

Subpart 12.4 - Unique Requirements Regarding Terms and Conditions for Commercial Products and Commercial Services

Parent topic: [Part 12 - Acquisition of Commercial Products and Commercial Services](#)

12.401 General.

This subpart provides-

(a) Guidance regarding tailoring of the paragraphs in the clause at [52.212-4](#), Contract Terms and Conditions-*Commercial Products* and *Commercial Services*, when the paragraphs do not reflect the customary practice for a particular market; and

(b) Guidance on the administration of contracts for *commercial products* or *commercial services* in those areas where the terms and conditions in [52.212-4](#) differ substantially from those contained elsewhere in the FAR.

12.402 Acceptance.

(a) The acceptance paragraph in [52.212-4](#) is based upon the assumption that the Government will rely on the contractor's assurances that the *commercial product* or *commercial service* tendered for acceptance conforms to the contract requirements. The Government *inspection* of *commercial products* or *commercial services* will not prejudice its other rights under the acceptance paragraph. Additionally, although the paragraph does not address the issue of rejection, the Government always has the right to refuse acceptance of nonconforming items. This paragraph is generally appropriate when the Government is acquiring noncomplex *commercial products* and *commercial services*.

(b) Other acceptance procedures *may* be more appropriate for the *acquisition* of complex *commercial products* or *commercial services*, or *commercial products* or *commercial services* used in critical applications. In such cases, the *contracting officer shall* include alternative *inspection* procedure(s) in an addendum and ensure these procedures and the postaward remedies adequately protect the interests of the Government. The *contracting officer must* carefully examine the terms and conditions of any express *warranty* with regard to the effect it *may* have on the Government's available postaward remedies (see [12.404](#)).

(c) The *acquisition* of *commercial products* or *commercial services* under other circumstances such as on an "as is" basis *may* also require acceptance procedures different from those contained in [52.212-4](#). The *contracting officer should* consider the effect the specific circumstances will have on the acceptance paragraph as well as other paragraphs of the clause.

12.403 Termination.

(a) *General.* The clause at 52.212-4 permits the Government to terminate a contract for *commercial products* or *commercial services* either for the convenience of the Government or for cause. However, the paragraphs in 52.212-4 entitled "Termination for the Government's Convenience" and "Termination for Cause" contain concepts which differ from those contained in the termination clauses prescribed in part 49. Consequently, the requirements of part 49 do not apply when terminating contracts for *commercial products* or *commercial services* and *contracting officers shall* follow the procedures in this section. *Contracting officers may* continue to use part 49 as guidance to the extent that part 49 does not conflict with this section and the language of the termination paragraphs in 52.212-4.

(b) *Policy.* The *contracting officer should* exercise the Government's right to terminate a contract for *commercial products* or *commercial services* either for convenience or for cause only when such a termination would be in the best interests of the Government. The *contracting officer should* consult with counsel prior to terminating for cause.

(c) Termination for cause.

(1) The paragraph in 52.212-4 entitled "Excusable Delay" requires contractors notify the *contracting officer* as soon as possible after commencement of any excusable delay. In most situations, this requirement *should* eliminate the need for a show cause notice prior to terminating a contract. The *contracting officer shall* send a cure notice prior to terminating a contract for a reason other than late delivery.

(2) The Government's rights after a termination for cause *shall* include all the remedies available to any buyer in the marketplace. The Government's preferred remedy will be to acquire similar items from another contractor and to charge the defaulted contractor with any excess reprocurement costs together with any incidental or consequential damages incurred because of the termination.

(3) When a termination for cause is appropriate, the *contracting officer shall* send the contractor a written notification regarding the termination. At a minimum, this notification *shall-*

(i) Indicate the contract is terminated for cause;

(ii) Specify the reasons for the termination;

(iii) Indicate which remedies the Government intends to seek or provide a date by which the Government will inform the contractor of the remedy; and

(iv) State that the notice constitutes a final decision of the *contracting officer* and that the contractor has the right to appeal under the Disputes clause (see 33.211).

(4) The *contracting officer*, in accordance with agency procedures, *shall* ensure that information related to termination for cause notices and any amendments are reported. In the event the termination for cause is subsequently converted to a *termination for convenience*, or is otherwise withdrawn, the *contracting officer shall* ensure that a notice of the conversion or withdrawal is reported. All reporting *shall* be in accordance with 42.1503(h).

(d) Termination for the Government's convenience.

(1) When the *contracting officer* terminates a contract for *commercial products* or *commercial services* for the Government's convenience, the contractor *shall* be paid-

- (i)
 - (A) The percentage of the contract price reflecting the percentage of the work performed prior to the notice of the termination for fixed-price or fixed-price with economic price adjustment contracts; or
 - (B) An amount for direct labor hours (as defined in the Schedule of the contract) determined by multiplying the number of direct labor hours expended before the *effective date of termination* by the hourly rate(s) in the Schedule; and
 - (ii) Any charges the contractor can demonstrate directly resulted from the termination. The contractor *may* demonstrate such charges using its standard record keeping system and is not required to comply with the cost accounting standards or the contract cost principles in [part 31](#). The Government does not have any right to audit the contractor's records solely because of the *termination for convenience*.
- (2) Generally, the parties *should* mutually agree upon the requirements of the termination proposal. The parties *must* balance the Government's need to obtain sufficient documentation to support payment to the contractor against the goal of having a simple and expeditious settlement.

12.404 Warranties.

(a) *Implied warranties.* The Government's post award rights contained in [52.212-4](#) are the implied *warranty* of merchantability, the implied *warranty* of fitness for particular purpose and the remedies contained in the acceptance paragraph.

(1) The implied *warranty* of merchantability provides that an item is reasonably fit for the ordinary purposes for which such items are used. The items *must* be of at least average, fair or medium-grade quality and *must* be comparable in quality to those that will pass without objection in the trade or market for items of the same description.

(2) The implied *warranty* of fitness for a particular purpose provides that an item is fit for use for the particular purpose for which the Government will use the items. The Government can rely upon an implied *warranty* of fitness for particular purpose when-

- (i) The seller knows the particular purpose for which the Government intends to use the item; and
- (ii) The Government relied upon the contractor's skill and judgment that the item would be appropriate for that particular purpose.

(3) *Contracting officers should* consult with legal counsel prior to asserting any *claim* for a breach of an implied *warranty*.

(b) *Express warranties.* [41 U.S.C.3307\(e\)\(5\)\(B\)](#) requires *contracting officers* to take advantage of commercial *warranties*. To the maximum extent practicable, *solicitations* for *commercial products* shall require *offerors* to *offer* the Government at least the same *warranty* terms, including *offers* of extended *warranties*, offered to the general public in customary commercial practice. *Solicitations*

may specify minimum *warranty* terms, such as minimum duration, appropriate for the Government's intended use of the item.

(1) Any express *warranty* the Government intends to rely upon *must* meet the needs of the Government. The *contracting officer should* analyze any commercial *warranty* to determine if-

(i) The *warranty* is adequate to protect the needs of the Government, *e.g.*, items covered by the *warranty* and length of *warranty*;

(ii) The terms allow the Government effective postaward administration of the *warranty* to include the identification of warranted items, procedures for the return of warranted items to the contractor for repair or replacement, and collection of product performance information; and

(iii) The *warranty* is cost-effective.

(2) In some markets, it *may* be customary commercial practice for contractors to exclude or limit the implied *warranties* contained in [52.212-4](#) in the provisions of an express *warranty*. In such cases, the *contracting officer shall* ensure that the express *warranty* provides for the repair or replacement of defective items discovered within a reasonable period of time after acceptance.

(3) Express *warranties shall* be included in the contract by addendum (see [12.302](#)).