

Report to Congress on Defense-Unique Laws Applicable to the Procurement of Commercial Items and Commercially Available Off-The-Shelf Items



JUNE 2016

**Office of the Under Secretary of Defense
for Acquisition, Technology, and Logistics**

The estimated cost of this report or study for the Department of
Defense is approximately \$10,000 for Fiscal Year 2016.
Generated on May 3, 2016. RefID: E-7EEA791

Report to Congress
Defense-Unique Laws Applicable to the Procurement of Commercial Items and
Commercially Available Off-The-Shelf Items

Requirements for this Report

Section 854 of the National Defense Authorization Act (NDAA) for FY 2016 (Public Law 114-92) requires that the Secretary of Defense submit to the congressional defense committees a report identifying the defense-unique provisions of law that are applicable for procurement of commercial items or commercial off-the-shelf items, both at the prime level and subcontract level. The report requires the Department to (1) discuss the impact of limiting the inclusion of clauses in contracts for commercial items or commercial off-the-shelf items to those that are required to implement law or Executive orders or are determined to be consistent with standard commercial practice and of limiting flow down of clauses in subcontracts for commercial off-the-shelf items to those that are required to implement law or Executive order; and (2) provide a listing of all standard clauses used in Federal Acquisition Regulation Part 12 contracts, including a justification for the inclusion of each. The report is due to the congressional defense committees not later than 180 days after the date of enactment of this Act or on May 23, 2016.

Background

Because of the additional rules arising out of the nature of the Government as a contracting entity, to include socio-economic obligations/goals, the Department is required to protect the public interest while assuring fair treatment to those who deal with the Government. As a result, the Government is required to include terms and conditions in its commercial contracts that would generally not be included in contracts between commercial entities. As part of the Defense Federal Acquisition Regulation Supplement (DFARS) rule making process, the Department published every provision and clause applicable to commercial acquisition for public comments. All comments were considered and dispositioned before the final rule (clause incorporation into the DFARS) was adopted.

Discussion

The attached matrix provides the current list of 85 Department of Defense (DoD) unique requirements applicable to commercial item acquisitions. Of significant importance, the Department is currently in the process of updating the regulations, via a draft DFARS rule, to implement the requirements of sections 851-853 and 855-857 of the FY 2016 NDAA. In the FY 2016 NDAA, Congress provided specific requirements for Commercial item acquisition.

Of the 85 Defense-unique requirements, 24 are provisions applicable to solicitations and the remaining 61 are unique clauses which may apply to commercial acquisitions. Of the 24 solicitation provisions, 16 were required as a result of Statutes, Executive Orders (E.O.) or Standard Commercial Practices (SCP). Of the 61 applicable clauses, 49 are required as result of a statute, E.O., or SCP. The remaining 20 clauses are not the result of statute, E.O., or SCP.

They were included because of the requirement levied to meet the Department's financial accountability obligations, protection of the public interest, or National Interests (e.g., contingency operations). Examples of clauses developed to facilitate the Department's compliance with the Chief Financial Officers Act of 1990 (Public Law 101-575) and the financial reporting requirements imposed by the Federal Accounting Standards Advisory Board were clauses 252.211-7003, Item Unique Identification and Valuation; clause 252.211-7007, Reporting of Government Furnished Property; and clause 252.211-7008, Use of Government-Assigned Serial Numbers. Clauses developed for public interest include clause 252.223-7008, Prohibition of Hexavalent Chromium, which is a known carcinogen; and clause 252.203-7003, Agency Office of the Inspector General, to report violations of Title 18 of U.S. Code or business ethics. An example of a clause developed for National Interests is clause 252.225-7043, Antiterrorism/Force Protection Policy for Defense Contractors Outside the United States, which is required to address the safety concerns of contractors supporting overseas contingencies. The impact of limiting these will reduce the Department's ability to meet its financial accountability obligations, increase our costs and administrative burden, and negatively impact the public safety. The complete list of specific applicable provisions and clauses are listed in the attachment and include the Federal Register notice number, effective date of the clause or provision, whether it was incorporated as a result of statute, E.O., or is considered a SCP, and includes the specific justification for inclusion and any flow down requirements.

Matrix

Number	FR Citation	Effective Date	Number	Clause (C)/ Provision (P)	Title	Applicable Law, EO, or SCP	Flow Down	Justification For Inclusion
1	66 FR 49862	10/1/2001	252.225-7016	C	Restriction on Acquisition of Ball and Roller Bearings	FY 2001 NDAA, Sec 805	No	Required by Statute
2	68 FR 69628	2/21/2003	252.232-7003	C	Electronic Submission of Payment Requests and Receiving Reports	FY 2001 NDAA, Sec. 1008	No	Required by Statute
3	69 FR 55989	10/1/2003	252.226-7001	C	Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns	FY 2003 NDAA, Sec. 8021/PL 107-248	Yes	Required by Statute
4	70 FR 20831	1/1/2004	252.211-7003	C	Item Unique Identification and Valuation	None	Yes	Due to Financial reporting requirements imposed by the Federal Accounting Standards Advisory Board.
5	72 FR 2633	1/22/2001	252.246-7003	C	Notification of Potential Safety Issues	FY 2004 NDAA, Sec. 8143	Yes	Due to safety and counterfeit parts issue.
6	71 FR 69489	9/1/2005	252.232-7010	C	Levies on Contract Payments	Pub. L. 108-357, Sec. 887 & Sec. 6331(h) of the Internal Revenue Code	No	Required by Statute
7	71 FR 53047	9/1/2005	252.237-7019	C	Training for Contractor Personnel Interacting with Detainees	FY 2005 NDAA, Sec. 1092	Yes	Due to national security implications, anyone (prime contractor or subcontractor) should equally receive the training.
8	73 FR 16764	6/16/2006	252.225-7040	C	Contractor Personnel Supporting U.S. Armed Forces Deployed Outside the United States	None	Yes	Provides for contractors other than private security contractor personnel to use deadly force against enemy armed forces but only in self-defense. Prevents contractors from performing any inherently Government military functions, such as preemptive attacks. Otherwise, civilians who accompany the U.S. Armed Forces lose their law of war protection.
9	72 FR 6480	5/19/2006	252.211-7006	C	Passive Radio Frequency Identification	SCP	No	Standard commercial practice to track shipments of high-priority supplies.

10	73 FR 70909	8/28/2007	252.247-7026	P	Evaluation Preference for Use of Domestic Shipyards—Applicable to Acquisition of Carriage by Vessel for DoD Cargo in the Coastwise or Noncontiguous Trade	FY 2007 NDAA, Sec. 1017	No	Required by Statute
11	75 FR 18035 & 79 FR 11342	9/15/2008 & 09/30/2013	252.225-7023	P	Preference for Products or Services from Afghanistan	FY 2008 NDAA, Sec. 886/892 FY 2013 NDAA, Sec. 826/842	No	Required by Statute
12	75 FR 18035 & 79 FR 11342	9/15/2008 & 09/30/2013	252.225-7024	C	Requirement for Products or Services from Afghanistan	FY 2008 NDAA, Sec. 886/892 FY 2013 NDAA, Sec. 826/842	No	Required by Statute
13	75 FR 18035 & 79 FR 11342	9/15/2008 & 09/30/2013	252.225-7026	C	Acquisition Restricted to Products or Services from Afghanistan	FY 2008 NDAA, Sec. 886/892 FY 2013 NDAA, Sec. 826/842	No	Required by Statute
14	74 FR 37626	7/29/2009	252.225-7008	C	Restriction on Acquisition of Specialty Metals	FY 2007 NDAA, Sec. 842 & FY 2008 NDAA, Sec. 8804/881	No	Required by Statute
15	74 FR 37626	7/29/2009	252.225-7009	C	Restriction on Acquisition of Certain Articles Containing Specialty Metals	FY 2007 NDAA, Sec. 842 & FY 2008 NDAA, Sec. 8804/882	Yes	Required by Statute
16	74 FR 37626	7/29/2009	252.225-7010	P	Commercial Derivative Military Article—Specialty Metals Compliance Certificate	FY 2007 NDAA, Sec. 842 & FY 2008 NDAA, Sec. 8804/883	No	Required by Statute
17	74 FR 37626	7/29/2009	252.247-7003	C	Pass-Through of Motor Carrier Fuel Surcharge Adjustment to the Cost Bearer	FY 2007 NDAA, Sec. 842 & FY 2008 NDAA, Sec. 8804/884	Yes	Costs will go to who incurred any surcharge whether at the prime or subcontract (any tier)
18	74 FR 59913	1/15/2009	252.203-7000	C	Requirements Relating to Compensation of Former DoD Officials	FY 2008 NDAA, Sec. 847	No	Required by Statute

19	76 FR 25569 & 77 FR 39141	6/29/2012	252.223-7008	C	Prohibition of Hexavalent Chromium	None	Yes	Restriction due to it being a known carcinogen. Codifies DoD policy for addressing the serious human health and environmental risks related to the use of HC. Rule prohibits its use unless there is no acceptable alternative.
20	76 FR 11371	7/13/2010	252.232-7011	C	Payments in Support of Emergencies and Contingency Operations	OMB Implementation of the Prompt Payment Act	No	Required by Statute
21	76 FR 14590	10/29/2010	252.246-7004	C	Safety of Facilities, Infrastructure, and Equipment for Military Operations	FY 2010 NDAA, Sec. 807	No	Required by Statute
22	77 FR 52254	8/29/2012	252.211-7007	C	Reporting of Government-Furnished Property	None	No	Due to Financial reporting requirements imposed by the Federal Accounting Standards Advisory Board. Required for asset accountability.
23	76 FR 58138	9/20/2011	252.204-7011	P	Alternative Line Item Structure	None	No	Allows offerors the opportunity to propose line item structure in solicitations for commercial items that may have not known to the Government prior to the issuance of the solicitation.
24	76 FR 44282	11/3/2010	252.237-7010	C	Prohibition on Interrogation of Detainees by Contractor Personnel	FY 2010 NDAA, Sec. 1038	Yes	National interest
25	74 FR 32839	6/6/2011	252.203-7003	C	Agency Office of the Inspector General	None	No	To provide the contractor the point of contact to report violations in Title 18 of United States Code and IAW FAR 3.1004(a).
26	77 FR 39126	6/29/2012	252.215-7007	P	Notice of Intent to Resolicit	None	No	Contracting Officer must resolicit for an additional period of at least 30 days, if the solicitation allowed fewer than 30 days and only one offer was received. Included for maximum completion.
27	77 FR 39126	6/29/2012	252.215-7008	P	Only One Offer	None	No	Required to notify that minimal additional information to determine a fair and reasonable price was received.

28	77 FR 35883	8/19/2011	252.225-7039	C	Defense Contractors Performing Private Security Functions Outside the United States	FY 2008 NDAA, Sec. 862 & DoDI 3020.50	Yes	National interest
29	77 FR 2653	6/29/2011	252.212-7002	P	Pilot Program for Acquisition of Military-Purpose Non developmental Items	FY 2011 NDAA, Sec. 866	No	Required by Statute
30	77 FR 13013 & 77 FR 30368	12/20/2011	252.225-7017	C	Photovoltaic Devices	FY 2011 NDAA, Sec. 846	No	Required by Statute
31	77 FR 13013 & 77 FR 30368	12/20/2011	252.225-7018	P	Photovoltaic Devices— Certificate	FY 2011 NDAA, Sec. 846	No	Required by Statute
32	77 FR 39140	6/29/2012	252.247-7028	C	Application for U.S Government Shipping Documentation/Instructions	None	No	Required to update the form to provide for use of both commercial and Government bills of lading.
33	78 FR 37980	6/25/2013	252.244-7000	C	Subcontracts for Commercial Items	None	Yes	Notification and flexibility for commercial terms and conditions required by the prime contractor.
34	78 FR 37980	6/25/2013	252.247-7025	C	Reflagging or Repair Work	10U.S.C. 2631(b)	No	Required by Statute
35	78 FR 37980	6/25/2013	252.247-7027	C	Riding Gang Member Requirements	FY2009 NDAA, Sec 3504	No	Required by Statute
36	79 FR 11337	2/28/2014	252.204-7013	P	Limitations on the Use or Disclosure of Information by Litigation Support Solicitation Offerors	FY 2012 NDAA, Sec. 802 (amended 10 U.S.C. 129d)	No	Required by Statute
37	79 FR 11337	2/28/2014	252.204-7014	C	Limitations on the Use or Disclosure of Information by Litigation Support Contractors	FY 2012 NDAA, Sec. 802 (amended 10 U.S.C. 129d)	Yes	Without the safeguards provided by this provision and clause, DoD could not provide adequate protection to the litigation information (including sensitive information) of the third party, and the offerors / contractors would be unaware of the potential disclosure of information to a litigation support contractor.

38	79 FR 11337	2/28/2014	252.204-7015	C	Disclosure of Information to Litigation Support Contractors	FY 2012 NDAA, Sec. 802 (amended 10 U.S.C. 129d)	Yes	Without the safeguards provided by this provision and clause, DoD could not provide adequate protection to the litigation information (including sensitive information) of the third party, and the offerors / contractors would be unaware of the potential disclosure of information to a litigation support contractor.
39	80 FR 67244	10/30/2015	252.239-7017	P	Notice of Supply Chain Risk	FY 2011 NDAA, Sec. 806 FY 2013 NDAA, Sec. 806	No	Required by Statute
40	80 FR 67244	10/30/2015	252.239-7018	C	Supply Chain Risk	FY 2011 NDAA, Sec. 806 FY 2013 NDAA, Sec. 806	No	Required by Statute
41	78 FR 65214	10/31/2013	252.215-7003	P	Requirements for Submission of Data Other Than Certified Cost or Pricing Data—Canadian Commercial Corporation	None	No	Providing additional information with regard to acquisitions in which only one offer is received and requests for data other than certified cost or pricing data is needed to determine a fair and reasonable price.
42	78 FR 65214	10/31/2013	252.215-7004	C	Requirement for Submission of Data other Than Certified Cost or Pricing Data—Modifications—Canadian Commercial Corporation	None	No	Providing additional information with regard to acquisitions in which only one offer is received and requests for data other than certified cost or pricing data is needed to determine a fair and reasonable price.
43	80 FR 4999	1/29/2015	252.222-7007	P	Representation Regarding Combating Trafficking in Persons	E.O. 13627	No	Required by Statute
44	79 FR 11342	9/30/2013	252.225-7029	C	Acquisition of Uniform Components for Afghan Military or Afghan National Police	FY 2013 NDAA, Sec. 826 and 842	No	Required by Statute

45	80 FR 51739	8/26/2015	252.204-7008	P	Compliance with Safeguarding Covered Defense Information Controls	FY 2013 NDAA, Sec. 941 FY 2015 NDAA, Sec. 1632	No	Required by Statute
46	80 FR 51739	8/26/2015	252.204-7009	C	Limitations on the Use or Disclosure of Third-Party Contractor Information	FY 2013 NDAA, Sec. 941 FY 2015 NDAA, Sec. 1632	Yes	To protect information submitted to DoD in response to a cyber incident.
47	80 FR 51739	8/26/2015	252.204-7012	C	Safeguarding Covered Defense Information and Cyber Incident Reporting	FY 2013 NDAA, Sec. 941 FY 2015 NDAA, Sec. 1632	Yes	To report penetrations of networks and information systems and allows DoD personnel access to equipment and information to assess the impact of reported penetrations
48	80 FR 51739	8/26/2015	252.239-7009	P	Representation of Use of Cloud Computing	None	No	Requires offerors to notify the Government if cloud computing services will be used and if they will be, the associated clause will be included in the contract.
49	80 FR 51739	8/26/2015	252.239-7010	C	Cloud Computing Services	None	Yes	This clause implements these policies uniformly throughout DoD when contracting for cloud services (including access, security and reporting requirements) and will help DoD mitigate the risks related to compromised information, as well as gather information for future improvements in cyber security policy.
50	79 FR 58694	9/30/2014	252.232-7014	P	Notification of Payment in Local Currency (Afghanistan)	None	No	Provides notice that host nation contractor will be paid in local currency.
51	79 FR 44313	7/31/2014	252.211-7008	C	Use of Government-Assigned Serial Numbers	None	No	Due to Financial reporting requirements imposed by the Federal Accounting Standards Advisory Board. Required for asset accountability.

52	79 FR 44313	7/31/2014	252.232-7006	C	Wide Area WorkFlow Payment Instructions	None	No	Government System for submission of payment requests and receiving reports to provided electronic payments to provide contractors in an efficient and effective manner.
53	80 FR 81467	12/30/2015	252.229-7014	C	Taxes—Foreign Contracts in Afghanistan	The Security and Defense Cooperation Agreement between the Islamic Republic of Afghanistan and the United States of America	No	Required by International Agreement
54	80 FR 81467	12/30/2015	252.229-7015	C	Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement)	The Security and Defense Cooperation Agreement between the Islamic Republic of Afghanistan and the United States of America	No	Required by International Agreement
55	80 FR 30116	5/26/2015	252.219-7000	C	Advancing Small Business Growth	FY 2014 NDAA, Sec. 1611 (10 U.S.C. 2419)	No	Required by Statute
56	79 FR 79490	8/5/2014	252.225-7049	P	Prohibition on Acquisition of Commercial Satellite Services from Certain Foreign Entities—Representations	FY 2014 NDAA, Sec. 1602	No	Required by Statute
57	80 FR 30117	5/26/2015	252.213-7000	P	Notice to Prospective Suppliers on Use of Past Performance Information Retrieval System—Statistical Reporting in Past Performance Evaluations	None	No	Necessary for the government to use best value determinations in the acquisition of supplies that are below the mandatory thresholds.
58	80 FR 51748	8/26/2015	252.225-7006	C	Acquisition of the American Flag	FY 2014 DoD Appr. Act, Sec. 8123 FY 2015 DoD Appr. Act, Sec. 8119	No	Required by Statute

59	60FR33465	9/29/1995	252.227-7013	C	Rights in Technical Data- Noncommercial Items	Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103- 355)	Yes	Retains for the Government's use, data that was paid by the Government to develop.
60	66 FR 55121	11/30/1995	252.205-7000	P	Provision of Information to Cooperative Agreement Holders	Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103- 355)	No	Required by Statute
61	66 FR 55121	11/30/1995	252.219-7003	C	Small Business Subcontracting Plan (DoD Contracts)	Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103- 355)	No	Required by Statute
62	66 FR 55121	11/1/2001	252.219-7004	C	Small Business Subcontracting Plan (Test Program)	Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103- 355)	No	Required by Statute
63	66 FR 55121	11/30/1995	252.225-7000	P	Buy American—Balance of Payments Program Certificate	Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103- 355)	No	Required by Statute
64	66 FR 55121	11/30/1995	252.225-7001	C	Buy American and Balance of Payments Program	Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103- 355)	No	Required by Statute
65	66 FR 55121	11/30/1995	252.225-7012	C	Preference for Certain Domestic Commodities	Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103- 355)	No	Required by Statute

66	66 FR 55121	11/30/1995	252.225-7015	C	Restriction on Acquisition of Hand or Measuring Tools	Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355)	No	Required by Statute
67	65 FR 55121	11/30/1995	252.225-7020	P	Trade Agreements Certificate	Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355)	No	Required by Statute
68	66 FR 55121	11/30/1995	252.225-7021		Trade Agreements	Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355)	No	Required by Statute
69	65 FR 55121	11/30/1995	252.225-7027	C	Restriction on Contingent Fees for Foreign Military Sales	Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355)	No	Required by Statute
70	65 FR 55121	11/30/1995	252.225-7028	C	Exclusionary Policies and Practices of Foreign Governments	Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355)	No	Required by Statute
71	65 FR 55121	11/30/1995	252.225-7031	P	Secondary Arab Boycott of Israel	Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355)	No	Required by Statute
72	65 FR 55121	11/30/1995	252.225-7035	P	Buy American—Free Trade Agreements—Balance of Payments Program Certificate	Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355)	No	Required by Statute
73	65 FR 55121	11/30/1995	252.225-7036	C	Buy American—Free Trade Agreements—Balance of Payments Program	Title VIII of the Federal Acquisition Streamlining Act of 1994 (PL. 103-355)	No	Required by Statute

74	65 FR 55121	11/30/1995	252.225-7037	P	Evaluation of Offers for Air Circuit Breakers	Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355)	No	Required by Statute
75	65 FR 55121	11/30/1995	252.225-7038	C	Restriction on Acquisition of Air Circuit Breakers	Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355)	No	Required by Statute
76	65 FR 55121	11/30/1995	252.225-7050	P	Disclosure of Ownership or Control by the Government of a Country that is a State Sponsor of Terrorism	Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355)	No	Required by Statute
77	65 FR 55121	11/30/1995	252.227-7015	C	Technical Data—Commercial Items	Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355)	No	Required by Statute
78	65 FR 55121	11/30/1995	252.227-7037	C	Validation of Restrictive Markings on Technical Data	Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355)	No	Required by Statute
79	65 FR 55121	11/30/1995	252.247-7022	P	Representation of Extent of Transportation by Sea	Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355)	No	Required by Statute
80	65 FR 55121	11/30/1995	252.247-7024	C	Notification of Transportation of Supplies by Sea	Title VIII of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355)	No	Required by Statute
81	64 FR 24529	6/11/1998	252.225-7043	C	Antiterrorism/Force Protection Policy for Defense Contractors Outside the United States	None	Yes	Required to address the safety concerns of contractors supporting the overseas contingencies.
82	63 FR 11522	7/11/1997	252.243-7002	C	Requests for Equitable Adjustment	10 U.S.C.2410(a)	No	Required by Statute

83	65 FR 14400	3/16/2000	252.247-7023	C	Transportation of Supplies by Sea	10 U.S.C.2631	Yes	The Clause is intended to ensure compliance with 10 U.S.C. 2631 for ocean cargoes clearly destined for DoD use, while avoiding disruption of commercial delivery systems.
84	65 FR 46625	7/31/2000	252.232-7009	C	Mandatory Payment by Government wide Commercial Purchase Card	SCP	No	Standard commercial practice to utilize purchase cards
85	77 FR 23631	4/20/2012	252.203-7005	P	Representation Relating to Compensation of Former DoD Officials	FY 2008 NDAA, Sec. 847	No	Required by Statute