall ensure that any items to be used in performance of this contract, that are treated as commercial products ~~or commercial services~~ pursuant to paragraph (~~c~~**[b]**)(1) of this clause, meet all terms and conditions of this contract that are applicable to commercial products or commercial services in accordance with the clause at ~~Federal Acquisition Regulation~~**[FAR]** 52.244-6 and paragraph (a) of this clause.

(~~d~~**[c]**) **[*Subcontracts.*]** The Contractor shall include the terms of this clause, including this paragraph (~~d~~**[c]**), in subcontracts awarded under this contract, including subcontracts for the acquisition of commercial products or commercial services.

(End of clause)