

Incorporate the following changes into the April 2008 NMCARS:

1. Under SUBPART 5201.3—AGENCY ACQUISITION REGULATIONS, section 5201.304(DFARS 201.304) Agency control and compliance procedures, paragraph (4) DON Procedures for Control of Component Clause Use, subparagraph (B) Standard Component Clauses is revised to address the requirements of DFARS 201.304(1)(i) for clause approval; subparagraph (E) Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items is revised to effect minor editorial revisions and to reflect the general procedures on provision/clause use that are added to Annex 7, as follows:

SUBPART 5201.3—AGENCY ACQUISITION REGULATIONS

5201.304 (DFARS 201.304) Agency control and compliance procedures.

(4) DON Procedures for Control of Component Clause Use.

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(B) Standard Component Clauses.

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(b)(1) Each contracting activity shall publish new component clauses or changes to existing component clauses that require USD(AT&L)/DPAP approval as a proposed rule in the Federal Register for public comment. After receipt and analysis of public comments, the contracting activity shall submit the proposed rule, in accordance with DFARS 201.201-1(d), NMCARS 5201.201-1(d) and DFARS 201.301, through the HCA and DASN(A&LM) to the DAR Council Director, prior to publication as a final rule.

(2) New standard component clauses, or changes to existing component clauses, which do not meet the conditions of DFARS 201.304(1)(i), (*i.e.* have a significant effect beyond the internal operating procedures of the agency, or a significant cost or administrative impact on offerors/contractors), do not require publication for public comment or approval of DASN(A&LM) or USD(AT&L)/DPAP. Copies of all new standard component clauses or changes to such clauses, that do not require DASN(A&LM) or USD(AT&L)/DPAP approval, shall be provided to DASN(A&LM) for inclusion in the Navy Clause Baseline.

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(E) Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items.

(a) Notwithstanding the requirements set forth in paragraphs 5201.304(4)(B), (C) and (D), the following approvals are required for use of agency or component-unique provisions or clauses in solicitations and contracts for commercial items that will supplement FAR Part 12 and DFARS Part 212 provisions or clauses:

(1) DASN(A&LM) is the approval authority for inclusion of a component-unique provision or clause that is necessary to reflect an agency-unique statute applicable to the acquisition of commercial items.

(2) The NSPE is the approval authority for inclusion of any agency or component-unique provision or clause that is otherwise not necessary to reflect an agency-unique statute applicable to the acquisition of commercial items.

(b) Annex (7), COMMERCIAL ITEM ACQUISITIONS PROVISION/CLAUSE USE, outlines current sources of approval authority governing inclusion of provisions and clauses in solicitations and contracts for commercial item acquisitions, as well as implementing general procedures to facilitate consistency in management, control and use of properly approved provisions or clauses. See NMCARS 5212.301 (DFARS 212.301) for additional guidance.

2. Under SUBPART 5212.3—SOLICITATION PROVISIONS AND CLAUSES FOR THE ACQUISITION OF COMMERCIAL ITEMS, section 5212.301(FAR 12.301), Solicitation provisions and contract clauses for the acquisition of commercial items, paragraph (f)(90) is revised to incorporate the new provision/clause use procedures added to Annex (7) and to effect minor editorial revisions, as follows:

SUBPART 5212.3—SOLICITATION PROVISIONS AND CLAUSES FOR THE ACQUISITION OF COMMERCIAL ITEMS

5212.301 (FAR 12.301) Solicitation provisions and contract clauses for the acquisition of commercial items.

(f) The following approvals are required for use of agency or component-unique provisions or clauses in solicitations and contracts for commercial items that will supplement FAR Subpart 12.3/DFARS 212.3 provisions or clauses:

(1) DASN(A&LM) is the approval authority for inclusion of a component-unique provision or clause that is necessary to reflect an agency-unique statute applicable to the acquisition of commercial items.

(2) The NSPE is the approval authority for inclusion of any agency or component-unique provision or clause that is otherwise not necessary to reflect an agency-unique statute applicable to the acquisition of commercial items.

(3) Submit all requests for approvals to DASN(A&LM) via email at RDAPolicy@navy.mil. Include in the subject line: “APPROVAL OF UNIQUE PROVISION/CLAUSE FOR COMMERCIAL ITEM CONTRACTS—[HCA NAME].” All requests shall contain the necessary documentation justifying the proposed action.

(90) Annex (7), COMMERCIAL ITEM ACQUISITIONS PROVISION/CLAUSE USE, includes a table in section A outlining the current sources of approval authority governing the use of provisions and clauses in solicitations and contracts for the acquisition of commercial items beyond those specifically prescribed for use in such actions by FAR Subpart 12.3 (DFARS Subpart 212.3). Section B of the Annex describes the implementing procedures on provision and clause use in solicitations and contracts for commercial items. Contracting Officers will use these procedures, in conjunction with prescribed policies and guidance set forth in FAR Part 12, DFARS Part 212 and NMCARS Part 5212, to determine the appropriate provisions and clauses to be used for a specific commercial item acquisition. Solicitations and contracts for commercial items that are issued pursuant to FAR Part 12 procedures shall contain properly approved provisions and clauses. Only USD(AT&L)DPAP may approve the use of any component-unique provision or clause that meets the conditions of DFARS 201.304(1)(i).

3. Under SUBPART 5217.74—UNDEFINITIZED CONTRACT ACTIONS, section 5217.7490, Semi-annual reporting requirements, is deleted; new sections 5217.7405 Plans and reports, are added; and Annex 6—CONSOLIDATED UNDEFINITIZED CONTRACT ACTION (UCA) MANAGEMENT REPORT, is revised, to reflect DFARS Change Notice 20090729 and a PGI change of December 23, 2009, as follows:

SUBPART 5217.74—UNDEFINITIZED CONTRACT ACTIONS

5217.7405 (DFARS 217.7405) Plans and reports.

(a)(2) HCAs shall submit by April 15 and October 15 a semi-annual consolidated undefinitized contract action (UCA) report, identifying each UCA with an estimated value of more than \$5 million.

(b) Submit the required UCA report to DASN(A&LM) via electronic mail address RDAJ&As@navy.mil in the format prescribed at Annex 6. Properly identify in the subject line of both the email and the reports “UCA MANAGEMENT REPORT” followed by the applicable reporting period/year (*e.g.* UCA MANAGEMENT REPORT: April 15, 2010).

5217.7405 (PGI 217.7405) Plans and reports.

(1) Submit a copy of the weighted guidelines for each definitized UCA during the reporting period with a value of \$100 million or more. If there is no record of weighted guidelines (*e.g.*, not required for a cost-plus-award-fee contract per DFARS 215.404-74), then submit alternative documentation that addresses appropriate recognition of the contractor’s reduced cost risk during the undefinitized performance period. Submit the required information in accordance with 5217.7405(b).

4. Under PART 5252 SOLICITATION PROVISIONS AND CONTRACT CLAUSES, add new SUBPART 5252.3—PROVISION AND CLAUSE MATRIX with corresponding sections to incorporate a newly developed matrix of FAR/DFARS and other government-unique provisions/clauses for DON commercial item acquisitions, as follows:

PART 5252 SOLICITATION PROVISIONS AND CONTRACT CLAUSES

SUBPART 5252.3--PROVISION AND CLAUSE MATRIX

5252.300 (FAR 52.300) Scope of Subpart

(90) The DON matrix of FAR/DFARS and Other Government-Unique Provisions/Clauses of this Subpart applies only to solicitations and contracts for commercial item acquisitions issued pursuant to FAR Part 12 procedures. Use this matrix, in conjunction with the relevant FAR, DFARS and NMCARS prescriptions on provision and clause use for commercial item acquisitions, when determining the applicability of a provision or clause for use in solicitations and contracts for commercial item acquisitions. See Annex 7, COMMERCIAL ITEM ACQUISITIONS PROVISION/CLAUSE USE.

5252.301 (FAR 52.301) Solicitation provisions and contract clauses (Matrix)

(90) The DON Matrix of FAR/DFARS and Other Government-Unique Provisions/Clauses for Commercial Item Acquisitions, available at https://acquisition.navy.mil/rda/home/policy_and_guidance/nmcars, includes web-enabled links to the most current text of the provisions and clauses approved for use in solicitations and contracts for commercial item acquisitions.

5. Under Annex 6—CONSOLIDATED UNDEFINITIZED CONTRACT ACTION (UCA) MANAGEMENT REPORT, the reporting format is revised to reflect DFARS Change Notice 20090729 as follows:

**ANNEX 6—CONSOLIDATED UNDEFINITIZED CONTRACT ACTION (UCA)
MANAGEMENT REPORT**

In accordance with NMCARS 5217.7405, Plans and reports, each contracting activity shall submit a Consolidated UCA Management Report which provides the following information:

Contract Number
Task Order/Delivery Order Number (if applicable)
Program Description/Reason for Award
Date UCA Awarded
Original Due Date for Definitization
Date Qualifying Proposal Received
Extended Date for Definitization
Date of Definitization Modification (if Definitized)
Reporting Date
Subject to Definitization Rules? (Yes/No)
Not to Exceed Amount (\$)
Amount Obligated (\$)
Comments

To standardize report submissions, use the UCA reporting template of DFARS PGI 217.7405(4) available at the following website:

http://www.acq.osd.mil/dpap/dars/pgi/pgi_hm/PGI217_74.htm.

Note: There are five automatic-calculated fields in this new template.

6. Under Annex 7, COMMERCIAL ITEM ACQUISITIONS CLAUSE USE, the Annex is reformatted, minor editorial revisions are made, and a new section is added to establish the DON procedures applicable to provision and clause use in solicitations and contracts for commercial item acquisitions, as follows:

ANNEX 7 - COMMERCIAL ITEM ACQUISITIONS PROVISION/CLAUSE USE

A. Commercial Item Acquisitions Provision/Clause Use Approval Matrix. The following table summarizes the approval requirements for provision or clause use in FAR Part 12 acquisitions:

Table 7-1

Action	Approval Authority	FAR/DFARS citation
Include a provision similar to FAR 52.212-2 containing all evaluation factors required by FAR 13.106, 14.2 or 15.3	Contracting Officer	FAR 12.301(c)(2)
Include in solicitations & contracts other FAR provisions & clauses when their use is consistent with the limitations in FAR 12.302 (<u>Discretionary use only due to nature of procurement action</u> , e.g. FAR 16.506 clauses for IDIQ contracts; FAR 17.208 when Options included; etc.)	Contracting Officer	FAR 12.301(e)
Tailor FAR provision 52.212-1 or FAR clause 52.212-4 identified in FAR 12.301, <u>after</u> conducting appropriate market research, to adapt to the market conditions for each acquisition (<i>i.e.</i> <u>tailor only consistent with commercial practices</u>).	Contracting Officer	FAR 12.302(a) FAR 12.301(b)(1) FAR 12.301(b)(3)
Tailor FAR clause 52.212-4 (except as noted in FAR 12.302(b)) in a manner that is <u>inconsistent</u> with customary commercial practice for the item being acquired, if waiver is approved.	HCA; except ASN(RD&A) approval is required if tailoring results in adding of any new terms or conditions	FAR 12.302(c) DFARS 212.302(c)
Deviate from FAR provision 52.212-3 <u>only</u> in accordance with FAR Subpart 1.4.	ASN(RD&A)/DASN(A&LM)	FAR 12.301(b)(2) DFARS 201.4
Supplement provisions & clauses in FAR/DFARS Parts 12/212 with use of additional clauses & provisions <u>only</u> as necessary to reflect agency-unique statutes applicable to acquisition of commercial items.	OASN (RD&A)/DASN (A&LM)	FAR 12.301(f)
Supplement provisions & clauses in FAR/DFARS Parts 12/212 with use of additional clauses & provisions other than those necessary to reflect agency-unique statutes applicable to acquisition of commercial items.	Navy Senior Procurement Executive (ASN RD&A) or Director, Defense Procurement and Acquisition Policy (DPAP)* w/o power of delegation	FAR 12.301(f)

**Note: Only OUSD(AT&L)DPAP may approve the use of any Component-unique clause or provision that meets the conditions of DFARS 201.304(1)(i).*

B. Commercial Item Acquisitions Provision/Clause Use Procedures.

1. **Purpose.** To establish the implementing procedures and a common framework to facilitate management, control and use of properly approved Government-unique provisions/clauses in Department of the Navy (DON) solicitations/contracts for commercial items and achieve consistency in DON commercial item provision/clause use and approval authority.

2. **Applicability/Scope.** The procedures set forth in this document apply to solicitations/contracts for commercial items as defined by FAR 2.101 and reflect the policies and guidance on provision/clause use as prescribed in FAR Part 12, DFARS Part 212, and NMCARS Part 5212. Personnel performing preaward/award functions within Navy/Marine Corps contracting activities and their subordinate organizations will use these procedures, in conjunction with the above prescribed regulations, to determine provision/clause use in solicitations/contracts for commercial items.

3. Background.

a. FAR 12.301(a) implements Section 8002 of Public Law 103-355 (41U.S.C. 264, note), which mandates that contracts for commercial items include, to the maximum extent practicable, only those clauses that are required to implement provisions of law or Executive Orders applicable to the acquisition of commercial items, or that are determined to be consistent with customary commercial practice. FAR 12.301(d) clearly states that despite prescriptions contained elsewhere in the FAR, when acquiring commercial items, Contracting Officers shall be required to use only those provisions/clauses as prescribed in FAR Part 12. It also states that revisions to such provisions/clauses may be made to reflect the applicability of statutes and Executive Orders to the acquisition of commercial items.

b. FAR Subpart 12.3 prescribes a streamlined set of five provisions/clauses that are broad-based and, for the most part, address commercial market practices for a wide range of potential Government acquisitions of commercial items (FAR 12.301 (b) and (c)). A few of these clauses may be tailored (*i.e.*, revised) to reflect current commercial practices prevailing at the time the contract requirement is to be publicized/issued. However, any tailoring of a provision or clause to adapt to the current market conditions may only occur after having performed market research (FAR 12.302(a)). Market research is a critical element in the commercial item acquisition process. It not only helps determine an effective acquisition strategy for the commercial item acquisition, but also establishes the basic foundation for the agency description of need, the solicitation, and the contract (FAR 12.202).

c. These procedures implement the Navy/Marine Corps Plan for Restricting Government-Unique Contract Provisions/ Clauses on Commercial Contracts dated July 11, 2008, developed in response to Section 821 of the National Defense Authorization Act (NDAA) for FY 2008 (Pub.L.110-181), and the policy promulgated in NMCARS Change 08-5 on provision/clause use for DON commercial item acquisitions. Section 821 directed the Under Secretary of Defense for Acquisition, Technology, and Logistics to develop/implement a plan to minimize the number of Government-unique contract clauses used in commercial contracts to (1) those government-unique clauses authorized by law or regulation, or (2) any additional clauses that are relevant and

necessary to a specific contract. Table 7-1 provides a summary of the unique approval requirements on provision/clause use as prescribed by FAR Subpart 12.3.

4. **References/Resources.** Table 7-2 lists and describes the documents that serve as references or resource tools in support of these procedures.

5. **Definitions.** Table 7-3 lists and defines terms used in these procedures.

6. **Roles and Responsibilities of Key Stakeholders.** Table 7-4 lists key stakeholders and their roles/responsibilities as these relate to the use of properly approved provisions/clauses in solicitations/contracts for commercial items.

7. **Procedures.** This paragraph outlines the process Contracting Officers will follow to ensure that only properly authorized provisions/clauses are used in commercial item acquisitions. The Provision/Clause Use Decision Tree for Commercial Item Acquisitions (hereinafter referred to as “decision tree”), available at the end of this section, illustrates the critical steps involved determining the appropriate provisions/clauses to be used for a specific commercial item acquisition. The Contracting Officer should use the decision tree, in conjunction with these procedures, to fully understand all required decisions. Contracting Officers perform the following actions:

a. Determine whether the acquisition is excluded from use of commercial item procedures per FAR 12.102; if it is not excluded, continue as outlined below.

b. Determine whether the acquisition meets the definition of a commercial item per FAR 2.101. For acquisitions exceeding \$1M, as required by DFARS 212.102 and as outlined in PGI 212.102(a), this determination is documented in writing and supported by market research demonstrating the rationale supporting a conclusion that the commercial item definition has been satisfied. If an acquisition plan/strategy is developed, it should include the information addressed in the commercial item determination. Market research must be performed in accordance with FAR 10.002. FAR 10.002(e) requires the results of market research to be documented in a manner appropriate to the size and complexity of the acquisition. The DoD Commercial Item Handbook of November 2001 available at <http://www.acq.osd.mil/dpap/Docs/cihandbook.pdf> provides guidance on how to perform and document market research efforts.

c. Develop the solicitation/contract identifying the appropriate provisions/clauses to be used for the specific commercial item acquisition.

(1) Use the DON Matrix of FAR/DFARS and Other Government-Unique Provisions/Clauses for Commercial Item Acquisitions (hereinafter referred to as “the DON matrix”) available at NMCARS Subpart 5252.3. The DON matrix, developed to assist the Contracting Officer in determining the appropriate FAR/DFARS and other government-unique provisions/clauses to be used in commercial item acquisitions, is only a reference tool; and, by itself, does not provide sufficient information to determine the applicability of a provision or clause. The Contracting Officer shall refer to the appropriate prescriptions in FAR/DFARS/NMCARS on provision/clause use in solicitations/contracts for commercial item

acquisitions to ensure that only properly authorized provisions/clauses are included in solicitations/contracts for commercial items.

(a) The DON matrix consists of two lists of provisions/clauses: One for solicitations/contracts issued in the Standard Procurement System (SPS) using two DPAP deviations; the other when the two DPAP deviations will not be used or if the solicitations/contracts will not be issued in SPS. Each list contains:

(i) FAR and DFARS provisions/clauses authorized by FAR Part 12 and DFARS Part 212 for use in commercial item acquisitions;

(ii) Other FAR provisions/clauses identified for use under the authority of FAR 12.301(e), Discretionary Use of FAR Clauses, that may be used when applicable to the specific commercial item acquisition;

(iii) Additional provisions/clauses authorized by ASN(RD&A) or DPAP for use when applicable to the specific commercial item acquisition; and

(iv) A link to the Central Command (CENTCOM) Contracting Webpage containing additional provisions/clauses and terms/conditions applicable to DoD Theater Business Clearance (TBC) covered actions awarded in support of the Joint Contracting Command Iraq/Afghanistan (JCC I/A).

(b) The main difference between the two lists concerns current DPAP deviations to omnibus clauses FAR 52.212-5 and DFARS 252.212-7001. The “deviation” list should only be referred to when issuing the solicitation/contract in SPS and using the DPAP class deviations to omnibus clauses FAR 52.212-5 and DFARS 252.212-7001. Each of these omnibus clauses contains a number of clauses the Contracting Officer may select as appropriate for the specific commercial item acquisition. These class deviations authorize the clauses included in FAR 52.212-5 and DFARS 252.212-7001 to be listed individually, rather than to be manually marked as applicable within each omnibus clause. Therefore, the “deviation” list individually depicts all clauses that would otherwise be included in each omnibus FAR/DFARS clause.

(2) All provisions/clauses listed in the DON matrix are identified by an “R” or “A”. “R” means "required" and the provision/clause must be used in all commercial item acquisitions. “A” means "as applicable" and the Contracting Officer must determine applicability of the provision/clause to the specific commercial item acquisition.

(3) The link to the CENTCOM Contracting Webpage contains additional provisions/clauses and terms/conditions applicable to solicitations/contracts for commercial items in which performance or delivery is in the CENTCOM area of responsibility. Contracting Officers must ensure that solicitations/contracts for commercial item acquisitions supporting the Commander, JCC I/A also include the appropriate provisions/clauses and/or terms/conditions identified in the CENTCOM Contracting Webpage, which is available at http://www2.centcom.mil/_layouts/AccessAgreement.aspx or through DPAP’s Contingency Contracting webpage under “Special Instructions for Iraq and Afghanistan” at

<http://www.acq.osd.mil/dpap/pacc/cc/index.html>. Contracts covered by the TBC policy include (i) those under which contractor personnel are performing in IRAQ and/or Afghanistan after April 1, 2008; (ii) that require the delivery of material to Iraq and/or Afghanistan after April 1, 2008 under FOB Destination terms using commercial transportation outside the Defense Transportation System; or (iii) that authorize contractor personnel, including subcontractors, to carry weapons in Iraq and/or Afghanistan regardless of contract end date. See DoD memorandum of September 15, 2009, Subject: Theater Business Clearance/Contract Administration Delegation (TBC/CAD) Compliance, available at <http://www.acq.osd.mil/dpap/policy/policyvault/USA003927-09-DPAP.pdf>.

(4) Other Government-Unique Provisions/Clauses. Component-unique provisions/clauses (*i.e.* which are developed by DON contracting activities) must be approved by the NSPE before use in solicitations/contracts for commercial item acquisitions. All approved component-unique provisions/clauses will be listed in the DON matrix located in NMCARS Subpart 5252.3.

d. Review the additional actions authorized by FAR Part 12 that impact the use of commercial item provisions/clauses, after selecting the necessary provisions/clauses. These additional actions are outlined in paragraph 7.e. below and illustrated in the decision tree at the end of this section. The decision tree:

(1) Addresses the actions of “tailoring” or “adding new” instructions, terms and conditions, or provisions/clauses. For these actions, the Contracting Officer must determine whether that action is consistent with commercial practices. This determination may be based on the results of initial market research conducted when developing the solicitation/contract; or, if not addressed at that time, from additional market research performed to support the determination.

(2) Identifies all supporting actions necessary for each decision listed. Supporting actions include documenting decisions made, obtaining legal sufficiency reviews, and obtaining approvals. It is not the intent for the Contracting Officer to prepare individual documents supporting each decision, but to combine actions with the same approval authorities into a single document, when appropriate.

e. Consider the following additional actions authorized by FAR Part 12, when appropriate. Note: The approval authorities for these actions are summarized in Table 7-1 and illustrated in the decision tree.

(1) Tailoring of FAR 52.212-1. This provision includes instructions to potential offerors submitting proposals on the specific commercial item acquisition. FAR 12.301(b)(1) allows tailoring of these instructions or the addition of new instructions, if necessary. However, as required by FAR 12.302(a), changes to these instructions can only be made to reflect market conditions (*i.e.*, consistent with commercial practices).

(2) Use of FAR 52.212-2 or Similar Provision. This provision allows the Contracting Officer to fill in the evaluation factors specific to the commercial item acquisition. The provision also includes language identifying the basis under which contract award will be made.

The Contracting Officer must determine whether the basis of award language is applicable to the specific commercial item acquisition. If not, as authorized by FAR 12.301(c)(2), a provision similar to FAR 52.212-2 may be drafted containing all evaluation factors required by FAR 13.106, Subpart 14.2, or Subpart 15.3.

(3) Deviation to FAR 52.212-3. This provision provides a single, consolidated list of representations and certifications for the acquisition of commercial items and is required to be attached to any commercial item solicitation for offerors to complete. This provision and its alternates cannot be modified in any manner, except in accordance with FAR deviation procedures outlined in FAR Subpart 1.4. Adjust acquisition execution milestones to reflect the timeframe necessary to process the deviation.

(4) Discretionary use authority of FAR 12.301(e). Use of other FAR provisions/clauses beyond the ones already included in the DON Matrix available at NMCARS 5252.3 shall be limited to the following:

(a) Discretionary use of additional FAR provisions/clauses is limited to only those FAR provisions/clauses necessary for the performance of the contract due to the nature of the specific commercial item acquisition (*e.g.*, using required option provisions/clauses when the acquisition has options, using required leasing provisions/clauses when the acquisition is for leasing, etc.).

(b) If an acquisition requires use of an additional FAR provision/clause that is not listed on the DON matrix, and is only for one-time use, then the DON matrix does not require updating to reflect this additional clause. However, if the particular acquisition will be recurring in nature prompting the need for this additional FAR provision/clause, the DON matrix must be updated. Submit the FAR provision/clause to DASN (in accordance with contracting activity procedures) for inclusion in the DON matrix.

(c) Component provisions/clauses may not be added to a solicitation/contract for commercial items using this authority.

(5) Tailoring of FAR 52.212-4. FAR 12.301(b)(3) allows the tailoring of this clause; however, certain limitations apply.

(a) As outlined in FAR 12.302(b), the following six terms/conditions of FAR 52.212-4 cannot be tailored:

- Paragraph (b) - Assignments;
- Paragraph (d) - Disputes;
- Paragraph (g) - Payment; (except as provided in Subpart 32.11)
- Paragraph (i) - Invoice;
- Paragraph (q) - Other compliances; and
- Paragraph (r) - Compliance with laws unique to Government contracts.

(b) Tailoring of the other fourteen existing terms/conditions consistent with commercial practices may be approved by the Contracting Officer. However, tailoring of these

existing terms/conditions inconsistent with commercial practices requires a waiver and a different level of approval, as outlined in the approval matrix of Table 7-1 and illustrated by the decision tree.

(c) The procedures for adding new terms and conditions to FAR 52.212-4 are outlined in the decision tree. Documentation must be submitted to ASN(RD&A) for approval via the contracting activity chain of command. Approved additional terms and conditions that are to be used on a recurring basis will be included in the DASN commercial item provision/clause repository.

(6) Development/use of component-unique provisions/clauses required to reflect agency statutes pursuant to FAR 12.301(f) authority.

(a) FAR 12.301(f) authorizes the use of additional provisions/clauses necessary to reflect agency unique statutes applicable to commercial item acquisitions. If a new provision/clause is required under this authority, the contracting activity/DASN will jointly develop one. DASN (A&LM) approved component-unique provisions/clauses meeting this criterion will be included in the DON Matrix at NMCARS Subpart 5252.3, PROVISION AND CLAUSE MATRIX.

(b) The contracting activity/DASN shall assess/determine if the provision/clause meets the conditions at DFARS 201.304(1)(i) requiring DPAP approval (*i.e.*, has a significant effect beyond the internal operating procedures of DON, or has a significant cost or administrative impact on contractors or offerors) and document the results.

(c) The provision/clause package (*i.e.*, the draft provision/clause, written results of the assessment, and justification for use) shall be submitted to Counsel for legal sufficiency review.

(d) The provision/clause package shall be sent for approval as outlined in Table 7-1 of this Annex. Without approval, a new provision or clause is not authorized for use.

(7) Development/use of additional component provisions/clauses other than those necessary to reflect agency statutes pursuant to FAR 12.301(f) authority.

(a) FAR 12.301(f) states that agencies may supplement FAR Part 12 provisions/clauses with the use of additional provisions/clauses other than those necessary to reflect agency unique statutes applicable to commercial item acquisitions. Only the NSPE may approve the use of any component-unique provision or clause pursuant to this authority, unless the proposed provision or clause meets the conditions at DFARS 201.304(1)(i) for DPAP approval.

(b) If a supplemental provision/clause is deemed necessary, the contracting activity shall assess/determine if it meets the conditions at DFARS 201.304(1)(i) (*i.e.*, has a significant effect beyond the internal operating procedures of an agency, or has a significant cost or administrative impact on contractors or offerors) and document the results.

(c) The provision/clause package (*i.e.*, the draft provision/clause, written results of the assessment, and justification for use) shall be submitted to Counsel for legal sufficiency review.

(d) The provision/clause package shall be sent for approval as outlined this Annex and in accordance with Table 7-1. Without approval, a new component provision/clause is not authorized for use.

8. Management/Oversight of Clause/Provision Use in Commercial Item Contracts.

a. The overarching responsibility of managing/controlling the use of component solicitation/contract provisions and clauses within DON resides with DASN(A&LM). DFARS 201.304(4) requires that agencies develop, and upon approval by DPAP, implement, maintain and comply with a plan for controlling clauses used in its contracts beyond than those prescribed by FAR/DFARS. The updated DON Control Plan for Component Clauses identifies a system of controls for the use of component-unique provisions/clauses in solicitations/contracts for commercial items (and non-commercial items) and conforms to prescribed FAR, DFARS, and NMCARS regulations. Each HCA serves a vital role in implementing/facilitating compliance with this Plan.

b. To ensure compliance with prescribed policies/procedures in the area of clause control, each HCA will include provision/clause use in solicitations/contracts for commercial item acquisitions as an element for review during its internal procurement management reviews/procurement performance management assessment program (PPMAP) assessments. DASN(A&LM) PPMAP will assess/validate compliance with this requirement during its PPMAP of HCAs.

TABLE 7-2
REFERENCES/RESOURCES

Reference/Resource	Description
NMCARS Subparts 5201.3, 5212.3 and Annex 7 (Commercial Items Acquisitions Clause Use)	Depict DON's current policy and procedures on provision/clause use in solicitations/contracts for commercial items. Annex 7 includes a summary of the unique approval requirements on provision/clause use for commercial item acquisitions as prescribed by FAR Subpart 12.3. It also identifies the sources of approval (<i>i.e.</i> from the Contracting Officer to the Navy Senior Procurement Executive to the Director, DPAP) and the process for including other than the specified FAR Part 12.3 provisions/clauses; for tailoring of existing FAR 12.3 provisions/clauses; and for adding of other Government-unique provisions/clauses in solicitations/contracts for commercial items.
Navy/Marine Corps Contracting Activities Plan for Restricting, Limiting, Controlling Use of Government-Unique Clauses of July 11, 2008	Establishes the objectives that will help DON restrict, manage and control the use of Government-unique clauses in commercial item contracts.
DON Control Plan for Component Clauses of August 19, 2009	Establishes the overarching process that will govern development and approval of all component-unique provisions or clauses as required by DFARS 201.304(1)(4). The objective of this plan is to ensure that DON solicitations/contracts include only properly approved component-unique provisions/clauses. It depicts the unique approval requirements governing provision or clause use in solicitations/contracts for commercial items.
DON Matrix of FAR/DFARS and Other Government-Unique Provisions/Clauses for Commercial Item Acquisitions (NMCARS Subpart 5252.3)	Serves as a reference tool listing the FAR Part 12, DFARS Part 212 and other government-unique provisions and clauses (including component-unique provisions/clauses) that are authorized for use in commercial item acquisitions within DON given the current authorities in the higher regulations. To the extent practicable, the matrix facilitates the selection of provisions/clauses for commercial item solicitations/contracts using the Standard Procurement System (SPS) or another procurement writing system. Contracting Officers bear the responsibility of ensuring that only appropriately authorized or approved provisions/clauses are used in each solicitation/contract for commercial items. Maintenance of this reference tool is the responsibility of DASN(A&LM)/Policy.
Provision/Clause Use Decision Tree for Commercial Item Acquisitions	Illustrates the decision-making process affecting provision/clause use in solicitations/contracts for commercial items. The Contracting Officer should use the decision tree in conjunction with the general procedures on provision/clause use outlined in paragraph 7, Procedures, of NMCARS Annex (7) section B, in order to fully understand all the required decisions in determining the appropriate provisions/clauses to be used for a specific commercial item acquisition.
DoD Commercial Item Handbook (Nov 2001)	Provides guidance on the contracting process for commercial item acquisitions, including tools for conducting and documenting market research.

**TABLE 7-3
DEFINITIONS OF KEY TERMS**

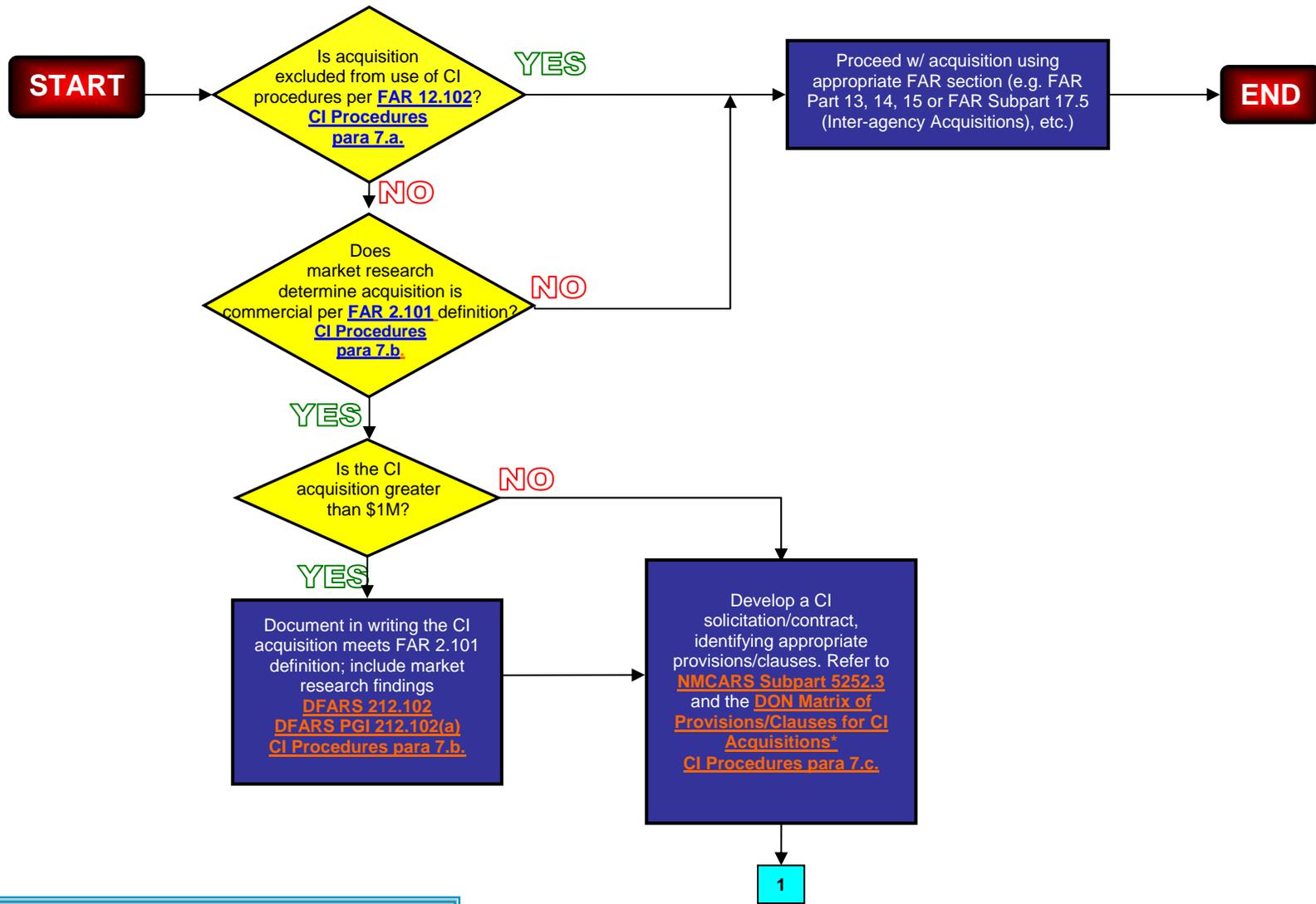
Terms	Definitions
Clause	A term or condition used in contracts or in both solicitations and contracts, and applying after contract award or both before and after award (FAR 2.101). For example, in commercial item acquisitions, clauses include (1) FAR 52.212-4 , (2) FAR 52.212-5 , (3) DFARS 252.212-7001 , and (4) when properly authorized, other clauses set forth in FAR Part 52, DFARS Part 252, NMCARS Part 5252, including DON Government-unique provisions or clauses developed in accordance with the DON Control Plan for Component Clauses.
Commercial Item (CI) Acquisition	A contract requirement that meets the definition of “commercial items” at FAR 2.101 and is executed (<i>i.e.</i> , procured/awarded) following the procedures set forth in FAR Part 12. (Note: The policies in FAR Part 12 are to be used in conjunction with policies and procedures for solicitation, evaluation, and award set forth in FAR Parts 13, 14, and 15, as appropriate.) When the head of the agency determines that the supplies and services are to be used to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack, such actions may be treated as an acquisition for commercial items as permitted by FAR 18.202.
Discretionary Use	Inclusion of additional FAR provisions/clauses that are not required by FAR 12.301(b) in solicitations/contracts for the acquisition of commercial items but which may be used when their use is consistent with customary commercial practices for the specific commercial item acquisition or as deemed necessary for contract performance due to the nature of the work (<i>e.g.</i> , FAR 16.506 clauses for IDIQ contracts, FAR 17.208 when Options are included, etc.).
Government-Unique Clause	A provision or clause developed by an organizational entity exercising contracting authority within DON (or DoD) and that is approved by the appropriate authority for use in commercial item acquisitions in addition to prescribed FAR Part 12 or DFARS Part 212 provisions/clauses
Provision	A term or condition used only in solicitations and applying only before contract award For example, provisions typically include representations and certifications to be completed by the offeror, instructions to offerors, and evaluation criteria/information regarding the basis of award for the specific acquisition. For commercial item acquisitions, provisions are of the type set forth in (1) FAR 52.212-1 ; (2) FAR 52.212-2 ; and (3) FAR 52.212-3 . Since provisions provide information necessary during the solicitation phase of an acquisition, these provisions are generally not incorporated in the contract award document.
Tailoring	Revising, editing or modifying the pre-existing instructions and/or terms and conditions contained in FAR Subpart 12.3 provisions/clauses to adapt these provisions/clauses to reflect current customary commercial practices as may be necessary to meet or protect the Governments interests. For example FAR 52.212-4 has twenty subsections addressing specific areas ranging from (a) inspection/acceptance to (t) Central Contractor Registration. Tailoring would involve adding, deleting or revising language concerning one of those specific areas, but not adding terms concerning new areas
Term and Condition	A requirement or obligation of one of the parties to a contract. For example, in commercial item acquisitions, terms and conditions are of the type set forth in FAR 52.212-4 .
Supplementing	Adding newly developed provisions/clauses in commercial item acquisitions necessary to (1) reflect Navy-unique statutes applicable to the acquisition of commercial items (<i>e.g.</i> a new statute imposes a specific requirement on shipbuilding or facilities maintenance and is deemed to apply to commercial item acquisitions), or (2) as may be approved by the Navy Senior Procurement Executive (<i>e.g.</i> establishment of a WAWF or ERP clause for use within Navy), or (3) by the Director, Defense Procurement and Acquisition Policy, without power of delegation (<i>e.g.</i> using special clauses for Acquisitions in Support of Operations in Iraq or Afghanistan). This also includes use of DFARS 252 and NMCARS 5252 provisions/clauses that are not specifically identified in the DON Matrix of FAR/DFARS and Other Government-Unique Provisions/Clauses for Commercial Item Acquisitions.

TABLE 7-4

**ROLES & RESPONSIBILITIES OF KEY STAKEHOLDERS FOR
PROVISION/CLAUSE USE IN COMMERCIAL ITEM ACQUISITIONS**

Key Stakeholder	Roles & Responsibilities
Contracting Officer	Responsible for ensuring that only properly authorized provisions/clauses are used in solicitations/contracts for commercial items. As a result, the Contracting Officer, supported by Contract Specialists, must work closely with the requirements and program offices in performing the necessary market research to (1) determine if the instant requirement meets the definition of a commercial item at FAR 2.101 and should be procured using FAR Part 12 procedures; (2) identify the current customary commercial practices that may affect the instant contract requirement in terms of provision/clause use; (3) determine the need for revisions to FAR Subpart 12.3 provisions/clauses or the development of any additional/supplemental component-unique provisions/clauses; and (4) obtain the appropriate approvals of such actions before release of the commercial item solicitation. The Contracting Officer obtains Counsel support, as necessary, during this entire process.
Chief of the Contracting Office (CCO)	Responsible for ensuring that the Contracting Officer and others within the contracting organization understand the current policy and procedures affecting Government-unique provision/clause use in commercial solicitations/contracts. The CCO facilitates this process by communicating policy and procedures in a timely manner throughout the contracting organization and establishing the necessary management/oversight controls to promote compliance with prescribed policy/procedures.
Head of the Contracting Activity (HCA)	Responsible for ensuring that appropriate management controls are in place to effectively manage and control provision/clause use in the activity's contracts for commercial items.
Counsel	Responsible for performing legal sufficiency reviews of provisions/clauses used in solicitations/contracts for commercial items, as required or as requested by the Contracting Officer.
Office of the Assistant Secretary of the Navy (Research, Development & Acquisition) (OASN(RD&A) and Deputy Assistant Secretary of the Navy(Acquisition and Logistics Management)	Responsible for overall management/oversight of component contract provisions/clauses within DON. This includes maintaining the electronic repository of all approved component provisions/clauses for use in solicitations/contracts for commercial or non-commercial items within the Agency; maintaining the DON Matrix of FAR/DFARS and Other Government-Unique Provisions/Clauses for Commercial Item Acquisitions; promulgating policy affecting clause use in contracts for commercial items; reviewing/approving requests for component provisions or clauses necessary to implement agency-unique statutes as required by FAR 12.301(f); and, maintaining an updated component clause control plan for DON. This office receives/processes HCA requests for authority to include supplemental provisions/clauses (<i>i.e.</i> use additional clauses/provisions) other than those necessary to reflect agency-unique statutes applicable to acquisition of commercial items as required by FAR 12.301(f).
Navy Senior Procurement Executive (NSPE)	As stipulated by FAR 12.301(f), serves as the final approval authority within DON for inclusion, in a solicitation/contract for commercial items, of any agency/component-unique provision/clause necessary to supplement FAR Subpart 12.3/DFARS 212.3 provisions/clauses with use of additional provisions/clauses, other than those necessary to reflect agency-unique statutes applicable to acquisition of commercial items. ASN(RD&A) is the NSPE.

Provision/Clause Use Decision Tree for Commercial Item (CI) Acquisitions



***Note**
 As used in this Decision Tree, the term “DON Matrix of Provisions/Clauses for CI Acquisitions” means the same as the “DON Matrix of FAR/DFARS and Other Government-Unique Provisions/Clauses for Commercial Item Acquisitions” used within Annex 7, Section B.

Key
 KO = Contracting Officer
 CI = Commercial Items

