**DFARS Case 2018-D074**

**Inapplicability of Additional Defense-Unique Laws and Certain**

**Non-statutory DFARS Clauses to Commercial Item Contracts**

**Final Rule**

**PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST**

**SUBPART 203.1—SAFEGUARDS**

\* \* \* \* \*

**203.171 Senior DoD officials seeking employment with defense contractors.**

\* \* \* \* \*

**203.171-4 Solicitation provision and contract clause.**

(a) \* \* \*

(b) Use the provision at [252.203-7005](http://www.acq.osd.mil/dpap/dars/dfars/html/current/252203.htm#252.203-7005), Representation Relating to Compensation of Former DoD Officials, in all solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial products and commercial services and solicitations for task orders and delivery orders.

\* \* \* \* \*

**SUBPART 203.10—contractor code of business ethics and conduct**

\* \* \* \* \*

**203.1004 Contract clauses.**

(a) Use the clause at [252.203-7003](https://www.acq.osd.mil/dpap/dars/dfars/html/current/252203.htm#252.203-7003), Agency Office of the Inspector General, in solicitations and contracts~~, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services,~~ that include the FAR clause 52.203-13, Contractor Code of Business Ethics and Conduct.

\* \* \* \* \*

**PART 204—ADMINISTRATIVE AND INFORMATION MATTERS**

\* \* \* \* \*

**Subpart 204.74—Disclosure of information to litigation support contractors**

\* \* \* \* \*

**204.7403 Contract clauses.**

(a) Use the clause at 252.204-7014, Limitations on the Use or Disclosure of Information by Litigation Support Contractors, in all solicitations and contracts that involve litigation support services, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services.

(b) Use the clause at 252.204-7015, Notice of Authorized Disclosure of Information for Litigation Support, in ~~all~~ solicitations and contracts **[that involve litigation support services]**, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services.

\* \* \* \* \*

**PART 205—PUBLICIZING CONTRACT ACTIONS**

**SUBPART 205.4—RELEASE OF INFORMATION**

**205.470 Contract clause.**

Use the clause at 252.205-7000, Provision of Information to Cooperative Agreement Holders, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, **[except for solicitations and contracts solely for the acquisition of commercially available off-the-shelf items,]** that are expected to exceed $1.5 million. This clause implements [10 U.S.C. 4957](https://www.govinfo.gov/link/uscode/10/4957).

\* \* \* \* \*

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

\* \* \* \* \*

**SUBPART 212.2 - SPECIAL REQUIREMENTS FOR THE ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES**

\* \* \* \* \*

**~~212.205 Offers.~~**

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

\* \* \* \* \*

**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.**

\* \* \* \* \*

(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*, 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).

(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. 4651.

(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 **[the National Defense Authorization Act for Fiscal Year 2008 (]**Pub. L. 110-181**[)]**.

(C) Use the clause at 252.203-7002, Requirement to Inform Employees of Whistleblower Rights, as prescribed in 203.970, to comply with 10 U.S.C. 4701.

~~(D) 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]**~~E~~) 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) \* \* \*

(B) Use the provision at 252.204-7008, Compliance with Safeguarding Covered Defense Information Controls, as prescribed in 204.7304(a)**[, to comply with section 941 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) and section 1632 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113-291)]**.

(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)**[, to comply with section 941 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) and section 1632 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113-291)]**.

(D) Use the clause at 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting, as prescribed in 204.7304(c)**[, to comply with section 941 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) and section 1632 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113-291)]**.

\* \* \* \* \*

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

(A) \* \* \*

(B) \* \* \*

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

(~~D~~**[C])** Use the provision [252.215-7008](https://www.acq.osd.mil/dpap/dars/dfars/html/current/252215.htm#252.215-7008), Only One Offer, as prescribed at [215.408](https://www.acq.osd.mil/dpap/dars/dfars/html/current/215_4.htm#215.408)(3).

(~~E~~**[D])** \* \* \*

(~~F~~**[E]**) \* \* \*

\* \* \* \* \*

(viii) *Part 219—Small Business Programs*.

\* \* \* \* \*

(D) Use the provision at 252.219-7012, Competition for Religious-Related Services, as prescribed in 219.270-3**[, to comply with section 898 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92)]**.

\* \* \* \* \*

(x) *Part 225—Foreign Acquisition*.

\* \* \* \* \*

(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.~~**[Public Law]** 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 **[the National Defense Authorization Act for Fiscal Year 2011 (]**Pub**[.]**~~lic~~ L**[.]**~~aw~~ 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 **[the National Defense Authorization Act for Fiscal Year 2011 (]**Pub**[.]**~~lic~~ L**[.]**~~aw~~ 111–383**[)]**.

\* \* \* \* \*

(U) 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)**[, to comply with section 826 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112–239)]**.

\* \* \* \* \*

(Y) 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~~ **[862 of the National Defense Authorization Act for Fiscal Year 2008 (]**Pub**[.]**~~lic~~ L**[.]**~~aw~~ 110-181**[)]**~~, as amended~~.

\* \* \* \* \*

(xi) *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.~~**[Public Law]** 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**[****, to comply with** **section 853 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136)]**.

(xii) *Part 227—Patents, Data, and Copyrights.*

\* \* \* \* \*

(C) Use the clause at 252.227-7037, Validation of Restrictive Markings on Technical Data, as prescribed in 227.7102-4(c)**[, to comply with** **10 U.S.C. 3781-3786]**.

\* \* \* \* \*

(xiv) *Part 232—Contract Financing.*

\* \* \* \* \*

(D) Use the clause at 252.232-7010, Levies on Contract Payments, as prescribed in 232.7102**[, to comply with 26 U.S.C. 6331(h)]**.

\* \* \* \* \*

(xv) *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 **[the National Defense Authorization Act for Fiscal Year 2010 (]**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 **[the National Defense Authorization Act for Fiscal Year 2005 (]**Pub. L. 108–375**[)]**.

\* \* \* \* \*

(xx) *Part 246—Quality Assurance*.

(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 **[the National Defense Authorization Act for Fiscal Year 2010 (]**Pub. L. 111–84**[)]**.

\* \* \* \* \*

(xxi) *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 **[the National Defense Authorization Act for Fiscal Year 2009 (Pub. L.]** ~~Public Law~~ 110–417**[)]**.

\* \* \* \* \*

(D) 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(c), to comply with section 1017 of **[the National Defense Authorization Act for Fiscal Year 2007 (Pub. L.]** ~~Public Law~~ 109–364**[)]**.

(E) Use the clause at 252.247–7027, Riding Gang Member Requirements, as prescribed in 247.574(d), to comply with section 3504 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417).

\* \* \* \* \*

**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.~~**[252.203-7003, Agency Office of the Inspector General.**

**(c) 252.215-7007, Notice of Intent to Resolicit.]**

**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~~**[October 13, 1994]**, not expressly authorized in law, are not applicable **[or are modified in their applicability]** to contracts for the acquisition of COTS items:

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

**[(b) 252.204-7008, Compliance with Safeguarding Covered Defense Information Controls.**

**(c) 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting.**

**(d) 252.204-7019, Notice of NIST SP 800-171 DoD Assessment Requirements.**

**(e) 252.204-7020, NIST SP 800-171 DoD Assessment Requirements.**

**(f) 252.204-7021, Cybersecurity Maturity Model Certification Requirements.**

**(g) 252.205-7000, Provision of Information to Cooperative Agreement Holders.]**

(**[h]**~~b~~) 252.270-7000, Pilot Program to Incentivize Contracting with Employee-Owned Businesses—Representation.

(**[i]**~~c~~) 252.270-7001, Pilot Program to Incentivize Contracting with Employee-Owned Businesses—Subcontracting Certification.

(**[j]**~~d~~) 252.270-7002, Pilot Program to Incentivize Contracting with Employee-Owned Businesses.

\* \* \* \* \*

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

\* \* \* \* \*

**212.504 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, commercial services, or commercial components:

\* \* \* \* \*

~~(xiii)~~ ~~10 U.S.C. 4871, Reporting Requirement Regarding Dealings with Terrorist Countries.~~

(~~xiv~~**[xiii]**) Section 8116 of the Defense Appropriations Act for Fiscal Year 2010 (Pub. L. 111-118) (prohibits mandatory arbitration) and similar sections in subsequent DoD appropriations acts.

(~~xv~~**[xiv]**) Domestic Content Restrictions in the National Defense Appropriations Acts for Fiscal Years 1996 and Subsequent Years, unless the restriction specifically applies to commercial products and commercial services. 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).

\* \* \* \* \*

**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 **[are]** 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:

\* \* \* \* \*

**PART 215—CONTRACTING BY NEGOTIATION**

\* \* \* \* \*

**SUBPART 215.3—SOURCE SELECTION**

\* \* \* \* \*

**215.371 Only one offer.**

\* \* \* \* \*

**215.371-4 Exceptions.**

(a) The requirements at ~~section~~ 215.371–2 do not apply to—

\* \* \* \* \*

**[(7) Acquisitions of commercial products and commercial services using FAR part 12 procedures.]**

\* \* \* \* \*

**215.371-6 Solicitation provision.**

Use the provision at [252.215-7007](https://www.acq.osd.mil/dpap/dars/dfars/html/current/252215.htm#252.215-7007), Notice of Intent to Resolicit, in competitive solicitations~~, including solicitations using FAR part 12 procedures for the acquisition of commercial products and commercial services,~~ that will be solicited for fewer than 30 days, unless an exception at [215.371-4](https://www.acq.osd.mil/dpap/dars/dfars/html/current/215_3.htm#215.371-4) applies or the requirement is waived in accordance with [215.371-5](https://www.acq.osd.mil/dpap/dars/dfars/html/current/215_3.htm#215.371-5).

\* \* \* \* \*

**PART 225—FOREIGN ACQUISITION**

\* \* \* \* \*

**SUBPART 225.11--SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

\* \* \* \* \*

**225.1103 Other provisions and clauses.**

\* \* \* \* \*

(4) Unless an exception in 225.770-3 applies, use the clause at 252.225-7007, Prohibition on Acquisition of Certain Items from Communist Chinese Military Companies, in solicitations and contracts**[, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services,]** involving the delivery of items covered by the United States Munitions List or the 600 series of the Commerce Control List.

\* \* \* \* \*