MEMORANDUM FOR DISTRIBUTION

SUBJECT: Class Deviation – Commercial Item Omnibus Clauses for Acquisitions Using the Standard Procurement System

The attached memorandum from the Director, Defense Procurement and Acquisition Policy (DPAP) dated May 01, 2009, authorizes a deviation from the requirements of Federal Acquisition Regulations (FAR) 12.301(b)(4) and Defense FAR Supplement (DFARS) 212.301(f)(iii), and the omnibus clauses at FAR 52.212-5 and DFARS 252.212.7001. Only contracting officers who use the Standard Procurement System (SPS) to contract for commercial items may deviate from these FAR and DFARS requirements and clauses. This deviation is in effect until April 30, 2014, unless rescinded earlier.

The DPAP deviation permits contracting officers to use the SPS clause logic capability to select the clauses that would apply to a solicitation and contract for commercial items. When the SPS clause logic is used, the deviation clauses under the attached memorandum, as well as applicable clauses listed in the omnibus FAR and DFARS clauses, should automatically populate into the solicitation and contract. Nevertheless, contracting officers must ensure the deviation clauses, including all other applicable clauses, are incorporated in solicitations and contracts for commercial items instead of the two omnibus FAR and DFARS clauses.

Please address inquiries regarding this memorandum to Evelyn Ortiz who can be reached at (703) 614-9640 or via email at evelyn.ortiz@navy.mil.

Elliott B. Branch
Executive Director
DASN(A&LM)

Attachments:
As stated

Distribution:
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SUBJECT: Class Deviation – Commercial Item Omnibus Clauses for Acquisitions
Using the Standard Procurement System

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MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (POLICY AND PROCUREMENT), ASA (ALT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION & LOGISTICS MANAGEMENT), ASN (RDA)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING), SAF/AQC
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DOD FIELD ACTIVITIES

SUBJECT: Class Deviation—Commercial Item Omnibus Clauses for Acquisitions Using the Standard Procurement System

When using the Standard Procurement System (SPS) to contract for commercial items, all Department of Defense contracting activities may deviate from the requirements in Federal Acquisition Regulation (FAR) 12.301(b)(4), the clause at FAR 52.212-5, Defense FAR Supplements (DFARS) 212.301(f)(iii), and the clause at DFARS 252.212-7001.

The clauses at FAR 52.212-5 and DFARS 252.212-7001 require the contracting officer to “check a box” to identify the clauses that are applicable to the specific acquisition of commercial items. Rather than requiring the contracting officers to “check the applicable clauses,” SPS has a clause logic capability that automatically selects the clauses under FAR 52.212-5 and DFARS 252-212-7001.

Contracting officers may use the SPS logic capability to automatically select the clauses that are applicable to the specific solicitation and contract. Contracting officers must ensure that the attached deviation clauses are incorporated into these solicitations and contracts because the deviation clauses fulfill the statutory requirements on auditing and subcontract clauses applicable to commercial items. The deviation also authorizes
adjustments to these deviation clauses required by future changes to the clauses at 52.212-5 or 252.212-7001 that are published in the FAR or DFARS.

This class deviation is effective May 1, 2009, and remains in effect until April 30, 2014, or until otherwise rescinded. My point of contact is Ms. Angie Sawyer and she can be reached on (703) 602-8384, or angela.sawyer@osd.mil.

Shay D. Assad
Director, Defense Procurement
and Acquisition Policy

Attachment:
As stated
Class Deviation—Commercial Item Omnibus Clauses for
Acquisitions Using the Standard Procurement System

Tracking Number 2009-00005

FAR 52.212-5 Contract Terms and Conditions Required to
Implement Statutes or Executive Orders—Commercial Items
(Apr 2009) (DEVIA TION)

(a) Comptroller General Examination of Record. The Contractor shall comply with the provisions of this paragraph (a) if this contract was awarded using other than sealed bid, is in excess of the simplified acquisition threshold, and does not contain the clause at 52.215-2, Audit and Records—Negotiation.

(1) The Comptroller General of the United States, or an authorized representative of the Comptroller General, shall have access to and right to examine any of the Contractor’s directly pertinent records involving transactions related to this contract.

(2) The Contractor shall make available at its offices at all reasonable times the records, materials, and other evidence for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified in FAR Subpart 4.7, Contractor Records Retention, of the other clauses of this contract. If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement. Records relating to appeals under the disputes clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims are finally resolved.

(3) As used in this clause, records include books, documents, accounting procedures and practices, and other data, regardless of type and regardless of form. This does not require the Contractor to create or maintain any record that the Contractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(b) (1) Notwithstanding the requirements of any other clause in this contract, the Contractor is not required to flow down any FAR clause, other than those in this paragraph (b) (1) in a subcontract for commercial items. Unless otherwise indicated below, the extent of the flow down shall be as required by the clause—
(i) 52.203-13, Contractor Code of Business Ethics and Conduct (Dec 2008) (Pub. L. 110-252, Title VI, Chapter 1 (41 U.S.C. 251 note)).

(ii) 52.219-8, Utilization of Small Business Concerns (May 2004) (15 U.S.C. 637(d)(2) and (3)), in all subcontracts that offer further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds $550,000 ($1,000,000 for construction of any public facility), the subcontractor must include 52.219-8 in lower tier subcontracts that offer subcontracting opportunities.

(iii) Reserved.

(iv) 52.222-26, Equal Opportunity (Mar 2007) (E.O. 11246).


(vii) 52.222-39, Notification of Employee Rights Concerning Payment of Union Dues or Fees (Dec 2004) (E.O. 13201).


(ix) 52.222-50, Combating Trafficking in Persons (Feb 2009) (22 U.S.C. 7104(g)). Alternate I (Aug 2007) of 52.222-50 (22 U.S.C. 7104(g)).


(xii) 52.222-54, Employment Eligibility Verification (Jan 2009).

(xiii) 52.226-6, Promoting Excess Food Donation to Nonprofit Organizations (Mar 2009) (Pub. L. 110-247). Flow down required in accordance with paragraph (e) of FAR clause 52.226-6.

(xiv) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (Feb 2006) (46 U.S.C. Appx. 1241(b) and 10 U.S.C. 2631). Flow down required in accordance with paragraph (d) of FAR clause 52.247-64.
(2) While not required, the contractor may include in its subcontracts for commercial items a minimal number of additional clauses necessary to satisfy its contractual obligations.

(End of clause)

Alternate I (Feb 2000) (Deviation). As prescribed in 12.301(b)(4), delete paragraph (a) from the basic clause, redesignate paragraph (b)(1) as paragraph (a), and redesignate paragraphs (b)(1)(i) through (b)(1)(xiv) as paragraphs (a)(1) through (a)(14) and redesignate paragraph (b)(2) as paragraph (b).

Alternate II (Apr 2009) (Deviation). As prescribed in 12.301(b)(4)(ii), substitute the following paragraphs (a)(1) and (b)(1) for paragraphs (a)(1) and (b)(1) of the basic clause as follows:

(a)(1) The Comptroller General of the United States, an appropriate Inspector General appointed under section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. App.), or an authorized representative of either of the foregoing officials shall have access to and right to—

(i) Examine any of the Contractor's or any subcontractors' records that pertain to, and involve transactions relating to, this contract; and

(ii) Interview any officer or employee regarding such transactions.

(b)(1) Notwithstanding the requirements of any other clause in this contract, the Contractor is not required to flow down any FAR clause in a subcontract for commercial items, other than—

(i) Paragraph (a) of this clause. This paragraph flows down to all subcontracts, except the authority of the Inspector General under paragraph (a)(1)(ii) does not flow down; and

(ii) Those clauses listed in this paragraph (b)(1). Unless otherwise indicated below, the extent of the flow down shall be as required by the clause—

(A) 52.203-13, Contractor Code of Business Ethics and Conduct (Dec 2008) (Pub. L. 110-252, Title VI, Chapter 1 (41 U.S.C. 251 note)).


(C) 52.219-8, Utilization of Small Business Concerns (May 2004) (15 U.S.C. 637(d)(2) and (3)), in
all subcontracts that offer further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds $550,000 ($1,000,000 for construction of any public facility), the subcontractor must include 52.219-8 in lower tier subcontracts that offer subcontracting opportunities.

(D) 52.222-26, Equal Opportunity (Mar 2007) (E.O. 11246).


(G) 52.222-39, Notification of Employee Rights Concerning Payment of Union Dues or Fees (Dec 2004) (E.O. 13201).


(I) 52.222-50, Combating Trafficking in Persons (Feb 2009) (22 U.S.C. 7104(g)).


(L) 52.222-54, Employment Eligibility Verification (Jan 2009).

(M) 52.226-6, Promoting Excess Food Donation to Nonprofit Organizations. (Mar 2009) (Pub. L. 110-247). Flow down required in accordance with paragraph (e) of FAR clause 52.226-6.

(N) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (Feb 2006) (46 U.S.C. Appx. 1241(b) and 10 U.S.C. 2631). Flow down required in accordance with paragraph (d) of FAR clause 52.247-64.
In addition to the clauses listed in paragraph (b) of the Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercial Items clause of this contract (FAR 52.212-5) (Apr 2009) (Deviation), the Contractor shall include the terms of the following clauses, if applicable, in subcontracts for commercial items or commercial components, awarded at any tier under this contract:


(End of clause)