## 12.404 Warranties.

- (a) *Implied warranties*. The Government's post award rights contained in <u>52.212-4</u> 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 <u>52.212-4</u> 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).

**Parent topic:** <u>Subpart 12.4 - Unique Requirements Regarding Terms and Conditions for Commercial Products and Commercial Services</u>