

## 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](#)).

**Parent topic:** [Subpart 12.4 - Unique Requirements Regarding Terms and Conditions for Commercial Products and Commercial Services](#)