

PART 1812

ACQUISITION OF COMMERCIAL ITEMS

(Revised March 1, 2016)

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PART 1812

ACQUISITION OF COMMERCIAL ITEMS

Subpart 1812.3--Solicitation Provisions and Contract Clauses

for the Acquisition of Commercial Items

1812.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f)(i) The following clauses are authorized for use in acquisitions of commercial items when required by the clause prescription:

- (A) [1852.204-75](#), Security Classification Requirements.
- (B) [1852.204-76](#), Security Requirements for Unclassified Information Technology Resources.
- (C) [1852.215-84](#), Ombudsman.
- (D) [1852.216-80](#), Task Order Procedures (Alternate I).
- (E) [1852.216-88](#), Performance Incentive.
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- (R) [1852.237-73](#), Release of Sensitive Information.
- (S) [1852.246-72](#), Material Inspection and Receiving Report.
- (T) [1852.247.71](#), Protection of the Florida Manatee.

(ii) No other provisions and clauses prescribed in the NFS or center documents shall be used in acquisitions of commercial items, except as permitted by FAR 12.302.

1812.302 Tailoring of provisions and clauses for the acquisition of commercial items.

(c) The Senior Procurement Executive is the approval authority for waivers. Requests for approval shall include a justification to substantiate tailoring of a provision or clause and shall be submitted to Headquarters Office of Procurement, Program Operations Division. Requests shall be prepared and submitted in accordance with 1801.471.

Subpart 1812.4—Unique Requirements Regarding Terms and  
Conditions for Commercial Items

1812.404 Warranties.

(b) In acquisitions under the Simplified Acquisition Threshold specified in FAR Part 13, Contracting officer’s shall not require any express warranty other than the offeror's commercial warranty.

1812.470 Unacceptable commercial items terms and conditions.

When procuring commercial software or other commercial products, contracting officers shall follow the guidance in the commercial items terms and conditions chart to preclude inclusion of unacceptable terms and conditions in the contract or order. The following chart lists commercial terms and conditions that are commonly found in software manufacturers’ unmodified commercial supplier agreements that are either inconsistent with Federal law or with requirements of the FAR. This list is not all-inclusive. In the event a commercial supplier proposes terms and conditions that may be unacceptable consultation with the legal office is advised.

Terms and conditions	Problem/recommendation
Definition of contracting parties	The licensee or customer shall be reflected as the specific agency or other federal entity that placed the order under which the license is provided. Conversely, because of competition rules, the contractor must be defined as a single entity even if the contractor is part of a corporate group. The Government cannot contract with the group, or in the alternative with a set of contracting parties.
Automatic contract formation via shrink-wrap/click-wrap/browse-wrap/web-wrap (e.g. using, downloading, clicking “I Agree”), or a provision purporting to bind the Government to a set of terms incorporated by reference (e.g., posted at a specified URL).	Under FAR 1.601(a), in an acquisition involving the use of appropriated funds, an agreement binding on the Government may only be entered into by a duly warranted contracting officer in writing. Under FAR 43.102, the same requirement applies to contract modifications affecting the rights of the parties. All terms and conditions intended to bind the Government must be included within the contract signed by the Government. These types of contractor terms and conditions should be excluded from Government contracts and orders.

<p>Customer indemnities: the customer commits to indemnify the vendor for various things, e.g., in connection with claimed infringement of intellectual property rights.</p>	<p>This is an obligation in advance of an appropriation that violates anti-deficiency laws (31 USC 1341 and 41 USC 6301), because it commits the Government to pay an unknown amount at an unknown future time. The violation occurs when the commitment is made, i.e., when the agreement featuring this clause is incorporated into a Government contract, and not when the clause is triggered. These types of contractor terms and conditions should be excluded from Government contracts and orders.</p>
<p>Contractor indemnities. Under these clauses, the contractor typically commits to pay damages and to "defend" the Government in various types of lawsuits, typically IP-related, on condition that the Government gives the contractor "sole control" over the conduct of such proceedings</p>	<p>Contractor indemnities are very desirable, especially in IT acquisitions. However, the undertaking to "defend" and the concept of "sole control" in litigation are contrary to the jurisdictional statute of the DOJ (28 USC 516) which vests the right to defend the Government and to exercise sole control in litigation, solely in the DOJ. Indemnification clauses should be retained in the agreement but revised. The DOJ must represent or "defend" the Government; however, the clause may provide for appropriate consultation with the contractor and its right to intervene in the proceedings at its own expense through legal counsel of its choice.</p>
<p>Automatic renewals: term-limited products or services (e.g., term licenses for software, or maintenance) renew automatically, and renewal charges fall due automatically, unless the customer takes action to opt out or terminate</p>	<p>Anti-deficiency violation. These types of contractor terms and conditions should be excluded from Government contracts and orders. For term-limited products or services, every subsequent term must be purchased separately.</p>
<p>Unspecified future fees or penalties. These fees and penalties can take a number of forms, such as the following:  Contractor's unilateral right to raise prices or to change from awarded contract prices to "then-current" commercial catalog prices.  Travel costs.  Various surcharges.  Various penalties, e.g., for late payment (including interest), for late shipment of defective part for repair, or for hiring a contractor's employee.  Liquidated damages.  Audit costs.  Maintenance reinstatement fees.  Government payment of contractor's attorney fees.</p>	<p>Anti-deficiency violation. These types of contractor terms and conditions should be excluded from Government contracts and orders. Generally, the Government should pay only the awarded contract price; any change to the contract price requires the contracting officer's approval and, specifically in Schedule contracts, is further limited as to frequency and amount. Applicable federal travel regulations govern travel costs. Late payment interest is governed by the Prompt Payment Act (31 USC 3901 et seq) and Treasury regulations at 5 CFR 1315. Attorney fees are available only under limited circumstances to certain small business claimants as set forth in the Equal Access to Justice Act (5 USC 504).</p>

<p>Taxes</p>	<p>FAR 52.212-4(k) provides that the contract price includes all applicable Federal, state and local taxes and duties. Under a line of GAO (U.S. Government Accountability Office) cases based on the Supremacy Clause of the US Constitution, the Government is exempt from state and local taxes whose "legal incidence" falls on the Federal Government. The applicability of a particular tax (e.g. "excise tax") to the Government is a case by case determination for the contracting officer. Accordingly, contractor terms and conditions attempting to place responsibility for taxes on the Government customer should be excluded from Government contracts or orders. This includes terms and conditions which purport to accept the manufacturers or contractors corporate income tax. If the vendor believes any charge is payable by the Government, the vendor should be instructed to submit such charge to the contracting officer for review.</p>
<p>Third-party terms: where the vendor's offering includes components provided by other manufacturers, or where the contractor is a dealer or reseller of other manufacturers' products, the agreement will often say that the customer agrees to be bound by the terms and conditions established by such manufacturer, without an opportunity for the customer to object to or negotiate the terms. The vendor or reseller is not a party to the third-party terms and disclaims all responsibility, while the manufacturer may become a third-party beneficiary of the contract.</p>	<p>This also introduces potentially unacceptable terms and removes the Government's ability to control what terms it is bound by. These types of contractor terms and conditions should be excluded from Government contracts and orders. Contractor indemnities do not constitute effective mitigation.</p>

<p>Contract to be governed by state/foreign law, litigated in state/foreign courts, or arbitrated; contractual limitation on actions</p>	<p>These types of contractor terms and conditions should be excluded from Government contracts and orders. All contracts to which the Federal Government is a party must be governed by Federal law under principles of sovereign immunity. Depending on the cause of action (e.g., tort, breach of contract, infringement of copyright or patent), both venue and the statute of limitations are usually mandated by applicable Federal law (e.g., the Federal Tort Claims Act, 28 USC 1346(b); the Contract Disputes Act, 41 USC 7101 et seq; the Tucker Act, 28 USC 1346(a)(1)). NASA has not issued agency wide approval for use of binding arbitration agreements which can only be implemented by the head of the agency when promulgated via administrative rulemaking (5 USC 575(c)). As such, requests to enter into binding arbitration are considered on a case-by-case basis at the time of the dispute. Such requests may also require the approval of the Department of Justice. These types of contractor terms and conditions should be excluded from Government contracts and orders.</p>
<p>Equitable remedies, injunctions</p>	<p>A sovereign immunity issue. Equitable remedies are generally not available against the Government under Federal statutes. These types of contractor terms and conditions should be excluded from Government contracts and orders.</p>
<p>Unilateral termination by contractor for breach</p>	<p>Inconsistent with FAR 52.233-1, which requires the contractor to submit a claim to the contracting officer if it believes the Government to be in breach, and to continue performance during the pendency of the claim. In commercial item contracts, the FAR also specifies the procedures for Government termination for breach or convenience. Under FAR 12.302(b), the FAR provisions dealing with dispute and continued performance cannot be changed by the contracting officer. These types of contractor terms and conditions should be excluded from Government contracts and orders.</p>

<p>Unilateral modification: the vendor reserves the right to unilaterally change the license terms or terms of service, with or without notice to the customer</p>	<p>This clause violates the contract formation rules of FAR 1.601(a) and 43.102. This allows the vendor to introduce unacceptable terms in the future and removes the Government's ability to control what terms it is bound by. These types of contractor terms and conditions should be excluded from Government contracts and orders.</p>
<p>Confidential Information: the vendor requires that the Government keep confidential certain information, including pricing and the terms of an order.</p>	<p>The clause must recognize that courts of competent jurisdiction may require certain information to be released. For example, the Freedom of Information Act (FOIA) (5 USC 552) requires that information that does not fall under certain exceptions must be released when requested. Such confidential clauses must be modified to recognize that federal agencies are subject to FOIA and some information may be released despite being characterized as "confidential" by the vendor.</p>
<p>Assignment without express Government approval</p>	<p>FAR 42.12 governs novation agreements or assignment of contracts while FAR 52.232-23 governs the Assignment of Claims. Contractor terms and conditions inconsistent with these FAR clauses should be excluded from Government contracts and orders.</p>

Subpart 1812.70—Commercial Space Hardware or Services

1812.7000 Anchor tenancy contracts.

(a) The term “anchor tenancy” means an arrangement in which the United States Government agrees to procure sufficient quantities of a commercial space product or service needed to meet Government mission requirements so that a commercial venture is made viable.

(b) Subject to receiving an appropriation that—

(1) Authorizes a multi-year anchor tenancy contract; and

(2) Specifies the commercial space product or service to be developed or used, NASA may enter into a multi-year anchor tenancy contract only if Administrator determines—

(i) The good or service meets the mission requirements of the National Aeronautics and Space Administration;

(ii) The commercially procured good or service is cost effective;

(iii) The good or service is procured through a competitive process;

(iv) Existing or potential customers for the good or service other than the United States Government have been specifically identified;

(v) The long-term viability of the venture is not dependent upon a continued Government market or other nonreimbursable Government support; and

(vi) Private capital is at risk in the venture.

(c) Contracts entered into under such authority may provide for the payment of termination liability in the event that the Government terminates such contracts for its convenience.

(1) Contracts that provide for this payment of termination liability shall include a fixed schedule of such termination liability payments. Liability under such contracts shall not exceed the total payments which the Government would have made after the date of termination to purchase the good or service if the contract were not terminated.

(2) Subject to appropriations, funds available for such termination liability payments may be used for purchase of the good or service upon successful delivery of the good or service pursuant to the contract. In such case, sufficient funds shall remain available to cover any remaining termination liability.

(d) Limitations:

(1) Contracts entered into under such authority shall not exceed 10 years in duration.

(2) Such contracts shall provide for delivery of the good or service on a firm, fixed price basis.

(3) To the extent practicable, reasonable performance specifications shall be used to define technical requirements in such contracts.

(4) In any such contract, the Administrator shall reserve the right to completely or partially terminate the contract without payment of such termination liability because of the contractor's actual or anticipated failure to perform its contractual obligations.