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SUBCHAPTER A—GENERAL

PART 201—FEDERAL ACQUISITION REGULATIONS SYSTEM

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AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36284, July 31, 1991, unless otherwise noted.

Subpart 201.1—Purpose, Authority, Issuance

201.103 Applicability.

The FAR and the Defense Federal Acquisition Regulation Supplement (DFARS) also apply to purchases and contracts by DoD contracting activities made in support of foreign military sales or North Atlantic Treaty Organization cooperative projects without regard to the nature or sources of funds obligated, unless otherwise specified in this regulation.

201.104 Issuance.

201.104–3 Copies.

Copies of the DFARS in loose-leaf and CFR form may be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402–9325. Purchase of a copy of DFARS includes a subscription for Defense Acquisition Circulars.

Subpart 201.2—Administration

201.201 Maintenance of the FAR.

201.201–1 The two councils.

(c) The composition and operation of the DAR Council is prescribed in DoD Directive 5000.35, Defense Acquisition Regulatory System.

(d)(i) Departments and agencies process proposed revisions of FAR or DFARS through channels to the Director of the DAR Council. Process the proposed revision as a memorandum in the following format, addressed to the Director, DAR Council, OUSD(A&T), 3062 Defense Pentagon, Washington, DC 20301–3062; datafax (703) 602–0350:

I. Problem: Succinctly state the problem created by current FAR and/or DFARS coverage and describe the factual and/or legal reasons necessitating regulatory change.

II. Recommendation: Identify the FAR and/or DFARS citations to be revised. Attach as TAB A a copy of the text of the existing coverage, conformed to include the proposed additions and deletions. Indicate deleted coverage with dashed lines through the current words being deleted and insert proposed language in brackets at the appropriate locations within the existing coverage. If the proposed deleted portion is extensive, it may be outlined by lines forming a box with diagonal lines drawn connecting the corners.

III. Discussion: Include a complete, convincing explanation of why the change is necessary and how the recommended revision will solve the problem. Address advantages and disadvantages of the proposed revision, as well as any cost or administrative impact on Government activities and contractors. Identify any potential impact of the change on automated systems, e.g., automated financial and procurement systems. Provide any other background information that would be helpful in explaining the issue.

IV. Collaterals: Address the need for public comment (FAR 1.301(b) and subpart 1.5), the Paperwork Reduction Act, and the Regulatory Flexibility Act (FAR 1.301(c)).

V. Deviations: If a recommended revision of DFARS is a FAR deviation, identify the deviation and include under separate TAB a justification for the deviation, which addresses the requirements of 201.402(3). The justification should be in the form of a memorandum for the USD(A&T)DP.

(ii) The public may offer proposed revisions of FAR or DFARS by submission of a memorandum, in the format (including all of the information) prescribed in paragraph (d)(i) of this subsection, to the Director of the DAR Council.

[56 FR 36284, July 31, 1991, as amended at 60 FR 61591, Nov. 30, 1995; 61 FR 50451, Sept. 26, 1996]

Subpart 201.3—Agency Acquisition Regulations

201.301 Policy.

(a) DoD implementation and supplementation of the FAR is issued in the Defense Federal Acquisition Regulation Supplement (DFARS) under authorization and subject to the authority, direction, and control of the Secretary of Defense.

(b) When FEDERAL REGISTER publication is required for any policy, procedure, clause, or form, the department or agency requesting USD(A&T) approval for use of the policy, procedure, clause, or form (see 201.304(1)) must include an analysis of the public comments in the request for approval.

[56 FR 36284, July 31, 1991, as amended at 60 FR 61591, Nov. 30, 1995]

201.303 Publication and codification.

(a)(i) The DFARS is codified under chapter 2 in title 48, Code of Federal Regulations.

(ii) To the extent possible, all DFARS text (whether implemental or supplemental) is numbered as if it were implemental. Supplemental numbering is used only when the text cannot be integrated intelligibly with its FAR counterpart.

(A) Implemental numbering is the same as its FAR counterpart, except when the text exceeds one paragraph, the subdivisions are numbered by skipping a unit in the FAR 1.104–2(b)(2) prescribed numbering sequence. For example, three paragraphs implementing FAR 19.501 would be numbered 219.501 (1), (2), and (3) rather than (a), (b), and (c). Three paragraphs implementing FAR 19.501(a) would be numbered 219.501(a) (i), (ii), and (iii) rather than (a) (1), (2), and (3). Further subdivision of the paragraphs follows the prescribed numbering sequence, e.g., 219.501(1)(i)(A)(*1*)(*i*).

(B) Supplemental numbering is the same as its FAR counterpart, with the addition of a number of 70 and up or (S–70) and up. Parts, subparts, sections, or subsections are supplemented by the addition of a number of 70 and up. Lower divisions are supplemented by the addition of a number of (S–70) and up. When text exceeds one paragraph, the subdivisions are numbered using the FAR 1.104–2(b)(2) prescribed sequence, without skipping a unit. For example, DFARS text supplementing FAR 19.501 would be numbered 219.501–70. Its subdivisions would be numbered 219.501–70 (a), (b), and (c).

(C) Subdivision numbering below the 4th level does not repeat the numbering sequence. It uses italicized Arabic numbers and then italicized lower case Roman numerals.

(D) An example of DFARS numbering is in Table 1–1, DFARS Numbering.

(iii) Department/agency and component supplements must parallel the FAR and DFARS numbering, except department/agency supplemental numbering uses subsection numbering of 90 and up, instead of 70 and up.

TABLE 1–1—DFARS NUMBERING

FAR	Is implemented as	Is supplemented as
19	219	219.70
19.5	219.5	219.570
19.501	219.501	219.501–70
19.501–1	219.501–1	219.501–1–70
19.501–1(a)	219.501–1(a)	219.501–1(a)(S–70)
19.501–1(a)(1)	219.501–1(a)(1)	219.501–1(a)(1)(S–70)

201.304 Agency control and compliance procedures.

Departments/agencies and their component organizations may issue acquisition regulations as necessary to implement or supplement the FAR or DFARS.

(1) Approval of the USD(A&T) is required, before inclusion in a department/agency or component supplement or any other contracting regulatory document such as a policy letter, or clause book, of any policy, procedure, clause, or form which—

(i) Has a significant effect beyond the internal operating procedures of the agency; or

(ii) Has a significant cost or administrative impact on contractors or offerors.

(2) The USD(A&T) has delegated authority to the USD(A&T)DP to approve or disapprove the policies, procedures, clauses, and forms subject to paragraph (1) of this section.

(3) Approval of USD(A&T)DP is required for any class deviation (as defined in FAR subpart 1.4) from the FAR or DFARS, before its inclusion in a department/agency or component supplement or any other contracting regulatory document such as a policy letter or clause book.

(4) Each department and agency shall develop and, upon approval by USD(A&T)DP, implement, maintain, and comply with a plan for controlling the use of clauses other than those prescribed by FAR or DFARS.

(5) Departments/agencies submit requests for the USD(A&T) and USD(A&T)DP approvals required by this section through the Director of the DAR Council.

(6) Revisions to the DFARS are issued through Defense Acquisition Circulars or Departmental Letters.

(i) Defense Acquisition Circulars—

(A) Are issued on a quarterly basis to all recipients of the DFARS.

(B) Are published in the FEDERAL REGISTER.

(C) Include, in addition to DFARS revisions, policies, directives, and informational items.

(D) Include the effective dates for use of the revisions, policies, or directives. The effective date means the date on which the revisions, policies, or directives must be applied. Unless stated otherwise in the circular, any new or revised clauses, provisions, or forms must be included in solicitations issued on or after that date.

(ii) Departmental Letters—

(A) Are issued as necessary to the departments and agencies when time is of essence in disseminating a revision, policy, or directive.

(B) Are effective until the revision, policy, or directive is superseded by publication of the material in a Federal Acquisition Circular, Defense Acquisition Circular, or other directive or is specifically withdrawn.

[56 FR 36284, July 31, 1991, as amended at 60 FR 61591, Nov. 30, 1995]

Subpart 201.4—Deviations From the FAR

201.402 Policy.

(1) The Director of Defense Procurement, Office of the Under Secretary of Defense (Acquisition & Technology), USD(A&T)DP, is the approval authority within the DoD for—

(i) Any individual deviation from—

(A) FAR/DFARS Section 3.104, Procurement integrity;

(B) FAR/DFARS Subpart 27.4, Rights in Data and Copyrights;

(C) FAR/DFARS Subpart 31.1, Applicability (contract cost principles);

(D) FAR/DFARS Subpart 31.2, Contracts with Commercial Organizations; or

(E) FAR/DFARS Part 32, Contract Financing (except 32.7, 32.8, and the payment clauses prescribed by 32.1).

(ii) Any class deviation.

(2) Individual deviations.

(i) Except as provided in paragraph (2)(ii) of this section, individual deviations, other than those in paragraph (1)(i) of this section, must be approved in accordance with the department/agency plan prescribed by 201.304(4).

(ii) Contracting officers outside the United States are authorized to deviate from prescribed non-statutory FAR and DFARS clauses when contracting for support services, supplies, or construction, with the governments of North Atlantic Treaty Organization (NATO) countries or other allies (as described in 10 U.S.C. 2341(2)), or with United Nations or NATO organizations.

This authority shall be exercised only if such governments or organizations will not agree to the standard clauses.

(3) Submit requests for deviation approval through department/agency channels to the approval authority in paragraph (1) or (2), as appropriate. Submit deviations which require USD(A&T)DP approval through the Director of the DAR Council. At a minimum, each request must—

(i) Identify the department/agency, and component if applicable, requesting the deviation;

(ii) Identify the FAR or DFARS citation from which a deviation is needed, state what is required by that citation, and indicate whether an individual or class deviation is requested;

(iii) Describe the deviation and indicate which of paragraphs (a) through (f) of FAR 1.401 best categorizes the deviation.

(iv) State whether the deviation will have a significant effect beyond the internal operating procedures of the agency and/or a significant cost or administrative impact on contractors or offerors, and give reasons to support the statement;

(v) State the period of time for which the deviation is required;

(vi) State whether approval for the same deviation has been received previously, and if so, when;

(vii) State whether the proposed deviation was published (see FAR subpart 1.5 for publication requirements) in the FEDERAL REGISTER and provide analysis of comments;

(viii) State whether the request for deviation has been reviewed by legal counsel, and if so, state results; and

(ix) Give detailed rationale for the request. State what problem or situation will be avoided, corrected, or improved if request is approved.

[56 FR 36284, July 31, 1991, as amended at 60 FR 61591, Nov. 30, 1995; 61 FR 50451, Sept. 26, 1996]

201.403 Individual deviations.

See approval requirements in 201.402.

201.404 Class deviations.

See approval requirements in 201.402.

Subpart 201.6—Contracting Authority and Responsibilities

201.602 Contracting officers.

201.602–2 Responsibilities.

Contracting officers may designate qualified personnel as their authorized representatives to assist in the technical monitoring or administration of a contract. A contracting officer's representative (COR)—

(1) Must be a Government employee, unless otherwise authorized in agency regulations.

(2) Must be qualified by training and experience commensurate with the responsibilities to be delegated in accordance with department/agency guidelines.

(3) May not be delegated responsibility to perform functions at a contractor's location that have been delegated under FAR 42.202(a) to a contract administration office.

(4) May not be delegated authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract.

(5) Must be designated in writing, and a copy furnished the contractor and the contract administration office,—

(i) Specifying the extent of the COR's authority to act on behalf of the contracting officer;

(ii) Identifying the limitations on the COR's authority;

(iii) Specifying the period covered by the designation;

(iv) Stating the authority is not redelegable; and

(v) Stating that the COR may be personally liable for unauthorized acts.

(6) Must maintain a file for each contract assigned. This file must include, as a minimum—

(i) A copy of the contracting officer's letter of designation and other documentation describing the COR's duties and responsibilities; and

(ii) Documentation of actions taken in accordance with the delegation of authority.

201.602–70 Contract clause.

Use the clause at 252.201–7000, Contracting Officer's Representative, in solicitations and contracts when appointment of a contracting officer's representative is anticipated.

201.603 Selection, appointment, and termination of appointment.

201.603–2 Selection.

(1) Pursuant to 10 U.S.C. 1724, beginning October 1, 1993, in order to qualify to serve as a contracting officer with authority to award or administer contracts for amounts above the small purchase threshold in FAR 13.000, a person must—

(i) Have completed all mandatory contracting courses required for a contracting officer at the grade level, or in the position within the grade of the General Schedule in which the person is serving;

(ii) Have at least two years experience in a contracting position;

(iii) Have—

(A) Received a baccalaureate degree from an accredited educational institution;

(B) Completed at least 24 semester credit hours, or equivalent, of study from an accredited institution of higher education in any of the following disciplines: Accounting, business finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, and organization and management; or

(C) Passed an examination considered to demonstrate skills, knowledge, or abilities comparable to that of an individual who has completed at least 24 semester credit hours, or equivalent, of study from an accredited institution of higher education in any of the disciplines in paragraph (1)(iii)(B) of this subsection; and

(iv) Meet such additional requirements, based on the dollar value and complexity of the contracts awarded or administered in the position as may be established by the Secretary of Defense.

(2) The requirements in 201.603–2(1)(iii) do not apply to any employee who, as of October 1, 1991, had at least 10 years experience in acquisition positions, in comparable positions in other government agencies or the private sector, or in similar positions in which the individual obtained experience directly relevant to the field of contracting.

(3) The requirements in 201.603–2(1) do not apply to any employee for purposes of qualifying to serve in the position in which the employee is serving on October 1, 1993, or any other position in the same grade and involving the same level of responsibilities as the position in which the employee is serving on that date.

(4) Waivers may be authorized. Information on waivers is contained in DoD Manual 5000.52–M, Career Development Program for Acquisition Personnel.

[58 FR 28463, May 13, 1993]

201.603–3 Appointment.

Certificates of Appointment executed under the Armed Services Procurement Regulation or the Defense Acquisition Regulation have the same effect as if they had been issued under FAR.

PART 202—DEFINITIONS OF WORDS AND TERMS

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

Subpart 202.1—Definitions

202.101 Definitions.

Contracting activity for DoD also means elements designated by the director of a defense agency which has been delegated contracting authority through its agency charter. DoD contracting activities are—

DEPARTMENT OF DEFENSE

Real Estate and Facilities Directorate, Washington Headquarters Services
Defense Evaluation Support Activity
Department of Defense Office of Dependents Schools
Office of Civilian Health and Medical Program of the Uniformed Services

ARMY

Contract Support Agency
Office of the Deputy Chief of Staff for Procurement, Headquarters, U.S. Army Materiel Command
Armament Munitions and Chemical Command
Missile Command

Research Laboratory
Communications-Electronics Command
Troop Support Agency
Troop Support Command
Tank-Automotive Command
Aviation Systems Command
Training and Doctrine Command
Test and Evaluation Command
Forces Command
Health Services Command
Military District of Washington
U.S. Army, Europe
National Guard Bureau
Corps of Engineers
Information Systems Command
Medical Research and Development Command
U.S. Army, Pacific
Military Traffic Management Command
Space and Strategic Defense Command
Eighth U.S. Army
Depot System Command
Intelligence and Security Command
U.S. Army South
Defense Supply Service—Washington
Directorate of Information Systems for Command, Control, Communications and Computers, Office of the Secretary of the Army
U.S. Army Special Operations Command

NAVY

Deputy, Acquisition and Business Management, Office of the Assistant Secretary of the Navy (Research, Development, and Acquisition)
Directorate of Procurement Policy, Office of the Assistant Secretary of the Navy (Research, Development, and Acquisition)
Naval Air Systems Command
Space and Naval Warfare Systems Command
Naval Facilities Engineering Command
Naval Inventory Control Point
Naval Sea Systems Command
Naval Supply Systems Command
Office of Naval Research
Military Sealift Command
Strategic Systems Programs
Headquarters, U.S. Marine Corps
Marine Corps Systems Command
Installations and Logistics, Headquarters, U.S Marine Corps

AIR FORCE

Office of the Deputy Assistant Secretary (Contracting)
Air Force Materiel Command
Air Combat Command
Air Mobility Command
Air Education and Training Command
Pacific Air Forces
United States Air Forces in Europe
Air Force Space Command

DEFENSE ADVANCED RESEARCH PROJECTS AGENCY

Office of the Deputy Director, Management

DEFENSE INFORMATION SYSTEMS AGENCY

Headquarters, Defense Information Systems Agency
Defense Commercial Communications Office

DEFENSE INTELLIGENCE AGENCY

Office of Procurement

DEFENSE LOGISTICS AGENCY

Office of the Executive Director, Contract Management
Office of the Executive Director, Contracting
Defense Supply Centers
Defense Personnel Support Center

DEFENSE MAPPING AGENCY

Headquarters, Office of Acquisition, Installations and Logistics

DEFENSE SPECIAL WEAPONS AGENCY

Headquarters, Defense Special Weapons Agency

NATIONAL SECURITY AGENCY

Headquarters, National Security Agency

ON-SITE INSPECTION AGENCY

Acquisition Management Office

BALLISTIC MISSILE DEFENSE ORGANIZATION

Headquarters, Ballistic Missile Defense Organization

UNITED STATES SPECIAL OPERATIONS COMMAND

Headquarters, United States Special Operations Command

Contracting officer's representative means an individual designated and authorized in writing by the contracting officer to perform specific technical or administrative functions.

Departments and agencies, as used in DFARS, means the military departments and the defense agencies. The military departments are the Departments of the Army, Navy, and Air Force (the Marine Corps is a part of the Department of the Navy). The defense agencies are the Defense Advanced Research Projects Agency, the Defense Commissary Agency, the Defense Information Systems Agency, the Defense Intelligence Agency, the Defense Investigative Service, the Defense Logistics Agency, the Defense Mapping Agency, the Defense Special Weapons Agency, the National Security Agency, the On-Site Inspection Agency, the Ballistic Missile Defense Organization, and the

United States Special Operations Command.

Department of Defense (DoD), as used in DFARS, means the Department of Defense, the military departments, and the defense agencies.

Executive agency means for DoD, the Department of Defense, the Department of the Army, the Department of the Navy, and the Department of the Air Force.

Head of the agency, means for DoD, the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force. Subject to the direction of the Secretary of Defense, the Under Secretary of Defense (Acquisition), and the Director of Defense Procurement, the directors of the defense agencies have been delegated authority to act as head of the agency for their respective agencies (i.e., to perform functions under the FAR or DFARS reserved to a head of agency or agency head), except for such actions that by terms of statute, or any delegation, must be exercised within the Office of the Secretary of Defense.

Senior procurement executive, means for DoD—

Department of Defense (including the defense agencies)—Under Secretary of Defense (Acquisition & Technology);

Department of the Army—Assistant Secretary of the Army (Research, Development and Acquisition);

Department of the Navy—Assistant Secretary of the Navy (Research, Development and Acquisition);

Department of the Air Force—Assistant Secretary of the Air Force (Acquisition).

The directors of the defense agencies have been delegated authority to act as senior procurement executive for their respective agencies, except for such actions that by terms of statute, or any delegation, must be exercised by the Under Secretary of Defense (Acquisition & Technology).

[56 FR 36287, July 31, 1991, as amended at 56 FR 67212, Dec. 30, 1991; 57 FR 42629, Sept. 15, 1992; 59 FR 27668, May 27, 1994; 60 FR 29497, June 5, 1995; 60 FR 61591, Nov. 30, 1995; 61 FR 7741, Feb. 29, 1996; 61 FR 50451, Sept. 26, 1996]

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Sec.

Subpart 203.1—Safeguards

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Subpart 203.7—Voiding and Rescinding Contracts

203.703 Authority.

Subpart 203.70—Contractor Standards of Conduct

203.7000 Policy.
203.7001 Procedures.
203.7002 Contract clause.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36288, July 31, 1991, unless otherwise noted.

Subpart 203.1—Safeguards

203.103 Independent pricing.

203.103–2 Evaluating the certification.

(b)(3) The contracting officer also shall report the matter in accordance with 209.406–3 and DoDD 7050.5, Coordination of Remedies for Fraud and Corruption Related to Procurement Activities.

203.104 Procurement integrity.

203.104–4 Definitions.

(c)(2) Each order under a basic ordering agreement is a separate procurement action.

203.104–5 Disclosure of proprietary and source selection information.

(e)(4) For purposes of FAR 3.104–5(e)(4) only, DoD follows the notification procedures in FAR 27.404(h). However, the first sentence in FAR 27.404(h) does not apply to DoD.

203.170 Statutory prohibitions on compensation to former DoD employees.

203.170–1 Policy.

(a) 10 U.S.C. 2397b prohibits DoD officials who left DoD service on or after April 16, 1987, and who, while serving with the DoD, performed acquisition related functions in connection with a major defense contractor, from accepting compensation from that contractor for a period of two years after the officials have left service with the DoD. Additional DoD implementation of the statute is in DoD Directive 5500.7, Standards of Conduct. (See the clause at 252.203–7000, Statutory Prohibition on Compensation to Former Department of Defense Employees, for definition of terms.) The prohibitions in 10 U.S.C. 2397b do not apply to contractors that supply only commercial items to DoD.

(b) Section 507 of the Ethics Reform Act of 1989 suspended the prohibitions of 10 U.S.C. 2397b from December 1, 1989, to November 30, 1990. Section 815 of the 1991 DoD Authorization Act (Pub. L. 101–510) continued the suspension from December 1, 1990, through May 31, 1991. During the period of the suspension, the clause which appeared at 252.203–7002, Statutory Compensation Prohibitions and Reporting Requirements Relating to Certain Former Department of Defense (DoD) Employees, was inserted in solicitations and contracts, but the provision of the clause that prohibited the offering of compensation to a person if the compensation would violate 10 U.S.C. 2397b, and the remedies for violating that provision, were not applied.

[56 FR 36288, July 31, 1991, as amended at 60 FR 61591, Nov. 30, 1995]

203.170–2 Reporting requirements.

Paragraph (c) of the clause at 252.203–7000, Statutory Prohibitions on Compensation to Former Department of Defense Employees, requires major defense contractors to report on the employment of certain former DoD employees.

203.170–3 Penalties.

(a) Major defense contractors are subject to the following penalties for knowing failure to comply with the statute, the contractual prohibition, or the reporting requirements—

(1) Civil fines up to $500,000 for knowingly offering or providing compensation to another person with knowledge that acceptance of that compensation is or would be in violation of the statute.

(2) Liquidated damages in the amount of either $100,000 or three times the amount of compensation paid by the contractor to the former DoD official, whichever is greater, for failure to comply with the contract prohibition.

(3) An administrative penalty not to exceed $10,000 for failure to report as required by the statute and as implemented in the clause at 252.203–7000, Statutory Prohibitions on Compensation to Former Department of Defense Employees.

(b) Liquidated damages will be assessed in accordance with agency procedures in coordination with the Designated Agency Ethics Official.

203.170–4 Contract clause.

Use the clause at 252.203–7000, Statutory Prohibitions on Compensation to

Former Department of Defense Employees, in all solicitations and contracts expected to exceed $100,000, except solicitations and contracts for commercial items.

[60 FR 61591, Nov. 30, 1995]

Subpart 203.2—Contractor Gratuities to Government Personnel

203.203 Reporting suspected violations of the Gratuities clause.

Report suspected violations of the Gratuities clause in accordance with 209.406–3 and DoDD 7050.5, Coordination of Remedies for Fraud and Corruption Related to Procurement Activities.

Subpart 203.3—Reports of Suspected Antitrust Violations

203.301 General.

(b) Report suspected antitrust violations in accordance with 209.406–3 and DoDD 7050.5, Coordination of Remedies for Fraud and Corruption Related to Procurement Activities.

Subpart 203.4—Contingent Fees

203.409 Misrepresentations or violations of the Covenant Against Contingent Fees.

(b) Report suspected fraud or other criminal conduct in accordance with 209.406–3 and DoDD 7050.5, Coordination of Remedies for Fraud and Corruption Related to Procurement Activities.

Subpart 203.5—Other Improper Business Practices

203.502 Subcontractor kickbacks.

Report suspected violations of the Anti-Kickback Act in accordance with 209.406–3 and DoDD 7050.5, Coordination of Remedies for Fraud and Corruption Related to Procurement Activities.

203.502–2 General.

(h) The DoD Inspector General has designated Special Agents of the following investigative organizations as representatives for conducting inspections and audits under the Anti-Kickback Act of 1986:

(i) U.S. Army Criminal Investigation Command.

(ii) Naval Criminal Investigative Service.

(iii) Air Force Office of Special Investigations.

(iv) Defense Criminal Investigative Service.

[56 FR 36288, July 31, 1991, as amended at 60 FR 29497, June 5, 1995]

203.570 Employment prohibitions on persons convicted of fraud or other DoD contract-related felonies.

203.570–1 Scope.

This subpart prescribes policies and procedures to implement 10 U.S.C. 2408.

203.570–2 Policy.

(a) Contractors or subcontractors shall not knowingly allow a person, convicted after September 29, 1988, of fraud or any other felony arising out of a contract with the DoD, to serve—

(1) In a management or supervisory capacity on any DoD contract or first-tier subcontract; or,

(2) On its board of directors; or

(3) As a consultant, agent, or representative.

(b) The period covered by the prohibition in paragraph (a) of this subsection is for five years from the date of conviction unless waived in the interest of national security by the agency head or designee.

203.570–3 Waiver.

(a) The contracting officer shall—

(1) Review any request for waiver; and

(2) Deny the request if the contracting officer decides the waiver is not required in the interests of national security; or

(3) Forward the request to the head of the agency or designee for approval if the contracting officer decides the waiver may be in the interest of national security.

(b) The head of the agency or designee shall report all waivers granted, and the reasons for granting the waiver, to the Under Secretary of Defense (Acquisition), who will forward the report to Congress as required by 10 U.S.C. 2408(a)(3).

203.570–4 Reporting.

When a Defense contractor or first-tier subcontractor is found in violation of the prohibition in 203.570–2, the contracting officer shall report the matter in accordance with 209.406–3 and DoDD 7050.5, Coordination of Remedies for Fraud and Corruption Related to Procurement Activities.

203.570–5 Contract clause.

Use the clause at 252.203–7001, Special Prohibition on Employment, in all solicitations and contracts exceeding the simplified acquisition threshold in FAR part 13, except solicitations and contracts for commercial items.

[60 FR 61592, Nov. 30, 1995]

Subpart 203.7—Voiding and Rescinding Contracts

203.703 Authority.

The authority to act for the agency head under this subpart is limited to a level no lower than an official who is appointed by and with the advice of the Senate, without power of redelegation. For the defense agencies, for purposes of this subpart, the agency head designee is the Under Secretary of Defense (Acquisition & Technology).

[56 FR 36288, July 31, 1991, as amended at 60 FR 61592, Nov. 30, 1995]

Subpart 203.70—Contractor Standards of Conduct

203.7000 Policy.

Government contractors must conduct themselves with the highest degree of integrity and honesty. Contractors should have standards of conduct and internal control systems that—

(1) Are suitable to the size of the company and the extent of their involvement in Government contracting,

(2) Promote such standards,

(3) Facilitate timely discovery and disclosure of improper conduct in connection with Government contracts, and

(4) Ensure corrective measures are promptly instituted and carried out.

203.7001 Procedures.

(a) A contractor's system of management controls should provide for—

(1) A written code of business ethics and conduct and an ethics training program for all employees;

(2) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with standards of conduct and the special requirements of Government contracting;

(3) A mechanism, such as a hotline, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports;

(4) Internal and/or external audits, as appropriate;

(5) Disciplinary action for improper conduct;

(6) Timely reporting to appropriate Government officials of any suspected or possible violation of law in connection with Government contracts or any other irregularities in connection with such contracts; and

(7) Full cooperation with any Government agencies responsible for either investigation or corrective actions.

(b) Contractors who are awarded a DoD contract of $5 million or more must display DoD Hotline Posters prepared by the DoD Office of the Inspector General unless—

(1) The contract will be performed in a foreign country; or

(2) The contractor has established an internal reporting mechanism and program, as described in paragraph (a) of this section.

203.7002 Contract clause.

Use the clause at 252.203–7002, Display of DoD Hotline Poster, in solicitations and contracts expected to exceed $5 million, except when performance will take place in a foreign country.

PART 204—ADMINISTRATIVE MATTERS

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AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36289, July 31, 1991, unless otherwise noted.

Subpart 204.1—Contract Execution

204.101 Contracting officer's signature.

(a)(i) Include the contracting officer's telephone number on contracts and modifications.

(ii) The contracting officer may sign bilateral modifications of a letter contract before signature by the contractor.

Subpart 204.2—Contract Distribution

204.201 Procedures.

(1) The procuring contracting officer (PCO) retains the original signed contract for the official contract file. Administrative contracting officers and terminations contracting officers provide the original of each modification to the PCO for retention in the official contract file. Unless otherwise directed by department/agency procedures, the office issuing the orders maintains the original of orders under basic ordering agreements and the original of provisioning orders.

(2) Ensure that distribution of contracts and modifications is consistent with security directives.

(e)(i) Distribute one copy of each of the following types of contracts or modifications to the appropriate Defense Contract Audit Agency (DCAA) field audit office (listed in the DCAA Directory—Headquarters and Field Offices)—

(A) Cost reimbursement;

(B) Time-and-materials;

(C) Labor-hour;

(D) Fixed price contracts with provisions for redetermination, incentives, economic price adjustment, or cost allowability; and

(E) Any other contract that requires audit service.

(ii) If there is a question as to the appropriate DCAA field audit office, request the assistance of the DCAA procurement liaison auditor or the nearest DCAA field audit office.

(f) Provide two copies to offices performing contract administration support functions.

[56 FR 36289, July 31, 1991, as amended at 59 FR 27668, May 27, 1994]

204.202 Agency distribution requirements.

(1) Distribute copies of contracts as follows—

(i) Four copies to the contract administration office (send simultaneously with the copy furnished under FAR 4.201(b));

(ii) One copy to each consignee indicated in the contract. A transshipping terminal is not a consignee.

(A) Inventory control points that have an automated uniform inventory control point data base that interfaces with consignees may use their automated procedure rather than sending a written copy of the contract. However, when inspection is required at destination, send a written copy to the consignee.

(B) The Defense Logistics Agency is authorized to prescribe alternate procedures for distribution of contract documents in Defense Subsistence Region, Europe;

(iii) Two copies to the military interdepartmental purchase request requiring activity in the case of coordinated acquisition;

(iv) One copy to the contract administration office (CAO) automatic data processing point, except when the DoDAAD code is the same as that of either the CAO or payment office (see DLAH 4105.4, DoD Directory of Contract Administration Services Components); and

(v) One copy, or an extract of the pertinent information, to the cognizant Defense Investigative Service office listed in DoD 5100.76–M, Physical Security of Sensitive Conventional Arms, Ammunition, and Explosives, when the clause at 252.223–7007, Safeguarding Sensitive Conventional Arms, Ammunition, and Explosives, is included in the contract.

(2) The activity executing a contract modification shall furnish a copy of the basic contract and all modifications to—

(i) The new and old payment office when adding or changing a payment office;

(ii) The new contract administration office, a new consignee or other activity, based on the extent to which each activity is concerned with the basic contract and modifications.

(3) Distribution of modifications issued to provide initial or amended shipping instructions under 204.7004(c)(3)(iii) and 204.7004(f) may be limited to the following—

(i) Contractor, one copy;

(ii) Receiving activity, one copy each;

(iii) Contract administration office, one copy;

(iv) Payment office, one copy; and

(v) Contract administration office automatic data processing point, one copy.

(4) Distribution of modifications generated by automated means (computer programs) may be limited to the following—

(i) Contractor, one copy;

(ii) Contract administration office, one copy;

(iii) New payment office, one copy;

(iv) Procuring contracting office, one copy;

(v) Funding activities, one copy to each; and

(vi) Consignee, one copy to each.

[56 FR 36289, July 31, 1991, as amended at 61 FR 7742, Feb. 29, 1996]

Subpart 204.4—Safeguarding Classified Information Within Industry

204.402 General.

(1) Subpart 239.74 contains policy and procedures for securing telecommunications between Government agencies and contractors and subcontractors.

(2) Pursuant to section 808 of Pub. L. 102–190, DoD employees or members of the Armed Forces who are assigned to or visiting a contractor facility and are engaged in oversight of an acquisition program will retain control of their work product. Classified work products of DoD employees or members of the Armed Forces shall be handled in accordance with DoD 5220.22–M, Industrial Security Manual, and DoD 5220.22–R, Industrial Security Regulation. Contractor procedures for protecting against unauthorized disclosure of information shall not require DoD employees or members of the Armed Forces to relinquish control of their work products, whether classified or not, to a contractor.

[57 FR 14992, Apr. 23, 1992]

204.404 Contract clause.

204.404–70 Additional contract clauses.

(a) Use the clause at 252.204–7000, Disclosure of Information, in solicitations and contracts when the contractor will have access to or generate unclassified information that may be sensitive and inappropriate for release to the public.

(b) Use the clause at 252.204–7003, Control of Government Personnel Work Product, in all solicitations and contracts.

[57 FR 14992, Apr. 23, 1992]

Subpart 204.6—Contract Reporting

204.600 Scope of subpart.

The Defense Contract Action Data System (DCADS) (see 204.670) is the DoD reporting system which supports the uniform reporting requirements for—

(1) DD Form 350, Individual Contracting Action Report; and

(2) DD Form 1057, Monthly Summary of Actions $25,000 or Less.

204.601 Record requirements.

(a) The DCADS meets these record retention requirements.

(d) The Directorate for Information, Operation, and Reports (DIOR), of the Washington Headquarters Services (WHS) transmits required DoD information to the Federal Procurement Data System.

204.602 Federal Procurement Data System.

(c) DoD uses the DD Form 350, Individual Contracting Action Report, in lieu of the SF 279, Federal Procurement Data System (FPDS) Individual Contract Action Report. DoD uses the DD Form 1057, Monthly Contracting Summary of Actions $25,000 or Less, in lieu of the SF 281, FPDS Summary Contract Action Report ($25,000 or Less).

204.602–70 Solicitation provision.

When the Commercial and Government Entity codes for the prospective offerors are not available to the contracting office, use the provision at 252.204–7001, Commercial and Government Entity (CAGE) Code Reporting.

[61 FR 61592, Nov. 30, 1995]

204.670 Defense Contract Action Data System (DCADS)

204.670–1 Definitions.

As used in this section and 253.204–70 and 253.204–71—

(a) *Contract administration office* means an office, other than the contracting office, which awards or executes contracting actions on behalf of the contracting office, including actions relating to the settlement of terminated contracts.

(b) *Contracting action* means any written action obligating or deobligating funds in connection with the purchasing, renting, or leasing of supplies, services, or construction. The term does not include grants or cooperative agreements. The term includes, but is not limited to—

(1) Definitive contracts, including notices of award;

(2) Letter contracts;

(3) Purchase orders;

(4) Orders under existing contracts or agreements, e.g.—

(i) Orders against basic ordering agreements, including service orders issued on DD Form 1164 by installation transportation offices;

(ii) Calls against blanket purchase agreements;

(iii) Job orders;

(iv) Task orders;

(v) Delivery orders;

(vi) Communication services authorizations; and

(vii) Notices of termination or cancellation.

(5) Contract modifications, e.g.—

(i) Change orders;

(ii) Supplemental agreements;

(iii) Funding actions; and

(iv) Option exercises.

(c) *Departmental data collection points* are—

(1) For the Army (including Corps of Engineers civil Works): U.S. Army Contracting Support Agency, Attn: SFAE–CSA–PPS, 5109 Leesburg Pike, Suite 916, Falls Church, VA 22041–3201

(2) For the Navy: Fleet Industrial Supply Center, Norfolk Detachment Washington, Attn: PMRS, Washington Navy Yard, Bldg. 200, 4th Floor, 800 M Street, SW, Washington, DC 20374–2004

(3) For the Air Force: SAF/AQCI, 1060 Air Force Pentagon, Washington, DC 20330–1060

(4) For the Defense Logistics Agency: Headquarters, Defense Logistics Agency, 8725 John J. Kingman Road, Suite 3147, Attn: Directorate of Procurement (Acquisition Operations Team, Ft. Belvoir, VA 22060–6221

(5) For other DoD contracting activities: U.S. Army Contracting Support Agency, Attn: SFAE–CSA–PPS, 5109 Leesburg Pike, Suite 916, Falls Church, VA 22041–3201.

(d) *United States and outlying areas* is defined in Federal Information Processing Standard Publication (FIPS PUB) 55–2, Guideline: Codes for Named Populated Places, Primary County Divisions, and Other Locational Entities of the United States and Outlying Areas. Outlying areas are—

(1) American Samoa;

(2) The Federated States of Micronesia;

(3) Guam;

(4) The Marshall Islands;

(5) Northern Mariana Islands;

(6) The Trust Territory of Palau;

(7) Puerto Rico;

(8) The U.S. Minor Outlying Islands; and

(9) The U.S. Virgin Islands.

[56 FR 36289, July 31, 1991, as amended at 60 FR 61592, Nov. 30, 1995; 61 FR 51030, Sept. 30, 1996]

204.670–2 Reportable contracting actions.

(a) Except as provided in paragraph (c) of this subsection, complete a DD Form 350 for—

(1) All contracting actions that obligate or deobligate more than $25,000; and

(2) All contracting actions that obligate or deobligate $25,000 or less if the action is in a designated industry group under the small business competitiveness demonstration program (See 204.670–9 and FAR subpart 19.10).

(b) Except as provided in paragraph (c) of this subsection, complete a DD Form 1057 for all contracting actions which obligate or deobligate $25,000 or less, including contracting actions reported on a DD Form 350 under paragraph (a)(2) of this subsection.

(c) Do not report on a DD Form 350, contingency actions defined in 213.101. Summarize these actions on a DD Form 1057 in accordance with the instructions in 253.204–71(a)(3).

(d) The following contracting actions shall not be reported on either the DD Form 350 or DD Form 1057:

(1) Imprest fund transactions, SF 44 purchases, and micro-purchases obtained through use of the purchase card;

(2) Transactions that cite only non-appropriated funds (Funds held in trust accounts for foreign governments shall be treated as appropriated funds.);

(3) Transactions for purchase of land, or rental or lease of real property, when the General Services Administration (GSA) executes the contracting action;

(4) Orders from GSA stock and the GSA Consolidated Purchase Program;

(5) Transactions that involve Government bills of lading or transportation requests, except orders placed under Regional Storage Management Office's (RSMO) BOAs;

(6) Requisitions transferring supplies within or among the departments or agencies; and

(7) Pursuant to 204.670–6(b), orders placed by other contracting activities against indefinite delivery contracts awarded by the—

(i) Military Sealift Command;

(ii) Defense Fuel Supply Center for petroleum and petroleum products; or

(iii) Defense Supply Center, Richmond, for petroleum products.

[56 FR 36289, July 31, 1991, as amended at 57 FR 53598, Nov. 12, 1992; 60 FR 61592, Nov. 30, 1995; 61 FR 51030, Sept. 30, 1996]

204.670–3 Contracting office responsibilities.

(a) For DD Form 350, contracting offices—

(1) Prepare the appropriate type of DD Form 350 (see 204.670–6), in accordance with the instructions in 253.204–70, on all reportable contracting actions (see 204.670–2(a)), including actions accomplished by contract administration offices on behalf of the contracting office.

(2) Complete the DD Form 350 in the required format within three working days after the date on which the dollars were actually obligated or deobligated (see 204.670–7). Submit all contracting actions for the calendar month to the departmental data collection point (see 204.670–1(c)) in accordance with departmental/agency procedures, except—

(i) For Defense Fuel Supply Center major petroleum acquisitions which result in multiple awards, the due date is ten working days when permitted by the departmental data collection point;

(ii) For actions executed in the month of September, due dates may be extended ten calendar days when permitted by the departmental data collection point; and

(iii) For actions accomplished by a contract administration office, the due date is three working days after the receipt of the contractual instrument annotated ''DD FORM 350 REPORTING COPY.''

(3) Prepare and submit a corrected or cancelling DD Form 350 as required in accordance with departmental data collection point instructions.

(4) Establish a control system for assigning report numbers to DD Forms 350 (Block A2 of the DD Form 350). The number shall have four positions and may be any combination of alpha or numeric characters. If more than one activity within a contracting office utilizes the same reporting office code, the contracting office shall assign separate blocks of numbers to each activity in order to prevent duplication of report numbers.

(5) Maintain a copy of the DD Form 350 in the contract file, in accordance with departmental/agency procedures.

(b) For DD Form 1057, contracting offices—

(1) Prepare a DD Form 1057, in accordance with the instructions in 253.204–71, covering reportable contracting actions (see 204.670–2(b)), including actions accomplished by contract administration offices on behalf of the contracting office. An installation, base, or other activity may have more than one contracting office code to separate the various types of acquisitions, such as base and central contracting, or RDT&E and non-RDT&E acquisition. Each contracting office with a separate code must submit its own DD Form 1057.

(2) Complete the DD Form 1057 in the required format within three working days after the cutoff of the reporting month (see 204.670–7 for alternate formats). Contracting offices are authorized to cut off the reporting month no earlier than the 25th calendar day. For September only, the cutoff date shall not be later than September 30. Submit the DD Form 1057 to the departmental data collection point in accordance with departmental/agency procedures.

(3) Unless otherwise instructed by the departmental data collection point, do not submit revised DD Form 1057 reports. Include any required corrections or adjustments in following month's report.

[56 FR 36289, July 31, 1991, as amended at 61 FR 51030, Sept. 30, 1996]

204.670–4 Contract administration office responsibilities.

Contract administration offices executing actions subject to DD Form 350 or DD Form 1057 reporting must submit an annotated copy of the contractual

instrument to the contracting office so that the contracting office can submit the required report.

(a) For DD Form 350, annotate in the heading of the contractual instrument in large block letters ''DD FORM 350 REPORTING COPY.'' Send the annotated copy to the contracting office within one working day after the action date.

(b) For DD Form 1057, annotate in the heading of the contractual instrument in large block letters ''DD FORM 1057 REPORTING COPY.'' Send the annotated copy with the normal distribution.

204.670–5 Departmental data collection point responsibilities.

Departmental data collection points—

(a) Collect DD Forms 350 and 1057 data provided by their contracting activities;

(b) Electronically record the data in accordance with the instructions for recording and editing developed by WHS–DIOR with the majority agreement of the departments/agencies and prescribed by the Director of Defense Procurement; and

(c) Submit monthly reports (noncumulative) to Washington Headquarters Services, ATTN: DIOR, within 18 days after the close of the reporting period, except the due date for September may be extended for no more than ten days. Reports control symbols, DD–P&L(M) 1014 and DD–P&L(M) 1015, respectively, apply to reports submitted to WHS–DIOR for DD Form 350 actions and DD Form 1057.

[61 FR 51030, Sept. 30, 1996]

204.670–6 Types of DD Form 350 reports.

There are three types of reports—single, consolidated, and multiple.

(a) A single report is one DD Form 350 report per contracting action.

(b) A consolidated report is one DD Form 350 report which combines several contracting actions.

(1) Prepare consolidated reports for—

(i) Air Mobility Command awards for international airlift services. The Command reports these at the end of each operating month with one DD Form 350 for each airlift contract.

(ii) Military Sealift Command awards of indefinite delivery contracts for ocean transportation. The Command reports at the beginning of each fiscal year the estimated value of the orders for that fiscal year on one DD Form 350.

(iii) Defense Fuel Supply Center of Defense Supply Center, Richmond, indefinite delivery contracts for petroleum or petroleum supplies. The Centers, at the time of award, report the estimated value of the orders to be placed against the contract on one DD Form 350.

(iv) Order place by the Defense commissary Agency (DeCA) for resale items in excess of $25,000. DeCA consolidates the orders monthly and reports the cumulative dollar amounts and actions on one DD Form 350 in accordance with departmental/agency procedures. Defense Logistics Agency activities submit single rather than consolidated reports.

(v) Vouchers processed by the U.S. Army Contracting Command, Europe (USACCE), for the purchase of utilities from municipalities (e.g., gas, electricity, water, sewage, steam, snow removal, and garbage collection). USACCE consolidates these transactions monthly and reports the cumulative dollar amount on one DD Form 350 in accordance with departmental/agency procedures.

(2) Consolidated reports may be prepared in accordance with departmental/agency procedures for orders under communications service agreements for local dial tone services.

(c) A multiple report is more than one DD Form 350 per contracting action. Prepare multiple reports if—

(1) The contracting action includes foreign military sales (FMS) requirements in addition to non-FMS requirements (Block B9 on the DD Form 350). Submit one DD Form 350 report for the FMS requirements and another DD Form 350 report for the non-FMS requirements, except if either of the portions in $25,000 or less, report the $25,000 or less portion on a DD Form 1057 in lieu of a DD Form 350.

(2) The contracting action includes more than one type of contract (Block C5 on the DD Form 350) and the type with the least dollar value exceeds

$500,000. Prepare a separate DD Form 350 for each contract type.

[56 FR 36289, July 31, 1991, as amended at 59 FR 27668, May 27, 1994; 60 FR 61592, Nov. 30, 1995; 61 FR 51031, Sept. 30, 1996]

204.670–7 Report formats.

Contracting offices submit the signed original DD Forms 350 and 1057, unless the data collection point approves use of an automated facsimile or electronic equivalent containing the information.

204.670–8 Security classification.

Submit DD Forms 350 as unclassified documents. Classified contracts are not exempt from reporting solely because the contract is classified. Contact the appropriate departmental data collection points for special instructions if it is necessary for security reasons to modify coding of all or any individual blocks on the DD Form 350. If contact cannot be made for security reasons, obtain instructions from the Office of the Deputy to the Under Secretary of Defense for Policy Support, ATTN: Director for Special Programs. Telephone number is (703) 614–0578/9 or DSN 224–0578/9.

[61 FR 51031, Sept. 30, 1996]

204.670–9 Reporting of individual contracting actions of $25,000 or less.

Under the Small Business Competitiveness Demonstration Program (see FAR subpart 19.10), contract actions of $25,000 or less in four designated industry groups (for Army, includes dredging) must be reported in the same manner as if the action were in excess of $25,000.

(a) Report contract actions of $25,000 or less in the designated industry groups on both the DD Form 350 and the DD Form 1057.

(b) The following contracting actions are not subject to the additional DD Form 350 reporting, although they must still be reported on the DD Form 1057:

(1) Contracting actions of $500 or less.

(2) Foreign military sales.

(3) Orders or modifications under a Federal schedule.

(4) Actions with a government agency.

(5) Actions with non-U.S. business firms.

(6) Actions where the place of performance is other than the United States and its outlying areas.

[56 FR 36289, July 31, 1991, as amended at 61 FR 51031, Sept. 30, 1996]

Subpart 204.8—Contract Files

204.802 Contract files.

Official contract files shall consist of—

(1) Only original, authenticated or conformed copies of contractual instruments—

(i) *Authenticated copies* means copies that are shown to be genuine in one of two ways—

(A) Certification as true copy by signature of an authorized person; or

(B) Official seal.

(ii) *Conformed copies* means copies that are complete and accurate, including the date signed and the names and titles of the parties who signed them.

(2) Signed or official record copies of correspondence, memoranda, and other documents.

204.804 Closeout of contract files.

Normally, the closeout date for contract files is the date in Block 9d on the DD Form 1594, Contract Completion Statement, or in columns 59–65 on the PK9. If the contracting office must do a major closeout action that will take longer than three months after the date shown in Block 9d of the DD Form 1594, or in columns 59–65 of the PK9—

(1) The closeout date for file purposes will be the date in Block 10e of the DD Form 1594 or the date of the closeout statement executed when the MILSCAP PK9 is received.

(2) The contracting office shall notify the contract administration office of the revised closeout date by either sending a copy of the completed DD Form 1594 or by preparing a MILSCAP Format Identifier PKZ, Contract Closeout Extension.

204.804–1 Closeout by the office administering the contract.

(1) For contracting offices administering their own contracts, locally

developed forms or statement of completion may be used instead of the DD Form 1594, Contract Completion Statement. Whichever method is used, the form shall be retained in the official contract file.

(2) For contracts valued above the small purchase threshold, prepare a DD Form 1597, Contract Closeout Check List, (or agency equivalent) to ensure that all required contract actions have been satisfactorily accomplished.

204.804–2 Closeout of the contracting office files if another office administers the contract.

(1) When an office, other than the contracting office, administers the contract, it shall—

(i) Provide the contracting office an interim contract completion statement when the contract is physically completed and accepted. This notice may be in the form of either a DD Form 1594, Contract Completion Statement, or a MILSCAP Format Identifier Interim PK9, Contract Physical Completion. When the DD Form 1594 is used, the contracting officer—

(A) Annotates Block 8, Remarks, with—

(*1*) ''Notice of Physical Completion;''

(*2*) Final acceptance date;

(*3*) Signature of a responsible official; and

(*4*) Date signed.

(B) Does not complete Blocks 9 (b), (c), and (d) at this time;

(ii) Prepare a DD Form 1597, Contract Closeout Check List, if necessary, to determine that all the required actions have been done;

(iii) Initiate DD Form 1593, Contract Administration Completion Record, if necessary to obtain statements from other organizational elements that they have completed the actions they are responsible for; and

(iv) Upon final payment—

(A) Process the DD Form 1594 with Blocks 1 through 9 completed or the MILSCAP Format Identifier PK9 verifying that all contract administration office actions have been done; and

(B) Send the original of the DD Form 1594 or the MILSCAP Format Identifier PK9 to the contracting office, and file a copy in the official contract file.

(2) If the administrative contracting officer (ACO) cannot closeout a contract within the specified time period (see FAR 4.804–1), the ACO must notify the procuring contracting officer (PCO) within 45 days after the expiration of the time period of—

(i) The reasons for the delay; and

(ii) New target date for closeout. If MILSCAP procedures apply, the ACO shall use the MILSCAP Format Identifier PKX, Unclosed Contract Status, to provide this notice to the PCO.

(3) If the contract still is not closed out by the new target date, the ACO shall again notify the PCO with the reasons for delay and new target date. If MILSCAP procedures apply, continue to use the MILSCAP Format Identifier PKX, Unclosed Contract Status, to provide this notice.

204.805 Disposal of contract files.

(1) The sources of the period for which official contract files must be retained are General Records Schedule 3 (Procurement, Supply, and Grant Records) and General Records Schedule 6 (Accountable Officers' Accounts Records). Copies of the General Records Schedule may be obtained from the National Archives and Records Administration, Washington, DC 20408.

(2) Deviations from the periods cannot be granted by the Defense Acquisition Regulatory Council. Forward requests for deviations to both the General Accounting Office and the National Archives and Records Administration.

(3) Hold completed contract files in the office responsible for maintaining them for a period of 12 months after completion. After the initial 12 month period, send the records to the local records holding or staging area until they are eligible for destruction. If no space is available locally, transfer the files to the General Services Administration Federal Records Center that services the area.

(4) Duplicate or working contract files should contain no originals of materials that properly belong in the official files. Destroy working files as soon as practicable once they are no longer needed.

(5) Retain pricing review files, containing documents related to reviews of the contractor's price proposals, subject to certification of cost or pricing data (see FAR 15.804–2), for six years. If it is impossible to determine the final payment date in order to measure the six year period, retain the files for nine years.

Subpart 204.9—Information Reporting to the Internal Revenue Service

204.902 General.

(b) DoD uses the DD Form 350, Individual Contract Action Report, (see 204.670) to meet these reporting requirements.

Subpart 204.70—Uniform Procurement Instrument Identification Numbers

204.7000 Scope.

This subpart prescribes policies and procedures for assigning numbers to all solicitations, contracts, and related instruments. This subpart—

(a) Does not apply to solicitations or contracts issued by the Defense Commercial Communications Office of the Defense Information Systems Agency; and

(b) Is optional for solicitations and contracts that will be completely administered by the purchasing office or the consignee, except that—

(1) The procurement instrument identification (PII) number, including supplemental modification numbers, shall not exceed 19 characters (excluding hyphens); and

(2) The number shall begin with the purchasing office identifier and the fiscal year in accordance with 204.7003(a)(1) and (2) and appendix G.

[56 FR 36289, July 31, 1991, as amended at 56 FR 67212, Dec. 30, 1991]

204.7001 Policy.

(a) Use the uniform PII numbering system prescribed by this subpart for the solicitation/contract instruments described in 204.7003 and 204.7004.

(b) Retain the basic PII number unchanged for the life of the instrument.

204.7002 Procedures.

(a) In assigning PII numbers—

(1) Use only the alpha-numeric characters, as prescribed in this subpart; and

(2) Do not use the letters ''I'' or ''O,'' except as noted in 204.7003(a)(1)(i) (J) and (K).

(b) If department/agency procedures require other identification on the solicitation, contract, or other related instrument forms, enter it in such a location so as to separate it clearly from the PII number.

(c) Enter the basic PII number, including Federal supply contract numbers and any supplementary numbers, in the spaces provided on the solicitation, contract, or related instrument forms. Separate the major elements by dashes, e.g., N00023–90–D–0009. If there is no space provided on the form, enter the number in the upper right corner of the form and identify what it is (e.g., Supplementary Number N00023–90–F–0120).

204.7003 Basic PII number.

(a) *Elements of a number.* The number consists of 13 alpha-numeric characters grouped to convey certain information.

(1) *Positions 1 through 6.* The first of the six positions, in upper case letters, identify the department/agency and office issuing the instrument.

(i) Department/agency identification:

(A) Department of the Army	DA
(B) Department of the Navy (except Marine Corps).	N
(C) Department of the Air Force	F
(D) Defense Information Systems Agency.	DCA
(E) Defense Logistics Agency	S
(F) Defense Special Weapons Agency.	DSWA
(G) Defense Mapping Agency	DMA
(H) Miscellaneous Defense Activities.	MDA
(I) Marine Corps	M
(J) Ballistic Missile Defense Organization.	HQ0006
(K) On Site Inspection Agency	OSIA
(L) Defense Commissary Agency	DECA
(M) United States Special Operations Command.	USZA

(ii) Issuing office identification. The remaining positions are the alpha-numeric characters that identify the

issuing office. These characters are in appendix G.

(iii) Use all six positions. If necessary, enter zeros between the department/agency identifier and the issuing office identifier.

(2) *Positions 7 through 8.* The seventh and eighth positions are the last two digits of the fiscal year in which the PII number was assigned.

(3) *Position 9.* Indicate the type of instrument by entering one of the following upper case letters in position nine—

(i) Blanket purchase agreements—A

(ii) Invitations for bids—B

(iii) Contracts of all types except indefinite delivery contracts, facilities contracts, sales contracts, and contracts placed with or through other Government departments or agencies or against contracts placed by such departments or agencies outside the DoD—C

(iv) Indefinite delivery contracts—D

(v) Facilities contracts—E

(vi) Contracting actions placed with or through other Government departments or agencies or against contracts placed by such departments or agencies outside the DoD (including actions with the National Industries for the Blind (NIB), the National Industries for the Severely Handicapped (NISH), and the Federal Prison Industries (UNICOR))—F

(vii) Basic ordering agreements—G

(viii) Agreements, including basic agreements and loan agreements, but excluding basic purchasing agreements, basic ordering agreements, and leases—H

(ix) Do not use—I

(x) Reserved—J

(xi) Short form research contract—K

(xii) Lease agreement—L

(xiii) Purchase orders—manual (assign W when numbering capacity of M is exhausted during the fiscal year)—M

(xiv) Notice of intent to purchase—N

(xv) Do not use—O

(xvi) Purchase order—automated (assign V when numbering capacity of P is exhausted during a fiscal year)—P

(xvii) Request for quotation—manual—Q

(xviii) Request for proposal—R

(xix) Sales contract—S

(xx) Request for quotation—automated (assign U when numbering capacity of T is exhausted during a fiscal year)—T

(xxi) See T—U

(xxii) See P—V

(xxiii) See M—W

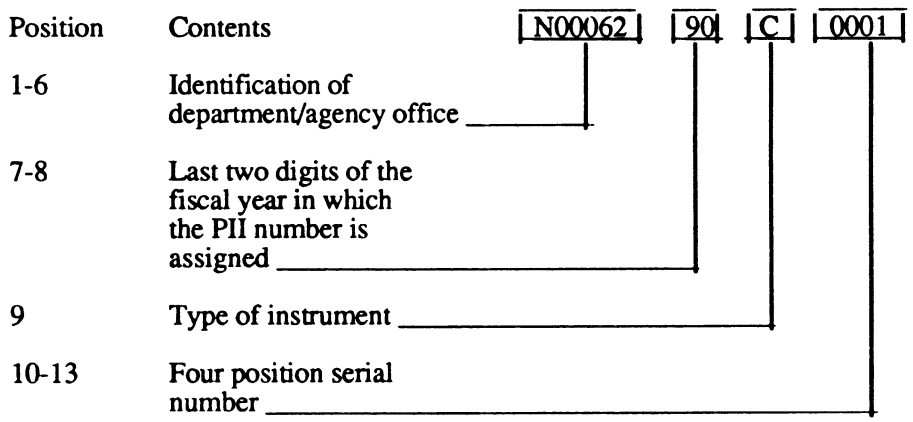
(xxiv) Reserved for departmental use—X

(xxv) Imprest fund—Y

(xxvi) Reserved for departmental use—Z

(4) *Position 10 through 13.* Enter the serial number of the instrument in these positions. A separate series of serial numbers may be used for any type of instrument listed in paragraph (a)(3) of this section. Activities shall assign such series of PII numbers sequentially. An activity may reserve blocks of numbers or alpha-numeric numbers for use by its various components.

(b) *Illustration of PII number.* The following illustrates a properly configured PII number—



[56 FR 36289, July 31, 1991, as amended at 56 FR 67212, Dec. 30, 1991; 59 FR 27668, May 27, 1994; 60 FR 61592, Nov. 30, 1995; 61 FR 50451, Sept. 26, 1996]

204.7004 Supplementary PII numbers.

(a) *Uses of the supplementary number.* Use supplementary numbers with the basic PII number, to identify—

(1) Amendments to solicitations;

(2) Modifications to contracts and agreements, including provisioned item orders; and

(3) Calls or orders under contracts, basic ordering agreements, or blanket purchase agreements, issued by the contracting office or by a DoD activity other than the contracting office, including DoD orders against Federal supply schedules.

(b) *Amendments to solicitations.* Number amendments to solicitations sequentially using a four position numeric serial number added to the basic PII number and beginning with 0001, e.g., N00062–91–R–1234–0001.

(c) *Modifications to contracts and agreements.* (1) Number modifications to contracts and agreements using a six position alpha-numeric added to the basic PII number.

(2) *Position 1.* Identify the office issuing the modification—

(i) Contract administration office—A

(ii) Contracting office—P

(3) *Positions 2 through 3.* These are the first two digits in a serial number. They may be either alpha or numeric. Use the letters K, L, M, N, P, Q, S, T, U, V, W, X, Y, or Z only in the second position and only in the following circumstances—

(i) Use K, L, M, N, P, and Q in the second position only if the modification is issued by the Air Force and is a provisioned item order.

(ii) Use S, and only S, in the second position to identify modifications issued to provide initial or amended shipping instructions when—

(A) The contract has either FOB origin or destination delivery terms; and

(B) The price changes.

(iii) Use T, U, V, W, X, or Y, and only those characters, in the second position to identify modifications issued to provide initial or amended shipping instructions when—

(A) The contract has FOB origin delivery terms; and

(B) The price does not change.

(iv) Only use Z in the second position to identify a modification which definitizes a letter contract.

(4) *Positions 4 through 6.* These positions are always numeric. Use a separate series of serial numbers for each type of modification listed in paragraph (c)(3) of this section. Examples of proper numbering for positions 2–6 (the first position will be either ''A'' or ''P'') are as follows:

Normal modification	Provisioned items order (reserved for exclusive use by the Air Force only)	Shipping instructions
00001–99999	K0001–K9999	S0001–S9999
then	KA001–KZ999	SA001–SZ999
A0001–A9999	L0001–L9999	T0001–T9999
B0001–B9999	LA001–LZ999	TA001–TZ999
and so on to	M0001–M9999	U0001–U9999
H0001–H9999	MA001–MZ999	UA001–UZ999
then	N0001–N9999	V0001–V9999
J0001–J9999	NA001–NZ999	VA001–VZ999
then	P0001–P9999	W0001–W9999
R0001–R9999	PA001–PZ999	WA001–WZ999
then	Q0001–Q9999	X0001–X9999
AA001–HZ999	QA001–QZ999	XA001–XZ999
then		Y0001–Y9999
JA001–JZ999		YA001–YZ999
RA001–RZ999.		

(5) If the contract administration office is changing the contract administration or disbursement office for the first time and is using computer generated modifications to notify many offices, it uses the six position supplementary number ARZ999. If either office has to be changed again during the life of the contract, the supplementary number will be ARZ998, and on down as needed.

(6) Each office authorized to issue modifications shall assign the supplementary identification numbers in sequence. Do not assign the numbers until it has been determined that a modification is to be issued.

(d) *Delivery orders under indefinite delivery contracts, orders under basic ordering agreements, and calls under blanket purchase agreements.* (1) Calls or orders issued by the office issuing the contract or agreement. Use a four position alpha-numeric call or order serial number added to the basic PII number. These shall be identified by using serial numbers beginning 0001 through 9999. When the numeric identifiers run out, use alpha characters in the third and fourth positions. Never use alpha characters in the first and second positions.

(2) Orders placed against another activity's contract or agreement.

(i) If the office placing the order or call is different from the office identified in the basic PII number, assign a serial number to the order or call. The first and second positions contain the call/order code assigned to the ordering office by appendix G. Do not use the letters A or P in the first position. The third and fourth positions are a two position serial number assigned by the ordering office. The series will begin with 01. When the numbers exceed 99, the office will assign a uniform series of identifiers containing alpha and/or numeric characters, e.g., Basic #: N00383–91–D–0001 serial #: TU01.

(ii) If an office is placing calls or orders with NIB, NISH, or UNICOR, the office shall identify the instrument with a 13 position supplementary PII number using an F in the 9th position. Modifications to these calls or orders shall be numbered in accordance with paragraph (c) of this section, e.g., Order #: DLA100–91–F–0001 modification #: A00001.

(e) *Modifications to calls or orders.* Use a two position alpha-numeric suffix, known as a call or order modification indicator, to identify a modification to a call or order.

(1) Modifications to a call or order issued by a purchasing office begin with 01, 02, and so on through 99, then B1 through B9, BA through BZ, C1 through C9, and so on through ZZ.

(2) Modifications to a call or order issued by a contract administration office begin with 1A, 1B, and so on through 9Z, followed by A1, A2, and so on to A9, then AA, AB, and so on through AZ.

Subpart 204.71—Uniform Contract Line Item Numbering System

204.7100 Scope.

This subpart prescribes policies and procedures for assigning contract line item numbers.

204.7101 Definitions.

Accounting classification reference number (ACRN) means a two position alpha or alpha/numeric control code used as a method of relating the accounting classification citation to detailed line item information contained in the schedule.

Attachment means any documentation, appended to a contract or incorporated by reference, which does not establish a requirement for deliverables.

Definitized item, as used in this subpart, means an item for which a firm

price has been established in the basic contract or by modification.

Exhibit means a document, referred to in a contract, which is attached and establishes requirements for deliverables. The term shall not be used to refer to any other kind of attachment to a contract. The DD Form 1423, Contract Data Requirements List, is always an exhibit, rather than an attachment.

Nonseverable deliverable, as used in this subpart, means a deliverable item that is a single end product or undertaking, entire in nature, that cannot be feasibly subdivided into discrete elements or phases without losing its identity.

Undefinitized item, as used in this subpart, means an item for which a price has not been established in the basic contract or by modification.

[56 FR 36289, July 31, 1991, as amended at 60 FR 34468, July 3, 1995]

204.7102 Policy.

(a) The numbering procedures of this subpart shall apply to all—

(1) Solicitations;

(2) Solicitation line and subline item numbers, if practicable;

(3) Contracts as defined in FAR Subpart 2.1;

(4) Contract line and subline item numbers;

(5) Exhibits;

(6) Exhibit line and subline items; and

(7) Any other document expected to become part of the contract.

(b) The numbering procedures are mandatory for all contracts where separate contract line item numbers are assigned, unless—

(1) There are no postaward contract administration functions that the contracting officer will assign to an office listed in the DoD Directory of Contract Administration Services Components;

(2) The contract is an indefinite delivery type for petroleum products against which posts, camps, and stations issue delivery orders for products to be consumed by them; or

(3) The contract is a communications service authorization issued by the Defense Information Systems Agency's Office of Defense Commercial Communications.

[56 FR 36289, July 31, 1991, as amended at 56 FR 67212, Dec. 30, 1991; 60 FR 34468, July 3, 1995]

204.7103 Contract line items.

204.7103–1 Criteria for establishing.

Contracts shall identify the items or services to be acquired as separate contract line items unless it is not feasible to do so.

(a) Contract line items shall have all four of the following characteristics; however, there are exceptions within the characteristics, which may make establishing a separate contract line item appropriate even though one of the characteristics appears to be missing—

(1) *Single unit price.* The item shall have a single unit price or a single total price, except—

(i) If the item is not separately priced (NSP) but the price is included in the unit price of another contract line item, enter NSP instead of the unit price;

(ii) When there are associated subline items, established for other than informational reasons, and those subline items are priced in accordance with 204.7104;

(iii) When the items or services are being acquired on a cost-reimbursement contract;

(iv) When the contract is for maintenance and repair services (e.g., a labor hour contract) and firm prices have been established for elements of the total price of an item but the actual number and quantity of the elements are not known until performance. The contracting officer may structure these contracts to reflect a firm or estimated total amount for each line item;

(v) When the contract line item is established to refer to an exhibit or an attachment (if management needs dictate that a unit price be entered, the price shall be set forth in the item description block and enclosed in parentheses); or

(vi) When the contract is an indefinite delivery type contract and provides that the price of an item shall be determined at the time a delivery

order is placed and the price is influenced by such factors as the quantity ordered (e.g., 10–99 @ $1.00, 100–249 @ $.98, 250+ @ $.95), the destination, the FOB point, or the type of packaging required.

(2) *Separately identifiable.* A contract line item must be identified separately from any other items or services on the contract.

(i) Supplies are separately identifiable if they have no more than one—

(A) National stock number (NSN);

(B) Item description; or

(C) Manufacturer's part number.

(ii) Services are separately identifiable if they have no more than one—

(A) Scope of work; or

(B) Description of services.

(iii) This requirement does not apply if there are associated subline items, established for other than informational reasons, and those subline items include the actual detailed identification in accordance with 204.7104. Where this exception applies, use a general narrative description instead of the contract item description.

(3) *Separate delivery schedule.* Each contract line item or service shall have its own delivery schedule, period of performance, or completion date expressly stated (''as required'' constitutes an expressly stated delivery term).

(i) The fact that there is more than one delivery date, destination, performance date, or performance point may be a determining factor in the decision as to whether to establish more than one contract line item.

(ii) If a contract line item has more than one destination or delivery date, the contracting officer may create individual contract line items for the different destinations or delivery dates, or may specify the different delivery dates for the units by destination in the delivery schedule.

(4) *Single accounting classification citation.* (i) Each contract line item shall reference a single accounting classification citation except as provided in paragraph (a)(4)(ii) of this subsection.

(ii) The use of multiple accounting classification citations for a contract line item is authorized in the following situations:

(A) A single, nonseverable deliverable to be paid for with R&D or other funds properly incrementally obligated over several fiscal years in accordance with DoD policy;

(B) A single, nonseverable deliverable to be paid for with different authorizations or appropriations, such as in the acquisition of a satellite or the modification of production tooling used to produce items being acquired by several activities; or

(C) A modification to an existing contract line item for a nonseverable deliverable that results in the delivery of a modified item(s) where the item(s) and modification are to be paid for with different accounting classification citations.

(iii) When the use of multiple accounting classification citations is authorized for a single contract line item, establish informational subline items for each accounting classification citation in accordance with 204.7104–1(a).

(b) Exhibits may be used as an alternative to putting a long list of contract line items in the schedule. If exhibits are used, create a contract line item citing the exhibit's identifier. See 204.7105(a).

(c) If the contract involves a test model or a first article which must be approved, establish a separate contract line item or subline item for each item of supply or service which must be approved. If the test model or first article consists of a lot composed of a mixture of items, a single line item or subline item may be used for the lot.

(d) If a supply or service involves ancillary functions, like packaging and handling, transportation, payment of state or local taxes, or use of reusable containers, and these functions are normally performed by the contractor and the contractor is normally entitled to reimbursement for performing these functions, do not establish a separate contract line item solely to account for these functions. However, do identify the functions in the contract schedule. If the offeror separately prices these functions, contracting officers may establish separate contract line items for the functions; however, the separate

line items must conform to the requirements of paragraph (a) of this subsection.

[56 FR 36289, July 31, 1991, as amended at 60 FR 34468, July 3, 1995; 60 FR 43191, Aug. 18, 1995]

204.7103–2 Numbering procedures.

(a) Contract line items shall consist of four numeric digits 0001 through 9999. Do not use numbers beyond 9999. Within a given contract, the item numbers shall be sequential but need not be consecutive.

(b) The contract line item number shall be the same as the solicitation line item number unless there is a valid reason for using different numbers.

(c) Once a contract line item number has been assigned, it shall not be assigned to another, different, contract line item in the same contract.

204.7104 Contract subline items.

204.7104–1 Criteria for establishing.

Contract subline items provide flexibility to further identify elements within a contract line item for tracking performance or simplifying administration. There are only two kinds of subline items: those which are informational in nature and those which consist of more than one item that requires separate identification.

(a) *Informational subline items.* (1) This type of subline item identifies information that relates directly to the contract line item and is an integral part of it (e.g., parts of an assembly or parts of a kit). These subline items shall not be scheduled separately for delivery, identified separately for shipment or performance, or priced separately for payment purposes.

(2) The informational subline item may include quantities, prices, or amounts, if necessary to satisfy management requirements. However, these elements shall be included within the item description in the supplies/services column and enclosed in parentheses to prevent confusing them with quantities, prices, or amounts that have contractual significance. Do not enter these elements in the quantity and price columns.

(3) Informational subline items shall be used to identify each accounting classification citation assigned to a single contract line item number when use of multiple citations is authorized (see 204.7103–1(a)(4)(ii)).

(b) *Separately identified subline items.* (1) Subline items will be used instead of contract line items to facilitate payment, delivery tracking, contract funds accounting, or other management purposes. Such subline items shall be used when items bought under one contract line item number—

(i) Are to be paid for from more than one accounting classification. A subline item shall be established for the quantity associated with the single accounting classification citation. Establish a line item rather than a subline item if it is likely that a subline item may be assigned additional accounting classification citations at a later date. Identify the funding as described in 204.7104–1(a)(3);

(ii) Are to be packaged in different sizes, each represented by its own NSN;

(iii) Have collateral costs, such as packaging costs, but those costs are not a part of the unit price of the contract line item;

(iv) Have different delivery dates or destinations or requisitions, or a combination of the three; or

(v) Identify parts of an assembly or kit which—

(A) Have to be separately identified at the time of shipment or performance; and

(B) Are separately priced.

(2) Each separately identified contract subline item shall have its own—

(i) Delivery schedule, period of performance, or completion date;

(ii) Unit price or single total price or amount (not separately priced (NSP) is acceptable as an entry for price or amount if the price is included in another subline item or a different contract line item). This requirement does not apply—

(A) If the subline item was created to refer to an exhibit or an attachment. If management needs dictate that a unit price be entered, the price shall be set forth in the item description block of the schedule and enclosed in parentheses; or

(B) In the case of indefinite delivery contracts described at 204.7103–1(a)(1)(vi).

(iii) Identification (e.g., NSN, item description, manufacturer's part number, scope of work, description of services).

(3) Unit prices and extended amounts.

(i) The unit price and total amount for all subline items may be entered at the contract line item number level if the unit price for the subline items is identical. If there is any variation, the subline item unit prices shall be entered at the subline item level only.

(ii) The unit price and extended amounts may be entered at the subline items level.

(iii) The two methods in paragraphs (b)(3) (i) and (ii) of this subsection shall not be combined in a contract line item.

(iv) When the price for items not separately priced is included in the price of another subline item or contract line item, it may be necessary to withhold payment on the priced subline item until all the related subline items that are not separately priced have been delivered. In those cases, use the clause at 252.204–7002, Payment for Subline Items Not Separately Priced.

[56 FR 36289, July 31, 1991, as amended at 60 FR 34468, July 3, 1995]

204.7104–2 Numbering procedures.

(a) Number subline items by adding either two numeric characters or two alpha characters to the basic contract line item number.

(1) *Information subline item numbers.* Use numeric characters only for information subline items, running 01 through 99. Do not use spaces or special characters to separate the subline item number from the contract line item number that is its root. For example, if the contract line item number is 0001, the first three subline items would be 000101, 000102, and 000103. Do not use a designation more than once within a contract line item.

(2) *Separately identified subline items.* Use alpha characters only for separately identified subline items, running AA through ZZ. Do not use spaces or special characters to separate the subline item number from the contract line item number that is its root. For example, if the contract line item number is 0001, the first three subline items would be 0001AA, 0001AB, and 0001AC.

(i) Do not use the letters I or O as alpha characters.

(ii) Use all 24 available alpha characters in the second position before selecting a different alpha character for the first position. For example, AA, AB, AC, through AZ before beginning BA, BB, and BC.

(b) Within a given contract line item, the subline item numbers shall be sequential but need not be consecutive.

(c) Exhibits may be used as an alternative to setting forth in the schedule a long list of contract subline items. If exhibits are used, create a contract subline item citing the exhibit's identifier. See 204.7105.

(d) If a contract line item involves ancillary functions, like packaging and handling, transportation, payment of state or local taxes, or use of reusable containers, and these functions are normally performed by the contractor and the contractor is normally entitled to reimbursement for performing these functions, do not establish a separate subline item solely to account for these functions. However, do identify the functions in the contract schedule. If offeror separately prices these functions, then contracting officers may establish separate subline items for the functions; however, the separate subline items must conform to the requirements of 204.7104–1.

(e) The following examples illustrate subline items numbering—

(1) Subline items structured to identify destinations for identical items, identically priced (delivery schedule shall be established for each subline item, not the contract line item).

Item No.	Supplies/service	Quantity	Unit	Unit price	Amount
0001	NSN 1615–00–591–6620 Shim, Aluminum Alloy, Apbl, Rotor, Helicopter PRON A1–9–63821–M1–M1 ACRN:AA.	.....		.....	.....
0001AA	A3168R–9030–4025 A2537M IPD: 2 RDD: 334 PROJ: 501.	10	EA	$100.00	$1,000.00

Item No.	Supplies/service	Quantity	Unit	Unit price	Amount
0001AB	A3168R–9030–4026 A51AXBM IPD: 2 RDD: 325 PROJ: 502.	10	EA	$100.00	$1,000.00
0001AC	A3168R–9030–4027 A67KBCM IPD: 2 RDD: 349 PROJ: 503.	15	EA	$100.00	$1,500.00

(2) Subline items structured to identify destinations for identical items, not identically priced (delivery schedule shall be established for each subline item, not the contract line item).

Item No.	Supplies/service	Quantity	Unit	Unit price	Amount
0001	NSN 1615–00–591–6620 Shim, Aluminum Alloy, Apbl, Rotor, Helicopter PRON A1–9–63821–M1–M1 ACRN:AA.	.....		.....	.....
0001AA	A3168R–9030–4025 A2537M IPD: 2 RDD: 334 PROJ: 501.	10	EA	$100.00	$1,000.00
0001AB	A3168R–9030–4026 A51AXBM IPD: 2 RDD: 325 PROJ: 502.	20	EA	$99.00	$1,980.00
0001AC	A3168R–9030–4027 A67KBCM IPD: 2 RDD: 349 PROJ: 503.	30	EA	$98.00	$2,940.09

Note: Difference in prices for identical items is due to separate destinations for FOB destination delivery.

(3) Subline items structured to identify different sizes of an item that are identically priced (delivery schedule shall be established for each subline item, not the contract line item).

Item No.	Supplies/service	Quantity	Unit	Unit price	Amount
0013	Boots Insulated, Cold Weather White, Type II, Class 1 ...	.....	PR	$38.35	$13,422.50
0013AA	8430–00–655–5541 Size 5N	50		.....	.....
0013AB	8430–00–655–5544 Size 8N	70		.....	.....
0013AC	8430–00–655–5551 Size 9N	30		.....	.....
0013AD	8430–00–655–5535 Size 9R	200		.....	.....

Note: Unit price and total amount shown at line item level rather than at subline item level.

(4) Subline items structured to identify different sizes of an item that are not identically priced (delivery schedule shall be established for each subline item, not the contract line item).

Item No.	Supplies/service	Quantity	Unit	Unit price	Amount
0002	Body Armor Ground Troops Variable Type Small Arms, Fragmentation Protective Nylon Felt Vest, Front and Back Plates, Ceramic Plate, Type I.	.....		.....	.....
0002AA	First Article	1	LO	NSP	.....
0002AB	8470–00–141–0935, Medium Regular	1936	SE	$331.77	$642,306.72
0002AC	8470–00–141–0936, Large Regular	625	SE	355.77	222,356.25
0002AD	8470–00–141–0937, Medium Long	1237	SE	346.77	428,954.49
0002AE	8470–00–141–0938, Large Long	804	SE	365.77	294,079.08

(5) Subline items structured to provide the capability for relating subordinate separately priced packaging costs to the overall contract line item. (Separate delivery schedules shall be established for the subline item identifying the contractor's product and for the subline item identifying packaging. No schedule will be established for the contract line item.)

Item No.	Supplies/service	Quantity	Unit	Unit price	Amount
0001	6105–00–635–6568 50380 Ref No 63504–WZ Armature				

Item No.	Supplies/service	Quantity	Unit	Unit price	Amount
0001AA	6105–00–635–6568 50380 Ref No 63504–WZ Armature Motor ACRN:AA	2	Ea	$2,895.87	$5,791.74
0001AB	Packaging ACRN:AA	2	Ea	$289.58	$579.16

(6) Subline items structured to identify different accounting classifications for identical items (delivery schedule shall be established for each subline item, not the contract line item).

AJ: 17X150518350315069100000192B000000000000000000
AK: 17X150518370317569100000192B000000000000000000
AL: 17X150519350314369100000192B000000000000000000

Item no.	Supplies/service	Quantity	Unit	Unit price	Amount
0002	Pulse Decoder, KY–312/A5Q–19	.....	EA	$3,037.40	
0002AA	Pulse Decoder, KY–312/A5Q–19 ACRN: AJ	2		.....	6,074.80
0002AB	Pulse Decoder, K1Y–312/A5Q–19 ACRN: AK	6		.....	18,224.40
0002AC	Pulse Decoder, KY–312/A5Q–19 ACRN: AL	2		.....	$6,074.80

Note: Unit price may be shown at line item level and total amounts shown at subline item level.

(7) Informational subline items established to identify multiple accounting classification citations assigned to a single contract line item.

Item No.	Supplies/service	Quantity	Unit	Unit price	Amount
0001	Air Vehicle	1	Ea	$6,700,000	$6,700,000
000101	ACRN:AA $3,300,000				
000102	ACRN:AB $2,000,000				
000103	ACRN:AC $1,400,000				

(8) Subline items structured to identify parts of an assembly (delivery schedule and price shall be established for each identified part at the subline item level, not for the assembly at the contract line item level).

Item no.	Supplies/service	Quantity	Unit	Unit price	Amount
0003	Automatic Degausing System Consisting of: (2 ea @ $52,061; $104,122 total).	.....		.....	.....
0003AA	Switchboard	2	EA	$52,061.00	$104,122.00
0003AB	Remote Control Panel	2	EA	NSP	.....
0003AC	Power Supply (M Coil) SSM Type 145 Amps, 220 V DC)	2	EA	NSP	.....
0003AF	Power Supply (A Coil) SSM Type (118 Amps, 220 V DC)	2	EA	NSP	.....

(9) Subline items structured to identify parts of a kit (delivery schedule and price shall be established for each identified part at the subline item level, not for the kit at the contract line item level).

Item no.	Supplies/service	Quantity	Unit	Unit price	Amount
0031	Conversion Kit to Convert Torpedo MK 45 Mod 0 to Torpedo MK 45 Mod 1, (50 Kt @ $10,868.52; $543,426 total).	.....		.....	.....
0031AA	Integrator Assy LD 620106	50	EA	$10,868.52	$543,426.00
0031AB	Pulse Generator Assy LD 587569	50	EA	NSP	.....
0031AC	Drive Shaft Assy LD 587559	50	EA	NSP	.....
0031BF	Actual Panel Assy LD 542924	50	EA	NSP	.....

Note: In this example, the prices of subline items 0031AB through 0031BF are included in the Integrator Assembly.

[56 FR 36289, July 31, 1991, as amended at 60 FR 34468, July 3, 1995]

204.7105 Contract exhibits and attachments.

(a) *Use of exhibits.* (1) Exhibits may be used instead of putting a long list of contract line items or subline items in the contract schedule. Exhibits are particularly useful in buying spare parts.

(2) When using exhibits, establish a contract line or subline item and refer to the exhibit.

(3) Identify exhibits individually.

(4) Each exhibit shall apply to only one contract line item or subline item, except—

(i) One exhibit may apply to one or more option line item(s) when the data required under the exhibits is identical in all respects except the period during which the option is to be exercised; and

(ii) An exhibit may apply to more than one contract line item if the exhibit is not separately priced and the exhibit deliverable is identical for all applicable contract line items.

(5) More than one exhibit may apply to a single contract line item.

(6) Data items on a DD Form 1423, Contract Data Requirements List, may be either separately priced or not separately priced.

(i) *Separately priced.* When data are separately priced, enter the price in only one place in the contract: in either Section B of the contract schedule or on the DD Form 1423. Whichever place, display the price there consistently.

(A) Section B. If the prices are entered in section B of the schedule, detach Blocks 17 and 18 of the DD Form 1423 and file elsewhere in the contract file. If the prices are entered on the DD Form 1423, do not detach Blocks 17 and 18 of the DD Form 1423.

(B) DD Form 1423. If the prices are entered on the DD Form 1423, the price of all separately priced deliverable data items attributable to a line item shall be totalled and included, for information purposes, in parentheses, below the supplies services for that line item, in section B of the schedule.

(ii) *NSP.* Include prices in a priced contract line item or subline item. Detach Blocks 17 and 18 of the DD Form 1423 and retain them elsewhere as required.

(7) The contracting officer may append attachments to exhibits, as long as the attachment does not identify a deliverable requirement which has not been established by a contract or exhibit line or subline item.

(b) *Numbering exhibits and attachments.* (1) Use alpha characters to identify exhibits. The alpha characters shall be either single or double capital letters. Do not use the letters I or O.

(2) Exhibit identifiers need not be either consecutive or sequential.

(3) Once an identifier has been assigned to an exhibit, do not use it on another exhibit in the same contract.

(4) The identifier shall always appear in the first or first and second positions of all applicable exhibit line item numbers.

(5) If the exhibit has more than one page, cite the procurement instrument identification number, exhibit identifier, and applicable contract line or subline item number on each page.

(6) Use numbers to identify attachments.

(c) *Numbering exhibit line items and subline items*—(1) *Criteria for establishing.* The criteria for establishing exhibit line items and subline items is the same as those for establishing contract line items and subline items (see 204.7103 and 204.7104, respectively).

(2) *Procedures for numbering.* (i) Number items in an exhibit in a manner similar to contract line items and subline items.

(ii) Number line items using a four position number.

(A) The first position or the first and second position contain the exhibit identifier.

(B) The third and fourth positions contain the alpha or numeric character serial numbers assigned to the line item.

(iii) Assign alpha or numeric characters to the line item on the basis of the same criteria outlined in contract subline items at 204.7104.

(iv) Exhibit line item numbers shall be sequential within the exhibit.

(3) *Examples*—(i) *Two position serial number for double letter exhibit identifier.*

Cumulative No. of line items	Serial number sequence
1–33	01 thru 09, then OA thru OZ, then
34–67	10 thru 19, then 1A thru 1Z, then
68–101	20 thru 29, then 2A thru 2Z, then
102–135	30 thru 39, then 3A thru 3Z, then
136–169	40 thru 49, then 4A thru 4Z, then
170–203	50 thru 59, then 5A thru 5Z, then
204–237	60 thru 69, then 6A thru 6Z, then
238–271	70 thru 79, then 7A thru 7Z, then
272–305	80 thru 89, then 8A thru 8Z, then
306–339	90 thru 99, then 9A thru 9Z, then
340–373	A0 thru A9, then AA thru AZ, then
374–407	B0 thru B9, then BA thru BZ, then
408–441	C0 thru C9, then CA thru CZ, then
442–475	D0 thru D9, then DA thru DZ, then
476–509	E0 thru E9, then EA thru EZ, then
510–543	F0 thru F9, then FA thru FZ, then
544–577	G0 thru G9, then GA thru GZ, then
578–611	H0 thru H9, then HA thru HZ, then
612–645	J0 thru J9, then JA thru JZ, then
646–679	K0 thru K9, then KA thru KZ, then
680–713	L0 thru L9, then LA thru LZ, then
714–747	M0 thru M9, then MA thru MZ, then
748–781	N0 thru N9, then NA thru NZ, then
782–815	P0 thru P9, then PA thru PZ, then
816–849	Q0 thru Q9, then QA thru QZ, then
850–883	R0 thru R9, then RA thru RZ, then
884–917	S0 thru S9, then SA thru SZ, then
918–951	T0 thru T9, then TA thru TZ, then
952–985	U0 thru U9, then UA thru UZ, then
986–1019	V0 thru V9, then VA thru VZ, then
1020–1053	W0 thru W9, then WA thru WZ, then
1054–1087	X0 thru X9, then XA thru XZ, then
1088–1121	Y0 thru Y9, then YA thru YZ, then
1122–1155	Z0 thru Z9, then ZA thru ZZ

(ii) *Three position numbers.*

Cumulative No. of line items	Serial number sequence
(ii) Three position numbers.	
1–33	001 thru 009, then 00A thru 00Z, then
34–67	010 thru 019, then 01A thru 101Z, then
68–101	020 thru 029, then 02A thru 02Z, then
102–135	030 thru 039, then 03A thru 03Z and so
136–305	on to
306–339	090 thru 099, then 09A thru 09Z, then
340–373	0A0 thru 0A9, then 0AA thru 0AZ, then
374–407	0B0 thru 0B9, then 0BB thru 0BZ, then
408–441	0C0 thru 0C9, then 0CA thru 0CZ, and
442–1121	so on to
1122–1155	0Z0 thru 0Z9, then 0ZA thru 0ZZ, then
1156–1189	100 thru 109, then 10A thru 10Z, then
1190–1223	110 thru 119, then 11A thru 11Z, then
1224–1257	120 thru 129, then 12A thru 12Z, and
1258–1461	so on to
1462–1495	190 thru 199, then 19A thru 19Z, then
1496–1529	1A0 thru 1A9, then 1AA thru 1AZ, then
1530–1563	1B0 thru 1B9, then 1BA thru 1BZ, and
1564–2277	so on to
2278–2311	1Z0 thru 1Z9, then 1ZA thru 1ZB, then
2312–2345	200 thru 109, then 10A thru 10Z, then
2346–2379	210 thru 219, then 21A thru 21Z, then
2380–2413	220 thru 229, then 22A thru 22Z, and
2414–2617	so on to
2618–2651	290 thru 299, then 29A thru 29Z, then
2652–2685	2A0 thru 2A9, then 2AA thru 2AZ, then
2686–2719	2B0 thru 2B9, then 2BA thru 2BZ, and
2720–3433	so on to
3434–3467	2Z0 thru 2Z9, then 2ZA thru 2ZZ, then
3468–3501	300 thru 309, then 30Z thru 30Z, and
3502–10403	so on to
10404–10437	900 thru 909, then 90A thru 90Z, then
10438–10471	910 thru 919, then 91A thru 91Z, and
10472–10709	so on to
10710–10743	990 thru 999, then 99A thru 99Z, then
10744–10777	9A0 thru 9A9, then 9AA thru 9AZ, then
10778–10811	9B0 thru 9B9, then 9BA thru 9BZ, and
10812–11525	so on to
11526–11559	9Z0 thru 9Z9, then 9ZA thru 9ZZ

204.7106 Contract modifications.

(a) If new items are added, assign new contract line or subline item numbers or exhibit line item numbers, in accordance with the procedures established at 204.7103, 204.7104, and 204.7105.

(b) Modifications to existing contract line items or exhibit line items. (1) If the modification relates to existing contract line items or exhibit line items, the modification shall refer to those item numbers.

(2) If the contracting officer decides to assign new identifications to existing contract or exhibit line items, the following rules apply—

(i) *Definitized and undefinitized items.* (A) The original line item or subline item number may be used if the modification applies to the total quantity of the original line item or subline.

(B) The original line item or subline item number may be used if the modification makes only minor changes in the specifications of some of the items ordered on the original line item or subline item and the resulting changes in unit price can be averaged to provide a new single unit price for the total quantity. If the changes in the specifications make the item significantly distinguishable from the original item or the resulting changes in unit price cannot be averaged, create a new line item.

(C) If the modification affects only a partial quantity of an existing contract or exhibit line item or subline item and the change does not involve either the delivery date or the ship-to/mark-for data, the original contract or exhibit line item or subline item number shall remain with the unchanged quantity. Assign the changed quantity the next available number.

(ii) *Undefinitized items.* In addition to the rules in paragraph (b)(2)(i), the following additional rules apply to undefinitized items—

(A) If the modification is undefinitized and increases the quantity of an existing definitized item, assign the undefinitized quantity the next available number.

(B) If the modification increases the quantity of an existing undefinitized item, the original contract or exhibit line item or subline item may be used if the unit price for the new quantity is expected to be the same as the price for the original quantity. If the unit prices of the two quantities will be different, assign the new quantity the next available number.

(C) If the modification both affects only a partial quantity of the existing contract or exhibit line or subline item and definitizes the price for the affected portion, the definitized portion shall retain the original item number. If there is any undefinitized portion of the item, assign it the next available number. However, if the modification definitizes the price for the whole quantity of the line item, and price impact of the changed work can be apportioned equally over the whole to arrive at a new unit price, the quantity with the changes can be added into the quantity of the existing item.

(D) If the modification affects only a partial quantity of an existing contract or exhibit line or subline item but does not change the delivery schedule or definitize price, the unchanged portion shall retain the original contract or exhibit line or subline item number. Assign the changed portion the next available number.

204.7107 Contract accounting classification reference number (ACRN).

(a) When a contract contains more than one accounting classification citation, contracting offices shall use ACRNs. Assigning the ACRNs is the responsibility of the contracting office issuing the contract, basic ordering agreement, or blanket purchase agreement. This authority shall not be delegated. If more than one office will use the contract (e.g., ordering officers, other contracting officers), the contract must contain instructions for assigning ACRNs.

(b) ACRNs are used to process certain contract data through the Military Standard Contract Administration Procedures (MILSCAP) system. The MILSCAP system uses the ACRN to relate certain contract administration records to the accounting classification citation used to obligate funds on the contract. Among these records are the accounting classification trailer record, the supplies schedules data record, and the services line item data record. ACRNs are also used to associate the various record formats of the contract payment notice as described in chapter 9 of the MILSCAP Manual, DoD 4000.25–5–M.

(c) *Procedures for establishing ACRNs.* ACRNs consist of a two position alpha or alpha/numeric code assigned to each discrete accounting classification citation within each contract. ACRNs shall be established in accordance with the following guidelines:

(1) Do not use the letters I and O.

(2) In no case shall an ACRN apply to more than one accounting classification citation, nor shall more than one ACRN be assigned to one accounting classification citation.

(d) *Using the ACRN in the contract.* (1) Show the ACRN as a detached prefix to the accounting classification citation in the accounting and appropriation data block or, if there are too many accounting classification citations to fit reasonably in that block, in section G (Contract Administration Data).

(2) ACRNs need not prefix accounting classification citations if the accounting classification citations are present in the contract only for the transportation officer to cite to Government bills of lading.

(3) If the contracting officer is making a modification to a contract and using the same accounting classification citations, which have had ACRNs assigned to them, the modification need cite only the ACRNs in the accounting and appropriations data block or on the continuation sheets.

(e) *Showing the ACRN in the contract.* If there is more than one ACRN in a contract, all the ACRNs will appear in several places in the schedule (e.g., ACRN:AA).

(1) *Ship-to/mark-for block.* Show the ACRN beside the identity code of each activity in the ship-to/mark-for block unless only one accounting classification citation applies to a line item or

subline item. Only one ACRN may be assigned to the same ship-to/mark-for within the same contract line or subline item number unless multiple accounting classification citations apply to a single nonseverable deliverable unit such that the item cannot be related to an individual accounting classification citation.

(2) *Supplies/services column.* (i) If only one accounting classification citation applies to a line item or a subline item, the ACRN may be shown in the supplies/services column near the item description.

(ii) If more than one accounting classification citation applies to a single contract line item, identify each assigned ACRN and the amount of associated funds using informational subline items (see 204.7104–1(a)).

(3) *Payment instructions.* (i) When a contract line item is funded by multiple accounting classification citations, the contracting officer shall provide adequate instructions in section G (Contract Administration Data), under the heading ''Payment Instructions for Multiple Accounting Classification Citations,'' to permit the paying office to charge the accounting classification citations assigned to that contract line item (see 204.7104–1(a)) in a manner that reflects the performance of work on the contract. If additional accounting classification citations are subsequently added, the payment instructions must be modified to include the additional accounting classification citations.

(ii) Payment instructions shall provide a methodology for the paying office to assign payments to the appropriate accounting classification citation(s), based on anticipated contract work performance. The method established should be consistent with the reasons for the establishment of the line items. The payment method may be based upon a unique distribution profile devised to reflect how the funds represented by each of the accounting classification citations support contract performance. Payment methods that direct that payments be made from the earliest available fiscal year funding sources, or that provide for proration across accounting classification citations assigned to the line item, or a combination thereof, may be used if that methodology reasonably reflects how each of the accounting classification citations supports contract performance.

[60 FR 34469, July 3, 1995; 60 FR 43191, Aug. 18, 1995]

Subpart 204.72—Contractor Identification

204.7200 Scope of subpart.

This subpart prescribes uniform policies and procedures for identification of commercial and Government entities when it is necessary to:

(a) Exchange data with another contracting activity, including contract administration activities and contract payment activities, or to comply with the reporting requirements of subpart 204.6; or

(b) Identify contractors for the purposes of developing computerized acquisition systems or solicitation mailing lists.

204.7201 Definitions.

(a) *Commercial and Government entity (CAGE) code* means—

(1) A code assigned by the Defense Logistics Services Center (DLSC) to identify a commercial or Government entity; or

(2) A code assigned by a member of the North Atlantic Treaty Organization (NATO) and maintained by the Defense Logistics Services Center.

(b) *Contractor identification code* means any code required by the contracting office for the purpose of identifying the offeror. CAGE code and contractor identification numbers are two examples of contractor identification codes.

[56 FR 36289, July 31, 1991, as amended at 61 FR 51031, Sept. 30, 1996]

204.7202 General.

Various coding systems are in use to identify commercial and government entities. Codes are requested by contracting and contract administration offices for various reasons. This guidance is designed to improve the accuracy of the initial code assignment and to help ensure that the data are maintained accurately and are up-to-date.

204.7202–1 CAGE codes.

(a) CAGE codes are assigned or maintained by the Defense Logistics Services Center (DLSC) to identify commercial and Government activities. Their use is prescribed by 253.204–70(b)(5)(ii)(C) and DoD 4000.25–5–M, Military Standard Contract Administration Procedures (MILSCAP).

(b) CAGE codes have also been known in the past as federal supply codes for manufacturers (FSCM) and federal supply codes for nonmanufacturers (FSCNM).

(c) If the CAGE code is not already available in the contracting office, and the apparent awardee does not respond to the provision at 252.204–7001, Commercial and Government Entity (CAGE) Code Reporting, use the following procedures in the order listed—

(1) Use the bimonthly H–8 microfiche or CD ROM publication issued by DLSC. (Their address is: DLSC–RP, Federal Center, 74 N. Washington, Battle Creek, MI 49017–3084. Their telephone numbers are: DSN 932–4725, FTS 552–4725, or commercial (616) 961–4725.);

(2) Use the on-line access to the CAGE file through the Defense Logistics Information System;

(3) Use the on-line access to the Defense Logistics Agency CAGE file through the DLA Network or dial-up capability; or

(4) Ask DLSC to assign a CAGE code. Submit a DD Form 2051, Request for Assignment of a CAGE Code, (or electronic equivalent) to the address in paragraph (c)(1) of this subsection, ATTN: DLSC–SBB. The contracting activity completes Section A of the DD Form 2051, Request for Assignment of a Commercial and Government Entity (CAGE) Code, and the contractor completes section B. The contracting activity must verify section B before the form is submitted.

(5) Direct questions on obtaining computer tapes, electronic updates, or code assignments to DLSC (DLSC–SBB) at DSN 932–4358, FTS 552–4358, or commercial (616) 961–4358.

[56 FR 36289, July 31, 1991, as amended at 57 FR 53598, Nov. 12, 1992; 61 FR 51031, Sept. 30, 1996]

204.7202–2 Contractor identification number.

Use of the contractor identification number for contract data reporting is prescribed by 253.204–70(b)(5)(ii)(A). A Data Universal Numbering System (DUNS) number, which is a nine-digit number assigned by Dun and Bradstreet Information Services to an establishment, is the contractor identification number for Federal contractors. When the contractor identification number is not already available to the contracting activity, use the following procedures in the order listed:

(a) Contact the offeror and obtain the DUNS number.

(b)(1) Dun & Bradstreet Information Services for a DUNS number by—

(i) Telephone (610) 882–7741.

(ii) Facsimile (610) 882–7140.

(iii) Writing to FPDC Department, Dun & Bradstreet Information Services, 899 Eaton Avenue, Bethlehem, PA 18025–0013.

(2) All requesters should provide the following information:

(i) Name of requesting contracting office;

(ii) Contracting office code (Block A3 on the DD Form 350) assigned by the departmental data collection point;

(iii) Appropriate agency code as follows:

(A) Army activities—2100;

(B) Navy activities—1700;

(C) Air Force activities—5700;

(D) Defense Logistics Agency—97AS;

(E) Other DoD contracting activities—9700.

(iv) Contracting office area code and commercial telephone number;

(v) Name of individual making the request;

(vi) Total number of DUNS requests, if more than one; and

(vii) Contractor establishment name, street address, P.O. Box, city/town, state, ZIP code, and telephone number (if available). For foreign offerors, include province, country, and postal code.

[57 FR 42629, Sept. 15, 1992, as amended at 61 FR 51031, Sept. 30, 1996]

204.7202–3 Taxpayer identification numbers.

The taxpayer identification number (TIN) is prescribed in FAR subpart 4.9.

204.7202–4 Locally developed coding systems.

Locally developed coding systems may be used to identify contractors as long as the contracting activity is able to comply with the identification requirements of the activities with which it must share data, e.g., furnish the CAGE code to the contract administration activity.

204.7203 Responsibilities of contracting officers.

(a) The contracting officer shall assist the offeror in obtaining the required contractor code(s).

(b) Prospective offerors may not be denied a solicitation or bid set because the offeror does not have a contractor code.

(c) The contracting officer or designee shall not request a new code assignment until the appropriate microfiche, hardcopy or computer files have been screened in an effort to identify a current code for the entity. If the contracting officer does not have access to the files or listings, then initiate action to obtain the files or listings and any equipment necessary to use those files and/or listings (see 204.7202–1 and 2).

(d) If a CAGE code is being requested, it is the responsibility of the contracting activity to request the assignment of the CAGE code by completing section A of the DD Form 2051, Request for Assignment of a Commercial and Government Entity (CAGE) Code (see 253.303–2051). The prospective contractor will complete section B of the form. The completed form or electronic equivalent will be submitted by the contracting activity to DLSC–SBB for processing and code assignment after the contracting activity has verified the data submitted by the contractor. CAGE codes may be requested at the time the offeror is sent a solicitation package or added to the mailing list to ensure that a code is assigned in sufficient time to process the DD Form 350, Individual Contracting Action Report, without delay.

[56 FR 36289, July 31, 1991, as amended at 57 FR 53598, Nov. 12, 1992; 61 FR 51031, Sept. 30, 1996]

204.7204 Maintenance.

Maintenance transactions such as changes in name or address are to be submitted to the maintenance activity.

204.7204–1 Maintenance of the CAGE file.

(a) Changes, except name changes, may be submitted in writing—

(1) By the entity identified by the code, using company letterhead, through the contract administration office;

(2) By the contracting office; or

(3) By the contract administration office (see also FAR Subpart 42.12, Novation and Change-of-Name Agreements.)

(4) Using the DD Form 2051, facsimile or electronic equivalent to: Defense Logistics Services Center, DLSC–SBB, Federal Center, 74 N. Washington, Battle Creek, MI 49017–3084. Telephone Numbers: DSN 932–4358, FTS 552–4358, commercial (616) 961–4358. Facsimile: (616) 961–4528, 4352, 4265. Bulletin Board: (616) 961–4589, 4527, 5262, 5303; Message: RUEBUAA.

(b) The change-of-name agreement shall be submitted to DLSC–SBB by the contracting officer responsible for execution of the agreement (see FAR subpart 42.12). In the event there are no current contracts in force, each contracting and contract administration office receiving notification of changes from the commercial entity shall forward a copy of the change notice annotated with the CAGE code to the DLSC–SBB unless the change notice indicates that DLSC–SBB has already been notified.

(c) Additional guidance for maintaining CAGE codes is set forth at Volume 7 of DoD 4100.39–M, Defense Integrated Data System (DIDS) Manual.

[56 FR 36289, July 31, 1991, as amended at 57 FR 53598, Nov. 12, 1991; 61 FR 51031, Sept. 30, 1996]

204.7204–2 Maintenance of contractor identification number codes.

Changes, except name changes, may be submitted in writing using company letterhead by the entity identified by the code through the contract administration office, by the contracting office or the contract administration office (see also FAR Subpart 42.12, Novation

and Change-of-Name Agreements), using the agency letterhead, by mail, facsimile or electronic equivalent to FPDC Department, Dun & Bradstreet Information Services, 899 Eaton Avenue, Bethlehem, PA 18025–0013.

[56 FR 67212, Dec. 30, 1991]

204.7205 Novation agreements, mergers and sales of assets.

Contracting officers shall process and execute novation agreements in accordance with FAR Subpart 42.12, Novation and Change-of-Name Agreements. These actions are independent of code and name assignments made as a result of the occasion which created the need for the novation agreement. The maintenance activity will determine which entity(s) will retain the existing code(s) and which entities will be assigned new codes. The contracting officer responsible for processing the novation agreement shall provide the maintenance activity with the following information:

(a) Name(s), address(es), and code(s) of the contractor(s) transferring the original contractual rights and obligations.

(b) Name(s), address(es), and code(s) (if any) of the entity who is the successor in interest (transferor).

(c) Name(s), address(es), and code(s) (if any) of the entity who is retaining or receiving the rights to the technical data.

(d) Description of the circumstances surrounding the novation agreement and especially the relationship of each entity to the other.

204.7206 Using CAGE codes to identify agents and brokers.

Authorized agents and brokers are entities and, as such, may be assigned CAGE codes and contractor identification number codes for identification and processing purposes.

(a) A single CAGE code will be assigned to the agent/broker establishment in addition to any codes assigned to the entities represented by the agent/broker, i.e., only one code will be assigned to a specific agent/broker entity regardless of the number of firms represented by that agent/broker.

(b) Additional codes may be assigned to an agent/broker if they meet the criteria for assigning additional codes for entities, e.g., different location.

(c) Codes will not be assigned to an agent/broker in care of the entity being represented or in any way infer that the agent/broker is a separate establishment bearing the name of the entity represented by the agent/broker.

[56 FR 36289, July 31, 1991, as amended at 61 FR 51032, Sept. 30, 1996]

SUBCHAPTER B—ACQUISITION PLANNING

PART 205—PUBLICIZING CONTRACT ACTIONS

Sec.

Subpart 205.2—Synopses of Proposed Contract Actions

205.203 Publicizing and response time.
205.207 Preparation and transmittal of synopses.

Subpart 205.3—Synopses of Contract Awards

205.303 Announcement of contract awards.

Subpart 205.4—Release of Information

205.470 Contractor information to be provided cooperative agreement holders.
205.470–1 Statutory requirement.
205.470–2 Contract clause.

Subpart 205.5—Paid Advertisements

205.502 Authority.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36302, July 31, 1991, unless otherwise noted.

Subpart 205.2—Synopses of Proposed Contract Actions

205.203 Publicizing and response time.

(b) Allow at least 45 days response time when requested by a qualifying or designated country source (as these terms are used in part 225) and the request is consistent with the Government's requirement.

205.207 Preparation and transmittal of synopses.

(d)(i) For small disadvantaged business set-asides under 219.502–2–70, use CBD Numbered Note 4.

(ii) For acquisitions being considered for small disadvantaged business set-aside, use CBD Numbered Note 6.

(iii) For historically black college and university and minority institution set-asides under 226.7003, use CBD Numbered Note 5.

(iv) For acquisitions being considered for historically black college and university and minority institution set-aside, state:

> This proposed contract is being considered as a 100 percent set-aside for historically black colleges and universities (HBCUs) and minority institutions (MIs), as defined by the clause at 252.226–7000 of the Defense Federal Acquisition Regulation Supplement. Interested HBCUs and MIs should provide the contracting office as early as possible, but not later than 15 days after this notice, evidence of their capability to perform the contract, and a positive statement of their eligibility as an HBCU or MI. If adequate response is not received from HBCUs and MIs, the solicitation will instead be issued, without further notice, as: _____ (indicate if unrestricted, or restricted for small business or small disadvantaged business, etc.). Therefore, replies to this notice are also requested from _____ (enter the types of firms to be solicited in the event an HBCU or MI set-aside is not made).''

(v) For broad agency announcement (BAA) (see 235.016) notices, indicate which, if any, portion of the BAA will be set-aside for historically black colleges and universities and minority institutions.

(e) For acquisitions restricted to domestic sources under the authority of FAR 6.302–3, use CBD Numbered Note 13.

Subpart 205.3—Synopses of Contract Awards

205.303 Announcement of contract awards.

(a) *Public announcement.* (i) The threshold for DoD awards is $5 million. Report all contractual actions, including modifications, that have a face value, excluding unexercised options, of more than $5 million.

(A) For undefinitized contractual actions, report the not-to-exceed (NTE) amount. Later, if the definitized amount exceeds the NTE amount by more than $5 million, report only the amount exceeding the NTE.

(B) For indefinite delivery, time and material, labor hour, and similar contracts, report the initial award if the estimated face value, excluding

unexercised options, is more than $5 million. Do not report orders up to the estimated value, but after the estimated value is reached, report subsequent modifications and orders that have a face value of more than $5 million.

(C) Do not report the same work twice.

(ii) Departments and agencies submit the information—

(A) To the Office of the Assistant Secretary of Defense (Public Affairs);

(B) By the close of business the day before the date of the proposed award;

(C) Using report control symbol DD–LA– (AR) 1279;

(D) Including, as a minimum, the following—

(*1*) *Contract data.* Contract number, modification number, or delivery order number, face value of this action, total cumulative face value of the contract, description of what is being bought, contract type, whether any of the buy was for foreign military sales (FMS) and identification of the FMS customer;

(*2*) *Competition information.* Number of solicitations mailed and number of offers received;

(*3*) *Contractor data.* Name, address, and place of performance (if significant work is performed at a different location);

(*4*) *Funding data.* Type of appropriation and fiscal year of the funds, and whether the contract is multiyear (see FAR Subpart 17.1); and

(*5*) *Miscellaneous data.* Identification of the contracting office, the contracting office point of contact, known congressional interest, and the information release date.

(iii) Departments and agencies, in accordance with department/agency procedures and concurrent with the public announcement, shall provide information similar to that required by paragraph (a)(ii) of this section to members of Congress in whose state or district the contractor is located and the work is to be performed.

[56 FR 36302, July 31, 1991, as amended at 56 FR 67212, Dec. 30, 1991]

Subpart 205.4—Release of Information

205.470 Contractor information to be provided cooperative agreement holders.

205.470–1 Statutory requirement.

(a) As required by 10 U.S.C. 2413, the Defense Logistics Agency enters into cooperative agreements—

(1) With—

(i) State and local governments;

(ii) Non-profit organizations;

(iii) Indian tribal organizations; and

(iv) Indian-owned economic enterprises

(2) For the provision of technical assistance to business entities.

(b) Contractors receiving defense contracts valued at more than $500,000 must provide cooperative agreement holders, at their request, the information specified in the clause at 252.205–7000, Provision of Information to Cooperative Agreement Holders.

205.470–2 Contract clause.

Use the clause at 252.205–7000, Provision of Information to Cooperative Agreement Holders, in solicitations and contracts expected to exceed $500,000.

Subpart 205.5—Paid Advertisements

205.502 Authority.

For paid advertisements to recruit civilian personnel, see section 332–1–9 of the Federal Personnel Manual.

(a) *Newspapers.* (i) Heads of contracting activities are delegated authority to approve the publication of paid advertisements in newspapers. They may redelegate this authority in accordance with agency procedures.

(ii) Submit DD Form 1535, Request/Approval for Authority to Advertise, to the approval authority to obtain special or general authority.

(A) Special authority permits the publication of a given advertisement for a specified number of times in designated newspapers.

(B) General authority permits the publication of such advertisements as may be required during a designated fiscal year.

PART 206—COMPETITION REQUIREMENTS

Sec.
206.001 Applicability.

Subpart 206.2—Full and Open Competition After Exclusion of Sources

206.202 Establishing or maintaining alternative sources.
206.203 Set-asides for small business and labor surplus area concerns.

Subpart 206.3—Other Than Full and Open Competition

206.302 Circumstances permitting other than full and open competition.
206.302–1 Only one responsible source and no other supplies or services will satisfy agency requirements.
206.302–2 Unusual and compelling urgency.
206.302–3 Industrial mobilization; or engineering, development, or research capability.
206.302–3–70 Solicitation provision.
206.302–4 International agreement.
206.302–5 Authorized or required by statute.
206.302–7 Public interest.
206.303 Justifications.
206.303–1 Requirements.
206.303–2 Content.
206.304 Approval of the justification.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36303, July 31, 1991, unless otherwise noted.

206.001 Applicability.

(b) Contracts awarded using the procedures in 237.104(b)(ii) are expressly authorized by 10 U.S.C. 1091.

[60 FR 61592, Nov. 30, 1995]

Subpart 206.2—Full and Open Competition After Exclusion of Sources

206.202 Establishing or maintaining alternative sources.

(a) Agencies may use this authority to totally or partially exclude a particular source from a contract action.

(b) The determination and findings (D&F) and the documentation supporting the D&F must identify the source to be excluded from the contract action.

(i) Include the following information, as applicable, and any other information that may be pertinent, in the supporting documentation:

(A) The acquisition history of the supplies or services, including sources, prices, quantities, and dates of award;

(B) The circumstances which make it necessary to exclude the particular source from the contract action, including—

(*1*) The reasons for the lack of or potential loss of alternative sources; e.g., the technical complexity and criticality of the supplies or services; and

(*2*) The current annual requirement and projected needs for the supplies or services;

(C) Whether the existing source must be totally excluded from the contract action or whether a partial exclusion is sufficient;

(D) The potential effect of exclusion on the excluded source in terms of loss of capability to furnish the supplies or services in the future;

(E) When FAR 6.202(a)(1) is the authority, the basis for—

(*1*) The determination of future competition; and

(*2*) The determination of reduced overall costs. Include, as a minimum, a discussion of start-up costs, facility costs, duplicative administration costs, economic order quantities, and life cycle cost considerations; and

(F) When FAR 6.202(a)(2) is the authority—

(*1*) The current annual and mobilization requirements for the supplies or services, citing the source of, or the basis for, the data;

(*2*) A comparison of current production capacity with that necessary to meet mobilization requirements;

(*3*) An analysis of the risks of relying on the present source; and

(*4*) A projection of the time required for a new source to acquire the necessary facilities and achieve the production capacity necessary to meet mobilization requirements.

(ii) A sample format for Determination and Findings citing the authority of FAR 6.202(a) is in Table 6–1, Determinations and Findings.

TABLE 6–1—DETERMINATIONS AND FINDINGS

Determinations and Findings
Authority to Exclude a Source

In accordance with 10 U.S.C. 2304(b)(1), it is my determination that the following contract action may be awarded using full and open competition after exclusion of _____[1]:

(Describe requirement.) Findings The exclusion of _____[1]

Alternate 1: will increase or maintain competition for this requirement and is expected to result in a reduction of $_____ in overall costs for the present and future acquisition of these supplies or services. (Describe how estimate was derived.)

Alternate 2: is in the interest of national defense because it will result in having a supplier available for furnishing these supplies or services in case of a national emergency or industrial mobilization. (Explain circumstances requiring exclusion of source.)

Alternate 3: is in the interest of national defense because it will result in establishment or maintenance of an essential engineering, research or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center. (Explain circumstances requiring exclusion of source.)

206.203 Set-asides for small business and labor surplus area concerns.

(b) Also no separate justification or determination and findings is required for contract actions processed as small disadvantaged business set-asides (219.502–2–70) or as historically black college and university and minority institution set-asides (226.7003).

Subpart 206.3—Other Than Full and Open Competition

206.302 Circumstances permitting other than full and open competition.

206.302–1 Only one responsible source and no other supplies or services will satisfy agency requirements.

(a) *Authority*. (2)(i) Section 8059 of Pub. L. 101–511 and similar sections in subsequent defense appropriations acts prohibit departments and agencies from entering into contracts for studies, analyses, or consulting services (see FAR subpart 37.2) on the basis of an unsolicited proposal without providing for full and open competition, unless—

(*1*) The head of the contracting activity, or a designee no lower than chief of the contracting office, determines that—

(*i*) Following thorough technical evaluation, only one source is fully qualified to perform the proposed work;

(*ii*) The unsolicited proposal offers significant scientific or technological promise, represents the product of original thinking, and was submitted in confidence; or

(*iii*) The contract benefits the national defense by taking advantage of a unique and significant industrial accomplishment or by ensuring financial support to a new product or idea;

(*2*) A civilian official of the DoD, whose appointment has been confirmed by the Senate, determines the award to be in the interest of national defense; or

(*3*) The contract is related to improvement of equipment that is in development or production.

(b) *Application*. This authority may be used for acquisitions of test articles and associated support services from a designated foreign source under the DoD Foreign Comparative Testing Program.

(4) Do not use this authority unless the equipment or parts have been adopted as standard items of supply in accordance with DoDI 5000.2, Defense Acquisition Management Policies and Procedures.

[56 FR 36303, July 31, 1991, as amended at 57 FR 14992, Apr. 23, 1992; 58 FR 28463, May 13, 1993]

206.302–2 Unusual and compelling urgency.

(b) *Application*. The circumstances under which use of this authority may be appropriate include, but are not limited to, the following:

(i) Supplies, services, or construction needed at once because of fire, flood, explosion, or other disaster;

[1] Identify source being excluded.

(ii) Essential equipment or repair needed at once to—

(A) Comply with orders for a ship;

(B) Perform the operational mission of an aircraft; or

(C) Preclude impairment of launch capabilities or mission performance of missiles or missile support equipment.

(iii) Construction needed at once to preserve a structure or its contents from damage;

(iv) Purchase requests citing an issue priority designator under DoDD 4410.6, Uniform Material Movement and Issue Priority System, of 4 or higher, or citing ''Electronic Warfare QRC Priority.''

206.302–3 Industrial mobilization; or engineering, development, or research capability.

206.302–3–70 Solicitation provision.

Use the provision at 252.206–7000, Domestic Source Restriction, in all solicitations that are restricted to domestic sources under the authority of FAR 6.302–3.

206.302–4 International agreement.

(c) *Limitations.* Pursuant to 10 U.S.C. 2304(f)(2)(E), the justifications and approvals described in FAR 6.303 and 6.304 are not required if—

(i) The head of the contracting activity prepares a document which describes the terms of an agreement or treaty or the written directions, such as a Letter of Offer and Acceptance, that have the effect of requiring the use of other than competitive procedures for the acquisition; and

(ii) The document in paragraph (c)(i) of this subsection is approved by the competition advocate for the contracting activity.

206.302–5 Authorized or required by statute.

(b) *Application.* Agencies may use this authority to—

(i) Acquire supplies and services from military exchange stores outside the United States for use by the armed forces outside the United States in accordance with 10 U.S.C. 2424(a) and subject to the limitations of 10 U.S.C. 2424(b). The limitations of 10 U.S.C. 2424(b) (1) and (2) do not apply to the purchase of soft drinks that are manufactured in the United States. For the purposes of 10 U.S.C. 2424, soft drinks manufactured in the United States are brand name carbonated sodas, manufactured in the United States, as evidenced by product markings.

(ii) Acquire police, fire protection, airfield operation, or other community services from local governments at military installations to be closed under the circumstances in 237.7401 (Section 2907 of Fiscal Year 1994 Defense Authorization Act (Pub. L. 103–160)).

(c) *Limitations.* (i) 10 U.S.C. 2361 precludes use of this exception for awards to colleges or universities for the performance of research and development, or for the construction of any research or other facility, unless—

(A) The statute authorizing or requiring award specifically—

(*1*) States that the statute modifies or supersedes the provisions of 10 U.S.C. 2361,

(*2*) Identifies the particular college or university involved, and

(*3*) States that award is being made in contravention of 10 U.S.C. 2361(a); and

(B) The Secretary of Defense provides Congress written notice of intent to award. The contract cannot be awarded until 180 days have elapsed since the date Congress received the notice of intent to award. Contracting activities must submit a draft notice of intent with supporting documentation through channels to the Director of Defense Procurement, Office of the Under Secretary of Defense (Acquisition & Technology).

(ii) The limitation in paragraph (c)(i) of this subsection applies only if the statute authorizing or requiring award was enacted after September 30, 1989.

(iii) Subsequent statutes may provide different or additional constraints on the award of contracts to specified colleges and universities. Contracting officers should consult legal counsel on a case-by-case basis.

[56 FR 36303, July 31, 1991, as amended at 57 FR 14992, Apr. 23, 1992; 58 FR 28463, May 13, 1993; 59 FR 36089, July 15, 1994; 60 FR 29497, June 5, 1995; 60 FR 40107, Aug. 7, 1995]

206.302–7 Public interest.

(c) *Limitations.* For the defense agencies, the written determination to use this authority must be made by the Secretary of Defense.

206.303 Justifications.

206.303–1 Requirements.

(b) Technical and requirements personnel must obtain any review and approval required by department or agency procedures before submission of a recommendation for other than full and open competition to the contracting officer.

(c) When conditions warrant, a class justification may provide for award of multiple contracts extending across more than one program phase.

[56 FR 36303, July 31, 1991, as amended at 60 FR 61592, Nov. 30, 1995]

206.303–2 Content.

(a) Include sufficient information in the justification to permit its approval as a stand-alone document, even though agency procedures may require supplementary documentation.

206.304 Approval of the justification.

(a)(4) The Under Secretary of Defense (Acquisition & Technology) may delegate this authority to—

(A) An Assistant Secretary of Defense; or

(B) For a defense agency, an officer or employee serving in, assigned, or detailed to that agency who—

(1) If a member of the armed forces, is serving in a rank above brigadier general or rear admiral (lower half); or

(2) If a civilian, is serving in a position with a grade under the General Schedule (or any other schedule for civilian officers or employees) that is comparable to or higher than the grade of major general or rear admiral.

[61 FR 10285, Mar. 13, 1995, as amended at 61 FR 50451, Sept. 26, 1996]

PART 207—ACQUISITION PLANNING

Subpart 207.1—Acquisition Plans

Sec.

207.102 Policy.
207.103 Agency-head responsibilities.
207.104 General procedures.
207.105 Contents of written acquisition plans.
207.106 Additional requirements for major systems.

Subpart 207.4—Equipment Lease or Purchase

207.401 Acquisition considerations.
207.470 Statutory requirements.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36305, July 31, 1991, unless otherwise noted.

Subpart 207.1—Acquisition Plans

207.102 Policy.

When a class justification for other than full and open competition has been approved, planning for competition shall be accomplished consistent with the terms of that approval.

[60 FR 61592, Nov. 30, 1995]

207.103 Agency-head responsibilities.

(c)(i) Military departments and agencies shall prepare written acquisition plans for—

(A) Acquisitions for development, as defined in FAR 35.001, when the total cost of all contracts for the acquisition program is estimated at $5 million or more;

(B) Acquisitions for production or services when the total cost of all contracts for the acquisition program is estimated at $30 million or more for all years or $15 million or more for any fiscal year; and

(C) Any other acquisition considered appropriate by the department or agency.

(ii) Written plans are not required in acquisitions for a final buy out or one-time buy. The terms ''final buy out'' and ''one-time buy'' refer to a single contract which covers all known present and future requirements. This exception does not apply to a multiyear contract or a contract with options or phases.

(d) Prepare written acquisition plans for acquisition programs meeting the thresholds of paragraphs (c)(i) (A) and (B) of this section on a program basis. Other acquisition plans may be written

on either a program or an individual contract basis.

(f) The program manager, or other official responsible for the program, has overall responsibility for acquisition planning.

(h)(i) Apply design-to-cost principles—

(A) In all major defense acquisition programs (DoDD 5000.1, Defense Acquisition), unless exempted by the Secretary of Defense; and

(B) To the acquisition of systems, subsystems, and components below the thresholds for major defense acquisition programs, to the extent prescribed by DoDD 5000.1.

(ii) Consider life-cycle-cost in all acquisitions of systems and equipment.

[56 FR 36305, July 31, 1991, as amended at 61 FR 50451, Sept. 26, 1996]

207.104 General procedures.

(b) The planner should forward the requirements information to the contract administration organization when assistance in identification of potential sources of supply is necessary, when an existing contract is being modified or resolicited, or when contract administration resource requirements will be affected.

[61 FR 50451, Sept. 26, 1996]

207.105 Contents of written acquisition plans.

For acquisitions covered by 207.103(c)(i) (A) and (B), correlate the plan to the DoD Future Years Defense Program, applicable budget submissions, and the decision coordinating paper/program memorandum, as appropriate. It is incumbent upon the planner to coordinate the plan with all those who have a responsibility for the development, management, or administration of the acquisition. The acquisition plan should be provided to the contract administration organization to facilitate resource allocation and planning for the evaluation, identification, and management of contractor performance risk.

(a) *Acquisition background and objectives*—(1) *Statement of need.* Include—

(A) Applicability of a decision coordinating paper (DCP), acquisition decision memorandum, Defense Acquisition Board (DAB), and/or internal service reviews. Describe the options in the DCP/acquisition decision memorandum and delineate which option the acquisition plan supports.

(B) The date approval for operational use has been or will be obtained. If waivers are requested, describe the need for the waivers.

(C) A milestone chart depicting the acquisition objectives.

(D) Milestones for updating the acquisition plan. Indicate when the plan will be updated. Program managers should schedule updates to coincide with DAB reviews and the transition from one phase to another (e.g., engineering and manufacturing development to production and deployment).

(8) *Acquisition streamlining.* DoDD 5000.1, Defense Acquisition, and DoD 5000.2–R, Mandatory Procedures for Major Defense Acquisition Programs (MDAPs) and Major Automated Information System (MAIS) Acquisition Programs, contain policy direction on acquisition streamlining. See MIL–HDBK 248, Acquisition Streamlining, for guidance on streamlining performance requirements, the technical package, and the contract strategy.

(b) *Plan of action.*—(5) *Budgeting and funding.* Include specific references to budget line items and program elements, where applicable, estimated production unit cost, and the total cost for remaining production.

(6) *Product descriptions.* For development acquisitions, describe the market research undertaken to identify commercial items, commercial items with modifications, or nondevelopmental items (see FAR part 10) that could satisfy the acquisition objectives.

(13) *Logistics considerations.* (i) Describe the extent of integrated logistics support planning to date, including references to approved plans.

(ii) Discuss the mission profile, reliability, and maintainability (R&M) program plan, R&M predictions, redundancy, qualified parts lists, parts and material qualification, R&M requirements imposed on vendors, failure analysis, corrective action and feedback, and R&M design reviews and trade-off studies.

(iv) See DoDD 5000.1, Defense Acquisition, and DoD 5000.2–R, Mandatory

Procedures for Major Defense Acquisition Programs (MDAPs) and Major Automated Information System (MAIS) Acquisition Programs, for procedures on standardization and on the DoD Parts Control Program. See MIL–STD–965, Parts Control Program, for procedures on the Standardized Military Drawing Program.

(S–70) Describe the extent of Computer-Aided Acquisition and Logistics Support (CALS) implementation (see MIL–HDBK 59, Department of Defense Computer-Aided Logistics Support (CALS) Program Guide, and MIL–STD–1840A, Automated Interchange of Technical Information.

(16) *Environmental and energy conservation objectives.* Discuss actions taken to ensure either elimination of or authorization to use class I ozone-depleting chemicals and substances (see 211.271).

(18) *Other considerations.* (A) National Technology and Industrial Base. For major defense acquisition programs, address the following (Pub. L. 102–484, section 4220)—

(*1*) An analysis of the capabilities of the national technology and industrial base to develop, produce, maintain, and support such program, including consideration of the following factors related to foreign dependency (Pub. L. 102–484, section 4219(h))—

(*i*) The availability of essential raw materials, special alloys, composite materials, components, tooling, and production test equipment for the sustained production of systems fully capable of meeting the performance objectives established for those systems; the uninterrupted maintenance and repair of such systems; and the sustained operation of such systems.

(*ii*) The identification of items specified in paragraph (b)(18)(A)(*1)(i*) of this section that are available only from sources outside the national technology and industrial base.

(*iii*) The availability of alternatives for obtaining such items from within the national technology and industrial base if such items become unavailable from sources outside the national technology industrial base; and an analysis of any military vulnerability that could result from the lack of reasonable alternatives.

(*iv*) The effects on the national technology and industrial base that result from foreign acquisition of firms in the United States.

(*2*) Consideration of requirements for efficient manufacture during the design and production of the systems to be procured under the program.

(*3*) The use of advanced manufacturing technology, processes, and systems during the research and development phase and the production phase of the program.

(*4*) To the maximum extent practicable, the use of contract solicitations that encourage competing offerors to acquire, for use in the performance of the contract, modern technology, production equipment, and production systems (including hardware and software) that increase the productivity of the offerors and reduce the life-cycle costs.

(*5*) Methods to encourage investment by U.S. domestic sources in advanced manufacturing technology production equipment and processes through—

(*i*) Recognition of the contractor's investment in advanced manufacturing technology production equipment, processes, and organization of work systems that build on workers' skill and experience, and work force skill development in the development of the contract objective; and

(*ii*) Increased emphasis in source selection on the efficiency of production.

(*6*) Expanded use of commercial manufacturing processes rather than processes specified by DoD.

(*7*) Elimination of barriers to, and facilitation of, the integrated manufacture of commercial items and items being produced under DoD contracts.

(*8*) Expanded use of commercial items, commercial items with modifications, or to the extent commercial items are not available, nondevelopmental items (see FAR part 10).

(B) *Industrial preparedness (IP).*

(*1*) Provide the program's IP strategy that assesses the capability of the U.S. industrial base to achieve identified surge and mobilization goals. If no IP strategy has been developed, provide supporting rationale for this position.

(*2*) If in the IP strategy, the development of a detailed IP plan was determined to be applicable, include the

plan by text or by reference. If the development of the IP plan was determined not to be applicable, summarize the details of the analysis forming the basis of this decision.

(*3*) If the program involves peacetime and wartime hardware configurations which are supported by logistics support plans, identify their impact on the IP plan.

(C) Ensure compliance with DoDD 4210.15, Hazardous Material Pollution Prevention.

(D) *Contract administration.* Discuss the level of Government administration anticipated or currently performed and any change proposed by the contract administration office.

[56 FR 36305, July 31, 1991, as amended at 58 FR 28463, May 13, 1993; 58 FR 32061, June 8, 1993; 60 FR 29497, June 5, 1995; 60 FR 61593, Nov. 30, 1995; 61 FR 50451, Sept. 26, 1996]

207.106 Additional requirements for major systems.

(b)(1)(A) The contracting officer is prohibited by 10 U.S.C. 2305(d)(4)(A) from requiring offers for development or production of major systems that would enable the Government to use technical data to competitively reprocure identical items or components of the system if the item or component were developed exclusively at private expense, unless the contracting officer determines that—

(*1*) The original supplier of the item or component will be unable to satisfy program schedule or delivery requirements;

(*2*) Proposals by the original supplier of the item or component to meet mobilization requirements are insufficient to meet the agency's mobilization needs; or

(*3*) The Government is otherwise entitled to unlimited rights in technical data.

(B) If the contracting officer makes a determination, under paragraphs (b)(1)(A) (*1*) and (*2*) of this section, for a competitive solicitation, 10 U.S.C. 2305(d)(4)(B) requires that the evaluation of items developed at private expense be based on an analysis of the total value, in terms of innovative design, life-cycle costs, and other pertinent factors, of incorporating such items in the system.

Subpart 207.4—Equipment Lease or Purchase

207.401 Acquisition considerations.

If the equipment will be leased for more than 60 days, the requiring activity must prepare and provide the contracting officer with the justification supporting the decision to lease or purchase.

§ 207.470 Statutory requirements.

(a) *Limitation on contracts with terms of 18 months or more.* As required by 10 U.S.C. 2401a, the contracting officer shall not enter into any contract for any vessel, aircraft, or vehicle, through a lease, charter, or similar agreement with a term of 18 months or more, or extend or renew any such contract for a term of 18 months or more, unless the head of the contracting activity has—

(1) Considered all costs of such a contract (including estimated termination liability); and

(2) Determined in writing that the contract is in the best interest of the Government.

(b) *Leasing of commercial vehicles and associated equipment.* Except as provided in paragraph (a) of this section, the contracting officer may use leasing in the acquisition of commercial vehicles and associated equipment whenever the contracting officer determines that leasing of such vehicles is practicable and efficient (10 US.C. 2401a).

[61 FR 16879, Apr. 18, 1996, as amended at 61 FR 50451, Sept. 26, 1996]

PART 208—REQUIRED SOURCES OF SUPPLIES AND SERVICES

Sec.
208.001 Priorities for use of Government supply sources.
208.002 Use of other Government supply sources.

Subpart 208.4—Ordering from Federal Supply Schedules

208.404 Using schedules.
208.404–1 Mandatory use.
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208.405 Ordering office responsibilities.
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Subpart 208.7—Acquisition from the Blind and Other Severely Handicapped

208.705 Procedures.

Subpart 208.70—Coordinated Acquisition

208.7000 Scope of subpart.
208.7001 Definitions.
208.7002 Assignment authority.
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208.7004–1 Purchase authorization from requiring department.
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208.7004–3 Use of advance MIPRs.
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208.7004–6 Cancellation of requirements.
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Subpart 208.71—Acquisition for National Aeronautics and Space Administration (NASA)

208.7100 Authorization.
208.7101 Policy.
208.7102 Procedures.
208.7103 Purchase request and acceptance.
208.7104 Changes in estimated total prices.
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Subpart 208.72—Industrial Preparedness Production Planning

208.7201 Definitions.
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Subpart 208.73—Use of Government-Owned Precious Metals

208.7301 Definitions.
208.7302 Policy.
208.7303 Procedures.
208.7304 Refined precious metals.
208.7305 Contract clause.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36306, July 31, 1991, unless otherwise noted.

208.001 Priorities for use of Government supply sources.

(a)(1)(v) See subpart 208.70, Coordinated Acquisition.

(2)(iii) Information on General Services Administration (GSA) schedules for maintenance, repair, and rehabilitation of personal property is in the GSA supply catalog. The types of personal property for which GSA, Federal Supply Service has schedule contracts for maintenance, repair, and/or rehabilitation are—

(*1*) Furniture (office, household, quarters, institutional, and hospital type);

(*2*) Typewriters (manual, electric, and electronic);

(*3*) Repair and maintenance of Government owned vehicles; and

(*4*) Tire retreading and repair (except aircraft).

208.002 Use of other Government supply sources.

(f) Detailed information on strategic and critical materials in excess of national stockpile requirements (e.g., metals, ores, chemicals) is available from the Defense National Stockpile Center, 1745 Jefferson Davis Highway, Crystal Square Bldg. #4, suite 100, Arlington, VA 22202.

(g) Acquire helium (Pub. L. 86–777)—

(i) In bulk from—

(A) The Department of Interior (Bureau of Mines); or

(B) Eligible private helium distributors. A list of eligible private helium distributors is maintained by the Bureau of Mines, Helium Field Operations, 1100 South Fillmore Street, Amarillo, TX 79101.

(ii) In cylinders or trailers, from—

(A) The Department of Interior (Bureau of Mines); or

(B) Through GSA Federal Supply Schedule contracts.

Subpart 208.4—Ordering From Federal Supply Schedules

208.404 Using schedules.

(a) When a schedule lists both foreign and domestic items that will meet the needs of the requiring activity, the ordering office must apply the procedures

of part 225 and FAR part 25, Foreign Acquisition. When purchase of an item of foreign origin is specifically required, the requiring activity must furnish the ordering office sufficient information to permit the determinations required by part 225 and FAR part 25 to be made.

208.404–1 Mandatory use.

The DoD will not be a mandatory user of any schedule unless individual DoD activities elect to provide annual requirements estimates to GSA and become mandatory users. Examples of areas where this approach may be applied are:

(1) Group 68—gases and chemicals;

(2) Group 26—pneumatic tires and inner tubes;

(3) Maintenance, repair, and/or rehabilitation of personal property; and

(4) ''Just-in-time'' arrangements for delivery of material directly from vendors to users.

208.404–2 Optional use.

Make maximum use of the schedules. Other procedures may be used if further competition is judged to be in the best interest of the Government in terms of quality, responsiveness, or cost.

208.405 Ordering office responsibilities.

208.405–2 Order placement.

(1) Ordering offices may use DD Form 1155, Order for Supplies or Services, to order items from schedules.

(2) Orders may be placed orally if—

(i) The order does not exceed the small purchase threshold at FAR 13.000;

(ii) The contractor agrees to furnish a delivery ticket for each shipment under the order (in the number of copies required by the ordering office). The ticket must include the—

(A) Contract number;

(B) Order number under the contract;

(C) Date of order;

(D) Name and title of person placing order;

(E) Itemized listing of supplies or services furnished; and

(F) Date of delivery or shipment.

(iii) Invoicing procedures are agreed upon. Optional methods of submitting invoices for payment are permitted, such as—

(A) An individual invoice with a receipted copy of the delivery ticket;

(B) A summarized monthly invoice covering all oral orders made during the month, with receipted copies of the delivery tickets (this option is preferred if there are many oral orders); or

(C) A contracting officer statement that the Government has received the supplies.

(3) For purchases where cash payment is an advantage, the use of imprest funds (see FAR 13.4) is authorized when—

(i) The order does not exceed the threshold at FAR 13.404(a); and

(ii) The contractor agrees to the procedure.

Subpart 208.7—Acquisition From the Blind and Other Severely Handicapped

208.705 Procedures.

Ordering offices may use DD Form 1155, Order for Supplies or Services, to place orders with central nonprofit agencies or workshops.

Subpart 208.70—Coordinated Acquisition

208.7000 Scope of subpart.

This subpart prescribes policy and procedures for acquisition of items for which contracting responsibility is assigned to one or more of the departments/agencies or the General Services Administration. Contracting responsibility is assigned through—

(a) The Coordinated Acquisition Program (commodity assignments are listed in appendix B); or

(b) The Integrated Materiel Management Program (assignments are in DoD 4140.26–M, Integrated Materiel Management for Consumable Items).

208.7001 Definitions.

For purposes of this subpart—

Acquiring department means the department, agency, or General Services Administration which has contracting

responsibility under the Coordinated Acquisition Program.

Integrated materiel management means assignment of acquisition management responsibility to one department, agency, or the General Services Administration for all of DoD's requirements for the assigned item. Acquisition management normally includes computing requirements, funding, budgeting, storing, issuing, cataloging, standardizing, and contracting functions.

Requiring department means the department or agency which has the requirement for an item.

208.7002 Assignment authority.

(a) Under the DoD Coordinated Acquisition Program, contracting responsibility for certain commodities is assigned to a single department, agency, or the General Services Administration (GSA). Commodity assignments are made—

(1) To the departments and agencies, by the Assistant Secretary of Defense (Production and Logistics);

(2) To the GSA, through agreement with GSA, by the Assistant Secretary of Defense (Production and Logistics);

(3) Outside the continental United States, by the Unified Commanders; and

(4) For acquisitions to be made in the United States for commodities not assigned under paragraphs (a) (1), (2), or (3) of this section, by agreement of agency heads (10 U.S.C. 2308).

(i) Agreement may be on either a one-time or a continuing basis. The submission of a military interdepartmental purchase request (MIPR) by a requiring activity and its acceptance by the contracting activity of another department, even though based on an oral communication, constitutes a one-time agreement.

(ii) Consider repetitive delegated acquisition responsibilities for coordinated acquisition assignment. If not considered suitable for coordinated acquisition assignment, formalize continuing agreements and distribute them to all activities concerned.

(b) Under the Integrated Materiel Management Program, assignments are made by the Assistant Secretary of Defense (Production and Logistics)—

(1) To the departments and agencies; and

(2) To the GSA, through agreement with GSA.

208.7002–1 Acquiring department responsibilities.

The acquiring department generally is responsible under coordinated acquisition for—

(a) Operational aspects of acquisition planning (Phasing the submission of requirements to contracting, consolidating or dividing requirements, analyzing the market, and determining patterns for the phased placement of orders to avoid unnecessary production fluctuations and meet the needs of requiring departments at the lowest price);

(b) Purchasing;

(c) Performing or assigning contract administration, including follow up and expediting of inspection and transportation; and

(d) Obtaining licenses under patents and settling patent infringement claims arising out of the acquisition. (Acquiring departments must obtain approval from the department whose funds are to be charged for obtaining licenses or settling claims.)

208.7002–2 Requiring department responsibilities.

The requiring department is responsible for—

(a) Ensuring compliance with the order of priority in FAR 8.001 for use of Government supply sources before submitting a requirement to the acquiring department for contracting action.

(b) Providing the acquiring department—

(1) The complete and certified documentation required by FAR 6.303–2(b). A requiring department official, equivalent to the appropriate level in FAR 6.304, must approve the documentation before submission of the military interdepartmental purchase request (MIPR) to the acquiring department;

(2) Any additional supporting data which the acquiring department contracting officer requests (e.g., the results of any market survey or why none was conducted, and actions the requiring department will take to overcome barriers to competition in the future);

(3) The executed determination and findings required by FAR 6.302–7(c)(1);

(4) When a requiring department requests an acquiring department to contract for supplies or services using full and open competition after exclusion of sources, all data required by FAR 6.202(b)(2);

(5) When the requiring department specifies a foreign end product, any determinations required by part 225 or FAR part 25;

(6) A complete definition of the requirements, including a list (or copies) of specifications, drawings, and other data required for the acquisition. The requiring department need not furnish Federal, military, departmental, or other specifications or drawings or data which are available to the acquiring department;

(7) Justification required by FAR 17.205(a) for any option quantities requested;

(8) A statement as to whether used or reconditioned material, former Government surplus property, or residual inventory will be acceptable, and if so—

(i) A list of any supplies that need not be new; and

(ii) The basis for determining the acceptability of such supplies, including an analysis of the factors at FAR 10.010(b);

(9) A statement as to whether the acquiring department may exceed the total MIPR estimate, and if so, by what amount;

(10) Unless otherwise agreed between the departments, an original and six copies of each MIPR and its attachments (except specifications, drawings, and other data); and

(11) A list of all persons who have had access to proprietary or source selection information (see FAR 3.104–9(e)).

208.7003 Applicability.

208.7003–1 Assignments under integrated material management (IMM).

(a) All items assigned for IMM must be acquired from the IMM manager except—

(1) Items purchased under circumstances of unusual and compelling urgency as defined in FAR 6.302–2. After such a purchase is made, the requiring activity must send one copy of the contract and a statement of the emergency to the IMM manager;

(2) Items for which the IMM manager assigns a supply system code for local purchase or otherwise grants authority to purchase locally; or

(3) When purchase by the requiring activity is in the best interest of the Government in terms of the combination of quality, timeliness, and cost that best meets the requirement. This exception does not apply to items—

(i) Critical to the safe operation of a weapon system;

(ii) With special security characteristics; or

(iii) Which are dangerous (e.g., explosives, munitions).

(b) When an item assigned for IMM is to be acquired by the requiring activity under paragraph (a)(3) of this subsection, the contracting officer must—

(1) Document the contract file with a statement of the specific advantage of local purchase for an acquisition exceeding the micro-purchase threshold in FAR part 13; and

(2) Ensure that a waiver is obtained from the IMM manager before initiating an acquisition exceeding the simplified acquisition threshold in FAR part 13, if the IMM assignment is to the General Services Administration (GSA), the Defense Logistics Agency (DLA), or the Army Materiel Command (AMC). Submit requests for waiver to—

(i) For GSA:

Commissioner (F), Federal Supply Service, Washington, DC 20406

(ii) For DLA:

Defense Construction Supply Center, ATTN: DCSC–BDA, P.O. Box 3990, Columbus, OH 43216–5000

Defense Electronics Supply Center, ATTN: DESC–ERM, 1507 Wilmington Pike, Dayton, OH 45444–5000

Defense Fuel Supply Center, ATTN: DFSC–OI, Cameron Station, VA 22304–6160

Defense General Supply Center, ATTN: DGSC–X, Richmond, VA 23297–5000

Defense Industrial Supply Center, ATTN: DISC–OPD, 700 Robbins Avenue, Philadelphia, PA 19111–5096

Defense Personnel Support Center, ATTN: DPSC–CSH, 2800 South 20th Street, P.O. Box 8419, Philadelphia, PA 19101–8419

(iii) For AMC:

Commander, U.S. Army Materiel Command, ATTN: AMCLG–S, 5001 Eisenhower Avenue, Alexandria, VA 22333–0001

[60 FR 61593, Nov. 30, 1995]

208.7003–2 Assignments under coordinated acquisition.

Requiring departments must submit to the acquiring department all contracting requirements for items assigned for coordinated acquisition, except—

(a) Items obtained through the sources in FAR 8.001(a)(1) (i) through (vii);

(b) Items obtained under 208.7003–1(a);

(c) Requirements not in excess of the simplified acquisition threshold in FAR part 13, when contracting by the requiring department is in the best interest of the Government;

(d) In an emergency. When an emergency purchase is made, the requiring department must send one copy of the contract and a statement of the emergency to the contracting activity of the acquiring department;

(e) Requirements for which the acquiring department's contracting activity delegates contracting authority to the requiring department;

(f) Items in a research and development stage (as described in FAR part 35). Under this exception, the military departments may contract for research and development requirements, including quantities for testing purposes and items undergoing in-service evaluation (not yet in actual production, but beyond prototype). Generally, this exception applies only when research and development funds are used.

(g) Items peculiar to nuclear ordnance material where design characteristics or test-inspection requirements are controlled by the Department of Energy (DoE) or by DoD to ensure reliability of nuclear weapons.

(1) This exception applies to all items designed for and peculiar to nuclear ordnance regardless of agency control, or to any item which requires test or inspection conducted or controlled by DoE or DoD.

(2) This exception does not cover items used for both nuclear ordnance and other purposes if the items are not subject to the special testing procedures.

(h) Items to be acquired under FAR 6.302–6 (national security requires limitation of sources);

(i) Items to be acquired under FAR 6.302–1 (supplies available only from the original source for follow-on contract);

(j) Items directly related to a major system and which are design controlled by and acquired from either the system manufacturer or a manufacturer of a major subsystem;

(k) Items subject to rapid design changes, or to continuous redesign or modification during the production and/or operational use phases, which require continual contact between industry and the requiring department to ensure that the item meets the requirements:

(1) This exception permits the requiring department to contract for items of highly unstable design. For use of this exception, it must be clearly impractical, both technically and contractually, to refer the acquisition to the acquiring department. Anticipation that contracting by negotiation will be appropriate, or that a number of design changes may occur during contract performance is not in itself sufficient reason for using this exception.

(2) This exception also applies to items requiring compatibility testing, provided such testing requires continual contact between industry and the requiring department;

(l) Containers acquired only with items for which they are designed;

(m) One-time buy of a noncataloged item.

(1) This exception permits the requiring departments to contract for a nonrecurring requirement for a noncataloged item. This exception could cover a part or component for a prototype which may be stock numbered at a later date.

(2) This exception does not permit acquisitions of recurring requirements for an item, based solely on the fact that the item is not stock numbered, nor may it be used to acquire items which have only slightly different

characteristics than previously cataloged items.

[56 FR 36306, July 31, 1991, as amended at 60 FR 61593, Nov. 30, 1995]

208.7004 Procedures.

208.7004–1 Purchase authorization from requiring department.

(a) Requiring departments send their requirements to acquiring departments on either a DD Form 448, Military Interdepartmental Purchase Request (MIPR), or a DD Form 416, Requisition for Coal, Coke or Briquettes. A MIPR or a DD Form 416 is the acquiring department's authority to acquire the supplies or services on behalf of the requiring department.

(b) The acquiring department is authorized to create obligations against the funds cited in a MIPR without further referral to the requiring department. The acquiring department has no responsibility to determine the validity of a stated requirement in an approved MIPR, but it should bring apparent errors in the requirement to the attention of the requiring department.

(c) Changes that affect the contents of the MIPR must be processed as a MIPR amendment regardless of the status of the MIPR. The requiring department may initially transmit changes electronically or by some other expedited means, but must confirm changes by a MIPR amendment.

(d) The requiring department must submit requirements for additional line items of supplies or services not provided for in the original MIPR as a new MIPR. The requiring department may use a MIPR amendment for increased quantities only if—

(1) The original MIPR requirements have not been released for solicitation; and

(2) The acquiring department agrees.

208.7004–2 Acceptance by acquiring department.

(a) Acquiring departments formally accept a MIPR by DD Form 448–2, Acceptance of MIPR, as soon as practicable, but no later than 30 days after receipt of the MIPR. If the 30 day time limit cannot be met, the acquiring department must inform the requiring department of the reason for the delay, and the anticipated date the MIPR will be accepted. The acquiring department must accept MIPRs in writing before expiration of the funds.

(b) The acquiring department in accepting a MIPR will determine whether to use Category I (reimbursable funds citation) or Category II (direct funds citation) methods of funding.

(1) Category I method of funding is used under the following circumstances and results in citing the funds of the acquiring department in the contract—

(i) Delivery is from existing inventories of the acquiring department;

(ii) Delivery is by diversion from existing contracts of the acquiring department;

(iii) Production or assembly is through Government work orders in Government-owned plants;

(iv) Production quantities are allocated among users from one or more contracts, and the identification of specific quantities of the end item to individual contracts is not feasible at the time of MIPR acceptance;

(v) Acquisition of the end items involves separate acquisition of components to be assembled by the acquiring department;

(vi) Payments will be made without reference to deliveries of end items (e.g., cost-reimbursement type contracts and fixed price contracts with progress payment clauses); or

(vii) Category II method of funding is not feasible and economical.

(2) Category II method of funding is used in circumstances other than those in paragraph (b)(1) of this subsection. Category II funding results in citation of the requiring department's funds and MIPR number in the resultant contract.

(c) When the acquiring departments accepts a MIPR for Category I funding—

(1) The DD Form 448–2, Acceptance of MIPR, is the authority for the requiring department to record the obligation of funds;

(2) The acquiring department will annotate the DD Form 448–2 if contingencies, price revisions, or variations in quantities are anticipated. The acquiring department will periodically advise the requiring department, prior to submission of billings, of any

changes in the acceptance figure so that the requiring department may issue an amendment to the MIPR, and the recorded obligation may be adjusted to reflect the current price;

(3) If the acquiring department does not qualify the acceptance of a MIPR for anticipated contingencies, the price on the acceptance will be final and will be billed at time of delivery;

(4) Upon receipt of the final billing (SF 1080, Voucher for Transferring Funds), the requiring department may adjust the fiscal records accordingly without authorization from or notice to the acquiring department.

(d) When the MIPR is accepted for Category II funding, a conformed copy of the contract (see 204.802(1)(ii)) is the authority to record the obligation. When all awards have been placed to satisfy the total MIPR requirement, any unused funds remaining on the MIPR become excess to the acquiring department. The acquiring department will immediately notify the requiring department of the excess funds by submitting an Acceptance of MIPR (DD Form 448–2). This amendment is authorization for the requiring department to withdraw the funds. The acquiring department is prohibited from further use of such excess funds.

(e) When the acquiring department requires additional funds to complete the contracting action for the requiring department, the request for additional funds must identify the exact items involved, and the reason why additional funds are required. The requiring department shall act quickly to—

(1) Provide the funds by an amendment of the MIPR; or

(2) Reduce the requirements.

(f) The accepting activity of the acquiring department shall remain responsible for the MIPR even though that activity may split the MIPR into segments for action by other contracting activities.

208.7004–3 Use of advance MIPRs.

(a) An advance MIPR is an unfunded MIPR provided to the acquiring department in advance of the funded MIPR so that initial steps in planning the contract action can begin at an earlier date.

(b) In order to use an advance MIPR, the acquiring department and the requiring department must agree that its use will be beneficial. The departments may execute a blanket agreement to use advance MIPRs.

(c) The requiring department shall not release an advance MIPR to the acquiring department without obtaining proper internal approval of the requirement.

(d) When advance MIPRs are used, mark ''ADVANCE MIPR'' prominently on the DD Form 448.

(e) For urgent requirements, the advance MIPR may be transmitted electronically.

(f) On the basis of an advance MIPR, the acquiring department may take the initial steps toward awarding a contract, such as obtaining internal coordination and preparing an acquisition plan. Acquiring departments may determine the extent of these initial actions but shall not award contracts on the basis of advance MIPRs.

208.7004–4 Cutoff dates for submission of Category II MIPRs.

(a) Unless otherwise agreed between the departments, May 31 is the cutoff date for the receipt of MIPRs citing expiring appropriations which must be obligated by September 30 of that fiscal year. If circumstances arise which require the submission of MIPRs citing expiring appropriations after the cutoff date, the requiring department will communicate with the acquiring department before submission to find out whether the acquiring department can execute a contract or otherwise obligate the funds by the end of the fiscal year. Acquiring departments will make every effort to obligate funds for all such MIPRs accepted after the cutoff date. However, acceptance of a late MIPR does not constitute assurance by the acquiring department that all such funds will be obligated.

(b) Nothing in these instructions is intended to restrict the processing of MIPRs when the acquiring department is capable of executing contracts or otherwise obligating funds before the end of the fiscal year.

(c) The May 31 cutoff date does not apply to MIPRs citing continuing appropriations.

208.7004–5 Notification of inability to obligate on Category II MIPRs.

On August 1, the acquiring department will advise the requiring department of any Category II MIPRs on hand citing expiring appropriations they will be unable to obligate prior to the fund expiration date. If an unforeseen situation develops after August 1 which will prevent execution of a contract, the acquiring department will notify the requiring department as quickly as possible and return the MIPR. The letter of transmittal returning the MIPR will authorize purchase by the requiring department and state the reason that the acquisition could not be accomplished.

208.7004–6 Cancellation of requirements.

(a) *Category I MIPRs.* The requiring department will notify the acquiring department by electronic or other immediate means when cancelling all or part of the supplies or services requested in the MIPR. Within 30 days, the acquiring department will notify the requiring department of the quantity of items available for termination and the amount of funds in excess of the estimated settlement costs. Upon receipt of this information, the requiring department will issue a MIPR amendment to reduce the quantities and funds accordingly.

(b) *Category II MIPRs.* The requiring department will notify the acquiring department electronically or by other immediate means when cancelling all or any part of the supplies or services requested in the MIPR.

(1) If the acquiring department has not entered into a contract for the supplies or services to be cancelled, the acquiring department will immediately notify the requiring department. Upon receipt of such notification, the requiring department shall initiate a MIPR amendment to revoke the estimated amount shown on the original MIPR for the cancelled items.

(2) If the items to be cancelled have already been placed under contract—

(i) As soon as practicable, but in no event more than 45 days after receipt of the cancellation notice from the requiring department, the contracting officer shall issue a termination data letter to the requiring department (original and four copies) containing, as a minimum, the information in Table 8–1, Termination Data Letter.

(ii) The termination contracting officer (TCO) will review the proceedings at least every 60 days to reassess the Government's probable obligation. If any additional funds are excess to the probable settlement requirements, or if it appears that previous release of excess funds will result in a shortage of the amount which will be required for settlement, the TCO will promptly notify the contracting office which will amend the termination data letter. The requiring department will process a MIPR amendment to reflect the reinstatement of funds within 30 days after receiving the amended termination data letter.

(iii) Upon receipt of a copy of the termination settlement agreement, the requiring department will prepare a MIPR amendment, if required, to remove any remaining excess funds.

TABLE 8–1, TERMINATION DATA LETTER

SUBJECT: Termination Data Re:
Contract No. _____
Termination No. _____
Contract _____
(a) As termination action is now in progress on the above contract, the following information is submitted:
(1) Brief Description of items terminated.
(2) You are notified that the sum of $_____ is available for release under the subject contract. This sum represents the difference between $_____, the value of items terminated under the contract, and $_____, estimated to be required for settlement of the terminated contract. The estimated amount available for release is allocated by the appropriations cited on the contract as follows:
MIPR NO. _____ ACCOUNTING CLASSIFICATION _____ AMOUNT _____
Total available for release at this time $_____
(b) Request you forward an amendment to MIPR _____ on DD Form 448–2 to reflect the reduced quantity and amount of funds available for release.
(c) Periodic reviews (not less than 60 days) will be made as termination proceedings progress to redetermine the Government's probable obligation.

_____
Contracting Officer

208.7004–7 Termination for default.

(a) When the acquiring department terminates a contract for default, they will ask the requiring department if the supplies or services to be terminated are still required so that repurchase action can be started.

(b) The requiring department will not deobligate funds on a contract terminated for default until receipt of a settlement modification or other written evidence from the acquiring department authorizing release of funds.

(c) On the repurchase action, the acquiring department will not exceed the unliquidated funds on the defaulted contract without receiving additional funds from the requiring department.

208.7004–8 Transportation funding.

The requiring department will advise the acquiring department or the transportation officer in the contract administration office of the fund account to be charged for transportation costs. The requiring department may cite the fund account on each MIPR or provide the funding cite to the transportation officer at the beginning of each fiscal year for use on Government bills of lading. When issuing a Government bill of lading, show the requiring department as the department to be billed and cite the appropriate fund account.

208.7004–9 Status reporting.

(a) The acquiring department will maintain a system of MIPR follow up to inform the requiring department of the current status of its requests. In addition, the contract administration office will maintain a system of follow up in order to advise the acquiring department on contract performance.

(b) If requested by the requiring department, the acquiring department will furnish the requiring department a copy of the solicitation when the MIPR is satisfied through Category II funding.

(c) Any reimbursement billings, shipping document, contractual documents, project orders, or related documentation furnished to the requiring department will identify the requiring department's MIPR number, quantities of items, and funding information.

208.7004–10 Administrative costs.

The acquiring department bears the administrative costs of acquiring supplies for the requiring department. However, when an acquisition responsibility is transferred to another department, funds appropriated or to be appropriated for administrative costs will transfer to the successor acquiring department. The new acquiring department must assume budget cognizance as soon as possible.

208.7005 MIPRs.

Instructions on preparation and use of DD Form 448, Military Interdepartmental Purchase Request, and DD Form 448–2, Acceptance of MIPR, are in 253.208.

208.7006 Coordinated acquisition assignments.

See appendix B for coordinated acquisition assignments.

Subpart 208.71—Acquisition for National Aeronautics and Space Administration (NASA)

208.7100 Authorization.

NASA is authorized by Public Law 85–568 to use the acquisition services, personnel, equipment, and facilities of DoD departments and agencies with their consent, with or without reimbursement, and on a similar basis to cooperate with the departments/agencies in the use of acquisition services, equipment, and facilities.

208.7101 Policy.

Departments and agencies will—

(a) Cooperate fully with NASA in making acquisition services, equipment, personnel, and facilities available on the basis of mutual agreement.

(b) Not claim reimbursement for administrative costs incident to acquisitions for NASA, unless agreed otherwise prior to the time services are performed.

208.7102 Procedures.

(a) When contracting or performing field service functions for NASA, the departments and agencies will use

their own methods, except when otherwise required by the terms of the agreement.

(b) Departments and agencies normally will use their own funds when contracting for or performing services for NASA and will not cite NASA funds on any defense obligation or payment document.

208.7103 Purchase request and acceptance.

(a) NASA will use NASA Form 523, NASA-Defense Purchase Request, to request acquisition of supplies or services.

(b) Except as provided in paragraph (d) of this section, departments and agencies will respond within 30 days to a NASA purchase request by forwarding DD Form 448–2, Acceptance of MIPR. Forward each DD Form 448–2 in quadruplicate and indicate action status as well as the name and address of the DoD acquisition activity for future use by the NASA initiator.

(c) To the extent feasible, all documents related to the NASA action will reference the NASA-Defense Purchase Request number and the item number when appropriate.

(d) Departments and agencies are not required to accept NASA-Defense Purchase Requests for common-use standard stock items which the supplying department has on hand or on order for prompt delivery at published prices.

208.7104 Changes in estimated total prices.

When a department or agency determines that the estimated total price (Block 6F, NASA Form 523) for NASA items is not sufficient to cover the required reimbursement, or is in excess of the amount required, the department/agency will forward a request for amendment to the NASA originating office. Indicate in the request a specific dollar amount, rather than a percentage, and include justification for any upward adjustment requested. Upon approval of a request, NASA will forward an amendment of its purchase request to the contracting activity.

208.7105 Payments.

Departments and agencies will submit SF 1080, Voucher for Transferring Funds, billings to the NASA office designated in Block 9 of the NASA-Defense Purchase Request, except where agreements provide that reimbursement is not required. Departments and agencies will support billings in the same manner as billings between departments and agencies.

Subpart 208.72—Industrial Preparedness Production Planning

208.7201 Definitions.

As used in this subpart—

Industrial base means that part of the total privately-owned and Government-owned industrial production and maintenance capacity of the United States and Canada, which will be available during national emergencies to manufacture and repair items required by the departments.

Industrial preparedness production planning means planning designed to maintain an adequate industrial base to support DoD requirements for selected essential military items in a national emergency.

National emergency means a condition declared by the President or the Congress which authorizes certain emergency action in the national interest, including partial or total mobilization of national resources.

Planned item means any item selected for industrial preparedness planning under the criteria of DoDI 4005.3, Industrial Preparedness Planning.

Planned producer means an industrial firm which has agreed by either nonbinding memorandum of understanding or binding contract/contract clause to provide production capacity data, to maintain existing capacity for a negotiated period of time, and to accept contracts for planned items upon the request of the Government.

208.7202 General.

(a) Under the Industrial Preparedness Production Planning (IPPP) program, DoD components and industry work together to ensure essential military items are available during an emergency.

(b) Departments and agencies select weapon systems and items for planning in accordance with DoDI 4005.3, Industrial Preparedness Planning. Planning

is conducted only with U.S. or Canadian sources.

(c) The use of privately-owned facilities is preferred to minimize the need for Government investment. Departments and agencies will include Government-owned production facilities in the industrial base only when—

(1) Private industry is unable to provide the facilities necessary to support DoD requirements; or

(2) The facilities are necessary—

(i) For reasons of national security; or

(ii) To ensure a quick response capability to meet fluctuating demands.

208.7203 Authority.

Authority under current contracting procedures to accomplish industrial planning actions includes—

(a) Leasing of Government-owned property to planned emergency producers under the authority of the Military Leasing Act of 1947, 10 U.S.C. 2667;

(b) Acquisitions in the interest of national defense under FAR 6.202(a)(2), or in case of a national emergency or to achieve industrial mobilization under FAR 6.302–3;

(c) Acquisition under 225.71 of—

(1) Miniature and instrument bearings;

(2) Precision components for mechanical time devices;

(3) High-purity silicon;

(4) High-carbon ferrochrome;

(5) Anti-friction bearings; and

(6) Forgings and welded shipboard anchor chain;

(d) Acquisition of jewel bearings (FAR 8.2);

(e) Use of multiyear contracting (FAR 17.1);

(f) Providing Government production and research property to contractors; and

(g) Use of direct payment for idle facilities or idle capacities reserved for defense mobilization production (FAR 31.205–17(d)).

[56 FR 36306, July 31, 1991, as amended at 57 FR 42629, Sept. 15, 1992]

208.7204 Procedures.

(a) Planned producers shall be solicited for all acquisitions of their planned items, when the acquisition is over the small purchase threshold in FAR 13.000, except as provided in FAR or DFARS.

(b) The contracting officer may contract for industrial planning efforts for selected essential military items. These efforts may include, but are not limited to, the maintenance of Government-owned industrial facilities (real and personal property) or production data packages. These planning efforts may be acquired through an individual service contract or as a line item on a contract for a planned item.

Subpart 208.73—Use of Government-Owned Precious Metals

208.7301 Definitions.

As used in this subpart—

Defense Industrial Supply Center (DISC) means the Defense Logistics Agency field activity located at 700 Robbins Avenue, Philadelphia, PA 19111–5096, which is the assigned commodity integrated material manager for refined precious metals and is responsible for the storage and issue of such material.

Dual pricing evaluation procedure means a procedure where offerors submit two prices for precious metals bearing items—one based on Government-furnished precious metals and one based on contractor-furnished precious metals. The contracting officer evaluates the prices to determine which is in the Government's best interest.

Precious Metals Indicator Code (PMIC) means a single digit, alpha-numeric code assigned to national stock numbered items in The Defense Integrated Data System Total Item Record used to indicate the presence or absence of precious metals in the item. PMICs and the content value of corresponding items are listed in DoDD 4100.39M, Defense Integrated Data System (DIDS) Procedures Manual, chapter 10, Table 160.

Refined precious metal means recovered silver, gold, platinum, palladium, iridium, rhodium, or ruthenium, in bullion, granulation or sponge form, which has been purified to at least .999 percentage of fineness.

208.7302 Policy.

DoD policy is for maximum participation in the Precious Metals Recovery Program (PMRP). DoD components shall furnish recovered precious metals contained in the DISC inventory to production contractors rather than use contractor-furnished precious metals whenever the contracting officer determines it to be in the Government's best interest. (See DoDD 4160.22, Recovery and Utilization of Precious Metals.)

208.7303 Procedures.

(a) Item managers and contracting officers will use the PMIC and/or other relevant data furnished with a purchase request to determine the applicability of this subpart.

(b) When an offeror advises of a precious metals requirement, the contracting officer shall use the procedures in chapter X of DoD 4160.21–M, Defense Utilization and Disposal Manual, to determine availability of required precious metal assets and current government-furnished materiel (GFM) unit prices. If the precious metals are available, the contracting officer shall evaluate offers and award the contract on the basis of the offer which is in the best interest of the Government.

(c) When the clause prescribed by 208.7305 is included in a solicitation, the contracting officer will ensure that section B, Schedule of Supplies or Services and Prices, is structured to—

(1) Permit insertion of alternate prices for each deliverable contract line item number that uses precious metals; and

(2) Use dual pricing evaluation procedures.

208.7304 Refined precious metals.

The following refined precious metals are currently managed by DISC:

Precious metal	National Stock No. (NSN)
Silver Bullion/Granules	9660–00–106–9432
Gold Bullion/Granules	9660–00–042–7733
Platinum Granules	9660–00–042–7768
Platinum Sponge	9660–00–151–4050
Palladium Granules	9660–00–042–7765
Palladium Sponge	9660–01–011–0320
Rhodium Sponge	9660–01–011–2625
Iridium Sponge	9660–01–011–1937
Ruthenium Sponge	9660–01–039–0313

208.7305 Contract clause.

(a) Use the clause at 252.208–7000, Intent to Furnish Precious Metals as Government-Furnished Material, in all solicitations and contracts except—

(1) When the contracting officer has determined that the required precious metals are not available from DISC;

(2) When the contracting officer knows that the items being acquired do not require precious metals in their manufacture; or

(3) For acquisitions below the small purchase threshold in FAR 13.000.

(b) To make the determination in paragraph (a)(1) of this section, the contracting officer shall consult with the end item inventory manager and comply with the procedures in Chapter X, DoD 4160.21–M, Defense Utilization and Disposal Manual.

PART 209—CONTRACTOR QUALIFICATIONS

Sec.

Subpart 209.1—Responsible Prospective Contractors

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AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36313, July 31, 1991, unless otherwise noted.

Subpart 209.1—Responsible Prospective Contractors

209.101 Definitions.

''Entity controlled by a foreign government,'' ''foreign government,'' and ''proscribed information,'' are defined in the provision at 252.209–7002, Disclosure of Ownership or Control by a Foreign Government.

[59 FR 51132, Oct. 7, 1994]

209.103 Policy.

(a)(i) Do not deny award to contractors subject to on-site inspection under the Intermediate-Range Nuclear Forces (INF) Treaty, or similar treaty, due to the actual or potential presence of Soviet inspectors at the contractor's facility unless—

(A) Necessary for reasons of national security;

(B) The decision is based on full information, including comment from the potential contractor or subcontractor on the security issues involved; and

(C) The department or agency acquisition executive reviews the decision and the Under Secretary of Defense (Acquisition & Technology) approves the decision.

(ii) Make any decision to deny consideration for award under paragraph (a)(i) of this section as early as possible in the acquisition process. Notify the firm in writing of any decision not to consider the firm for award of a contract or subcontract.

(c) The additional cost of contract administration and audit due to a contractor's performance risk may be considered in evaluating the contractor's price.

[56 FR 36313, July 31, 1991, as amended at 60 FR 29497, June 5, 1995; 61 FR 50452, Sept. 26, 1996]

209.103–70 Contract clause.

Use the clause at 252.209–7000, Acquisition from Subcontractors Subject to On-Site Inspection Under the Intermediate-Range Nuclear Forces (INF) Treaty, in all solicitations and contracts exceeding the simplified acquisition threshold, except solicitations and contracts for commercial items.

[60 FR 61593, Nov. 30, 1995, as amended at 61 FR 50452, Sept. 26, 1996]

209.104 Standards.

209.104–1 General standards.

(e) For cost-reimbursement or incentive type contracts, or contracts which provide for progress payments based on costs or on a percentage or stage of completion, the prospective contractor's accounting system and related internal controls must provide reasonable assurance that—

(i) Applicable laws and regulations are complied with;

(ii) The accounting system and cost data are reliable;

(iii) Risk of misallocations and mischarges are minimized; and

(iv) Contract allocations and charges are consistent with invoice procedures.

(g)(i) *Ownership or control by the government of a terrorist country.* (A) Under 10 U.S.C. 2327(b), a contracting officer shall not award a contract to a firm or to a subsidiary of a firm when a foreign government—

(*1*) Either directly or indirectly, has a significant interest—

(*i*) In the firm; or

(*ii*) In the subsidiary; and

(*2*) Has been determined by the Secretary of State under 50 U.S.C. App. 2405(j)(1)(A) to be a government of a country that has repeatedly provided support for acts of international terrorism.

(B) The Secretary of Defense may waive the prohibition in paragraph (g)(i)(A) of this subsection in accordance with 10 U.S.C. 2327(c). This waiver authority may not be delegated.

(ii) *Ownership or control by a foreign government when access to proscribed information is required to perform the contract.* (A) Under 10 U.S.C. 2536(a), no DoD contract under a national security program may be awarded to an entity controlled by a foreign government if

that entity requires access to proscribed information to perform the contract.

(B) Whenever the contracting officer has a question about application of the provision at 252.209–7002, the contracting officer may seek advice from the Director, Defense Security Programs, Office of the Assistant Secretary of Defense for Command, Control, Communications and Intelligence.

(C) In accordance with 10 U.S.C. 2536(b), the Secretary of Defense may waive the prohibition in subparagraph (g)(ii)(A) of this subsection upon determining that the waiver is essential to the national security interests of the United States. The Secretary has delegated authority to grant this waiver to the Assistant Secretary of Defense Command, Control, Communications and Intelligence. Waiver requests, prepared by the requiring activity in coordination with the contracting officer, shall be processed through the Director of Defense Procurement, Office of the Under Secretary of Defense (Acquisition & Technology), and shall include a proposed national interest determination. The proposed national interest determination, prepared by the requiring activity in coordination with the contracting officer, shall include:

(*1*) Identification of the proposed awardee, with a synopsis of its foreign ownership (include solicitation and other reference numbers to identify the action);

(*2*) General description of the acquisition and performance requirements;

(*3*) Identification of the national security interests involved and the ways award of the contract helps advance those interests;

(*4*) The availability of another entity with the capacity, capability and technical expertise to satisfy defense acquisition, technology base, or industrial base requirements; and

(*5*) A description of any alternate means available to satisfy the requirement, e.g., use of substitute products or technology or alternate approaches to accomplish the program objectives.

(iii) *Commercial transactions with the government of a terrorist country.* (A) In accordance with section 843 of the National Defense Authorization Act for Fiscal Year 1994 (Public Law 103–160)—

(*1*) Each offeror submitting an offer exceeding $5,000,000 must disclose each commercial transaction that it has conducted with the government of a terrorist country since February 28, 1994; and

(*2*) For each contract exceeding $5,000,000, the contractor must annually report each commercial transaction that it conducts during the course of the contract (but not beyond September 30, 1996) with the government of a terrorist country.

(B) Upon award of a contract exceeding $5,000,000 to an offeror disclosing that it has conducted commercial transactions with the government of a terrorist country, the contracting officer shall—

(*1*) Forward a copy of the offeror's disclosure to the Deputy Director of Defense Procurement (Foreign Contracting); and

(*2*) Include with the disclosure the following information:

(*i*) Offeror's name and address;

(*ii*) Contracting officer's name and telephone number; and

(*iii*) Contract number and award date.

[58 FR 28464, May 13, 1993, as amended at 59 FR 51131, 51132, Oct. 7, 1994; 60 FR 29497, June 5, 1995]

209.104–4 Subcontractor responsibility.

Generally, the Canadian Commercial Corporation's (CCC) proposal of a firm as its subcontractor is sufficient basis for an affirmative determination of responsibility. However, when the CCC determination of responsibility is not consistent with other information available to the contracting officer, the contracting officer shall request from CCC and any other sources whatever additional information is necessary to make the responsibility determination.

209.104–70 Solicitation provisions and contract clause.

(a) Use the provision at 252.209–7001, Disclosure of Ownership or Control by the Government of a Terrorist Country, in all solicitations expected to result in contracts of $100,000 or more.

(b) Use the provision at 252.209–7002, Disclosure of Ownership or Control by

a Foreign Government, in all solicitations, including those subject to the procedures in FAR part 13, when access to proscribed information is necessary to perform a DoD contract under a national security program.

(c) Use the provision at 252.209–7003, Disclosure of Commercial Transactions with the Government of a Terrorist Country, in all solicitations expected to result in contracts exceeding $5,000,000.

(d) Use the clause at 252.209–7004, Reporting of Commercial Transactions with the Government of a Terrorist Country, in all solicitations that include the provision at 252.209–7003, and in all contracts exceeding $5,000,000.

[58 FR 28464, May 13, 1993, as amended at 59 FR 51131, Oct. 7, 1994]

209.106 Preaward surveys.

209.106–1 Conditions for preaward surveys.

(a) If a preaward survey is requested, include the rationale in block 23 of the SF 1403, Preaward Survey of Prospective Contractor (General).

[60 FR 61593, Nov. 30, 1995]

209.106–2 Requests for preaward surveys.

(1) The surveying activity is the cognizant contract administration office as listed in DLAH 4105.4, DoD Directory of Contract Administration Services Components. When information is required as part of the survey on the adequacy of the contractor's accounting system or its suitability for administration of the proposed type of contract, the surveying activity will obtain the information from the auditor.

(2) Limited information may be requested by telephone.

(3) The contracting officer may request a formal survey by telephone but must confirm immediately with SF 1403, Preaward Survey of Prospective Contractor (General). For a formal survey, send original and three copies of SF 1403, including necessary drawings and specifications.

(a) List additional factors in item H, section III of the SF 1403 and explain them in block 23. For example—

(i) Information needed to determine a prospective contractor's eligibility under the Walsh-Healey Public Contracts Act. (Note that the Walsh-Healey Public Contracts Act, block 12 of section I, only indicates what the contractor has represented its classification to be under Walsh-Healey.)

(ii) Evaluation of a contractor as a planned producer when the offered item is or may appear on the Industrial Preparedness Planning List (IPPL). When the preaward survey results in a recommendation for award, ask the office responsible for industrial preparedness planning to consider designating the prospective contractor as a planned producer. If the item is already on the IPPL or the prospective contractor is already a planned producer, note the information in block 23.

(iii) Evaluation of the prospective contractor's performance against small business subcontracting plans.

(c) On base level preaward surveys, technical personnel from the requiring installation should participate when there is concern about the ability of a prospective contractor to perform a base level service or construction contract.

(d) Allow more time for—

(i) Complex items;

(ii) New or inexperienced DoD contractors; and

(iii) Surveys with time-consuming requirements, e.g., secondary survey, accounting system review, financial capability analysis, or purchasing office participation.

(e) Only request those factors essential to the determination of responsibility. See 253.209–1(a) for an explanation of the factors in section III, blocks 19 and 20 of the SF 1403.

[56 FR 36313, July 31, 1991, as amended at 58 FR 28464, May 13, 1993]

Subpart 209.2—Qualifications Requirements

209.202 Policy.

(a)(1) The inclusion of qualification requirements in specifications for products which are to be included on a Qualified Products List, or manufactured by business firms included on a Qualified Manufacturers List, requires approval by the departmental standardization office in accordance with

DoD Manual 4120.3–M, Defense Standardization Program Policies and Procedures. The inclusion of other qualification requirements in an acquisition or group of acquisitions requires approval by the chief of the contracting office.

[60 FR 61593, Nov. 30, 1995]

Subpart 209.3—First Article Testing and Approval

209.303 Use.

(d) The contracting officer may require that first articles be manufactured using the same facilities, production processes, methods, and materials to be used for production units under the contract.

209.305 Risk.

The contracting officer may give this authorization to a contractor only after approval by a level higher than the contracting officer.

209.306 Solicitation requirements.

(a)(1) To be sure that the contractor and the Government clearly understand and interpret contract terms and conditions in the same manner, avoid describing first article requirements exclusively in general terms such as ''visual,'' ''dimensional,'' ''workmanship,'' or ''specification compliance.''

209.308 Contract clauses.

Alternate I of the clauses at FAR 52.209–3, First Article Approval—Contractor Testing, or 52.209–4, First Article Approval—Government Testing, as appropriate, may be used when—

(1) The form, fit, or function of the product would be adversely affected by contractor changes in the production facilities, processes, methods, or materials subsequent to first article approval; and

(2) The Government has relied upon first article testing in the absence of complete design specifications to supplement a performance specification; or

(3) It is essential to have an approved first article to serve as a manufacturing standard.

Subpart 209.4—Debarment, Suspension, and Ineligibility

209.402 Policy.

(d) The uniform suspension and debarment procedures to be followed by all debarring and suspending officials are set out in appendix H to this chapter.

(e) The department or agency shall provide a copy of the Debarment and Suspension Procedures at DFARS appendix H to this chapter to contractors at the time of their suspension or when they are proposed for debarment, and upon request to other interested parties.

[59 FR 27668, May 27, 1994]

209.403 Definitions.

Debarring official. (1) For DoD, the designees are—

Army—Commander, U.S. Army Legal Services Agency
Navy—the General Counsel of the Department of the Navy
Air Force—Deputy General Counsel (Contractor Responsibility)
Defense Advanced Research Projects Agency—The Director
Defense Information Systems Agency—The General Counsel
Defense Logistics Agency—The Special Assistant for Contracting Integrity
Defense Mapping Agency—The General Counsel
Defense Special Weapons Agency—The Director
National Security Agency—The Director
Ballistic Missile Defense Organization—The General Counsel
Overseas installations—as designated by the agency head

(2) Overseas debarring officials—

(i) Are authorized to debar or suspend contractors located within the official's geographic area of responsibility under any delegation of authority they receive from their agency head.

(ii) Debar or suspend in accordance with the procedures in FAR subpart 9.4 or under modified procedures approved by the agency head based on consideration of the laws or customs of the foreign countries concerned.

(iii) In addition to the bases for debarment in FAR 9.406–2, may consider the following additional bases—

(A) The foreign country concerned determines that a contractor has engaged in bid-rigging, price-fixing, or other anti-competitive behavior; or

(B) The foreign country concerned declares the contractor to be formally debarred, suspended, or otherwise ineligible to contract with that foreign government or its instrumentalities.

[56 FR 36313, July 31, 1991, as amended at 56 FR 67212, Dec. 30, 1991; 59 FR 27669, May 27, 1994; 60 FR 61593, Nov. 30, 1995; 61 FR 50452, Sept. 26, 1996]

209.405 Effect of listing.

Under 10 U.S.C. 2393b, when a department or agency determines that a compelling reason exists for it to conduct business with a contractor that is on the list of parties excluded from procurement programs, it shall provide written notice of the determination to the General Services Administration, Office of Acquisition Policy. Examples of compelling reasons are—

(1) Only a listed contractor can provide the supplies or services;

(2) Urgency requires contracting with a listed contractor;

(3) The contractor and a department or agency have an agreement covering the same events which resulted in the listing and the agreement includes the department/agency decision not to debar or suspend the contractor; or

(4) The national defense requires continued business dealings with the listed contractor.

209.405–1 Continuation of current contracts.

(b) Unless the agency head makes a written determination that a compelling reason exists to do so, ordering activities shall not—

(i) Place orders exceeding the guaranteed minimum under indefinite quantity contracts: or

(ii) When the agency is an optional user, place orders against Federal Supply Schedule contracts.

(c) This includes exercise of options.

[60 FR 29497, June 5, 1995, as amended at 60 FR 61593, Nov. 30, 1995]

209.406 Debarment.

209.406–1 General.

(a)(i) When the debarring official decides that debarment is not necessary, the official may require the contractor to enter into a written agreement which includes—

(A) A requirement for the contractor to establish, if not already established, and to maintain the standards of conduct and internal control systems prescribed by subpart 203.70; and

(B) Other requirements the debarring official considers appropriate.

(ii) Before the debarring official decides not to suspend or debar in the case of an indictment or conviction for a felony, the debarring official must determine that the contractor has addressed adequately the circumstances that gave rise to the misconduct, and that appropriate standards of ethics and integrity are in place and are working.

[57 FR 14992, Apr. 23, 1992]

209.406–2 Causes for debarment.

(a) Any person shall be considered for debarment if criminally convicted of intentionally affixing a label bearing a ''Made in America'' inscription to any product sold in or shipped to the United States that was not made in America (10 U.S.C. 2410f).

(i) The debarring official will make a determination concerning debarment not later than 90 days after determining that a person has been so convicted.

(ii) In cases where the debarring official decides not to debar, the debarring official will report that decision to the Director of Defense Procurement who will notify Congress within 30 days after the decision is made.

[58 FR 28464, May 13, 1993]

209.406–3 Procedures.

(a) *Investigation and referral.* (i) The contracting officer shall prepare a report containing the information required by paragraph (a)(ii) of this subsection when—

(A) A contractor has committed, or is suspected of having committed, any of

the acts described in FAR 9.406–2 and 9.407–2;

(B) FAR 49.106 requires a report;

(C) Part 203 requires a report;

(D) The Government suspects a contractor of violating the Buy American Act (see FAR 25.204); or

(E) The Government suspects a contractor of attempting to evade the prohibitions of debarment or suspension by changes of address, multiple addresses, formation of new companies, or by other devices.

(ii) Include the following information, when available, in the report required by paragraph (a)(i) of this subsection—

(A) Name, address, and telephone number of the point of contact for the activity making the report;

(B) Name, contractor and Government entity (CAGE) code, and address of the contractor;

(C) Name and addresses of the members of the board, principal officers, partners, owners, and managers;

(D) Name and addresses of all known affiliates, subsidiaries, or parent firms, and the nature of the business relationship;

(E) For each contract affected by the conduct being reported—

(*1*) The contract number;

(*2*) All office identifying numbers or symbols;

(*3*) Description of supplies or services;

(*4*) The amount;

(*5*) The percentage of completion;

(*6*) The amount paid the contractor;

(*7*) Whether the contract is assigned under the Assignment of Claims Act and, if so, to whom; and

(*8*) The amount due the contractor;

(F) For any other contracts outstanding with the contractor or any of its affiliates—

(*1*) The contract number;

(*2*) The amount;

(*3*) The amounts paid the contractor;

(*4*) Whether the contract is assigned under the Assignment of Claims Act and, if so, to whom; and

(*5*) The amount due the contractor;

(G) A complete summary of all pertinent evidence and the status of any legal proceedings involving the contractor;

(H) An estimate of any damages sustained by the Government as a result of the contractor's action (explain how the estimate was calculated);

(I) The comments and recommendations of the contracting officer and of each higher level contracting review authority regarding—

(*1*) Whether to suspend or debar the contractor;

(*2*) Whether to apply limitations to the suspension or debarment;

(*3*) The period of any recommended debarment; and

(*4*) Whether to continue any current contracts with the contractor (explain why a recommendation regarding current contracts is not included);

(J) When appropriate, as an enclosure to the report—

(*1*) A copy or extracts of each pertinent contract;

(*2*) Witness statements or affidavits;

(*3*) Copies of investigative reports;

(*4*) Certified copies of indictments, judgments, and sentencing actions; and

(*5*) Any other appropriate exhibits or documentation.

(iii) Send three copies of each report, including enclosures, to the debarring official in 209.403.

209.470 Military recruiting on campus.

209.470–1 Policy.

(a)(1) Section 558 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103–337) provides that no funds available to DoD may be provided by grant or contract to any institution of higher education that has a policy of denying or that effectively prevents the Secretary of Defense from obtaining for military recruiting purposes—

(i) Entry to campuses or access to students on campuses; or

(ii) Access to directory information pertaining to students.

(2) Section 541 of the National Defense Authorization Act for Fiscal Year 1996 (10 U.S.C. 983) provides that no funds appropriated or otherwise available to DoD may be obligated by contract or by grant, including a grant of funds to be available for student aid, to any institution of higher education that, as determined by the Secretary of Defense, has an anti-ROTC policy and at which, as determined by the Secretary, the Secretary would otherwise

maintain or seek to establish a unit of the Senior Reserve Officer Training Corps, or at which the Secretary would otherwise enroll or seek to enroll students for participation in a unit of the Senior Reserve Officer Training Corps at another nearby institution of higher education. This prohibition applies to new contracts and all contract modifications. (See 243.105.) This prohibition shall cease to apply to that institution upon a determination by the Secretary that the institution no longer has an anti-ROTC policy.

(b) Institutions of higher education that are determined under 32 CFR part 216 to have the policy or practice in paragraph (a)(1) or (a)(2) of this subsection shall be listed as ineligible on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs published by the General Services Administration. (See FAR 9.404.)

(c) In cases where a determination is made under 32 CFR part 216 that specific subordinate elements of an institution of higher education, rather than the institution as a whole, have the policy or practice in paragraph (a)(1) or (a)(2) of this subsection, 32 CFR part 216 provides that the prohibition on use of DoD funds applies only to those subordinate elements.

[61 FR 25408, My 21, 1996]

209.470–2 Procedures.

(a) Agencies shall not solicit offers from, award contracts to, or consent to subcontracts with ineligible contractors.

(b) After a determination of ineligibility under 209.470–1(a)(1), departments and agencies shall make no further payments under existing contracts with the institutions, and shall initiate termination action.

[61 FR 25408, My 21, 1996]

209.470–3 Contract clause.

Use the clause at 252.209–7005, Military Recruiting on Campus, in all solicitations and contracts with institutions of higher education.

[60 FR 13074, Mar. 10, 1995, as amended at 60 FR 51693, Nov. 30, 1995]

PART 211—DESCRIBING AGENCY NEEDS

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211.002 Policy.
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211.272 Alternate preservation, packaging, and packing.

Subpart 211.5—Liquidated Damages

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Subpart 211.6—Priorities and Allocations

211.602 General.

AUTHORITY: 41 U.S.C. 421 and 48 CFR Chapter 1.

SOURCE: 60 FR 61594, Nov. 30, 1995, unless otherwise noted.

211.002 Policy

All systems acquisition programs in the DoD are subject to the acquisition streamlining policies and procedures in DoDI 5000.2, Defense Acquisition Management Policies and Procedures.

211.002–70 Contract clause.

Use the clause at 252.211–7000, Acquisition Streamlining, in all solicitations and contracts for systems acquisition programs.

Subpart 211.2—Using and Maintaining Requirements Documents

211.201 Identification and availability of specifications.

(a) The DoD index of data item descriptions is DoD 5010.12–L, Acquisition Management Systems and Data Requirements Control List (AMSDL).

(b) Also, furnish data item descriptions which are not listed in the AMSDL, except when it is not feasible, e.g., documents are bulky or only a

limited number of copies are available at the contracting activity.

(d) The AMSDL, all unclassified specifications and standards listed in the DODISS, and data item descriptions listed in the AMSDL may also be purchased from the Standardization Documents Desk, Building 4D, 700 Robbins Avenue, Philadelphia, PA 19111–5094. Include with the letter or DD Form 1425—

(i) The requester's customer number; and

(ii) Complete return mailing address, including any ''mark for'' instructions.

211.204 Solicitation provisions and contract clauses.

(c) When contract performance requires use of specifications and standards which are not listed in the DODISS and data item descriptions which are not listed in the AMSDL, use provisions, as appropriate, substantially the same as those at 252.211–7001, Availability of Specifications and Standards Not Listed in DODISS, Data Item Descriptions Not Listed in DoD 5010.12–L, and Plans, Drawings, and Other Pertinent Documents, and 252.211–7002, Availability for Examination of Specifications, Standards, Plans, Drawings, Data Item Descriptions, and Other Pertinent Documents.

211.270 Brand name or equal purchase descriptions.

211.270–1 Policy.

When a ''brand name or equal'' purchase description is used—

(a) The purchase description—

(1) Should include a complete common generic identification of the item.

(2) Should reference all known acceptable brand name products, to include—

(i) Name of manufacturer, producer, or distributor of each brand name product referenced (and address if not well known); and

(ii) Model, make, or catalog number for each, and identity of the commercial catalog in which it appears.

(3) May, if necessary to adequately describe an item, use a commercial catalog description or an extract from the catalog. Ensure that a copy of each catalog referenced (except parts catalogs) is available at the contracting office for review by offerors.

(4) Should give prospective offerors the opportunity to offer products other than those specifically referenced by brand name, as long as they meet the needs of the Government in essentially the same manner as the brand name product.

(5) Must identify those salient physical, functional, or other characteristics which are essential to the needs of the Government.

(b) The solicitation—

(1) Shall be at or below the simplified acquisition threshold in FAR part 13.

(2) May require bid samples for ''or equal'' offers, but not for ''brand name'' offers.

(3) Must provide for full consideration and evaluation of ''or equal'' offers against the salient characteristic specified in the purchase description. Do not reject offers for minor differences in design, construction, or features which do not affect the suitability of the product for its intended use.

(4) Must include the following immediately after the item description—Offering:

Manufacturer's Name_____ Brand_____ Model or Part No._____

(c) The contract shall—

(1) Not exceed the simplified acquisition threshold in FAR part 13.

(2) Identify, or incorporate by reference an identification of the specific products the contractor is to furnish. Include any brand name, make or model number, descriptive material, and any modifications of brand name products specified in the offer.

211.270–2 Solicitation provision.

(a) When a brand name or equal purchase description is included in a solicitation at or below the simplified acquisition threshold in FAR part 13, use the provision at 252.211–7003, Brand Name or Equal.

(b) When component parts of an end item are described by brand name or equal purchase descriptions and application of the provision at 252.211–7003

to some or all of the components is impracticable, either do not use the provision or limit its application to specified components.

211.271 Elimination of use of class I ozone-depleting substances.

(a) *Contracts.* No DoD contract may include a specification or standard that requires the use of a class I ozone-depleting substance or that can be met only through the use of such a substance unless the inclusion of the specification or standard is specifically authorized at a level no lower than a general or flag officer or member of the Senior Executive Service of the requiring activity in accordance with Section 326, Public Law 102–484 (10 U.S.C. 2301 (repealed) note).

(b) *Modifications.* (1) Contracts awarded before June 1, 1993, with a value in excess of $10 million, that are modified or extended (including option exercise) and, as a result of the modification or extension will expire more than one year after the effective date of the modification or extension, must be evaluated in accordance with agency procedures for the elimination of ozone-depleting substances.

(i) The evaluation must be carried out within 60 days after the first modification or extension.

(ii) No further modification or extension may be made to the contract until the evaluation is complete.

(2) If, as a result of this evaluation, it is determined that an economically feasible substitute substance or alternative technology is available, the contracting officer shall modify the contract to require the use of the substitute substance or alternative technology.

(3) If a substitute substance or alternative technology is not available, a written determination shall be made to that effect at a level no lower than a general or flag officer or member of the Senior Executive Service of the requiring activity.

211.272 Alternate preservation, packaging, and packing.

Use the provision at 252.211–7004, Alternate Preservation, Packaging, and Packing, in solicitations which include military preservation, packaging, or packing specifications when it is feasible to evaluate and award using commercial or industrial preservation, packaging, or packing.

Subpart 211.5—Liquidated Damages

211.504 Contract clauses.

(b) Use the clause at FAR 52.211–12, Liquidated Damages—Construction, in all construction contracts exceeding $500,000, except cost-plus-fixed-fee contracts or contracts where the contractor cannot control the pace of the work. Use of the clause in contracts of $500,000 or less is optional.

Subpart 211.6—Priorities and Allocations

211.602 General.

DoD implementation of the Defense Priorities and Allocations System is in DoDI 4400.1, Priorities and Allocations—Delegation of DO and DX Priorities and Allocations Authorities, Rescheduling of Deliveries and Continuance of Related Manuals.

PART 212—ACQUISITION OF COMMERCIAL ITEMS—GENERAL

Subpart 212.2—Special Requirements for the Acquisition of Commercial Items

Sec.

212.211 Technical data.

Subpart 212.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.
212.302 Tailoring of provisions and clauses for the acquisition of commercial items.

Subpart 212.5—Applicability of Certain Laws to the Acquisition of Commercial Items

212.503 Applicability of certain laws to Executive Agency contracts for the acquisition of commercial items.
212.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.

AUTHORITY: 41 U.S.C. 421 and 48 CFR Chapter 1.

SOURCE: 60 FR 61595, Nov. 30, 1995, unless otherwise noted.

Subpart 212.2—Special Requirements for the Acquisition of Commercial Items

212.211 Technical data.

The DoD policy for acquiring technical data for commercial items is at 227.7102.

Subpart 212.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f)(i) Use one of the following provisions as prescribed in part 225:

(A) 252.225–7000, Buy American Act—Balance of Payments Program Certificate.

(B) 252.225–7006, Buy American Act—Trade Agreements—Balance of Payments Program Certificate.

(C) 252.225–7035, Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program Certificate.

(ii) Use the provision at 252.212–7000, Offeror Representations and Certifications—Commercial Items, in all solicitations for commercial items exceeding the simplified acquisition threshold. If an exception to 10 U.S.C. 2410i applies to a solicitation exceeding the simplified acquisition threshold (see 225.770–3), indicate on an addendum that ''The certification in paragraph (b) of the provision at 252.225–7000 does not apply to this solicitation.''

(iii) Use the clause at 252.212–7001, Contract Terms and Conditions Required to Implement Statutes Applicable to Defense Acquisitions of Commercial Items, in all solicitations and contracts for commercial items, completing paragraph (b), as appropriate.

[60 FR 61595, Nov. 30, 1995, as amended at 61 FR 50452, Sept. 26, 1996]

212.302 Tailoring of provisions and clauses for the acquisition of commercial items.

(c) *Tailoring inconsistent with customary commercial practice.*

The head of the contracting activity is the approval authority within the DoD for waivers under FAR 12.302(c).

Subpart 212.5—Applicability of Certain Laws to the Acquisition of Commercial Items

212.503 Applicability of certain laws to Executive Agency contracts for the acquisition of commercial items.

(a) The following laws are not applicable to contracts for the acquisition of commercial items:

(i) Section 806, Public Law 102–190 (10 U.S.C. 2301 (repealed) note), Payment Protections for Subcontractors and Suppliers.

(ii) 10 U.S.C. 2306(b), Prohibition on Contingent Fees.

(iii) 10 U.S.C. 2324, Allowable Costs Under Defense Contracts.

(iv) 10 U.S.C. 2384(b), Requirement to Identify Suppliers.

(v) 10 U.S.C. 2397(a)(1), Reports by Employees or Former Employees of Defense Contractors.

(vi) 10 U.S.C. 2397b(f), Limits on Employment for Former DoD Officials.

(vii) 10 U.S.C. 2397c, Defense Contractor Requirements Concerning Former DoD Officials.

(viii) 10 U.S.C. 2408(a), Prohibition on Persons Convicted of Defense Related Felonies.

(ix) 10 U.S.C. 2410b, Contractor Inventory Accounting System Standards (see 252.242–7004).

(x) 107 Stat 1720 (Section 843(a), Public Law 103–160), Reporting Requirement Regarding Dealings with Terrorist Countries.

(xi) Domestic Content Restrictions in the National Defense Appropriations Acts for Fiscal Years 1996 and Subsequent Years.

(c) The applicability of the following laws has been modified in regard to contracts for the acquisition of commercial items:

(i) 10 U.S.C. 2402, Prohibition on Limiting Subcontractor Direct Sales to the United States (see FAR 3.503 and 52.203–6).

(ii) 10 U.S.C. 2306a, Truth in Negotiations Act (see FAR 15.804).

212.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.

(a) The following laws are not applicable to subcontracts at any tier for the acquisition of commercial items or commercial components:

(i) 10 U.S.C. 2241 note, Limitations on Procurement of Food, Clothing, and Specialty Metals Not Produced in the United States.

(ii) Section 806, Public Law 102–190 (10 U.S.C. 2301 (repealed) note), Payment Protections for Subcontractors and Suppliers.

(iii) 10 U.S.C. 2306(b) Prohibition on Contingent Fees.

(iv) 10 U.S.C. 2313(c), Examination of Records of a Contractor.

(v) 10 U.S.C. 2320, Rights in Technical Data.

(vi) 10 U.S.C. 2321, Validation of Proprietary Data Restrictions.

(vii) 10 U.S.C. 2324, Allowable Costs Under Defense Contracts.

(viii) 10 U.S.C. 2327, Reporting Requirement Regarding Dealings with Terrorist Countries.

(ix) 10 U.S.C. 2384(b), Requirement to Identify Suppliers.

(x) 10 U.S.C. 2391 note, Notification of Substantial Impact on Employment.

(xi) 10 U.S.C. 2393, Prohibition Against Doing Business with Certain Offerors or Contractors.

(xii) 10 U.S.C. 2397(a)(1), Reports by Employees or Former Employees of Defense Contractors.

(xiii) 10 U.S.C. 2397b(f), Limits on Employment for Former DoD Officials.

(xiv) 10 U.S.C. 2397c, Defense Contractor Requirements Concerning Former DoD Officials.

(xv) 10 U.S.C. 2408(a) Prohibition on Persons Convicted of Defense Related Felonies.

(xvi) 10 U.S.C. 2410b, Contractor Inventory Accounting System Standards.

(xvii) 10 U.S.C. 2501 note, Notification of Proposed Program Termination.

(xviii) 10 U.S.C. 2534, Miscellaneous Limitations on the Procurement of Goods Other Than United States Goods.

(xix) 10 U.S.C. 2534(c), Preference for United States and Canadian Valves and Machine Tools.

(xx) 10 U.S.C. 2534(d), Restriction on Acquisition of Carbonyl Iron Powder.

(xxi) 10 U.S.C. 2534(e), Restriction on Acquisition of Air Circuit Breakers.

(xxii) Effective May 1, 1996: 10 U.S.C. 2631, Transportation of Supplies by Sea.

(xxiii) 19 U.S.C. 2512, Trade Agreements Act.

(xxiv) 41 U.S.C. 10, Buy American Act.

(xxv) 10 U.S.C. 2327 (Section 843(a), Public Law 103–160), Reporting Requirement Regarding Dealings with Terrorist Countries.

(xxvi) Domestic Content Restrictions in the National Defense Appropriations Acts for Fiscal Years 1996 and Subsequent Years.

(b) Certain requirements of the following laws have been eliminated for subcontracts at any tier for the acquisition of commercial items or commercial components:

(i) 10 U.S.C. 2393(d), Subcontractor Reports Under Prohibition Against Doing Business with Certain Offerors (see FAR 52.209–6).

(ii) 10 U.S.C. 2402, Prohibition on Limiting Subcontractor Direct Sales to the United States (see FAR 3.503 and 52.203–6).

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 213—SIMPLIFIED ACQUISITION PROCEDURES

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213.000 Scope of part.

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213.101 Definitions.

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213.203 Establishment of Blanket Purchase Agreements.
213.203–1 General.
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213.204 Purchase under Blanket Purchase Agreements.

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Subpart 213.5—Purchase Orders

213.503 Obtaining contractor acceptance and modifying purchase orders.
213.504 Termination or cancellation of purchase orders.
213.505 Purchase order and related forms.
213.505–1 Optional Form (OF) 347, Order for Supplies or Services, and Optional Form 348, Order for Supplies or Services Schedule-Continuation.
213.505–3 Standard Form 44, Purchase Order-Invoice-Voucher.
213.507 Provisions and clauses.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36324, July 31, 1991, unless otherwise noted.

213.000 Scope of part.

This part also implements 10 U.S.C. 2302(7) which increases the simplified acquisition threshold to $200,000 for any contract to be awarded and performed outside the United States in support of a contingency operation as defined in 10 U.S.C. 101(a)(13).

[59 FR 50851, Oct. 6, 1994, as amended at 61 FR 7742, Feb. 29. 1996]

Subpart 213.1—General

213.101 Definitions.

Contingency operation is defined in 10 U.S.C. 101(a)(13) as a military operation that—

(1) Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10, chapter 15 of Title 10, or any other provision of law during a war or during a national emergency declared by the President or Congress.

[59 FR 50851, Oct. 6, 1994, as amended at 61 FR 7742, Feb. 29, 1996]

Subpart 213.2—Blanket Purchase Agreements

213.203 Establishment of Blanket Purchase Agreements.

213.203–1 General.

(i) Prepare and issue blanket purchase agreements (BPAs) on DD Form 1155, Order for Supplies or Services.

213.203–2 Clauses.

(a) The clauses prescribed at 213.507 for purchase orders also apply to BPAs.

213.204 Purchase under Blanket Purchase Agreements.

(b) Individual purchases for subsistence may be made at any dollar value; however, the contracting officer shall satisfy the competition requirements

of FAR part 6 for any action not using simplified acquisition procedures.

[56 FR 36324, July 31, 1991, as amended at 61 FR 7742, Feb. 29, 1996]

Subpart 213.3—Fast Payment Procedure

§ 213.302 Conditions for use.

(a) Individual orders may exceed $25,000 for—

(i) Brand name commissary resale subsistence; and

(ii) Medical supplies for direct shipment overseas.

Subpart 213.4—Imprest Fund

213.401 General.

See DoDD 7360.10, Disbursing Policies, and chapter 32 of the DoD Accounting Manual, DoD 7220.9–M.

[56 FR 36324, July 31, 1991. Redesignated at 61 FR 7742, Feb. 29, 1996]

213.402 Agency responsibilities.

(c) Installation commanders and commanders of other activities with contracting authority are responsible for approving the establishment of imprest funds.

[56 FR 36324, July 31, 1991. Redesignated at 61 FR 7742, Feb. 29, 1996]

213.403 Conditions for use.

(a) Overseas transactions in support of a contingency operation as defined in 10 U.S.C. 101(a)(13) may use imprest funds up to $2,500.

(c)(i) Additional conditions for use include—

(A) Availability for delivery within 60 days; and

(B) No requirement for detailed technical specifications or technical inspections.

(ii) When imprest funds are used for simplified acquisitions, the funds may also be used to pay charges for local delivery, parcel post, c.o.d. charges, and line haul or inter-city transportation charges when the supplier is to arrange for delivery.

[56 FR 36324, July 31, 1991, as amended at 59 FR 50851, Oct. 6, 1994. Redesignated and amended at 61 FR 7742, Feb. 29, 1996]

Subpart 213.5—Purchase Orders

213.503 Obtaining contractor acceptance and modifying purchase orders.

(a) Require written acceptance of purchase orders for classified acquisitions.

(b) Use Standard Form 30, Amendment of Solicitation/Modification of Contract, to modify purchase orders.

(d)(i) Unilateral modifications (see FAR 43.103) may also be used for—

(A) No cost amended shipping instructions (ASI) if—

(*1*) The ASI modifies a unilateral purchase order, and

(*2*) The contractor agrees verbally or in writing.

(B) Any change made before work begins if—

(*1*) The change is within the scope of the original order;

(*2*) The contractor agrees;

(*3*) The modification references the contractor's verbal or written agreement; and

(*4*) Block 13D of the Standard Form 30 is annotated to reflect the authority for issuance of the modification.

(ii) A supplemental agreement converts a unilateral purchase order to a bilateral agreement. If not previously included in the purchase order, incorporate the clauses prescribed in 213.507(a)(ii) in the Standard Form 30, Amendment of Solicitation/Modification of Contract, and obtain the contractor's acceptance by signature on the Standard Form 30.

213.504 Termination or cancellation of purchase orders.

(b) Use Standard Form 30 to cancel a unilateral purchase order.

213.505 Purchase order and related forms.

213.505–1 Optional Form (OF) 347, Order for Supplies or Services, and Optional Form 348, Order for Supplies or Services Schedule-Continuation.

Departments and agencies shall not use Optional Forms 347, Order for Supplies or Services, and 348, Order for Supplies or Services Schedule-Continuation.

(b)(i) Use DD Form 1155, Orders for Supplies or Services, (see 253.213(e)), for purchases made using the simplified acquisition procedures of FAR part 13. The DD Form 1155 serves as—

(A) A purchase order or a blanket purchase agreement, when used with the clauses prescribed at 213.507(a);

(B) A delivery order under a Government contract or from Government agencies outside the DoD;

(C) A receiving and inspection report;

(D) A property voucher;

(E) A document for acceptance by the supplier; and

(F) A public voucher, when used as—

(*1*) A delivery order;

(*2*) The basis for payment of an invoice against blanket purchase agreements or basic ordering agreements when a firm price has been established; or

(*3*) A purchase order for acquisitions using simplified acquisition procedures.

(ii) The DD Form 1155 is also authorized for use for—

(A) Classified acquisitions when the purchase is made within the United States, its possessions, and Puerto Rico. Attach the DD Form 254, Contract Security Classification Specification, to the purchase order.

(B) Orders under departmental contracts or from Government agencies outside the DoD (see FAR subparts 8.4, 8.6, 8.7, and 16.5).

[56 FR 36324, July 31, 1991. Redesignated and amended at 61 FR 7742, Feb. 29, 1996; 61 FR 9532, Mar. 8, 1996]

213.505–3 Standard Form 44, Purchase Order-Invoice-Voucher.

(b)(1) The micro-purchase limitation applies to all purchases except that purchases up to the simplified acquisition threshold may be made for—

(A) Aviation fuel and oil;

(B) Overseas transactions by contracting officers in support of a contingency operation as defined in 10 U.S.C. 101(a)(13); and

(C) Transactions in support of intelligence and other specialized activities addressed by Part 2.7 of Executive Order 12333.

[59 FR 50851, Oct. 6, 1994, as amended at 61 FR 7742, Feb. 29, 1996; 61 FR 18195, Apr. 24, 1996]

213.507 Provisions and clauses.

(a) Use the clauses in paragraphs (a)(i) through (iii) of this section, as applicable, in all purchase orders and blanket purchase agreements. The clauses listed in the following paragraphs (i) and (ii) may be incorporated by reference, except for FAR 52.252–2, Clauses Incorporated by Reference. Any other clauses included in the purchase order shall be incorporated by reference or in full text as required by the matrix in FAR 52.3.

(i) Unilateral purchase orders—

(A) FAR 52.252–2, Clauses Incorporated by Reference (required only if other clauses are incorporated by reference);

(B) FAR 52.203–3, Gratuities;

(C) FAR 52.211–16, Variation in Quantity;

(D) FAR 52.222–3, Convict Labor (unless the order will be subject to the Walsh-Healey Public Contracts Act (see FAR subpart 22.6));

(E) FAR 52.222–26, Equal Opportunity (unless exempt under FAR 22.807);

(F) FAR 52.225–3, Buy American Act-Supplies;

(G) FAR 52.232,–1, Payments;

(H) FAR 52.232–25, Prompt Payment;

(I) FAR 52.232–28, Electronic Funds Transfer Payment Methods;

(J) FAR 52.233–1, Disputes;

(K) FAR 52.246–1, Contractor Inspection Requirements (except when an alternate level of quality assurance is necessary (see FAR 46.203 and 46.204)); and

(L) FAR 52.246–16, Responsibility for Supplies.

(ii) Bilateral purchase orders—

(A) The clauses in paragraph (a)(i) of this section;

(B) FAR 52.204–2, Security Requirements (if the acquisition is classified);

(C) FAR 52.243–1, Changes—Fixed Price (with appropriate alternate as necessary);

(D) 252.243–7001, Pricing of Contract Modifications;

(E) FAR 52.249–1, 52.249–4, or 52.249–5, Termination for Convenience of the Government; and

(F) FAR 52.249–8, 52.249–9, or 52.249–10, Default.

(iii) Any other clauses required by the prescription for their use.

[56 FR 36324, July 31, 1991, as amended at 61 FR 7742, Feb. 29, 1996]

PART 214—SEALED BIDDING

Sec.

Subpart 214.2—Solicitation of Bids

214.202 General rules for solicitation of bids.
214.202–5 Descriptive literature.

Subpart 214.4—Opening of Bids and Award of Contract

214.404 Rejection of bids.
214–404–1 Cancellation of invitations after opening.
214.406 Mistakes in bids.
214.406–3 Other mistakes disclosed before award.

Subpart 214.5—Two-Step Sealed Bidding

214.503 Procedures.
214.503–1 Step one.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36326, July 31, 1991, unless otherwise noted.

Subpart 214.2—Solicitation of Bids

214.202 General rules for solicitation of bids.

214.202–5 Descriptive literature.

(d) *Requirements of invitation for bids.* When brand name or equal purchase descriptions are used, use of the provision at 252.210–7000, Brand Name or Equal, satisfies this requirement.

Subpart 214.4—Opening of Bids and Award of Contract

214.404 Rejection of bids.

214.404–1 Cancellation of invitations after opening.

The contracting officer shall make the written determinations required by FAR 14.404–1 (c) and (e).

214.406 Mistakes in bids.

214.406–3 Other mistakes disclosed before award.

(e) Authority for making a determination under FAR 14.406–3(a), (b) and (d) is delegated for the defense agencies, without power of redelegation, as follows:

(i) Defense Advanced Research Projects Agency: General Counsel, DARPA.

(ii) Defense Information Systems Agency: General Counsel, DISA.

(iii) Defense Intelligence Agency: Principal Assistant for Acquisition.

(iv) Defense Logistics Agency:

(A) General Counsel, DLA; and

(B) Associate General Counsel, DLA.

(v) Defense Mapping Agency: General Counsel, DMA.

(vi) Defense Special Weapons Agency: General Counsel, DSWA.

(vii) National Security Agency: Director of Procurement, NSA.

(viii) On-Site Inspection Agency: General Counsel, OSIA.

(ix) Ballistic Missile Defense Organization: General Counsel, BMDO.

(h) Send a signed copy of the document authorizing correction of the bid to the appropriate finance center with its copy of the contract.

[57 FR 42629, Sept. 15, 1992, as amended at 59 FR 27669, May 27, 1994; 61 FR 50452, Sept. 26, 1996]

Subpart 214.5—Two-Step Sealed Bidding

214.503 Procedures.

214.503–1 Step one.

(a) Requests for technical proposals may be in the form of a letter.

[56 FR 36326, July 31, 1991, as amended at 57 FR 53599, Nov. 12, 1992]

PART 215—CONTRACTING BY NEGOTIATION

Sec.

Subpart 215.4—Solicitation and Receipt of Proposals and Quotations

215.401 Applicability.
215.406–2 Part I—The Schedule.
215.414 Forms.

Subpart 215.6—Source Selection

215.605 Evaluation factors and subfactors.
215.607 Disclosure of mistakes before award.
215.608 Proposal evaluation.
215.611 Best and final offers.
215.613 Alternate source selection procedures.
215.613–70 Four-step source selection procedures.

Subpart 215.7—Make-or-Buy Programs

215.704 Items and work included.

Subpart 215.8—Price Negotiation

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215.804 Cost or pricing data.
215.804–1 General.
215.804–3 Exemptions from or waiver of submission of certified cost or pricing data.
215.804–6 Procedural requirements.
215.804–7 Defective cost or pricing data.
215.804–8 Contract clauses.
215.805 Proposal analysis.
215.805–5 Field pricing support.
215.805–70 Cost realism analysis.
215.806 Subcontract pricing considerations.
215.806–1 General.
215.806–3 Field pricing reports.
215.807 Prenegotiation objectives.
215.808 Price negotiation memorandum.
215.809 Forward pricing rate agreements.
215.810 Should-cost review.
215.810–2 Program should-cost review.
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215.811 Estimating systems.
215.811–70 Disclosure, maintenance, and review requirements.
215.870—215.871 [Reserved]
215.872 Work measurement systems.
215.872–1 Definition.
215.872–2 Policy.
215.872–3 General.
215.872–4 Applicability.
215.873 Estimated data prices.

Subpart 215.9—Profit

215.902 Policy.
215.903 Contracting officer responsibilities.
215.905 Profit-analysis factors.
215.905–1 Common factors.
215.970 DD Form 1547, Record of Weighted Guidelines Method Application.
215.971 Weighted guidelines method.
215.971–1 General.
215.971–2 Performance risk.
215.971–3 Contract type risk and working capital adjustment.
215.971–4 Facilities capital employed.
215.972 Modified weighted guidelines method for nonprofit organizations.
215.973 Alternate structured approaches.
215.974 Fee requirements for cost-plus-award-fee contracts.
215.975 Reporting profit and fee statistics.

Subpart 215.10—Preaward, Award, and Postaward Notifications, Protests, and Mistakes

215.1001 Notifications to unsuccessful offerors.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36326, July 31, 1991, unless otherwise noted.

Subpart 215.4—Solicitation and Receipt of Proposals and Quotations

215.401 Applicability.

See 225.872 for additional guidance on procedures for purchasing from qualifying countries.

215.406–2 Part I—The Schedule.

(g) When a contract contains both fixed-priced and cost-reimbursement line items or subline items, the contracting officer shall provide, in Section B, Supplies or Services and Prices/Costs, an identification of contract type specified for each contract line item or subline item to facilitate appropriate payment.

[60 FR 34470, July 3, 1995; 60 FR 43191, Aug. 18, 1995]

215.414 Forms.

This does not preclude use of letter RFPs and RFQs, provided their use complies with other requirements of the FAR and this regulation.

Subpart 215.6—Source Selection

215.605 Evaluation factors and subfactors.

(b)(2)(A) In acquisitions which require use of the clause at FAR 52.219–9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, the extent of participation of small and small disadvantaged business in performance of the contact shall be addressed in source selection.

(*1*) For acquisitions other than those based only on cost or price competition, the contracting officer shall evaluate the extent to which offerors identify and commit to small business and to small disadvantaged business,

historically black college and university, or minority institution performance of the contract, whether as a joint venture, teaming arrangement, or subcontractor.

(*2*) Criteria for evaluation may include—

(*i*) The extent which such firms are specifically identified in proposals;

(*ii*) The extent of commitment to use such firms (for example, enforceable commitments are to be weighted more heavily than non-enforceable ones);

(*iii*) The complexity and variety of the work small firms are to perform;

(*iv*) The realism of the proposal;

(*v*) When not otherwise required by 215.608(a)(2), past performance of the offerors in complying with requirements of the clauses at FAR 52.219–8, Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns, and 52.219–9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan; and

(*vi*) The extent of participation of such firms in terms of the value of the total acquisition.

(*3*) Proposals addressing the extent of small and small disadvantaged business performance may be separate from subcontracting plans submitted pursuant to the clause at FAR 52.219–9 and should be structured to allow for consideration of offers from small businesses.

(*4*) When an evaluation includes the criterion in paragraph (b)(2)(A)(*2*)(*i*) of this section, the small, small disadvantaged, or women-owned small businesses considered in the evaluation shall be listed in any subcontracting plan submitted pursuant to FAR 52.219–9 to facilitate compliance with 252.219–7003(g).

(B) The costs or savings related to contract administration and audit may be considered when the offeror's past performance or performance risk is likely to result in significant costs or savings.

(c) In competitive acquisitions of services—

(i) Evaluation and award should be based, to the maximum extent practicable, on best overall value to the Government in terms of quality and other factors.

(ii) The weighting of costs must be commensurate with the nature of the services being acquired.

(A) It may be appropriate to award to an offeror, based on technical and quality considerations, at other than the lowest price when—

(*1*) The effort being contracted for departs from clearly defined efforts; or

(*2*) Highly skilled personnel are required.

(B) It may be appropriate to award to the technically acceptable offeror with the lowest price when—

(*1*) Services being acquired are of a routine or simple nature;

(*2*) Highly skilled personnel are not required; or

(*3*) The product to be delivered is clearly defined at the outset of the acquisition.

[56 FR 36326, July 31, 1991, as amended at 56 FR 67213, Dec. 30, 1991; 57 FR 14992, Apr. 23, 1992; 59 FR 27669, May 27, 1994; 61 FR 18687, Apr. 29, 1996; 61 FR 50452, Sept. 26, 1996]

215.607 Disclosure of mistakes before award.

(c)(3) The designee is the head of the contracting activity, who may redelegate this authority to the chief of the contracting office.

215.608 Proposal evaluation.

(a)(1) Contracting officers shall ensure that the use of uncompensated overtime in contracts to acquire services on the basis of the number of hours provided (see 237.170) will not degrade the level of technical expertise required to fulfill the Government's requirements. When acquiring such services, contracting officers shall conduct a risk assessment, and evaluate for award on that basis, any proposals received that reflect factors such as—

(i) Unrealistically low labor rates or other costs that may result in quality or service shortfalls; and

(ii) Unbalanced distribution of uncompensated overtime among skill levels and its use in key technical positions.

(2) When a past performance evaluation is required by FAR 15.605, and the solicitation includes the clause at FAR 52.219–8, Utilization of Small, Small Disadvantaged and Women-Owned

Small Business Concerns, the evaluation shall include the past performance of offerors in complying with requirements of that clause. When a past performance evaluation is required by FAR 15.605, and the solicitation includes the clause at FAR 52.219–9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan, the evaluation shall include the past performance of offerors in complying with requirements of that clause.

(b) Except for determinations based on violations or possible violations of section 27 of the Office of Federal Procurement Policy (OFPP) Act, and unless otherwise specified in department/agency regulations, the contracting officer shall make the written determination. Determinations based on violations or possible violations of section 27 of the OFPP Act shall be made at the level specified in FAR 3.104–11(g).

[56 FR 36326, July 31, 1991, as amended at 56 FR 67213, Dec. 30, 1991; 61 FR 18687, Apr. 29, 1996]

215.611 Best and final offers.

(c)(i) Before requesting an additional (second or subsequent) best and final offer, the contracting officer shall obtain approval from—

(A) The source selection authority and the senior procurement executive (SPE) for competitive negotiated acquisitions under formal source selection (see FAR 15.612). The SPE may delegate this authority to a level no lower than the head of the contracting activity.

(B) The head of the contracting activity (HCA) for all other competitive negotiated acquisitions. The HCA may delegate this authority to the chief of the contracting office.

(ii) Each HCA shall establish a system for reporting and documenting additional requests for best and final offers. Systems shall include as a minimum—

(A) The total number of competitive negotiated acquisitions awarded;

(B) The number of those acquisitions for which an additional request for best and final offers was approved and issued; and

(C) The reasons for approving each additional request for best and final offers.

(iii) To ensure that additional requests for best and final offers are used only when necessary and unavoidable, HCAs shall—

(A) Periodically analyze data collected under paragraph (c)(ii) of this section;

(B) Take appropriate corrective action, e.g., training, revising approval levels; and

(C) Provide periodic summary reports to the SPE as specified in department/agency regulations.

215.613 Alternate source selection procedures.

215.613–70 Four-step source selection procedures.

(a) *General.* The four-step source selection procedure is designed for those situations where the Government wishes to focus on technical excellence. Proposals are evaluated, a competitive range established, and an apparent successful offeror selected without discussions of proposal deficiencies (a deficiency is defined as that part of an offeror's proposal which would not satisfy the Government's requirements). Negotiations are conducted only in the final step and only with the apparent successful offeror.

(b) *Applicability.* Four-step source selection procedures may be used for—

(1) Competitively negotiated research and development acquisitions with an estimated value of $2 million or more; or

(2) Other acquisitions as permitted by department/agency regulations, except those in paragraph (c) of this subsection.

(c) *Restrictions.* Four-step source selection procedures shall not be used for acquisitions which—

(1) Will require extensive discussion and negotiations;

(2) Use the authority of FAR 6.302–2;

(3) Are solely for personal or nonpersonal services;

(4) Are for architect-engineer services; or

(5) Have an estimated value of less than $2 million.

(d) *Presolicitation.* Establish early and open dialogue with prospective offerors

to ensure their understanding of the Government's needs, since the evaluation will be conducted with limited discussions and without disclosing deficiencies in offeror proposals. Ways of establishing this dialogue are—

(1) Presolicitation notices;

(2) Presolicitation conferences;

(3) Preproposal conferences;

(4) Solicitations for information or planning purposes; and

(5) Tailoring of specifications.

(e) *Solicitations.* Include the following special provisions in four-step source selection solicitations—

(1) Explanation of the four-step concept and procedures;

(2) Statement regarding the relative importance of technical/system performance criteria;

(3) Notification that the contracting officer may reject proposals with unrealistic technical, schedule, cost, or price commitments since unrealistic commitments reflect an inherent lack of technical competence or indicate a failure to comprehend the complexity and risks of the requirements;

(4) Schedule of planned source selection events, including specific dates for the sequential submission of separate technical and cost proposal.

(5) Requirement for the technical proposal to include—

(i) Identification, when appropriate, of trade-offs (with illustrative cost estimate impacts) among performance, production costs, operating and support costs, schedule and logistics support factors; and

(ii) Information showing that the goals for design to cost and operating and support costs (when used) will be achieved when the item enters production.

(6) Requirement for the cost proposal to include detailed cost information supporting the technical proposal and the cost factors in the evaluation criteria;

(7) Statement that both technical and cost discussions will be limited as described in paragraphs (f) and (g) of this subsection; and

(8) Notification that the contracting officer will only negotiate with the selected offeror, and that offerors' initial technical and cost proposals should be their best offer.

(f) *Step one—evaluation of technical proposals.* (1) The sequence of step one—

(i) Evaluate all technical proposals;

(ii) Conduct limited discussions with all offerors; and

(iii) Ask for any necessary clarifications and additional supporting data when necessary (normally, ask that this be submitted with the cost proposal).

(2) In conducting step one—

(i) Limit discussions to only what is necessary to ensure that both parties understand each other;

(ii) Do not tell offerors about deficiencies in their proposals; and

(iii) Provide written clarification to all offerors when it appears the Government's requirements have been misinterpreted.

(g) *Step two—evaluation of cost proposals.* (1) The sequence of step two—

(i) Request cost proposals;

(ii) Evaluate all cost proposals;

(iii) Establish the competitive range;

(iv) Eliminate those proposals outside the range and advise those offerors;

(v) Conduct limited discussions with remaining offerors; and

(vi) Eliminate proposals which cannot be made acceptable and advise the offerors.

(2) In conducting step two—

(i) Limit discussions to—

(A) Clarifying inconsistencies or correcting mathematical errors;

(B) Correlating cost elements with technical effort in order to assess cost realism; and

(C) Ensuring a complete understanding of the Government's requirements, the offeror's offer, and other contract terms;

(ii) Do not tell an offeror that any of its cost elements are either too high or too low; and

(iii) Follow the guidelines in paragraph (f) of this subsection if further discussions of technical proposals or clarifications are required.

(h) *Step three—common cut-off and selection of an offeror for final contract negotiations.* (1) The sequence of step three—

(i) Notify offerors of the common cut-off date for receipt of best and final offers (technical and cost);

(ii) Evaluate the offers;

(iii) Select the best offeror (see paragraph (h)(2)(iv) of this subsection for multiple sources);

(iv) Tell the selected source that the decision is conditional based on negotiation of a definitive contract within the time period prescribed by the source selection authority; and

(v) Advise the other offerors of the source selected.

(2) In conducting step three—

(i) Remind offerors, when notifying them of the common cut-off date, that any changes incorporated in the final proposal must be fully documented;

(ii) Do not accept lump sum reductions in final cost proposals without supporting data;

(iii) Do not request additional best and final offers without the approval required by 215.611(c); and

(iv) Do not select two or more offerors, rather than a single source, for final contract negotiations, unless the HCA makes a written determination that final selection of a single source should not be made until the prospective contracts have been tentatively negotiated.

(i) *Step four—final negotiations and contract award.* (1) The sequence of step four (single selectee)—

(i) Negotiate the final contract price, terms, and conditions; and

(ii) Award the contract.

(2) The sequence of step four (multiple selectees)—

(i) Negotiate tentative final contract terms and conditions;

(ii) Select the best source; and

(iii) Award.

(3) In conducting step four—

(i) Complete negotiations and award the contract within the time prescribed by the source selection authority;

(ii) Terminate negotiations and make a new source selection decision if the condition in paragraph (i)(3)(i) cannot be met;

(iii) Do not permit changes in the Government's requirements or the offeror's proposal which would affect the source selection decision; and

(iv) Follow the procedures in FAR 15.606 if changes in the Government's requirements are necessary.

Subpart 215.7—Make-or-Buy Programs

215.704 Items and work included.

The minimum dollar amount is $1 million.

Subpart 215.8—Price Negotiation

215.801 Definitions.

Cost realism analysis means a review of the overall costs in an offeror's proposal to determine if they—

(1) Are realistic for the work to be performed;

(2) Reflect a clear understanding of the requirements; and

(3) Are consistent with the various elements of the offeror's technical proposal.

215.804 Cost or pricing data.

215.804–1 General.

(a) When certified cost or pricing data are not required, the contracting officer may ask for partial or limited data when the data are necessary for the Government's analysis. The contracting officer shall not ask the contractor to certify these data.

[57 FR 42629, Sept. 15, 1992]

215.804–3 Exemptions from or waiver of submission of certified cost or pricing data.

(a)(1) The contracting officer rarely should need to require the submission or certification of cost or pricing data on acquisitions where adequate price competition is expected (regardless of the type of contract anticipated).

(b) *Adequate price competition.* (1) Adequate price competition may exist for any contract, including cost-reimbursement contracts, as long as price is a substantial factor in the evaluation. If, after receipt of proposals, the contracting officer determines that adequate price competition does not exist, the contracting officer shall obtain, as appropriate (see FAR 15.804–2), certified cost or price data.

(3)(A) Examples of a price ''based on'' adequate price competition are:

(*1*) Exercise of an option in a contract where adequate price competition existed, if the contracting officer has determined that the option price is reasonable under FAR 17.207(d);

(*2*) Acquisition of an item that has multiple suppliers, where the contracting officer only solicits or receives one offer, but the price is clearly reasonable in comparison with recent purchases where adequate price competition existed.

(B) Dual or multiple source programs. (*1*) In dual or multiple source programs, the determination of adequate price competition must be made on a case-by-case basis. Contracting officers must exercise deliberation and thorough review in making the determination. Even when adequate price competition exists, in certain cases it may be appropriate to obtain some data to assist in price analysis.

(*2*) Adequate price competition normally exists when—

(*i*) Prices are solicited across a full range of step quantities, normally including a 0–100 percent split, from at least two offerors who are individually capable of producing the full quantity; and

(*ii*) The price reasonableness of all prices awarded is clearly established on the basis of price analysis (see FAR section 15.805–2).

(*3*) If price reasonableness cannot be determined on the basis of price analysis, including the results of negotiations, the exemption at FAR section 15.804–3(a)(1) from submission of certified cost of pricing data shall not apply.

(i) *Waiver for exceptional cases.* (i) The DoD has exempted the Canadian Commercial Corporation and its subcontractors from submission and certification of cost or pricing data on all acquisitions.

(ii) The DoD has waived certain cost or pricing data certification requirements for nonprofit organizations (including educational institutions) on cost-reimbursement-no-fee contracts. The contracting officer—

(A) Shall require cost or pricing data, including cost or pricing data from subcontractors;

(B) Shall not require certification of data submitted by the organization on its own behalf or on behalf of subcontractors which are also nonprofit organizations;

(C) Shall require certification of cost or pricing data from subcontractors which are not nonprofit organizations or educational institutions.

(iii) Use the following format when preparing an authorization for waiver in accordance with FAR 15.804–3(i):

(MILITARY DEPARTMENT OR DEFENSE AGENCY)

Authority to Waive Submission of Certified Cost or Pricing Data

1. The (contracting activity) proposes to award a contract to (name of contractor) for acquisition of (brief description of supplies or services).

2. Under FAR 15.804–2, the prospective contractor is required to submit certified cost or pricing data. However, for the following reasons, I am waiving the requirement for certification of the data (The waiver may be partial, e.g., limited to particular cost or pricing data. If so, describe the cost or pricing data for which the certification is to be waived): Explain the circumstances and conditions which make the prospective contract action an exceptional case. State the reasons why the waiver is justified.)

3. I make this waiver under the authority of 10 U.S.C. 2306a(b)(2), as implemented by FAR 15.804–3(i).

Date _____

Signed _____

[56 FR 36326, July 31, 1991, as amended at 57 FR 42629, Sept. 15, 1992; 57 FR 53599, Nov. 12, 1992; 59 FR 27669, May 27, 1994]

215.804–6 Procedural requirements.

(b)(2)(A) When the solicitation requires contractor compliance with the Contractor Cost Data Reporting (CCDR) System (Army—AMCP 715–8, Navy—NAV PUB P–5241, and Air Force—AFMCP 800–15), require the contractor to submit DD Forms 1921 or 1921–1 with its SF 1411.

(B) Contracting offices may develop contract pricing proposal supporting schedules for use by offerors in providing supporting data for the SF 1411. Schedules should only ask for data that are necessary and reasonable based on industry, company, or commodity practices.

[56 FR 36326, July 31, 1991, as amended at 59 FR 27669, May 27, 1994]

215.804–7 Defective cost or pricing data.

(b)(2) Unless there is clear evidence to the contrary, the contracting officer may presume the defective data were relied on and resulted in a contract price increase equal to the amount of the defect plus related overhead and profit or fee. The contracting officer is not expected to reconstruct the negotiation by speculating as to what would have been the mental attitudes of the negotiating parties if the nondefective data had been known.

215.804–8 Contract clauses.

If the solicitation or contract includes one of the clauses at FAR 52.215–23, FAR 52.215–24, or FAR 52.215–25, also use the clause at 252.215–7000, Pricing Adjustments.

[60 FR 61596, Nov. 30, 1995]

215.805 Proposal analysis.

215.805–5 Field pricing support.

(a)(1)(A) Contracting officers shall request field pricing reports for—

(*1*) Fixed-price proposals exceeding $500,000;

(*2*) Cost-type proposals exceeding $500,000 from offerors with significant estimating system deficiencies (see 215.811–70(a)(3) and (c)(2)(i)); or

(*3*) Cost-type proposals exceeding $10 million from offerors without significant estimating system deficiencies.

(B) Contracting officers may, with adequate written justification, waive the requirement for these reports.

(2)(A) The contract administration office price/cost analyst supports the administrative contracting officer in preparing a complete and accurate field pricing report for the contracting officer. The analyst—

(*1*) In concert with the auditor and in consideration of the auditor's workload, establishes a deadline for the auditor's input, subject to adjustments when considered necessary;

(*2*) Identifies areas for special consideration;

(*3*) Arranges for exchanges of technical and audit information; and

(*4*) Must be fully responsive to a request for technical information from the auditor.

(B) The pricing report—

(*1*) Details the price/cost analyst's comprehensive review and evaluation of the proposal;

(*2*) Includes information specifically requested by the contracting officer; and

(*3*) Summarizes what was analyzed, how it was analyzed, and the conclusions reached.

(c)(i) In requesting field pricing support—

(A) Mark all requests ''FIELD PRICING REQUEST'' in bold letters on the mailing envelope;

(B) On urgent requests, provide facsimile numbers to facilitate return of the completed report; and

(C) Send an advance copy to the audit activity.

(ii) When the contracting officer knows in advance that field pricing support will be required, the contracting officer may request field pricing support before the offeror submits a proposal.

(A) Give the administrative contracting officer (ACO) and auditor a copy of the solicitation;

(B) Tell them when to expect the proposal; and

(C) Tell the offeror to provide the ACO and auditor copies of the proposal.

(iii) Where audit reports are received on contracting actions that are subsequently cancelled or unsuccessful, notify the cognizant auditor in writing.

(iv) For spare parts or support equipment, identify all line items where the proposed price exceeds by 25 percent or more the lowest price the Government has paid within the most recent 12-month period. The field pricing report will include, as a minimum—

(A) A detailed analysis of each line item identified by the contracting officer in the request;

(B) A detailed analysis of those line items where a comparison of the item description and the proposed price indicates a potential for overpricing;

(C) An analysis of the significant high-dollar-value items. If there are no obvious high-dollar-value items, include an analysis of a random sample of items; and

(D) An analysis of a random sample of the remaining low-dollar value items. Sample size may be determined

by subjective judgment, e.g., experience with the contractor and reliability of its estimating and accounting systems.

(v) For spare parts proposals that have been identified as Spares Acquisition Integrated with Production (SAIP) items (see DoD Instruction 4245.12, Spares Acquisition Integrated with Production (SAIP))—

(A) Include a copy of the data entitled ''Contractor's Procurement Schedule for SAIP'' (Data Item DI–V–7200), or equivalent, in the request so that the benefits of combining new and in process quantities can be assured (these data are delivered by the contractor on contracts that include SAIP requirements); or

(B) Require the contractor to include these data in its proposal.

(e)(6) The contract administration office price/cost analyst is responsible for providing a complete and accurate field pricing report. This includes quantifying technical findings; however, if the auditor requests a technical analysis, the auditor normally will incorporate the financial effect of the analysis in the audit report.

(7) The contracting officer shall, with the advice of the ACO and auditor, ensure that the contractor initiates necessary corrective action before contract award.

(8) The administrative contracting officer and auditor shall confer with the contractor during the course of the field pricing review to fully understand the basis for each item in the proposal and to remove any doubts as to the validity and accuracy of their conclusions and findings.

(g) The audit activity sends the original to the administrative contracting officer and a copy to the contracting officer.

[56 FR 36326, July 31, 1991, as amended at 60 FR 61596, Nov. 30, 1995]

215.805–70 Cost realism analysis.

(a) In competitive acquisitions, even when adequate price competition exists, to ensure that proposed costs are consistent with the technical proposal, the contracting officer—

(1) Should perform a cost realism analysis when—

(i) A cost-reimbursement contract is anticipated;

(ii) The solicitation contains new requirements that may not be fully understood by competing contractors;

(iii) There are quality concerns; or

(iv) Past experience indicates that contractors proposed costs have resulted in quality or service shortfalls.

(2) May perform a cost realism analysis on other acquisitions.

(b) The contracting officer should determine what data are necessary for the cost realism analysis during acquisition planning and development of the solicitation. Unless these data are already available from Government sources, the contracting officer will need to ask the offerors for them.

(1) Request only necessary data; and

(2) Do not request submission or certification of cost or pricing data.

215.806 Subcontract pricing considerations.

215.806–1 General.

Price redeterminable or fixed-price incentive contracts may include subcontracts placed on the same basis. When the contracting officer wants to reprice the prime contract even though the contractor has not yet established final prices for the subcontracts, the contracting officer may negotiate a firm contract price—

(1) If cost or pricing data on the subcontracts show the amounts to be reasonable and realistic; or

(2) If cost or pricing data on the subcontracts are too indefinite to determine whether the amounts are reasonable and realistic, but—

(i) Circumstances require prompt negotiation; and

(ii) A statement substantially as follows is included in the repricing modification of the prime contract:

As soon as the Contractor establishes firm prices for each subcontract listed below, the Contractor shall submit (in the format and with the level of detail specified by the Contracting Officer) to the Contracting Officer the subcontractor's cost incurred in performing the subcontract and the final subcontract price. The Contractor and Contracting Officer shall negotiate an equitable adjustment in the total amount paid or to be paid under this contract to reflect the final subcontract price.

(a)(1) Contractor and subcontractor proposals may reflect the selection of sources whose proposals offer the greatest value to the Government in terms of performance and other factors. If the selection is based on greatest value rather than lowest price, the analysis supporting subcontractor selection should include a discussion of the factors considered in the selection (see also FAR 15.605(c) and 215.605(c)). If the contractor's analysis is not adequate, return it for correction of deficiencies.

(d) The contracting officer shall make every effort to ensure that fees negotiated by contractors for cost-plus-fixed-fee subcontracts do not exceed the fee limitations in FAR 15.903(d).

[56 FR 36326, July 31, 1991, as amended at 60 FR 29497, June 5, 1995]

215.806–3 Field pricing reports.

(a)(i) If, in the opinion of the contracting officer or auditor, the review of a prime contractor's proposal requires further review of subcontractors' cost estimates at the subcontractors' plants (after due consideration of reviews performed by the prime contractor), these reviews should be fully coordinated with the administrative contracting officer (ACO) having cognizance of the prime contractor before being initiated. The ACO for the prime contractor will initiate the request to the ACO for the subcontractor, with an information copy to the auditor for the subcontractor. The ACO for the subcontractor sends the resulting field pricing report to the prime ACO with an information copy to the prime auditor. Requests for field pricing support on lower tier subcontractors are handled in a like manner.

(ii) Notify the appropriate contract administration activities when extensive, special, or expedited field pricing assistance will be needed to review and evaluate subcontractors' proposals under a major weapon system acquisition.

215.807 Prenegotiation objectives.

(a)(i) Also consider data resulting from application of work measurement systems in developing prenegotiation objectives.

(ii) Consider field pricing support personnel participation in planned prenegotiation and negotiation activities.

(b) Prenegotiation objectives, including objectives related to disposition of findings and recommendations contained in preaward and postaward contract audit and other advisory reports, shall be documented and reviewed in accordance with Departmental procedures.

[56 FR 36326, July 31, 1991, as amended at 59 FR 27669, May 27, 1994]

215.808 Price negotiation memorandum.

(a)(8) Include the principal factors related to the disposition of findings and recommendations contained in preaward and postaward contract audit and other advisory reports.

(10) The memorandum—

(A) Must document significant deviations from the prenegotiation profit objective;

(B) Should include the DD Form 1547, Record of Weighted Guidelines Application (see subpart 215.9), if used, with supporting rationale; and

(C) Must document the rationale for not using the weighted guidelines method when its use is required by 215.9.

215.809 Forward pricing rate agreements.

(e)(i) Use forward pricing rate agreement (FPRA) rates when such rates are available, unless waived on a case-by-case basis by the head of the contracting activity.

(ii) Advise the ACO of each case waived.

(iii) Contact the ACO for questions on FPRAs or recommended rates.

215.810 Should-cost review.

215.810–2 Program should-cost review.

(b) DoD contracting activities should consider performing a program should-cost review before award of a definitive major systems contract exceeding $100 million.

[61 FR 7742, Feb. 29, 1996]

215.810–3 Overhead should-cost review.

(a) Contact the DCMC/DLA Overhead Center, Fort Belvoir, VA 22060–6221, at (703) 767–3387, for questions on overhead should-cost analysis.

(b)(i) The Defense Contract Management Command/Defense Logistics Agency (DCMC/DLA), or the military department responsible for performing contract administration functions (e.g., Navy SUPSHIP), should consider, based on risk assessment, performing an overhead should-cost review of a contractor business unit (as defined in FAR 31.001) when all of the following conditions exist:

(A) Projected annual sales to DoD exceed $1 billion;

(B) Projected DoD versus total business exceeds 30 percent;

(C) Level of sole-source DoD contracts is high;

(D) Significant volume of proposal activity is anticipated;

(E) Production or development of a major weapon system or program is anticipated; and

(F) Contractor cost control/reduction initiatives appear inadequate.

(ii) The head of the contracting activity may request an overhead should-cost review for a business unit which does not meet the criteria in paragraph (b)(i) of this subsection.

(iii) Overhead should-cost reviews are labor intensive. These reviews generally involve participation by the contracting, contract administration, and contract audit elements. The extent of availability of military department, contract administration, and contract audit resources to support DCMC/DLA-led teams should be considered when determining whether a review will be conducted. Overhead should-cost reviews generally shall not be conducted at a contractor business segment more frequently than every three years.

[61 FR 7743, Feb. 29, 1996; 61 FR 18195, Apr. 24, 1996]

215.811 Estimating systems.

215.811–70 Disclosure, maintenance, and review requirements.

(a) *Definitions.* (1) *Adequate estimating system* means an estimating system that—

(i) Is established, maintained, reliable, and consistently applied; and

(ii) Produces verifiable, supportable, and documented cost estimates.

(2) *Contractor* means a business unit as defined in FAR 31.001.

(3) *Estimating system* is as defined in the clause at 252.215–7002 Cost Estimating System Requirements.

(4) *Significant estimating system deficiency* means a shortcoming in the estimating system which is likely to consistently result in proposal estimates for total cost or a major cost element(s) which do not provide an acceptable basis for negotiation of fair and reasonable prices.

(b) *Applicability.* (1) DoD policy is that all contractors have estimating systems that—

(i) Are adequate;

(ii) Consistently produce well supported proposals that are acceptable as a basis for negotiation of fair and reasonable prices;

(iii) Are consistent with and integrated with the contractor's related management systems; and

(iv) Are subject to applicable financial control systems.

(2) A large business contractor is subject to estimating system disclosure, maintenance, and review requirements if—

(i) In its preceding fiscal year the contractor received DoD prime contracts or subcontracts totalling $50 million or more for which certified cost or pricing data were required; or

(ii) If in its preceding fiscal year the contractor received DoD prime contracts or subcontracts totalling $10 million or more (but less than $50 million) for which certified cost or pricing data were required and the contracting officer, with concurrence or at the request of the administrative contracting officer, determines it to be in the best interest of the Government (e.g., significant estimating problems are believed to exist or the contractor's sales are predominantly Government).

(c) *Responsibilities.* (1) The contracting officer shall—

(i) Through use of the clause at 252.215–7002 Cost Estimating System Requirements, apply the disclosure, maintenance and review requirements to large business contractors meeting

the criteria in paragraph (b)(2)(i) of this subsection;

(ii) Consider whether to apply the disclosure, maintenance, and review requirements to large business contractors under paragraph (b)(2)(ii) of this subsection; and

(iii) Not apply the disclosure, maintenance, and review requirement to other than large business contractors.

(2) The cognizant administrative contracting officer, for contractors subject to paragraph (b)(2) of this subsection, shall—

(i) Determine the adequacy of the disclosure and system; and

(ii) Pursue correction of any deficiencies.

(3) The cognizant auditor, on behalf of the ACO, serves as team leader in conducting estimating system reviews.

(4) A contractor subject to estimating system disclosure, maintenance, and review requirements shall—

(i) Maintain an adequate system;

(ii) Describe its system to the administrative contracting officer (ACO);

(iii) Provide timely notice of changes in the system; and

(iv) Correct system deficiencies identified by the ACO.

(d) *Characteristics of an adequate estimating system*—(1) *General.* An adequate system should provide for the use of appropriate source data, utilize sound estimating techniques and good judgment, maintain a consistent approach, and adhere to established policies and procedures.

(2) *Evaluation*. In evaluating the adequacy of a contractor's estimating system, the ACO should consider whether the contractor's estimating system, for example—

(i) Establishes clear responsibility for preparation, review and approval of cost estimates;

(ii) Provides a written description of the organization and duties of the personnel responsible for preparing, reviewing, and approving cost estimates;

(iii) Assures that relevant personnel have sufficient training, experience and guidance to perform estimating tasks in accordance with the contractor's established procedures;

(iv) Identifies the sources of data and the estimating methods and rationale used in developing cost estimates;

(v) Provides for appropriate supervision throughout the estimating process;

(vi) Provides for consistent application of estimating techniques;

(vii) Provides for detection and timely correction of errors;

(viii) Protects against cost duplication and omissions;

(ix) Provides for the use of historical experience, including historical vendor pricing information, where appropriate;

(x) Requires use of appropriate analytical methods;

(xi) Integrates information available from other management systems, where appropriate;

(xii) Requires management review including verification that the company's estimating policies, procedures and practices comply with this regulation;

(xiii) Provides for internal review of and accountability for the adequacy of the estimating system, including the comparison of projected results to actual results and an analysis of any differences;

(xiv) Provides procedures to update cost estimates in a timely manner throughout the negotiation process; and

(xv) Addresses responsibility for review and analysis of the reasonableness of subcontract prices.

(3) *Indicators of potentially significant estimating deficiencies*. The following examples indicate conditions that may produce or lead to significant estimating deficiencies—

(i) Failure to ensure that historical experience is available to and utilized by cost estimators, where appropriate;

(ii) Continuing failure to analyze material costs or failure to perform subcontractor cost reviews as required.

(iii) Consistent absence of analytical support for significant proposed cost amounts;

(iv) Excessive reliance on individual personal judgment where historical experience or commonly utilized standards are available;

(v) Recurring significant defective pricing findings within the same cost element(s);

(vi) Failure to integrate relevant parts of other management systems

(e.g., production control or cost accounting) with the estimating system so that the ability to generate reliable cost estimates is impaired; and

(vii) Failure to provide established policies, procedures, and practices to persons responsible for preparing and supporting estimates.

(e) *Review Procedures.* Cognizant audit and contract administration activities shall—

(1) Establish and manage regular programs for reviewing selected contractors' estimating systems.

(2) Conduct reviews as a team effort.

(i) The contract auditor will be the team leader.

(ii) The team leader will—

(A) Coordinate with the ACO to ensure that team membership includes qualified contract administration technical specialists.

(B) Advise the ACO and contractor of significant findings during the conduct of the review and during the exit conference.

(C) Prepare a team report.

(*1*) The ACO or a representative should—

(*i*) Coordinate the contract administration activity's review;

(*ii*) Consolidate findings and recommendations; and

(*iii*) When appropriate, prepare a comprehensive written report for submission to the auditor.

(*2*) The contract auditor will attach the ACO's report to the team report.

(3) Tailor reviews to take full advantage of the day-to-day work done by both organizations.

(4) Conduct a review every three years of contractors subject to the disclosure requirements. The ACO and auditor may lengthen or shorten the three-year period based on their joint risk assessment of the contractor's past experience and current vulnerability.

(f) *Disposition of survey team findings*—(1) *Reporting of survey team findings.* The auditor will document the findings and recommendations of the survey team in a report to the ACO. If there are significant estimating deficiencies, the auditor will recommend disapproval of all or portions of the estimating system.

(2) *Initial notification to the contractor.* The ACO will provide a copy of the team report to the contractor and, unless there are no deficiencies mentioned in the report, ask the contractor to submit a written response in 30 days, or a reasonable extension.

(i) If the contractor agrees with the report, the contractor has 60 days from the date of initial notification to correct any identified deficiencies or submit a corrective action plan showing milestones and actions to eliminate the deficiencies.

(ii) If the contractor disagrees, the contractor should provide rationale in its written response.

(3) *Evaluation of contractor's response.* The ACO, in consultation with the auditor, will evaluate the contractor's response to determine whether—

(i) The estimating system contains deficiencies which need correction;

(ii) The deficiencies are significant estimating deficiencies which would result in disapproval of all or a portion of the contractor's estimating system; or

(iii) The contractor's proposed corrective actions are adequate to eliminate the deficiency.

(4) *Notification of ACO determination.* The ACO will notify the contractor and the auditor of the determination and, if appropriate, of the Government's intent to disapprove all or selected portions of the system. The notice shall—

(i) List the cost elements covered;

(ii) Identify any deficiencies requiring correction; and

(iii) Require the contractor to correct the deficiencies within 45 days or submit an action plan showing milestones and actions to eliminate the deficiencies.

(5) *Notice of disapproval.* If the contractor has neither submitted an acceptable corrective action plan nor corrected significant deficiencies within 45 days, the ACO shall disapprove all or selected portions of the contractor's estimating system. The notice of disapproval must—

(i) Identify the cost elements covered;

(ii) List the deficiencies which prompted the disapproval; and

(iii) Be sent to the cognizant auditor, and each contracting and contract administration office having substantial business with the contractor.

(6) *Monitoring contractor's corrective action.* The auditor and ACO will monitor the contractor's progress in correcting deficiencies. If the contractor fails to make adequate progress, the ACO shall take whatever action is necessary to ensure that the contractor corrects the deficiencies. Examples of actions the ACO can take are: Bringing the issue to the attention of higher level management, reducing or suspending progress payments (see FAR 32.503–6), and recommending nonaward of potential contracts.

(7) *Withdrawal of estimating system disapproval.* The ACO will withdraw the disapproval when the ACO determines that the contractor has corrected the significant system deficiencies. The ACO will notify the contractor, the auditor, and affected contracting and contract administration activities of the withdrawal.

(g) *Impact of estimating system deficiencies on specific proposals.* (1) Field pricing teams will discuss identified estimating system deficiencies and their impact in all reports on contractor proposals until the deficiencies are resolved.

(2) The contracting officer responsible for negotiation of a proposal generated by an estimating system with an identified deficiency shall evaluate whether the deficiency impacts the negotiations. If it does not, the contracting officer should proceed with negotiations. If it does, the contracting officer should consider other alternatives, e.g.—

(i) Allowing the contractor additional time to correct the estimating system deficiency and submit a corrected proposal;

(ii) Considering another type of contract, e.g., an FPIF instead of an FFP;

(iii) Using additional cost analysis techniques to determine the reasonableness of the cost elements affected by the system's deficiency;

(iv) Segregating the questionable areas as a cost reimbursable line item;

(v) Reducing the negotiation objective for profit or fee; or

(vi) Including a contract (reopener) clause that provides for adjustment of the contract amount after award.

(3) The contracting officer who incorporates a reopener clause into the contract is responsible for negotiating price adjustments required by the clause. Any reopener clause necessitated by an estimating deficiency should—

(i) Clearly identify the amounts and items which are in question at the time of negotiation;

(ii) Indicate a specific time or subsequent event by which the contractor will submit a supplemental proposal, including cost or pricing data, identifying the cost impact adjustment necessitated by the deficient estimating system. The clause should require that the contractor certify cost or pricing data submitted as part of the supplemental proposal;

(iii) Provide for the contracting officer to unilaterally adjust the contract price if the contractor fails to submit the supplemental proposal; and

(iv) Provide that failure of the Government and the contractor to agree to the price adjustment shall be a dispute under the Disputes clause.

(h) *Contract clause.* Use the clause at 252.215–7002, Cost Estimating System Requirements, in all solicitations and contracts to be awarded on the basis of certified cost or pricing data.

[56 FR 36326, July 31, 1991, as amended at 56 FR 67213, Dec. 30, 1991]

215.870—215.871 [Reserved]

215.872 Work measurement systems.

215.872–1 Definition.

Work measurement systems (WMS), as used in this section, means systems used—

(a) To analyze the touch labor content of a manufacturing operation,

(b) To establish labor standards for that operation;

(c) To measure and analyze variances from those standards;

(d) To continuously improve both the manufacturing operation and the labor standards used in that operation.

215.872–2 Policy.

DoD policy is to use WMS, when appropriate, to provide data for use in planning, cost estimating, and monitoring contract performance.

215.872–3 General.

(a) The contracting officer, in coordination with the program manager, shall include provisions in the contract to implement the program's work measurement system requirements.

(b) An example of an acceptable set of criteria for WMS is found in MIL–STD–1567A. Tailor either MIL–STD–1567A or the contractor's existing WMS, if acceptable to the Government, for the specific program or contract.

215.872–4 Applicability.

The contracting officer—

(a) Should include provisions for WMS in solicitations and resulting production contracts for major weapons systems or subsystems in excess of—

(1) $100 million total cost; or

(2) $20 million annually.

(b) Should tailor the provisions to be consistent with program requirements and compatible with existing contractor technical and management processes and procedures;

(c) May include WMS requirements in full scale development contracts exceeding $100 million, when appropriate (e.g., to assist in transitioning from full scale development to production).

(d) Should not include WMS when—

(1) Acquiring commercial products (FAR 11.001);

(2) There will be low volume, nonrepetitive production runs;

(3) Submission and certification of cost or pricing data are not required; or

(4) There will be no cost benefit from the imposition of these systems.

215.873 Estimated data prices.

(a) The Department of Defense requires estimates of the prices of data in order to evaluate the cost to the Government of data items in terms of their management, product, or engineering value.

(b) When data are required to be delivered under a contract, the solicitation will include DD Form 1423, Contract Data Requirements List. The form and the provision included in the solicitation request the offeror to state what portion of the total price is estimated to be attributable to the production or development of the listed data for the Government (not to the sale of rights in the data). However, offerors' estimated prices may not reflect all such costs; and different offerors may reflect these costs in a different manner, for the following reasons—

(1) Differences in business practices in competitive situations;

(2) Differences in accounting systems among offerors;

(3) Use of factors or rates on some portions of the data;

(4) Application of common effort to two or more data items; and

(5) Differences in data preparation methods among offerors.

(c) Data price estimates should not be used for contract pricing purposes without further analysis.

(d) The contracting officer shall ensure that the contract does not include a requirement for data which the contractor has delivered or is obligated to deliver to the Government under another contract or subcontract, and that the successful offeror furnishes any certification required by the solicitation. However, where duplicate data are desired, the contract price shall include the costs of duplication, but not of preparation, of such data.

Subpart 215.9—Profit

215.902 Policy.

Departments and agencies shall use a structured approach for developing a prenegotiation profit or fee objective (profit objective) on any negotiated contract action that requires cost analysis, except on cost-plus-award-fee contracts (but see 215.974). There are three approaches—

(1) The weighted guidelines method;

(2) The modified weighted guidelines method; and

(3) An alternate structured approach.

215.903 Contracting officer responsibilities.

(a) Also, do not perform a profit analysis when assessing cost realism in competitive acquisitions.

(b) The contracting officer—

(1) Shall use the weighted guidelines method (see 215.971), unless—

(A) The modified weighted guidelines method applies; or

(B) An alternate approach is justified.

(2) Shall use the modified weighted guidelines method (see 215.972) on contract actions with nonprofit organizations;

(3) May use an alternate structured approach (see 215.973) when—

(i) The contract action is—

(A) Under $500,000;

(B) For architect-engineer or construction work;

(C) Primarily for delivery of material from subcontractors; or

(D) A termination settlement; or

(ii) The weighted guidelines method does not produce a reasonable overall profit objective and the head of the contracting activity approves use of the alternate approach in writing.

(4) Shall use the weighted guidelines method to establish a basic profit rate under a formula type pricing agreement, and may then use the basic rate on all actions under the agreement, provided that conditions affecting profit do not change.

(5) Shall document the profit analysis in the price negotiation memorandum.

(e) Although specific agreement on the applied weights or values for individual profit factors shall not be attempted, the contracting officer may encourage the contractor to—

(1) Present the details of its proposed profit amounts in the weighted guidelines format or similar structured approach; and

(2) Use the weighted guidelines method in developing profit objectives for negotiated subcontracts.

(f) The contracting officer must also verify that relevant variables have not materially changed (e.g., performance risk, interest rates, progress payment rates, distribution of facilities capital).

215.905 Profit-analysis factors.

215.905–1 Common factors.

The common factors are embodied in the DoD structured approaches and need not be further considered by the contracting officer.

215.970 DD Form 1547, Record of Weighted Guidelines Method Application.

(a) The DD Form 1547—

(1) Provides a vehicle for performing the analysis necessary to develop a profit objective;

(2) Provides a format for summarizing profit amounts subsequently negotiated as part of the contract price; and

(3) Serves as the principal source document for reporting profit statistics to DoD's management information system.

(b) The Military Departments are responsible for establishing policies and procedures for feeding the DoD-wide management information system on profit and fee statistics (see 215.975).

(c) The contracting officer shall—

(1) Use and prepare a DD Form 1547 whenever a structured approach to profit analysis is required by 215.902. (See 215.971, 215.972, and 215.973 for guidance on using the structured approaches.) Administrative instructions for completing the form are in 253.215–70.

(2) Ensure that the DD Form 1547 is accurately completed. The contracting officer is responsible for the correction of any errors detected by the management system auditing process.

215.971 Weighted guidelines method.

215.971–1 General.

(a) The weighted guidelines method focuses on three profit factors—

(1) Performance risk;

(2) Contract type risk; and

(3) Facilities capital employed.

(b) The contracting officer assigns values to each profit factor; the value multiplied by the base results in the profit objective for that factor. Each profit factor has a normal value and a designated range of values. The normal value is representative of average conditions on the prospective contract when compared to all goods and services acquired by DoD. The designated range provides values based on above normal or below normal conditions. In the price negotiation memorandum, the contracting officer need not explain assignment of the normal value,

but should address conditions that justify assignment of other than the normal value.

215.971–2 Performance risk.

(a) *Description.* This profit factor addresses the contractor's degree of risk in fulfilling the contract requirements. The factor consists of three parts—

(1) Technical—the technical uncertainties of performance.

(2) Management—the degree of management effort necessary to ensure that contract requirements are met.

(3) Cost control—the contractor's efforts to reduce and control costs.

(b) *Determination.* The following extract from the DD Form 1547 is annotated to describe the process.

Item	Contractor Risk Factors	Assigned Weighting	Assigned Value	Base (Item 18)	Profit Objective
21	Technical	(1)	(2)	N/A	N/A
22	Management	(1)	(2)	N/A	N/A
23	Cost Control	(1)	(2)	N/A	N/A
24	Performance Risk (Composite)	N/A	(3)	(4)	(5)

(1) Assign a weight (percentage) to each element according to its input to the total performance risk. The total of the three weights equals 100%.

(2) Select a value for each element from the list in paragraph (c) of this subsection using the evaluation criteria in paragraphs (d), (e), and (f) of this subsection.

(3) Compute the composite as shown in the following example—

Assigned—	Assigned weighting (percent)	Assigned value (percent)	Weighted value (percent)
Technical	30	5.0	1.5
Management	30	4.0	1.2
Cost Control	40	4.5	1.8
Composite Value	100		4.5

(4) Insert the amount from Block 18 of the DD Form 1547. Block 18 is total contract costs, excluding general and administrative expenses, contractor independent research and development/bid and proposal expenses, and facilities capital cost of money.

(5) Multiply (3) by (4).

(c) *Values:* Normal and designated ranges.

Standard Alternate	Normal value (percent)	Designated range (percent)
Standard	4	2 to 6.
Alternate	6	4 to 8

(1) Standard. The standard designated range should apply to most contracts.

(2) Alternate. Contracting officers may use the alternate designated range for research and development and service contractors when these contractors require relatively low capital investment in buildings and equipment when compared to the defense industry overall. If the alternate designated range is used, do not give any profit for facilities capital employed (see 215.971–4(c)(3)).

(d) *Evaluation criteria for technical.* (1) Review the contract requirements and focus on the critical performance elements in the statement of work or specifications. Factors to consider include—

(i) Technology being applied or developed by the contractor;

(ii) Technical complexity;

(iii) Program maturity;

(iv) Performance specifications and tolerances;

(v) Delivery schedule; and

(vi) Extent of a warranty or guarantee.

(2) Above normal conditions. (i) The contracting officer may assign a higher than normal value in those cases where there is a substantial technical risk. Indicators are—

(A) The contractor is either developing or applying advanced technologies;

(B) Items are being manufactured using specifications with stringent tolerance limits;

(C) The efforts require highly skilled personnel or require the use of state of the art machinery;

(D) The services and analytical efforts are extremely important to the Government and must be performed to exacting standards;

(E) The contractor's independent development and investment has reduced the Government's risk or cost;

(F) The contractor has accepted an accelerated delivery schedule to meet DoD requirements; or

(G) The contractor has assumed additional risk through warranty provisions.

(ii) Extremely complex, vital efforts to overcome difficult technical obstacles which require personnel with exceptional abilities, experience, and professional credentials may justify a value significantly above normal.

(iii) The following may justify a maximum value—

(A) Development or initial production of a new item, particularly if performance or quality specifications are tight; or

(B) A high degree of development or production concurrency.

(3) Below normal conditions.

(i) The contracting officer may assign a lower than normal value in those cases where the technical risk is low. Indicators are—

(A) Acquisition is for off-the-shelf items;

(B) Requirements are relatively simple;

(C) Technology is not complex;

(D) Efforts do not require highly skilled personnel;

(E) Efforts are routine;

(F) Programs are mature; or

(G) Acquisition is a follow-on effort or a repetitive type acquisition.

(ii) The contracting officer may assign a value significantly below normal for—

(A) Routine services;

(B) Production of simple items;

(C) Rote entry or routine integration of Government furnished information; or

(D) Simple operations with Government-furnished property.

(e) *Evaluation criteria for management.* (1) The contracting officer should—

(i) Assess the contractor's management and internal control systems using contracting office information and reviews made by field contract administration offices or other DoD field offices;

(ii) Assess the management involvement expected on the prospective contract action;

(iii) Consider the degree of cost mix as an indication of the types of resources applied and value-added by the contractor; and

(iv) Consider the contractor's support of Federal socioeconomic programs.

(2) Above normal conditions. (i) The contracting officer may assign a higher than normal value when the management effort is intense. Indicators of this are—

(A) The contractor's value-added is both considerable and reasonably difficult;

(B) The effort involves a high degree of integration or coordination; or

(C) The contractor has a substantial record of active participation in Federal socioeconomic programs.

(ii) The contracting officer may justify a maximum value when the effort—

(A) Requires large scale integration of the most complex nature;

(B) Involves major international activities with significant management coordination (e.g., offsets with foreign vendors); or

(C) Has critically important milestones.

(3) Below normal conditions. (i) The contracting officer may assign a lower than normal value when the management effort is minimal. Indicators of this are—

(A) The program is mature and many end item deliveries have been made;

(B) The contractor adds minimum value to an item;

(C) The efforts are routine and require minimal supervision;

(D) The contractor provides poor quality, untimely proposals;

(E) The contractor fails to provide an adequate analysis of subcontractor costs; or

(F) The contractor does not cooperate in the evaluation and negotiation of the proposal.

(ii) The following may justify a value significantly below normal—

(A) Reviews performed by the field contract administration offices disclose unsatisfactory management and internal control systems (e.g., quality

assurance, property control, safety, security); or

(B) The effort requires an unusually low degree of management involvement.

(f) *Evaluation criteria for cost control.* (1) The contracting officer should evaluate—

(i) The expected reliability of the contractor's cost estimates (including the contractor's cost estimating system);

(ii) The contractor's cost reduction initiatives (e.g., competition advocacy programs, dual sourcing, spare parts pricing reform, value engineering);

(iii) The adequacy of the contractor's management approach to controlling cost and schedule; and

(iv) Any other factors which affect the contractor's ability to meet the cost targets, e.g., foreign currency exchange rates and inflation rates.

(2) Above normal conditions. The contracting officer may assign a higher than normal value if the contractor can demonstrate a highly effective cost control program. Indicators of this are—

(i) The contractor provides fully documented and reliable cost estimates;

(ii) The contractor has an aggressive cost reduction program that has demonstrable benefits;

(iii) The contractor uses a high degree of subcontract competition (e.g., aggressive dual sourcing); or

(iv) The contractor has a proven record of cost tracking and control.

(3) Below normal conditions. The contracting officer may assign a lower than normal value if the contractor demonstrates minimal concern for cost control. Indicators are—

(i) The contractor's cost estimating system is marginal;

(ii) The contractor has made minimal effort to initiate cost reduction programs;

(iii) The contractor's cost proposal is inadequate;

(iv) The contractor has a record of cost overruns or other indication of unreliable cost estimates and lack of cost control.

215.971–3 Contract type risk and working capital adjustment.

(a) *Description.* The contract type risk factor focuses on the degree of cost risk accepted by the contractor under varying contract types. The working capital adjustment is an adjustment added to the profit objective for contract type risk. It only applies to fixed-price contracts that provide for progress payments. Though it uses a formula approach, it is not intended to be an exact calculation of the cost of working capital. Its purpose is to give general recognition to the contractor's cost of working capital under varying contract circumstances, financing policies, and the economic environment.

(b) *Determination.* The following extract from the DD 1547 is annotated to explain the process.

Item	Contractor risk factors		Assigned value	Base (Item 18)	Profit objective
25	Contract Type Risk		(1)	(2)	(3)
		Cost financed	Length factor	Interest rate	
26	Working Capital (4)	(5)	(6)	(7)	(8)

(1) Select a value from the list of contract types in paragraph (c) of this subsection using the evaluation criteria in paragraph (d) of this subsection.

(2) Insert the amount from Block 18, i.e., the total allowable costs excluding general and administrative expenses, independent research and development/bid proposal expenses, and facilities capital cost of money.

(3) Multiply (1) by (2).

(4) Only complete this Block when the prospective contract is a fixed-price contract containing provisions for progress payments.

(5) Insert the amount computed per paragraph (e) of this subsection.

(6) Insert the appropriate figure from paragraph (f) of this subsection.

(7) Use the interest rate established by the Secretary of the Treasury (230.7101(a)). Do not use any other interest rate.

(8) Multiply (5) by (6) by (7). This is the working capital adjustment. It shall not exceed 4 percent of the contract costs in Block 20.

(c) *Values:* Normal and designated ranges.

Contract type	Notes	Normal value (percent)	Designated range (percent)
Firm fixed-price, no financing.	(1)	5	4 to 6.
Firm fixed-price, with financing.	(2)	3	2 to 4.
Fixed-price-incentive, no financing.	(1)	3	2 to 4.
Fixed-price with redeterminable provision.	(3)		
Fixed-price-incentive, with financing.	(2)	1	0 to 2.
Cost-plus-incentive-fee.	(4)	1	0 to 2.
Cost-plus-fixed-fee	(4)	.5	0 to 1.
Time and material contracts (including overhaul contracts priced on time and material basis).	(5)	.5	0 to 1.
Labor-hour contracts.	(5)	.5	0 to 1.
Firm fixed-price-level-of-effort-term.	(5)	.5	0 to 1.

(1) *No financing* means that the contract either does not provide progress payments, or provides them only on a limited basis, such as financing of first articles. Do not compute a working capital adjustment.

(2) *With financing* means progress payments. When progress payments are present, compute a working capital adjustment (Block 26).

(3) For the purposes of assigning profit values, treat a fixed-price contract with redeterminable provisions as if it were a fixed-price-incentive contract with below normal conditions.

(4) Cost-plus contracts shall not receive the working capital adjustment.

(5) These types of contracts are considered cost-plus-fixed-fee contracts for the purposes of assigning profit values. They shall not receive the working capital adjustment in Block 26. However, they may receive higher than normal values within the designated range to the extent that portions of cost are fixed.

(d) *Evaluation criteria*—(1) *General.* The contracting officer should consider elements that affect contract type risk such as—

(i) Length of contract;

(ii) Adequacy of cost data for projections;

(iii) Economic environment;

(iv) Nature and extent of subcontracted activity;

(v) Protection provided to the contractor under contract provisions (e.g., economic price adjustment clauses);

(vi) The ceilings and share lines contained in incentive provisions; and

(vii) Risks associated with contracts for foreign military sales (FMS) which are not funded by U.S. appropriations.

(2) *Mandatory*—The contracting officer shall assess the extent to which costs have been incurred prior to definitization of the contract action (see also 217.7404–6(a)). The assessment shall include any reduced contractor risk on both the contract before definitization and the remaining portion of the contract. When costs have been incurred prior to definitization, generally regard the contract type risk to be in the low end of the designated range. If a substantial portion of the costs have been incurred prior to definitization, the contracting officer may assign a value as low as 0%, regardless of contract type.

(3) *Above normal conditions.* The contracting officer may assign a higher than normal value when there is substantial contract type risk. Indicators of this are—

(i) Efforts where there is minimal cost history;

(ii) Long-term contracts without provisions protecting the contractor, particularly when there is considerable economic uncertainty;

(iii) Incentive provisions (e.g., cost and performance incentives) which place a high degree of risk on the contractor; or

(iv) FMS sales (other than those under DoD cooperative logistics support arrangements or those made from U.S. Government inventories or stocks) where the contractor can demonstrate

that there are substantial risks above those normally present in DoD contracts for similar items.

(4) *Below normal conditions.* The contracting officer may assign a lower than normal value when the contract type risk is low. Indicators of this are—

(i) Very mature product line with extensive cost history;

(ii) Relatively short-term contracts;

(iii) Contractual provisions which substantially reduce the contractor's risk; or

(iv) Incentive provisions which place a low degree of risk on the contractor.

(e) *Costs financed.* (1) Costs financed equal total costs multiplied by the portion (percent) of costs financed by the contractor.

(2) Total costs equal Block 20 (i.e., all allowable costs, including general and administrative and independent research and development/bid and proposal, but excluding facilities capital cost of money), reduced as appropriate when—

(i) The contractor has little cash investment (e.g., subcontractor progress payments liquidated late in period of performance);

(ii) Some costs are covered by special financing provisions, such as advance payments; or

(iii) The contract is multiyear and there are special funding arrangements.

(3) The portion financed by the contractor is generally the portion not covered by progress payments, i.e., 100% minus the customary progress payment rate (FAR 32.501). For example, if a contractor receives progress payments at 75%, the portion financed by the contractor is 25%. On contracts that provide flexible progress payments (252.232–7003) or progress payments to small businesses, use the customary progress payment rate for large businesses.

(f) *Contract length factor.* (1) This is the period of time that the contractor has a working capital investment in the contract. It—

(i) Is based on the time necessary for the contractor to complete the substantive portion of the work;

(ii) Is not necessarily the period of time between contract award and final delivery (or final payment), as periods of minimal effort should be excluded;

(iii) Should not include periods of performance contained in option provisions; and

(iv) Should not, for multiyear contracts, include periods of performance beyond that required to complete the initial program year's requirements.

(2) The contracting officer—

(i) Should use the following table to select the contract length factor;

(ii) Should develop a weighted average contract length when the contract has multiple deliveries; and

(iii) May use sampling techniques provided they produce a representative result.

TABLE

Period to perform substantive portion (in months)	Contract length factor
21 or less	.40
22 to 27	.65
28 to 33	.90
34 to 39	1.15
40 to 45	1.40
46 to 51	1.65
52 to 57	1.90
58 to 63	2.15
64 to 69	2.40
70 to 75	2.65
76 or more	2.90

(3) Example: A prospective contract has a performance period of 40 months with end items being delivered in the 34th, 36th, 38th, and 40th months of the contract. The average period is 37 months and the contract length factor is 1.15.

[56 FR 36326, July 31, 1991, as amended at 59 FR 27669, May 27, 1994]

215.971–4 Facilities capital employed.

(a) *Description.* This factor focuses on encouraging and rewarding aggressive capital investment in facilities that benefit DoD. It recognizes both the facilities capital that the contractor will employ in contract performance and the contractor's commitment to improving productivity.

(b) *Determination.* The following extract from the DD Form 1547 has been annotated to explain the process.

Item	Contractor facilities capital employed	Assigned value	Amount employed	Profit objective
27	Land	N/A	(2)	N/A
28	Buildings	(1)	(2)	(3)
29	Equipment	(1)	(2)	(3)

(1) Select a value from the list in paragraph (c) of this subsection using the evaluation criteria in paragraph (d) of this subsection.

(2) Use the allocated facilities capital attributable to land, buildings, and equipment, as derived in DD Form 1861, ''Contract Facilities Capital Cost of Money'' (see 215.871–5 and 230.7001).

(i) In addition to the net book value of facilities capital employed, consider facilities capital that is part of a formal investment plan if the contractor submits reasonable evidence that—

(A) Achievable benefits to DoD will result from the investment; and

(B) The benefits of the investment are included in the forward pricing structure.

(ii) If the value of intracompany transfers has been included in Block 18 at cost (i.e., excluding general and administrative (G&A) expenses and profit), add to the contractor's allocated facilities capital, the allocated facilities capital attributable to the buildings and equipment of those corporate divisions supplying the intracompany transfers. Do not make this addition if the value of intracompany transfers has been included in Block 18 at price (i.e., including G&A expenses and profit).

(3) Multiply (1) by (2).

(c) *Values: Normal and designated ranges.*

Notes	Asset type	Normal value (percent)	Designated range
(1)	Land	0	N/A.
(1)	Buildings	15	10% to 20%.
(1)	Equipment	35	20% to 50%.
(2)	Land	0	N/A.
(2)	Buildings	5	0% to 10%.
(2)	Equipment	20	15% to 25%.
(3)	Land	0	N/A.
(3)	Buildings	0	0%.
(3)	Equipment	0	0%.

(1) These are the normal values and ranges. They apply to all situations except those noted in (2) and (3).

(2) These alternate values and ranges apply to situations where a highly facilitized manufacturing firm will be performing a research and development or services contract. They balance the method used to allocate facilities capital cost of money, which may produce disproportionate allocation of assets to these types of efforts.

(3) When using a value from the alternate designated range for the performance risk factor (215.971–2(c)(2)), do not allow profit on facilities capital employed.

(d) *Evaluation criteria.* (1) In evaluating facilities capital employed, the contracting officer—

(i) Should relate the usefulness of the facilities capital to the goods or services being acquired under the prospective contract;

(ii) Should analyze the productivity improvements and other anticipated industrial base enhancing benefits resulting from the facilities capital investment, including—

(A) The economic value of the facilities capital, such as physical age, undepreciated value, idleness, and expected contribution to future defense needs; and

(B) The contractor's level of investment in defense related facilities as compared with the portion of the contractor's total business which is derived from DoD;

(iii) Should consider any contractual provisions that reduce the contractor's risk of investment recovery, such as termination protection clause, capital investment indemnification, and productivity saving rewards (215.870–3); and

(iv) Shall ensure that increases in facilities capital investments are not merely asset revaluations attributable to mergers, stock transfers, take-overs, sales of corporate entities, or similar actions.

(2) *Above normal conditions.* (i) The contracting officer may assign a higher than normal value if the facilities capital investment has direct, identifiable,

and exceptional benefits. Indicators are—

(A) New investments in state-of-the-art technology which reduce acquisition cost or yield other tangible benefits such as improved product quality or accelerated deliveries;

(B) Investments in new equipment for research and development applications; or

(C) Contractor demonstration that the investments are over and above the normal capital investments necessary to support anticipated requirements of DoD programs.

(ii) The contracting officer may assign a value significantly above normal when there are direct and measurable benefits in efficiency and significantly reduced acquisition costs on the effort being priced. Maximum values apply only to those cases where the benefits of the facilities capital investment are substantially above normal.

(3) *Below normal conditions.* (i) The contracting officer may assign a lower than normal value if the facilities capital investment has little benefit to DoD. Indicators are—

(A) Allocations of capital apply predominantly to commercial item lines;

(B) Investments are for such things as furniture and fixtures, home or group level administrative offices, corporate aircraft and hangars, gymnasiums; or

(C) Facilities are old or extensively idle.

(ii) The contracting officer may assign a value significantly below normal when a significant portion of defense manufacturing is done in an environment characterized by outdated, inefficient, and labor-intensive capital equipment.

[56 FR 36326, July 31, 1991, as amended at 60 FR 61596, Nov. 30, 1995]

215.972 Modified weighted guidelines method for nonprofit organizations.

(a) *Definition.* As used in this subpart, a nonprofit organization is a business entity—

(1) Which operates exclusively for charitable, scientific, or educational purposes;

(2) Whose earnings do not benefit any private shareholder or individual;

(3) Whose activities do not involve influencing legislation or political campaigning for any candidate for public office; and

(4) Which is exempted from Federal income taxation under section 501 of the Internal Revenue Code.

(b) For nonprofit organizations which are Federally funded research and development centers (FFRDCs), the contracting officer—

(1) Should consider whether any fee is appropriate. Considerations shall include the FFRDC's—

(i) Proportion of retained earnings (as established under generally accepted accounting methods) that relates to DoD contracted effort;

(ii) Facilities capital acquisition plans;

(iii) Working capital funding as assessed on operating cycle cash needs;

(iv) Contingency funding; and

(v) Provision for funding unreimbursed costs deemed ordinary and necessary to the FFRDC.

(2) Shall, when a fee is considered appropriate, compute the fee objective using the weighted guidelines method in 215.971, with the following modifications—

(i) *Modifications to performance risk (Blocks 21–24 of the DD Form 1547).* (A) If the contracting officer assigns a value from the standard designated range (215.971–2(c)), reduce the fee objective by an amount equal to 1% of the costs in Block 18 of the DD Form 1547. Show the net (reduced) amount on the DD Form 1547.

(B) If the contracting officer assigns a value from the alternate designated range, reduce the fee objective by an amount equal to 2% of the costs in Block 18 of the DD Form 1547. Show the net (reduced) amount on the DD Form 1547.

(ii) *Modifications to contract type risk (Block 25 of the DD Form 1547).* Use a designated range of −1% to 0% in lieu of the values in 215.971–3. There is no normal value.

(c) For nonprofit organizations which are entities that have been identified by the Secretary of Defense or a Secretary of a Department as receiving sustaining support on a cost-plus-fixed-

fee basis from a particular DoD department or agency, compute a fee objective for covered actions using the weighted guidelines method in 215.971, modified as described in paragraph (b)(2) of this section.

(d) For all other nonprofit organizations, compute a fee objective for covered actions using the weighted guidelines method in 215.971, modified as described in paragraph (b)(2)(i) of this section.

215.973 Alternate structured approaches.

(a) The contracting officer may use an alternate structured approach under 215.903.

(b) The contracting officer may design the structure of the alternate, but it shall include—

(1) Consideration of the three basic components of profit—performance risk, contract type risk (including working capital), and facilities capital employed. However, the contracting officer is not required to complete Blocks 21 through 30 of the DD Form 1547.

(2) Offset for facilities capital cost of money.

(i) The contracting officer shall reduce the overall prenegotiation profit objective by the lesser of 1% of total cost or the amount of facilities capital cost of money. The profit amount in the negotiation summary of the DD Form 1547 must be net of the offset.

(ii) This adjustment is needed for the following reason: The values of the profit factors used in the weighted guidelines method were adjusted to recognize the shift in facilities capital cost of money from an element of profit to an element of contract cost (FAR 31.205–10) and reductions were made directly to the profit factors for performance risk. In order to ensure that this policy is applied to all DoD contracts which allow facilities capital cost of money, similar adjustments shall be made to contracts which use alternate structured approaches.

215.974 Fee requirements for cost-plus-award-fee contracts.

In developing a fee objective for cost-plus-award-fee contracts, the contracting officer shall—

(a) Follow the guidance in FAR 16.404–2 and 216.404–2;

(b) Not use the weighted guidelines method or alternate structured approach;

(c) Apply the offset policy in 215.973(b)(2) for facilities capital cost of money, i.e., reduce the base fee by the lesser of 1% of total costs or the amount of facilities capital cost of money; and

(d) Not complete a DD Form 1547.

215.975 Reporting profit and fee statistics.

(a) Contracting officers in contracting offices which participate in the management information system for profit and fee statistics send completed DD Forms 1547 on actions of $500,000 or more, where the contracting officer used either the weighted guidelines method, an alternate structured approach, or the modified weighted guidelines method, to their designated office within 30 days after contract award.

(b) Participating contracting offices and their designated offices are—

Contracting office	Designated office
Army:	
All	Army Procurement Research and Analysis Office, ATTN: SFRD–KPR(WGL), Bldg 12500, C Wing, Ft. Lee, VA 23801–6045.
Navy:	
Naval Air Systems Command [1]	Commander, Naval Supply Systems Command, ATTN: SUP 026, Washington, DC 20376–5000.
Naval Sea Systems Command [1]	
Space and Naval Warfare Systems Command [1]	
Naval Facilities Engineering Command [1]	
Naval Supply Systems Command [1]	
Office of Naval Research [1]	
Headquarters, United States Marine Corps [1]	
Strategic Systems Programs Office [1]	
Military Sealift Command [1]	
Automatic Data Processing Selection Office [1]	
Navy Regional Data Automation Center [1]	
Naval Research Laboratory [1]	
Navy Commercial Communications Center [1]	
Naval Aviation Depot Operations Center [1]	
Air Force:	
Air Force Materiel Command (all field offices)	Air Force Materiel Command, 645 CCSG/SCOS, ATTN: J010 Clerk, 2721 Sacramento Street, Wright-Patterson Air Force Base, Ohio 45433.

[1] Includes all subordinate field offices.

(c) When negotiation of a contract action over $500,000 has been delegated to another contracting agency (e.g., to an administrative contracting officer), that agency shall ensure that a copy of the DD Form 1547 is provided to the delegating office for reporting purposes within 30 days from negotiation of the contract action.

(d) Contracting offices outside the United States, its possessions, and Puerto Rico are exempt from reporting.

(e) Designated offices send a quarterly (non-cumulative) report of DD Form 1547 data to: Washington Headquarters Service, Directorate for Information Operations and Reports (WHS/DIOR), 1215 Jefferson Davis Highway, suite 1204, Arlington, VA 22202–4302.

(f) In preparing/sending the quarterly report, designated offices—

(1) Perform the necessary audits to ensure information accuracy;

(2) Do not enter classified information;

(3) Transmit the report via computer magnetic tape using the procedures, format, and editing process issued by the Director of Defense Procurement; and

(4) Send the reports not later than the 30th day after the close of the quarterly reporting periods.

(g) These reporting requirements have been assigned report control symbol: P&L(Q) 1751.

[56 FR 36326, July 31, 1991, as amended at 57 FR 53599, Nov. 12, 1992; 59 FR 27669, May 27, 1994]

Subpart 215.10—Preaward, Award, and Postaward Notifications, Protests, and Mistakes

215.1001 Notifications to unsuccessful offerors.

(b) *Preaward notices.*

(2) Acquisitions processed under small purchase procedures are exempt from the requirements of FAR 15.1001(b)(2).

PART 216—TYPES OF CONTRACTS

Sec.

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216.703 Basic ordering agreements.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36340, July 31, 1991, unless otherwise noted.

Subpart 216.1—Selecting Contract Types

216.104 Factors in selecting contract types.

(d) Design stability should also be considered.

216.104–70 Research and development.

(a) *General.* There are several categories of research and development (R&D) contracts: research, exploratory development, advanced development, engineering development, and operational systems development (see 235.001 for definitions). Each category has a primary technical or functional objective. Different parts of a project may fit several categories. The contract type must fit the work required, not just the classification of the overall program.

(b) *Research and exploratory development.* (1) Price is not necessarily the primary factor in determining the contract type.

(2) The nature of the work to be performed will usually result in a cost-plus award fee, cost-plus fixed fee term, cost-no-fee, or cost-sharing contract.

(3) If the Government and the contractor can identify and agree upon the level of contractor effort required, the contracting officer may select a firm fixed-price level-of-effort contract, except see 235.006.

(4) If the Government and the contractor agree that an incentive arrangement is desirable and capable of being evaluated after completion of the work, the contracting officer may use an incentive type contract.

(c) *Advanced development.* (1) The nature of the work to be performed often results in a cost-plus fixed fee completion type contract.

(2) Contracting officers may select incentive contracts if—

(i) Realistic and measurable targets are identified; and

(ii) Achievement of those targets is predictable with a reasonable degree of accuracy.

(3) Contracting officers should not use contracts with only cost incentives where—

(i) There will be a large number of major technical changes; or

(ii) Actions beyond the control of the contractor may influence the contractor's achievement of cost targets.

(d) *Engineering development and operational systems development.* (1) When selecting contract types, also consider—

(i) The degree to which the project is clearly defined, which in turn affects the contractor's ability to provide accurate cost estimates;

(ii) The need for effort that will overlap that of earlier stages;

(iii) The need for firm technical direction by the Government; and

(iv) The degree of configuration control the Government will exercise.

(2) For development efforts, particularly for major defense systems, the preferred contract type is cost reimbursement.

(3) Contracting officers should use fixed-price type contracts when risk has been reduced to the extent that realistic pricing can occur; e.g., when a program has reached the final stages of development and technical risks are minimal, except see 235.006.

Subpart 216.2—Fixed-Price Contracts

216.203 Fixed-price contracts with economic price adjustment.

216.203–4 Contract clauses.

(a) *Adjustment based on established prices-standard supplies.* Generally, use the clause at FAR 52.216–2, Economic Price Adjustment-Standard Supplies only when—

(i) The total contract price is over the small purchase threshold in FAR 13.000; and

(ii) Delivery will not be completed within 6 months after the contract date.

(b) *Adjustment based on established prices-semistandard supplies.* Generally, use the clause at FAR 52.216–3, Economic Price Adjustment-Semistandard Supplies, only when—

(i) The total contract price is over the small purchase threshold in FAR 13.000; and

(ii) Delivery will not be completed within 6 months after the contract date.

(c) *Adjustments based on actual cost of labor or material.*

(2) Limit use of the clause at FAR 52.216–4, Economic Price Adjustment-Labor and Material, to contracts in which the price exceeds $50,000 and the period of performance exceeds 6 months, unless otherwise approved by the chief of the contracting office. Use an appropriate modification of the clause in sealed bidding.

(4) Apply the full amount of the decrease in the labor rates and fringe benefits or unit prices for materials.

(d) *Adjustments based on cost indexes of labor or material.* Use the following guidelines—

(i) Do not make the clause unnecessarily complex.

(ii) Normally, the clause should not provide either a ceiling or a floor for adjustment unless adjustment is based on indices below the four digit level of the Bureau of Labor Statistics—

(A) Producer Price Index;

(B) Employment Cost Index for wages and salaries, benefits, and compensation costs for aerospace industries; or

(C) Wage and Income Series by Standard Industrial Classification (Labor).

(iii) Normally, the clause should cover all potential economic fluctuations within the original contract period of performance.

(iv) The clause must accurately identify the index(es) upon which adjustments will be based.

(A) It must provide for a means to adjust for appropriate economic fluctuation in the event publication of the movement of the designated index is discontinued. This might include the substitution of another index if the time remaining would justify doing so and an appropriate index is reasonably available, or some other method for repricing the remaining portion of work to be performed.

(B) Normally, there should be no need to make an adjustment if computation of the identified index is altered. However, it may be appropriate to provide for adjustment of the economic fluctuation computations in the event there is such a substantial alteration in the method of computing the index that the original intent of the parties is negated.

(C) When an index to be used is subject to revision (e.g., the Bureau of Labor Statistics Producer Price Indexes), the economic price adjustment clause must specify that any economic price adjustment will be based on a revised index and must identify which revision to the index will be used.

(v) Construct the index to encompass a large sample of relevant items while still bearing a logical relationship to the type of contract costs being measured. The basis of the index should not be so large and diverse that it is significantly affected by fluctuations not relevant to contract performance, but it must be broad enough to minimize the effect of any single company, including the anticipated contractor(s).

(vi) Construction of an index is largely dependent upon three general series published by the U.S. Department of Labor, Bureau of Labor Statistics (BLS). These are the—

(A) Industrial Commodities portion of the Producer Price Index;

(B) Employment Cost Index for wages and salaries, benefits, and compensation costs for aerospace industries; and

(C) Wage and Income Series by Standard Industrial Classification (Labor). Since there is no BLS published series currently available that relates directly to total prices of delivered DoD aircraft, ships, missiles, electronics, etc., it will be necessary to construct composite indices from major portions of the three series identified.

(vii) Normally, do not use more than two indices, i.e., one for labor (direct and indirect) and one for material (direct and indirect).

(viii) The clause must establish and properly identify a base period comparable to the contract periods for which adjustments are to be made as a reference point for application of an index.

(ix) The clause should not provide for an adjustment beyond the original contract performance period, including options. The start date for the adjustment may be the beginning of the contract or a later time, as appropriate, based on the projected rate of expenditures.

(x) The expenditure profile for both labor and material should be based on a predetermined rate of expenditure (expressed as the percentage of material or labor usage as it relates to the total contract price) in lieu of actual cost incurred.

(A) If the clause is to be used in a competitive acquisition, determine the labor and material allocations, with regard to both mix of labor and material and rate of expenditure by percentage, in a manner which will, as nearly as possible, approximate the average expenditure profile of all companies to be solicited so that all companies may compete on an equal basis.

(B) If the clause is to be used in a noncompetitive acquisition, the labor and material allocations may be subject to negotiation and agreement.

(C) For multiyear contracts, establish predetermined expenditure profile tables for each of the annual increments in the multiyear buy. Each of the second and subsequent year tables must be cumulative to reflect the total expenditures for all increments funded through the latest multiyear funding.

(xi) The clause should state the percentage of the contract price subject to price adjustment.

(A) Normally, do not apply adjustments to the profit portion of the contract.

(B) Examine the labor and material portions of the contract to exclude any areas that do not require adjustment. For example, it may be possible to exclude—

(*1*) Subcontracting for short periods of time during the early life of the contract which could be covered by firm-fixed-priced subcontracting;

(*2*) Certain areas of overhead, e.g., depreciation charges, prepaid insurance costs, rental costs, leases, certain taxes, and utility charges;

(*3*) Labor costs for which a definitive union agreement exists; and

(*4*) Those costs not likely to be affected by fluctuation in the economy.

(C) Allocate that part of the contract price subject to adjustment to specific periods of time (e.g., quarterly, semiannually, etc.) based on the most probable expenditure or commitment basis (expenditure profile).

(xii) The clause should provide for definite times or events that trigger price adjustments. Adjustments should be frequent enough to afford the contractor appropriate economic protection without creating a burdensome administrative effort. The adjustment period should normally range from quarterly to annually.

(xiii) When the contract contains cost incentives, any sums paid to the contractor on account of economic price adjustment provisions must be subtracted from the total of the contractor's allowable costs for the purpose of establishing the total costs to which the cost incentive provisions apply. If the incentive arrangement is cited in percentage ranges, rather than dollar ranges, above and below target costs, structure the economic price adjustment clause to maintain the original contract incentive range in dollars.

(xiv) The economic price adjustment clause should provide that once the labor and material allocations and the portion of the contract price subject to

price adjustment have been established, they remain fixed through the life of the contract and shall not be modified except in the event of significant changes in the scope of the contract. The clause should state that pricing actions pursuant to the Changes clause or other provisions of the contract will be priced as though there were no provisions for economic price adjustment. However, subsequent modifications may include a change to the delivery schedule or significantly change the amount of, or mix of, labor or material for the contract. In such cases, it may be appropriate to prospectively apply economic price adjustment coverage. This may be accomplished by—

(A) Using an economic price adjustment (EPA) clause that applies only to the effort covered by the modification;

(B) Revising the baseline data or period in the EPA clause for the basic contract to include the new work; or

(C) Using an entirely new EPA clause for the entire contract, including the new work.

(xv) Consistent with the factors in paragraphs (d)(i) through (xiv) of this subsection, it may also be appropriate to provide in the prime contract for similar economic price adjustment arrangements between the prime contractor and affected subcontractors to allocate risks properly and ensure that those subcontractors are provided similar economic protection.

(xvi) When economic price adjustment clauses are included in contracts that do not require submission of cost or pricing data as provided for in FAR 15.804–3, the contracting officer must obtain adequate information to establish the baseline from which adjustments will be made. The contracting officer may require verification of the data submitted to the extent necessary to permit reliance upon the data as a reasonable baseline.

216.203–4–70 Additional clauses.

(a) *Price adjustment for basic steel, aluminum, brass, bronze, or copper mill products.* (1) The price adjustment clause at 252.216–7000, Economic Price Adjustment—Basic Steel, Aluminum, Brass, Bronze, or Copper Mill Products, may be used in fixed-price supply contracts for basic steel, aluminum, brass, bronze, or copper mill products, such as sheets, plates, and bars, when an established catalog or market price—

(i) Exists for the particular product being acquired; and

(ii) Has been verified in accordance with the criteria at FAR 15.804–3(c).

(2) Do not make an adjustment under this clause until the adjustment has been verified in accordance with the criteria set forth in FAR 15.804–3.

(3) The ten percent figure in paragraph (d)(1) of the clause shall not be exceeded unless approval is obtained at a level above the contracting officer.

(b) *Price adjustment for nonstandard steel items.* (1) The price adjustment clause at 252.216–7001, Economic Price Adjustment—Nonstandard Steel Items, may be used in fixed-price supply contracts when—

(i) The contractor is a steel producer and actually manufacture the standard steel mill item referred to in the ''base steel index'' definition of the clause; and

(ii) The items being acquired are nonstandard steel items made wholly or in part of standard steel mill items.

(2) When this clause is included in invitations for bids, omit Note 6 of the clause and all references to Note 6.

(3) Solicitations shall instruct offerors to complete all blanks in accordance with the applicable notes.

(4) When the clause is to provide for adjustment based on the contractor's ''established price'' (see paragraphs (a) and (f) and Note 6 of the clause), verify the established price before contract award in accordance with FAR 15.804–3.

(5) When the clause is to provide for adjustment on a basis other than ''established price'' (see Note 6 of the clause), that price must be verified.

(6) Make no adjustment in contract price under this clause until the requested adjustment has been verified in accordance with the criteria in FAR 15.804–3 (but see Note 6 of the clause) and as required by paragraph (f) of the clause.

(7) The ten percent figure in paragraph (e)(4) of the clause shall not be exceeded unless approval is obtained at a level above the contracting officer.

Subpart 216.3—Cost-Reimbursement Contracts

216.301 General.

216.301–3 Limitations.

(c) The contracting officer executes the determination and findings.

216.306 Cost-plus-fixed-fee contracts.

(c) *Limitations.*

(i) Annual military construction appropriations acts restrict the use of cost-plus-fixed-fee contracts that—

(A) Are funded by a military construction appropriations act:

(B) Are estimated to exceed $25,000; and

(C) Will be performed within the United States, except Alaska.

(ii) The Secretaries of the military departments are authorized to approve contracts described in paragraph (c)(i) of this section that are for environmental work only, provided the environmental work is not classified as construction, as defined by 10 U.S.C 2801.

(iii) The Secretary of Defense or designee must specifically approve contracts described in paragraph (c)(i) of this section that are not for environmental work only.

[61 FR 7743, Feb. 29, 1996; 61 FR 18195, Apr. 24, 1996]

216.307 Contract clauses.

(i) Use the clause at FAR 52.216–15, Predetermined Indirect Cost Rates, with 252.216–7002, Alternate A, in solicitations and contracts when a cost-reimbursement research and development contract with an educational institution (see FAR 42.705–3(b)) is contemplated and predetermined indirect cost rates are to be used.

[59 FR 53116, Oct. 21, 1994]

Subpart 216.4—Incentive Contracts

216.402 Application of predetermined, formula-type incentives.

216.402–2 Technical performance incentives.

Contractor performance incentives should relate to specific performance areas of milestones, such as delivery or test schedules, quality controls, maintenance requirements, and reliability standards.

216.403 Fixed-price incentive contracts.

(b) *Application.*

(3) Individual line items may have separate incentive provisions; e.g., when dissimilar work calls for separate formulas.

216.403–2 Fixed-price incentive (successive targets) contracts.

(a) *Description.* (1)(iii) The formula does not apply for the life of the contract. It is used to fix the firm target profit for the contract. To provide an incentive consistent with the circumstances, the formula should reflect the relative risk involved in establishing an incentive arrangement where cost and pricing information were not sufficient to permit the negotiation of firm targets at the outset.

216.403–70 Fixed-price contracts with award fees.

Award fee provisions may be used in fixed price contracts as provided in 216.470.

216.404 Cost-reimbursement incentive contracts.

216.404–1 Cost-plus-incentive-fee contracts.

(b) *Application.*

(3) Give appropriate weight to basic acquisition objectives in negotiating the range of fee and the fee adjustment formula. For example—

(A) In an initial product development contract, it may be appropriate to provide for relatively small adjustments

in fee tied to the cost incentive feature, but provide for significant adjustments if the contractor meets or surpasses performance targets.

(B) In subsequent development and test contracts, it may be appropriate to negotiate an incentive formula tied primarily to the contractor's success in controlling costs.

216.404–2 Cost-plus-award-fee contracts.

(a) *Description.* (i) Normally, award fee is not earned when the fee-determining official has determined that contractor performance has been submarginal or unsatisfactory.

(ii) The basis for all award fee determinations shall be documented in the contract file.

(b) *Application.* (1) The cost-plus-award-fee (CPAF) contract is also suitable for level of effort contracts where mission feasibility is established but measurement of achievement must be by subjective evaluation rather than objective measurement. See Table 16–1, Performance Evaluation Criteria, for sample performance evaluation criteria and Table 16–2, Contractor Performance Evaluation Report, for a sample evaluation report.

(2) The contracting activity may—

(A) Establish a board to—

(*1*) Evaluate the contractor's performance; and

(*2*) Determine the amount of the award or recommend an amount to the contracting officer.

(B) Afford the contractor an opportunity to present information on its own behalf.

(c) *Limitations.* The CPAF contract shall not be used—

(i) To avoid—

(A) Establishing CPFF contracts when the criteria for CPFF contracts apply, or

(B) Developing objective targets so a CPIF contract can be used.

(ii) For either engineering development or operational system development acquisitions which have specifications suitable for simultaneous research and development and production, except a CPAF contract may be used for individual engineering development or operational system development acquisitions ancillary to the development of a major weapon system or equipment, where—

(A) It is more advantageous; and

(B) The purpose of the acquisition is clearly to determine or solve specific problems associated with the major weapon system or equipment.

(2)(A) Do not apply the weighted guidelines method to CPAF contracts for either the base (fixed) fee or the award fee.

(B) The base fee shall not exceed three percent of the estimated cost of the contract exclusive of the fee.

216.470 Other applications of award fees.

The ''award amount'' portion of the fee may be used in other types of contracts under the following conditions—

(1) The Government wishes to motivate and reward a contractor for management performance in areas which cannot be measured objectively and where normal incentive provisions cannot be used. For example, logistics support, quality, timeliness, ingenuity, and cost effectiveness are areas under the control of management which may be susceptible only to subjective measurement and evaluation.

(2) The ''base fee'' (fixed amount portion) is not used.

(3) The chief of the contracting office approves the use of the ''award amount.''

(4) An award review board and procedures are established for conduct of the evaluation.

(5) The administrative costs of evaluation do not exceed the expected benefits.

TABLE 16–1—PERFORMANCE EVALUATION CRITERIA

		Submarginal	Marginal	Good	Very good	Excellent
A—Time of Delivery.	(A–1) Adherence to plan schedule.	Consistently late on 20% of plans.	Late on 10% plans w/o prior agreement.	Occasional plan late w/o justification.	Meets plan schedule.	Delivers all plans on schedule & meets prod. change requirements on schedule.
	(A–2) Action on Anticipated delays.	Does not expose changes or resolve them as soon as recognized.	Exposes changes but is dilatory in resolution on plans.	Anticipates changes, advise Shipyard but misses completion of design plans 10%.	Keeps Yard posted on delays, resolves independently on plans.	Anticipates in good time, advises Shipyard, resolves independently and meets production schedule.
	(A–3) Plan Maintenance.	Does not complete interrelated systems studies concurrently.	System studies completed but constr. plan changes delayed.	Major work plans coordinated in time to meet production schedules.	Design changes from studies and interrelated plans issued in time to meet product schedules.	Design changes, studies resolved and test data issued ahead of production requirements.
B—Quality of Work.	(B–1) Work Appearance.	25% dwgs. not compatible with Shipyard repro. processes and use.	20% not compatible with Shipyard repro. processes and use.	10% not compatible with Shipyard repro. processes and use.	0% dwgs. prepared by Des. agent not compatible with Shipyard repro. processes and use.	0% dwgs. presented incl. Des. agent, vendors, subcontr. not compatible with Shipyard repro. processes and use.
	(B–2) Thoroughness and Accuracy of Work.	Is brief on plans tending to leave questionable situations for Shipyard to resolve.	Has followed guidance, type and standard dwgs.	Has followed guidance, type and standard dwgs. questioning and resolving doubtful areas.	Work complete with notes and thorough explanations for anticipated questionable areas.	Work of highest caliber incorporating all pertinent data required including related activities.
	(B–3) Engineering Competence.	Tendency to follow past practice with no variation to meet reqmts. job in hand.	Adequate engrg. to use & adapt existing designs to suit job on hand for routine work.	Engineered to satisfy specs., guidance plans and material provided.	Displays excellent knowledge of constr. reqmts. considering systems aspect, cost, shop capabilities and procurement problems.	Exceptional knowledge of Naval shipwork & adaptability to work process incorporating knowledge of future planning in Design.
	(B–4) Liaison Effectiveness.	Indifferent to requirements of associated activities, related systems, and Shipyard advice.	Satisfactory but dependent on Shipyard to force resolution of problems without constructive recommendations to subcontr. or vendors.	Maintains normal contact with associated activities depending on Shipyard for problems requiring military resolution.	Maintains independent contact with all associated activities, keeping them informed to produce compatible design with little assistance for Yard.	Maintains expert contact, keeping Yard informed, obtaining info from equip., supplies w/o prompting by Shipyard.

TABLE 16–1—PERFORMANCE EVALUATION CRITERIA—Continued

		Submarginal	Marginal	Good	Very good	Excellent
	(B–5) Independence and Initiative.	Constant surveillance req'd to keep job from slipping—assign to low priority to satisfy needs.	Requires occasional prodding to stay on schedule & expects Shipyard resolution of most problems.	Normal interest and desire to provide workable plans with average assistance & direction by Shipyard.	Complete & accurate job. Free of incompatibilities with little or no direction by Shipyard.	Develops complete and accurate plans, seeks out problem areas and resolves with assoc. act. ahead of schedule.
C—Effectiveness in Controlling and/or Reducing Costs.	(C–1) Utilization of Personnel.	Planning of work left to designers on drafting boards.	Supervision sets & reviews goals for designers.	System planning by supervisory, personnel, studies checked by engineers.	Design parameters established by system engineers & held in design plans.	Mods. to design plans limited to less than 5% as result lack engrg. system correlation.
	(C–2) Control Direct Charges (Except Labor).	Expenditures not controlled for services.	Expenditures reviewed occasionally by supervision.	Direct charges set & accounted for on each work package.	Provides services as part of normal design function w/o extra charges.	No cost overruns on original estimates absorbs service demands by Shipyard.
	(C–3) Performance to Cost Estimate.	Does not meet cost estimate for original work or changes 30% time.	Does not meet cost estimate for original work or changes 20% time.	Exceeds original est. on change orders 10% time and meets original design costs.	Exceeds original est. on change orders 5% time.	Never exceeds estimates of original package or change orders.

TABLE 16–2.—CONTRACTOR PERFORMANCE EVALUATION REPORT

Category	Criteria	Rating		Item factor		Evaluation rating		Category factor		Efficiency rating
A	TIME OF DELIVERY.									
	A–1 Adherence to Plan Schedule	_____	×	.40	=	_____				
	A–2 Action on Anticipated Delays	_____	×	.30	=	_____				
	A–3 Plan Maintenance	_____	×	.30	=	_____				
	Total Item Weighed Rating					_____	×	.30	=	_____
B	QUALITY OF WORK.									
	B–1 Work Appearance	_____	×	.15	=	_____				
	B–2 Thoroughness and Accuracy of Work	_____	×	.30	=	_____				
	B–3 Engineering Competence	_____	×	.20	=	_____				
	B–4 Liaison Effectiveness	_____	×	.15	=	_____				
	B–5 Independence and Initiative	_____	×	.20	=	_____				
	Total Item Weighed Rating					_____	×	.40	=	_____
C	EFFECTIVENESS IN CONTROLLING AND/OR REDUCING COSTS.									
	C–1 Utilization of Personnel	_____	×	.30	=	_____				
	C–2 Control of all Direct Charges Other than Labor	_____	×	.30	=	_____				
	C–3 Performance to Cost Estimate	_____	×	.40	=	_____				
	Total Item Weighed Rating					_____	×	.30	=	_____
TOTAL WEIGHED RATING:										
Rated by:										
Signature(s):										

Ratings—Excellent; Very good; Good; Marginal; Submarginal;
Period of 19
Contract Number
Contractor
Date of Report
PNS Techical Monitor/s
Note: Provide supporting data and/or justification for below average or outstanding item ratings.

Subpart 216.5—Indefinite-Delivery Contracts

216.501 General.

(a)(i) For items with a shelf-life of less than 6 months, consider the use of indefinite delivery type contracts with orders to be placed either—

(A) Directly by the users; or

(B) By central purchasing offices with deliveries direct to users.

(ii) Whenever an indefinite delivery contract is issued, the issuing office must furnish all ordering offices sufficient information for the ordering office to complete its contract reporting responsibilities under 204.670–2. This data must be furnished to the ordering activity in sufficient time for the activity to prepare its report for the action within 3 working days of the order.

[56 FR 36340, July 31, 1991, as amended at 57 FR 42630, Sept. 15, 1992]

216.505 Contract clauses.

(d) If the contract is for the preparation of personal property for shipment or storage (see 247.271–4), substitute paragraph (f) at 252.247–7015, Requirements, for paragraph (f) of the clause at FAR 52.216–21, Requirements.

216.506 Ordering.

Orders placed under indefinite delivery contracts may be issued on DD Form 1155, Order for Supplies or Services.

Subpart 216.6—Time-And-Materials, Labor-Hour, and Letter Contracts

216.603 Letter contracts.

216.603–3 Limitations.

See subpart 217.74 for additional limitations on the use of letter contracts.

216.603–4 Contract clauses.

(b)(2) See 217.7406(a) for additional guidance regarding use of the clause at FAR 52.216–24, Limitation of Government Liability.

(3) Use the clause at 252.217–7027, Contract Definitization, in accordance with its prescription at 217.7406(b), instead of the clause at FAR 52.216–25, Contract Definitization.

[61 FR 7743, Feb. 29, 1996]

Subpart 216.7—Agreements

216.703 Basic ordering agreements.

(c) *Limitations.* The period during which orders may be placed against a basic ordering agreement may not exceed three years. The contracting officer, with the approval of the chief of the contracting office, may grant extensions for up to two years. No single extension shall exceed one year. See subpart 217.74 for additional limitations on the use of undefinitized orders under basic ordering agreements.

(d) *Orders.* (i) The contracting officer issuing an order under a basic ordering agreement shall be responsible for ensuring compliance with the provisions and limitations of this section.

(ii) Individual orders under a basic ordering agreement shall be individually closed following completion of the orders (see FAR 4.804).

(1)(iii) The office issuing the agreement shall furnish all authorized ordering offices sufficient information for the ordering office to complete its contract reporting responsibilities under 204.670–2 or, in the case of civilian agencies, the Federal Procurement Data System reporting requirement. Data furnished to civilian agencies must contain uncoded information about the data elements and the meanings of the codes to permit these users to translate the data into the federal format. This data must be furnished to the ordering activity in sufficient time for the activity to prepare its report for the action within 3 working days of the order.

(2)(i) Any activity listed in the agreement may issue orders on DD Form 1155, Order for Supplies or Services, or Standard Form 26, Award/Contract.

(3) Incentive provisions consistent with this part are permitted.

[56 FR 36340, July 31, 1991, as amended at 61 FR 7743, Feb. 29, 1996; 61 FR 18195, Apr. 24, 1996]

PART 217—SPECIAL CONTRACTING METHODS

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AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36345, July 31, 1991, unless otherwise noted.

Subpart 217.1—Multiyear Contracting

217.102 Policy.

217.102–2 General.

(b) The applicable program year is that shown in the DoD Future Years Defense Program.

217.102–3 Objectives.

(d)(3) For additional restrictions on inclusion of recurring costs in the cancellation ceiling in DoD multiyear contracts, see 217.103–1(a)(iii) and the DoD Budget Guidance Manual (DoD 7110.1–M).

[57 FR 53599, Nov. 12, 1992]

217.103 Procedures.

217.103–1 General.

(a) *Criteria.* 10 U.S.C. 2306(h) and annual DoD authorization and appropriations acts have established the following additional criteria:

(i) The use of such a contract will promote the national security of the United States (10 U.S.C. 2306(h)(1)).

(ii) The contract provides for a production rate at not less than minimum economic production rates given the existing tooling and facilities (10 U.S.C. 2306(h)(9));

(iii) Any advance economic order quantity acquisition (see FAR 17.101) is funded at least to the limits of the Government's liability. Recurring costs for such economic order quantities shall not be included in the unfunded cancellation ceiling. (Section 9021, Pub. L. 101–165 and similar sections in subsequent Defense appropriations acts).

(b) *Limitations.*

(i) *Public Law 90–378 (10 U.S.C. 2306(g)).*

(A) DoD may enter into multiyear acquisitions for the following services (and items of supply relating to such services), even though funds are limited by statute to obligation during the fiscal year in which the contract is executed:

(*1*) Operation, maintenance, and support of facilities and installations;

(*2*) Maintenance or modification of aircraft, ships, vehicles, and other highly complex military equipment;

(*3*) Specialized training requiring high quality instructor skills (e.g., training for pilots and other aircrew members or foreign language training); and

(*4*) Base services (e.g., ground maintenance, in-plane refueling, bus transportation, and refuse collection and disposal).

(B) This authority may be used as long as the contract—

(*1*) Does not extend beyond five years;

(*2*) Complies with FAR 17.101 through 17.105; and

(*3*) Performance years do not extend beyond the end of any fiscal year.

(ii) *Public Law 97–214 (10 U.S.C. 2829).*

(A) DoD may enter into multiyear contracts for supplies and services required for management, maintenance, and operation of military family housing and may pay the costs of such contracts for each year out of annual appropriations for that year.

(B) This authority may be used as long as the contract—

(*1*) Does not extend beyond four years;

(*2*) Complies with FAR 17.101 through 17.105; and

(*3*) Performance years do not extend beyond the end of any fiscal year.

(iii) Award of a multiyear contract for services requires a written determination by the head of the contracting activity (10 U.S.C. 2306(g)(1)) that—

(A) There will be a continuing need for the services and incidental supplies;

(B) Furnishing the services and incidental supplies will require—

(*1*) A substantial initial investment in plant or equipment;

(*2*) The upfront commitment of substantial financial resources for the assembly, training or transportation of a specialized work force; or

(*3*) Other substantial startup costs; and

(C) Using a multiyear contract will be in the best interest of the United States by encouraging effective competition and promoting economical business operations.

(iv) The appropriate Secretary must provide a 30-day advance notification to the Committees on Appropriations and Armed Services of the House of Representatives and the Senate before the award of any—

(A) Multiyear contract that contains a cancellation ceiling in excess of $100 million (10 U.S.C. 2306(h)(3));

(B) Multiyear contract that provides for economic order quantity purchases in excess of $20 million in any year (Section 9021, Pub. L. 101–165 and similar sections in subsequent appropriations acts);

(C) Multiyear contract that includes an unfunded contingent liability in excess of $20 million (Section 9021, Pub. L. 101–165 and similar sections in subsequent appropriations acts); or

(D) Contract for advance procurement leading to a multiyear contract with an economic order quantity procurement in excess of $20 million in any year (Section 9021, Pub. L. 101–165 and similar sections in subsequent appropriations acts).

(v) Departments/agencies shall establish reporting procedures to meet the requirements of paragraph (b)(iv) of this subsection. Submit copies of the notifications to the Under Secretary of Defense (Acquisition & Technology), Director of Defense Procurement (USD(A&T)DP) and the Under Secretary of Defense (Comptroller) (Program/Budget) (USD(C)(P/B)).

(vi) Do not initiate a multiyear contract—

(A) In excess of $500 million for any system or component thereof unless—

(*1*) Specifically provided for in a Defense appropriations act (section 9021, Pub. L. 101–165 and similar sections in subsequent appropriations acts); and

(*2*) The Secretary of Defense certifies to Congress that the current Future Years Defense Program fully funds the support costs associated with the multiyear program. Forward documentation to support this certification to the Under Secretary of Defense (Acquisition & Technology), Director of Defense Procurement.

(B) Without using present value analysis to determine the lowest cost to the Government of a multiyear contract compared to annual contracts (Section 9021, Pub. L. 101–165 and similar sections in subsequent appropriations acts).

(vii) Do not terminate a multiyear contract under a program approved by Congress without providing a ten-day advance notification to the Committees on Appropriations and Armed Services of the House of Representatives and the Senate (Section 9021, Pub. L. 101–165 and similar sections in subsequent appropriations acts).

(viii) The Secretary of Defense may ask Congress for relief from any conditions established by law for that particular procurement program (10 U.S.C. 2306(h)(11)).

(A) A request for relief from the requirement to achieve specific cost savings may be made if it appears, after negotiations with the contractors, that such savings cannot be achieved, but that substantial savings could nevertheless be achieved by using a multiyear contract.

(B) Include in such request details concerning the reasons for requesting use of a multiyear contract as well as details about the negotiated contract terms and conditions.

(C) Forward supporting documentation to the Under Secretary of Defense (Acquisition & Technology), Director of Defense Procurement.

(ix) Departments/agencies also must comply with any other restrictions or notification requirements contained in annual authorization or appropriation acts.

(d) *Cancellation*. State cancellation ceilings in the schedule as a not-to-exceed amount.

[56 FR 36345, July 31, 1991, as amended at 57 FR 14992, Apr. 23, 1992; 58 FR 28465, May 13, 1993; 60 FR 61596, Nov. 30, 1995]

Subpart 217.2—Options

217.202 Use of options.

(1) Options may be used for foreign military sales requirements.

(2) Consider use of surge options to support the Industrial Preparedness Production Planning program (see subpart 208.72). A surge option allows the Government, prior to final delivery, to—

(i) Accelerate the contractor's production rate in accordance with a surge production plan or a delivery schedule

provided by the contractor under the terms of the contract; and

(ii) Purchase additional quantities of supplies or services.

(3) See subpart 217.74 for limitations on the use of undefinitized options.

[56 FR 36345, July 31, 1991, as amended at 61 FR 7743, Feb. 29, 1996]

217.208 Solicitation provisions and contract clauses.

Sealed bid solicitations shall not include provisions for evaluations of options unless the contracting officer determines that there is a reasonable likelihood that the options will be exercised (10 U.S.C. 2301(a)(7)). This limitation also applies to sealed bid solicitations for the contracts excluded by FAR 17.200.

217.208–70 Additional clauses.

(a) Use the clause at 252.217–7000, Exercise of Option to Fulfill Foreign Military Sales Commitments, when an option may be used for foreign military sale requirements.

(1) Use Alternate I when the foreign military sale country is not known at the time of solicitation or award.

(2) Do not use this clause in contracts for establishment or replenishment of DoD inventories or stocks, or acquisitions made under DoD cooperative logistics support arrangements.

(b) When a surge option is needed in support of industrial preparedness production planning (see subpart 208.72), use the clause at 252.217–7001, Surge Option, in solicitations and contracts.

(1) Insert the percentage of increase the option represents in paragraph (a) of the clause.

(2) Change 30 days in paragraphs (b)(2) and (d)(1) to longer periods, if appropriate.

(3) Change the 24-month period in paragraph (c)(3), if appropriate.

Subpart 217.4—Leader Company Contracting

217.401 General.

When leader company contracting is to be considered, take special effort to select a small disadvantaged business (SDB) concern as the follower company. Where other than an SDB is selected as the follower company, the contracting officer shall document the contract file to reflect—

(1) The extent of actions taken to identify SDB concerns for participation in the acquisition; and

(2) The rationale for selection of a non-SDB as the follower company.

Subpart 217.5—Interagency Acquisitions Under the Economy Act

217.500 Scope of subpart.

Acquisitions from required sources, as described in FAR part 8, are not orders under the Economy Act.

[59 FR 22760, May 3, 1994]

217.502 General.

If requested, the contracting officer who normally would contract for the requesting activity should advise in the determination process.

[59 FR 22760, May 3, 1994]

217.504 Ordering procedures.

(b) Do not send invitations for bids or requests for proposals to other Government agencies.

Subpart 217.6—Management and Operating Contracts

217.600 Scope of subpart.

FAR subpart 17.6 does not apply to DoD.

Subpart 217.70—Exchange of Personal Property

217.7000 Scope of subpart.

This subpart prescribes policy and procedures for exchange of nonexcess personal property concurrent with an acquisition. Section 201(c) of the Federal Property and Administrative Services Act of 1949, 63 Stat. 384, as amended (40 U.S.C. 481(c)) permits exchange of personal property and application of the exchange allowance to the acquisition of similar property. This subpart does not authorize the sale of nonexcess personal property.

217.7001 Definitions.

As used in this subpart,

(a) *Exchange (trade-in) property* means property which—

(1) Is not excess but is eligible for replacement (because of obsolescence, unserviceability, or other reason); and

(2) Is applied as whole or partial payment toward the acquisition of similar items (i.e., items designed and constructed for the same purpose).

(b) *Property* means items which fall within one of the generic categories listed in DoDI 4140.51, Exchange of Nonexcess Personal Property in the Department of Defense.

217.7002 Policy.

DoD policy is to exchange, rather than replace, eligible nonexcess property whenever exchange promotes economical and efficient program accomplishment. Exchange policy, authority, and applicability are governed by—

(a) The Federal Property Management Regulations issued by the Administrator of the General Services Administration; and

(b) DoDI 4140.51, Exchange of Nonexcess Personal Property in the Department of Defense.

217.7003 Purchase request.

Ensure that the requiring activity provides all of the following in support of the purchase request—

(a) A certification that the property is eligible for exchange and complies with all conditions and limitations of DoDI 4140.51;

(b) A written determination of economic advantage indicating—

(1) The anticipated economic advantage to the Government from use of the exchange authority;

(2) That exchange allowances shall be applied toward, or in partial payment of, the items to be acquired; and

(3) That, if required, the exchange property has been rendered safe or innocuous or has been demilitarized;

(c) All applicable approvals for the exchange; and

(d) A description of the property available for exchange (e.g., nomenclature, location, serial number, estimated travel value).

217.7004 Solicitation and award.

(a) Solicitations shall include a request for offerors to state prices—

(1) For the new items being acquired without any exchange; and

(2) For the new items with the exchange (trade-in allowance) for the exchange property listed.

(b) The contracting officer is not obligated to award on an exchange basis. If the lowest evaluated offer is an offer for the new items without any exchange, the contracting officer may award on that basis and forgo the exchange.

(c) Exchanges may be made only with the successful offeror. When the successful offer includes an exchange, award one contract for both the acquisition of the new property and the trade-in of the exchange property. The only exception is when the items must be acquired against a mandatory Federal supply schedule contract, in which case, award a separate contract for the exchange.

217.7005 Solicitation provision.

Use the provision at 252.217–7002, Offering Property for Exchange, when offering nonexcess personal property for exchange. Allow a minimum of 14 calendar days for the inspection period in paragraph (b) of the clause if the exchange property is in the continental United States. Allow at least 21 calendar days outside the United States.

Subpart 217.71—Master Agreement for Repair and Alteration of Vessels

217.7100 Scope of subpart.

This subpart contains acquisition policies and procedures for master agreements for repair and alteration of vessels.

217.7101 Definitions.

(a) *Master agreement for repair and alteration of vessels*—

(1) Is a written instrument of understanding, negotiated between a contracting activity and a contractor that—

(A) Contains contract clauses, terms, and conditions applying to future contracts for repairs, alterations, and/or additions to vessels; and

(B) Contemplates separate future contracts that will incorporate by reference or attachment the required and applicable clauses agreed upon in the master agreement.

(2) Is not a contract.

(b) *Job order*—

(1) Is a fixed price contract incorporating, by reference or attachment, a master agreement for repair and alteration of vessels;

(2) May include clauses pertaining to subjects not covered by the master agreement; but applicable to the job order being awarded; and

(3) Applies to a specific acquisition and sets forth the scope of work, price, delivery date, and other appropriate terms that apply to the particular job order.

217.7102 General.

(a) Activities shall enter into master agreements for repair and alteration of vessels with all prospective contractors located within the United States, its possessions, or Puerto Rico, which—

(1) Request ship repair work; and

(2) Which possess the organization and facilities to perform the work satisfactorily. (Issuance of a master agreement does not indicate approval of the contractor's facility for any particular acquisition and is not an affirmative determination of responsibility under FAR subpart 9.1 for any particular acquisition.)

(b) Activities may use master agreements in work with prospective contractors located outside the United States, its possessions, or Puerto Rico.

(c) Activities may issue job orders under master agreements to effect repairs, alterations, and/or additions to vessels belonging to foreign governments.

(1) Contractors shall treat vessels of a foreign government as if they were vessels of the U.S. Government whenever requested to do so by the contracting officer.

(2) Identify the vessel and the foreign government in the solicitation and job order.

217.7103 Procedures.

217.7103–1 Content and format.

(a) A Master agreement shall contain all clauses required by 217.7104(a), statute and executive order.

(b) The following format may be adapted to fit specific circumstances:

MASTER AGREEMENT FOR REPAIR AND ALTERATION OF VESSELS

(1) This agreement is entered into this _____ day of _____ 19___, by the United States of America (the ''Government'':) represented by _____, the Contracting Officer, and, _____ a corporation organized and existing under the laws of the State of _____ (the ''Contractor'').

(2) The clauses in this agreement, shall be incorporated, by reference or attachment, in job orders issued under this agreement to effect repairs, alterations, and/or additions to vessels.

(3) By giving 30 days written notice, either party to this agreement has the right to cancel it without affecting the rights and liabilities under any job order existing at the time of cancellation. The Contractor shall perform, under the terms of this agreement, all work covered by any job order awarded before the effective date of the cancellation.

(4) This agreement may be modified only by mutual agreement of the parties. A modification of this agreement shall not affect any job order in existence at the time of modification, unless the parties agree otherwise.

(5) The rights and obligations of the parties to this agreement are set forth in this agreement and the clauses of any job orders issued under this agreement. In the event there is an inconsistency between this agreement and any job order, the provisions of this agreement shall govern.

(6) This agreement shall remain in effect until canceled by either party.

THE UNITED STATES OF AMERICA

by _____

(Contracting Officer)

_____

(Contractor)

by _____

(Authorized Individual)

_____

(Title)

217.7103–2 Period of agreement.

(a) Master agreements remain in effect until canceled by either the contractor or the contracting officer.

(b) Master agreements can be canceled by either the contractor or the contracting officer by giving 30 days written notice to the other.

(c) Cancellation of a master agreement does not affect the rights and liabilities under any job order existing at the time of cancellation. The contractor must continue to perform all work covered by any job order issued before the effective date of cancellation of the master agreement.

217.7103–3 Solicitations for job orders.

(a) When a requirement arises within the United States, its possessions, or Puerto Rico for the type of work covered by the master agreement, solicit offers from prospective contractors that—

(1) Previously executed a master agreement; or

(2) Have not previously executed a master agreement, but possess the necessary qualifications to perform the work and agree to execute a master agreement before award of a job order.

(b) Prepare the solicitation in the uniform contract format and in accordance with FAR subparts 14.2 or 15.4, as applicable.

(c) Include in the solicitation—

(1) The nature of the work to be performed;

(2) The date the vessel will be available to the contractor;

(3) The date the work is to be completed; and

(4) Whether bulk ammunition is aboard the vessel.

(d) Unless the solicitation states otherwise, offers are to be based on performance at the contractor's site.

(e) Solicitations processed under negotiated acquisition procedures shall require offerors to include a breakdown of the price with reasonable supporting detail in whatever format and detail the contracting officer may request.

(f) Where practicable, afford potential offerors an opportunity to inspect the item needing repair or alteration.

217.7103–4 Award of a job order.

Award job orders in accordance with FAR subparts 14.4 or 15.10.

217.7103–5 Emergency work.

(a) The contracting officer, without soliciting offers, may issue a written job order to a contractor that has previously executed a master agreement when—

(i) Delay in the performance of necessary repair work would endanger a vessel, its cargo or stores; or

(ii) Military necessity requires immediate work on a vessel.

(b) Process this type of undefinitized contract action in accordance with subpart 217.74.

(c) Negotiate a price as soon as practicable after the issuance of an undefinitized order and definitize the job order upon completing negotiations.

217.7103–6 Repair costs not readily ascertainable.

If the nature of any repairs is such that their extent and probable cost cannot be ascertained readily, the solicitation should—

(a) Solicit offers for determining the nature and extent of the repairs;

(b) Provide that upon determination by the contracting officer of what work is necessary, the contractor, if requested by the contracting officer, shall negotiate prices for performance of the repairs; and

(c) Provide that prices for the repairs, if ordered, will be set forth in a modification of the job order.

217.7103–7 Modification of master agreements.

(a) Review each master agreement at least annually before the anniversary of its effective date and revise it as necessary to conform to the requirements of the FAR and DFARS. Statutory or other mandatory changes may require review and revision earlier than one year.

(b) A master agreement shall be changed only by modifying the master agreement itself. It shall not be changed through a job order.

(c) A modification to a master agreement shall not affect job orders issued before the effective date of the modification.

217.7104 Contract clauses.

(a) Use the following clauses in solicitations for, and in, master agreements for repair and alteration of vessels:

(1) 252.217–7003, Changes.

(2) 252.217–7004, Job Orders and Compensation.

(3) 252.217–7005, Inspection and Manner of Doing Work.

(4) 252.217–7006, Title.

(5) 252.217–7007, Payments.

(6) 252.217–7008, Bonds.

(7) 252.217–7009, Default.

(8) 252.217–7010, Performance.

(9) 252.217–7011, Access to Vessel.

(10) 252.217–7012, Liability and Insurance.

(11) 252.217–7013, Guarantees.

(12) 252.217–7014, Discharge of Liens.

(13) 252.217–7015, Safety and Health.

(14) 252.217–7016, Plant Protection, as applicable.

(b)(1) Incorporate in solicitations for, and in, job orders, the clauses in the master agreement, and any other clauses on subjects not covered by the master agreement, but applicable to the job order to be awarded.

(2) Use the clause at 252.217–7016, Plant Protection, in job orders where performance is to occur at the contractor's facility.

Subpart 217.72—Bakery and Dairy Products

217.7200 Scope.

This subpart provides special policies and requirements for acquisition of perishable bakery and dairy products.

217.7201 Contract requirements for dairy products.

(a) Include the following chemical and microbiological requirements in solicitations and resulting contracts for milk, milk products, and cultured products (as defined in the Veterinary/Medical Wholesomeness Assurance Program for Fresh and Cultured Dairy Products and Frozen Desserts (AR–40–70/NAVSUPINST 4355.6/AFR 161–46/MCO 10110.44)):

(1) *Chemical requirements.* Products shall meet the chemical requirements for each specification cited in the contract on the date of award.

(2) *Microbiological requirements.* Products shall meet microbiological requirements stated in Public Health Service Publication 229, Grade A Pasteurized Milk Ordnance, in effect on the date of award. In the event of conflict between these requirements and individual product specifications, the requirements of Public Health Service Publication 229 take precedence.

(b) When the contractor is required to furnish its own cabinets for dispensing milk from bulk containers—

(1) Include the following information in the solicitation—

(i) The number (or estimated number) of dispenser cabinets required;

(ii) Whether metal stands for the cabinets are required;

(iii) The number of cabinets required with a capacity of two containers each; and

(iv) The number required with a capacity of three containers each.

(2) Include the contractor's list of cabinet equipment in the schedule of the contract.

(c) The contracting officer shall notify the Government quality assurance representative of code changes approved under the clause at 252.217–7022, Code Dating.

217.7202 Contract type.

Normally use requirements contracts for bakery and dairy products. Other indefinite delivery contracts and other contract types may be used as appropriate.

217.7203 Contract clauses.

(a) Use the following additional clauses in solicitations and contracts for perishable bakery and dairy products—

(1) 252.217–7017, Time of Delivery. Use Alternate I when the contract is other than a requirements contract. Insert the number of hours in paragraph (c) of Alternate I.

(2) 252.217–7018, Change in Plant Location.

(3) 252.217–7019, Sanitary Conditions. Use Alternate I when the contract is other than a requirements contract.

(4) 252.217–7022, Code Dating. Use this clause only when the schedule or a specification requires labels showing

the date of pasteurization, manufacture, production, or processing.

(5) 252.217–7023, Marking. Do not use this clause when MIL–STD–129, Marking for Shipment and Storage, is required.

(6) 252.217–7024, Responsibility for Containers and Equipment. Use when contractor is required to provide reusable containers and equipment.

(b) Use the following additional clauses in solicitations and contracts for perishable dairy products—

(1) 252.217–7020, Examination and Testing. Use Alternate I when the contract is an indefinite quantity contract.

(2) 252.217–7021, Deficiency Adjustment.

(3) 252.217–7025, Containers and Equipment.

Subpart 217.73—Identification of Sources of Supply

217.7300 Scope.

This subpart implements 10 U.S.C. 2384. It contains policy and procedures for requiring contractors to identify the actual manufacturer of supplies furnished to DoD.

217.7301 Policy.

Contractors shall identify their sources of supply in contracts for supplies. Contractor identification of sources of supply enables solicitation, in subsequent acquisitions, of actual manufacturers or other suppliers of items. This enhances competition and potentially avoids payment of additional costs for no significant added value.

217.7302 Procedures.

(a) Whenever practicable, include a requirement for contractor identification of sources of supply in all contracts for the delivery of supplies. The identification shall include—

(1) The item's actual manufacturer or producer, or all the contractor's sources for the item;

(2) The item's national stock number (if there is one);

(3) The item identification number used by—

(i) The actual manufacturer or producer of the item; or

(ii) Each of the contractor's sources for the item; and

(4) The source of any technical data delivered under the contract.

(b) The requirement in paragraph (a) of this section does not apply to commercial items.

[56 FR 36345, July 31, 1991, as amended at 60 FR 61596, Nov. 30, 1995]

217.7303 Solicitation provision.

(a) Use the provision at 252.217–7026, Identification of Sources of Supply, or one substantially the same, in all solicitations for supplies when the acquisition is being conducted under other than full and open competition, except when—

(1) Using FAR 6.302–5;

(2) The contracting officer already has the information required by the provision (e.g., the information was obtained under other acquisitions);

(3) The contract is for subsistence, clothing or textiles, fuels, or supplies purchased and used outside the United States;

(4) The contracting officer determines that it would not be practicable to require offerors/contractors to provide the information, e.g., nonrepetitive local purchases; or

(5) The contracting officer determines that the exception at 217.7302(b) applies to all items under the solicitation.

(b) If appropriate, use the provision at 252.217–7026, Identification of Sources of Supply, or one substantially the same, in service contracts requiring the delivery of supplies.

Subpart 217.74—Undefinitized Contract Actions

217.7400 Scope.

This subpart prescribes policies and procedures implementing 10 U.S.C. 2326.

217.7401 Definitions.

As used in this subpart—

(a) *Contract action* means an action which results in a contract.

(1) It includes contract modifications for additional supplies or services.

(2) It does not include change orders, administrative changes, funding modifications, or any other contract modifications that are within the scope and under the terms of the contract, e.g., engineering change proposals, value engineering change proposals, and over and above work requests as described in subpart 217.77.

(b) *Definitization* means the agreement on, or determination of, contract terms, specifications, and price, which converts the undefinitized contract action to a definitive contract.

(c) *Qualifying proposal* means a proposal containing sufficient information for the DoD to do complete and meaningful analyses and audits of the—

(1) Information in the proposal; and

(2) Any other information that the contracting officer has determined DoD needs to review in connection with the contract.

(d) *Undefinitized contract action* means any contract action for which the contract terms, specifications, or price are not agreed upon before performance is begun under the action. Examples are letter contracts, orders under basic ordering agreements, and provisioned item orders, for which the price has not been agreed upon before performance has begun.

217.7402 Exceptions.

The following undefinitized contract actions (UCAs) are not subject to this subpart, but the contracting officer should apply the policy to them (and to changes under the Changes clause) to the maximum extent practicable—

(a) UCAs for foreign military sales;

(b) Purchases at or below the simplified acquisition threshold;

(c) Special access programs;

(d) Congressionally mandated long-lead procurement contracts.

[56 FR 36345, July 31, 1991, as amended at 61 FR 7743, Feb. 29, 1996]

217.7403 Policy.

DoD policy is that undefinitized contract actions shall—

(a) Be used only when—

(1) The negotiation of a definitive contract action is not possible in sufficient time to meet the Government's requirements; and

(2) The Government's interest demands that the contractor be given a binding commitment so that contract performance can begin immediately.

(b) Be as complete and definite as practicable under the particular circumstances.

217.7404 Limitations.

217.7404–1 Authorization.

The contracting officer shall obtain approval from the head of the contracting activity before—

(a) Entering into a UCA. The request for approval must fully explain the need to begin performance before definitization, including the adverse impact on agency requirements resulting from delays in beginning performance.

(b) Including requirements for non-urgent spare parts and support equipment in a UCA. The request should show that inclusion of the non-urgent items is consistent with good business practices and in the best interest of the United States.

(c) Modifying the scope of a UCA when performance has already begun. The request should show that the modification is consistent with good business practices and in the best interests of the United States.

217.7404–2 Price ceiling.

UCAs shall include a not-to-exceed price.

217.7404–3 Definitization schedule.

(a) UCAs shall contain definitization schedules which provide for definitization by the earlier of the following dates—

(1) The date which is 180 days after issuance of the action (this date may be extended but may not exceed the date which is 180 days after the contractor submits a qualifying proposal); or

(2) The date on which the amount of funds obligated under the contract action is equal to more than 50 percent of the not-to-exceed price.

(b) Submission of a qualifying proposal in accordance with the definitization schedule is a material element of the contract. If the contractor does not submit a timely qualifying

proposal, the contracting officer may suspend or reduce progress payments under FAR 32.503–6, or take other appropriate action.

[56 FR 36345, July 31, 1991, as amended at 60 FR 29498, June 5, 1995; 61 FR 7743, Feb. 29, 1996]

217.7404–4 Limitations on obligations.

The Government shall not obligate more than 50 percent of the not-to-exceed price before definitization. However, if a contractor submits a qualifying proposal before 50 percent of the not-to-exceed price has been obligated by the Government, then the limitation on obligations before definitization may be increased to no more than 75 percent (see 232.102–70 for coverage on provisional delivery payments).

[60 FR 29498, June 5, 1995]

217.7404–5 Exceptions.

(a) The limitations in 217.7404–2, 217.7404–3, and 217.7404–4 do not apply to UCAs for the purchase of initial spares.

(b) The head of an agency may waive the limitations in 217.7404–2, 217.7404–3, and 217.7404–4 for UCAs if the head of the agency determines that the waiver is necessary to support a contingency operation.

[60 FR 29498, June 5, 1995]

217.7404–6 Allowable profit.

When the final price of a UCA is negotiated after a substantial portion of the required performance has been completed, the head of the agency shall ensure the profit allowed reflects—

(a) Any reduced cost risk to the contractor for costs incurred during contract performance before negotiation of the final price; and

(b) The contractor's reduced cost risk for costs incurred during performance of the remainder of the contract.

217.7405 Definitizations.

For each definitization modification, the contracting officer shall include all data required by 243.171.

[60 FR 34470, July 3, 1995]

217.7406 Contract clauses.

(a) Use the clause at FAR 52.216–24, Limitation of Government Liability, in all UCAs, solicitations associated with UCAs, basic ordering agreements, indefinite delivery contracts, and any other type of contract providing for the use of UCAs.

(b) Use the clause at 252.217–7027, Contract Definitization, in all UCAs, solicitations associated with UCAs, basic ordering agreements, indefinite delivery contracts, and any other type of contract providing for the use of UCAs. Insert the applicable information in paragraphs (a), (b), and (d) of the clause. If, at the time of entering into the UCA, the contracting officer knows that the definitive contract action will meet the criteria of FAR 15.804–1 for not requiring submission of cost or pricing data, the words ''and cost or pricing data'' may be deleted from paragraph (a) of the clause.

[61 FR 7743, Feb. 29, 1996]

Subpart 217.75—Acquisition of Replenishment Parts

217.7500 Scope of subpart.

This subpart provides guidance on additional requirements related to acquisition of replenishment parts (as defined in appendix E).

217.7501 General.

Departments and agencies—

(a) May acquire replenishment parts concurrently with production of the end item.

(b) Shall provide for full and open competition when fully adequate drawings and any other needed data are available with the right to use for acquisition purposes (see part 227). However—

(1) When data is not available for a competitive acquisition, use one of the procedures in 217.7503.

(2) Replenishment parts must be acquired so as to ensure the safe, dependable, and effective operation of the equipment. Where this assurance is not possible with new sources, competition may be limited to the original manufacturer of the equipment or other

sources that have previously manufactured or furnished the parts as long as the action is justified.

(c) Shall follow the limitations on price increases in 217.7504.

217.7502 Spares acquisition integrated with production (SAIP).

(a) Spares acquisition integrated with production (SAIP) is a technique used to acquire replenishment parts concurrently with parts being produced for the end item.

(b) DoD acquisition managers select parts for SAIP under the criteria in DoDI 4245.12, Spares Acquisition Integrated With Production (SAIP).

(c) Include appropriately tailored provisions in the contract when SAIP is used.

217.7503 Acquisition of parts when data is not available.

When acquiring a part for which the Government does not have necessary data with rights to use in a specification or drawing for competitive acquisition, use one of the following procedures in order of preference—

(a) When items of identical design are not required, the acquisition may still be conducted through full and open competition by using a performance specification or other similar technical requirement or purchase description that does not contain data with restricted rights. Two methods are—

(1) Two-step sealed bidding; and

(2) Brand name or equal purchase descriptions.

(b) When other than full and open competition is authorized under FAR part 6, acquire the part from the firm which developed or designed the item or process, or its licensees, provided productive capacity and quality are adequate and the price is fair and reasonable.

(c) When additional sources are needed and the procedures in paragraph (a) of this section are not practicable, consider the following alternatives—

(1) Encourage the developer to license others to manufacture the parts;

(2) Acquire the necessary rights in data;

(3) Use a leader company acquisition technique (FAR subpart 17.4) when complex technical equipment is involved and establishing satisfactory additional sources will require technical assistance as well as data; or

(4) Incorporate a priced option in the contract which allows the Government to require the contractor to establish a second source.

(d) As a last alternative, the contracting activity may develop a design specification for competitive acquisition through reverse engineering. Contracting activities shall not do reverse engineering unless—

(1) Significant cost savings can be demonstrated; and

(2) The action is authorized by the head of the contracting activity.

217.7504 Limitations on price increases.

This section provides implementing guidance for section 1215 of Public Law 98–94 (10 U.S.C. 2452 note).

(a) The contracting officer shall not award, on a sole source basis, a contract for any centrally managed replenishment part when the price of the part has increased by 25 percent or more over the most recent 12-month period.

(1) Before computing the percentage difference between the current price and the prior price, adjust for quantity, escalation, and other factors necessary to achieve comparability.

(2) Departments and agencies may specify an alternate percentage or percentages for contracts within the small purchase limitation in FAR part 13.

(b) The contracting officer may award a contract for a part, the price of which exceeds the limitation in paragraph (a) of this section, if the contracting officer certifies in writing to the head of the contracting activity before award that—

(1) The contracting officer has evaluated the price of the part and concluded that the price increase is fair and reasonable; or

(2) The national security interests of the United States require purchase of the part despite the price increase.

(c) The fact that a particular price has not exceeded the limitation in paragraph (a) of this section does not relieve the contracting officer of the

responsibility for obtaining a fair and reasonable price.

(d) Contracting officers may include a provision in sole source solicitations requiring that the offeror supply with its proposal, price and quantity data on any government orders for the replenishment part issued within the most recent 12 months.

Subpart 217.76—Contracts with Provisioning Requirements

217.7600 Scope of subpart.

This subpart contains contract requirements and procedures for items to be provisioned. For technical requirements of provisioning, see DoDD 4140.40, Provisioning of End Items of Material. For breakout requirements, see appendix E.

217.7601 Definitions.

As used in this subpart,

(a) *Provisioning* means the process of determining and acquiring the range and quantity of spare and repair parts, and support and test equipment required to operate and maintain an end item for an initial period of service.

(b) *Provisioned item* means any item selected under provisioning procedures.

(c) *Provisioned items order* (PIO) means an undefinitized order issued under a contract which includes the Government's requirements for provisioned items. (Provisioned items with firm prices are acquired by supplemental agreement or by separate contract.)

(d) *Provisioning activity* means the organization responsible for selecting and determining requirements for provisioned items.

(e) *Provisioning requirements statement* means the contractual document listing the specific provisioning requirements for that contract. The statement normally includes:

(1) Instructions, such as the provisioning method to be used;

(2) The extent of provisioning technical documentation and data needed (including administrative requirements for submission and distribution);

(3) The type and location of provisioning conferences;

(4) Sample article requirements;

(5) The delivery schedule;

(6) Packaging and marking requirements for provisioned items; and

(7) Requirements for provisioning screening.

(f) *Provisioning technical documentation* means the data needed for the identification, selection, determination of initial requirements, and cataloging of support items to be acquired through the provisioning process. It includes such things as provisioning lists and logistics support analysis summaries. Descriptive data such as drawings and photographs are referred to as *supplementary provisioning technical documentation*.

217.7602 Contracting requirements.

217.7602–1 Contractual provisions.

Contracts containing provisioning requirements shall—

(a) List the provisioning functions to be performed and who will perform them;

(b) Include a provisioning requirements statement or specify a time limit for its incorporation into the contract by modification (revisions to the provisioning requirements statement shall also be incorporated by contract modification);

(c) Include on the DD Form 1423, Contract Data Requirements List, a schedule for delivery of provisioning technical documentation, or provide for the schedule to be incorporated later by contract modification;

(d) Require flowdown of the appropriate provisioning technical documentation requirement when the subcontractor prepares the documentation;

(e) Specify any applicable procedures for interim release by the contractor of long lead time items, and include ordering and funding instructions for such items. As a minimum, the instructions shall require the contractor to advise the contracting officer or provisioning activity at least 30 days before release of the items, their estimated costs, and the effective date of release;

(f) Specify the activity designated to issue provisioned items orders, i.e., contracting officer, provisioning activity, or administrative contracting officer. When it is expected that more than

one activity will place provisioned items orders against the contract, state the requirements for provisioned items of each activity as separate contract line items;

(g) Provide a definitization schedule (normally 120 days after receipt of the contractor's proposal), and a timeframe for the contractor to furnish price proposals for provisioned items orders (normally 60 days after order issuance);

(h) Specify exhibit identifiers applicable to the contract line/subline items; and

(i) Include procedures for processing changes (including cancellations) in quantities of items ordered.

217.7602–2 Issuance of provisioned items orders.

(a) Use the Standard Form 30, Amendment of Solicitation/Modification of Contract, to—

(1) Issue provisioned items orders;

(2) Decrease or cancel quantities of items ordered; and

(3) Cover the contractor's interim release of long lead items when the contracting officer approves the release (if the release is not approved, the contracting officer shall notify the contractor to cancel the items).

(b) Include in Block 14 of the Standard Form 30—

(1) The term PROVISIONED ITEMS ORDER in capital letters and underlined; and

(2) The appropriate exhibit identifier(s) for all attached exhibits.

(c) Obligate funds to cover the estimated price of the items being ordered. Show individual estimated prices for each exhibit line item on the accounting and payment office copies.

(d) Distribution is the same as for the basic contract (see FAR 4.2). However, if the exhibits are voluminous, the contracting officer may restrict distribution of the exhibits to the contract administration office.

(e) See subpart 217.74 for additional guidance and limitations on the use of undefinitized contract actions.

217.7603 Contract administration requirements.

217.7603–1 Provisioning conferences.

When requested by the contracting officer or provisioning activity, the contract administration office shall assist the contracting officer or provisioning activity in scheduling and determining the types of provisioning conferences required, e.g., guidance meetings, long lead time items conferences, source coding meetings.

217.7603–2 Contract administration office monitoring.

The contract administration office (CAO) shall monitor contracts containing provisioning requirements. As a minimum the CAO shall—

(a) Ensure that the contractor understands the provisioning requirements;

(b) Review contractor progress in the preparation of provisioning technical documentation and, if requested by the contracting officer or provisioning activity, inspect it for format and content;

(c) Ensure the prime contractor flows-down provisioning requirements to any subcontractor charged with preparation of documentation;

(d) Advise the contracting office or provisioning activity of delays in delivery of provisioning technical documentation or other related problems (see FAR subpart 42.11);

(e) Ensure contractor compliance with contract requirements concerning the assignment of national stock numbers; and

(f) Ensure that the contractor complies with contractual criteria for release of long lead time items.

217.7603–3 Negotiating and executing supplemental agreements.

(a) The administrative contracting officer (ACO) shall definitize provisioned items orders within the prescribed schedule.

(b) If the provisioned items order does not contain a delivery date, or the contractor cannot meet the date, the ACO shall coordinate the negotiated schedule with the contracting officer

or provisioning activity before execution of the supplemental agreement.

(c) The ACO shall maintain records of provisioned items orders showing—

(1) The adequacy of obligated funds;

(2) Due dates for price proposals; and

(3) Actions taken to obtain additional funds or to deobligate excess funds.

Subpart 217.77—Over and Above Work

217.7700 Scope of subpart.

This subpart prescribes policies and procedures for acquisition of over and above work.

217.7701 Procedures.

(a) Contracts for the performance of maintenance, overhaul, modification, and repair of various items (e.g., aircraft, engines, ground support equipment, ships) generally contain over and above work requirements. When they do, the contracting officer shall establish a separate contract line item for the over and above work.

(b) Over and above requirements task the contractor to identify needed repairs and recommend corrective action during contract performance. The contractor submits a work request to identify the over and above work and, as appropriate, the Government authorizes the contractor to proceed.

(c) The clause at 252.217–7028, Over and Above Work, requires the contractor and the contracting officer responsible for administering the contract to negotiate specific procedures for Government administration and contractor performance of over and above work requests.

(d) The contracting officer may issue a blanket work request authorization describing the manner in which individual over and above work requests will be administered and setting forth a dollar limitation for all over and above work under the contract. The blanket work request authorization may be in the form of a letter or contract modification (Standard Form 30).

(e) Over and above work requests are within the scope of the contract. Therefore, procedures in subpart 217.74, Undefinitized Contractual Actions, do not apply.

(f) To the maximum extent practical, over and above work shall be negotiated prior to performance of the work.

217.7702 Contract clause.

Use the clause at 252.217–7028, Over and Above Work, in solicitations and contracts containing requirements for over and above work, except as provided for in subpart 217.71.

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 219—SMALL BUSINESS PROGRAMS

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AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36353, July 31, 1991, unless otherwise noted.

219.000 Scope of part.

This part also implements 10 U.S.C. 2323, which sets a goal for DoD for each of fiscal years 1987 through 2000 to—

(1) Award five percent of contract and subcontract dollars to small disadvantaged business (SDB) concerns, historically black colleges and universities (HBCUs), and minority institutions (MIs) (See part 226 for policy/procedures on HBCU/MIs); and

(2) Maximize the number of such entities in DoD contracting and subcontracting.

[56 FR 36353, July 31, 1991, as amended at 59 FR 27670, May 27, 1994]

219.001 Definitions.

The definition of *small disadvantaged business concern* to be used for DoD contracts is in the provision at 252.219–7000 and is more restrictive than the definition in FAR 19.001.

Subpart 219.2—Policies

219.201 General policy.

(a) The DoD will use the section 8(a) program, small disadvantaged business set asides and evaluation preferences, advance payments, outreach, and technical assistance to meet its five percent goal for contract and subcontract awards to small disadvantaged businesses.

(c)(2) For the defense agencies, the director of the Office of Small and Disadvantaged Business Utilization shall be appointed by, be responsible to, and report directly to the director deputy director of the defense agency.

(7) The responsibility for assigning small business technical advisors is delegated to the head of the contracting activity.

(9) Contracting activity small business specialists perform this function by—

(A) Reviewing and making recommendations for all acquisitions over $10,000, except small business-small purchase set-asides;

(B) Making the review before issue of the solicitation or contract modification and documenting it on DD Form 2579, Small Business Coordination Record;

(C) Referring recommendations which have been rejected by the contracting officer to the Small Business Administration (SBA) procurement center representative. However, in the case of a rejected small disadvantaged business set-aside recommendation or if an SBA representative is not assigned or available, the specialist refers the matter to the specialist's appointing authority.

(d) Contracting and contract administration activities appoint small business specialists as directed by DoDD 4205.1, DoD Small Business and Small Disadvantaged Business Utilization Programs. Specialists—

(i) Report directly and are responsible only to their appointing authority;

(ii) Make sure that the contracting activity takes the necessary actions to implement small business, historically black college and university/minority institution, and labor surplus area programs;

(iii) Advise and assist contracting, program manager, and requirements personnel on all matters which affect small businesses, historically black colleges and universities or minority institutions, and labor surplus area concerns;

(iv) Aid, counsel, and assist small business, small disadvantaged business, historically black colleges and universities, and minority institutions by providing—

(A) Advice concerning acquisition procedures;

(B) Information regarding proposed acquisitions; and

(C) Instructions on preparation of proposals in the interpretation of standard clauses, representations, and certifications;

(v) Maintain an outreach program (including participation in Government-industry conferences and regional interagency small business councils) designed to locate and develop information on the technical competence of small business, small disadvantaged business concerns, historically black colleges and universities, and minority institutions;

(vi) Ensure that financial assistance, available under existing regulations, is offered and also assist small business concerns in obtaining payments under their contracts, late payment, interest penalties, or information on contractual payment provisions;

(vii) Provide assistance to contracting officers in determining the need for and acceptability of subcontracting plans and assist administrative contracting officers (see 219.706(a)(ii)) in evaluating, monitoring, reviewing, and documenting contract performance to determine compliance with subcontracting plans; and

(viii) Recommend to the appointing authority the activity's small and disadvantaged business program goals, including goal assignments to subordinate contracting offices; monitor the activity's performance against these goals; and recommend action to correct reporting errors/deficiencies.

219.202 Specific policies.

219.202–1 Encouraging small business participation in acquisitions.

The DoD will maximize the use of small business concerns as planned producers in the Industrial Readiness Planning Program.

219.202–5 Data collection and reporting requirements.

Determine the premium percentage to be entered in Item D4E of the Individual Contract Action Report (DD Form 350), (see 253.204–70), as follows —

(1) For small disadvantaged business or historically black college and university/minority institution set-asides, divide the difference between the fair market price and the award price by the fair market price.

(2) For 219.7000 evaluation preference awards, divide the difference between the low responsive offer and the award price by the low responsive offer.

(3) For 219.502–3 preferential consideration awards, divide the difference between the award price on the non-set-aside portion and the award price on the set-aside portion by the award price on the non-set-aside portion.

(b) Within 60 days after the end of each fiscal year, departments and agencies shall submit the report to the Secretary of Defense, who will report to the SBA on behalf of all DoD departments and agencies. Reports must include—

(i) Justification for failure to meet goals established by the Office of the Secretary of Defense; and

(ii) Planned actions for increasing participation by such firms in future contract awards.

Subpart 219.3—Determination of Status as a Small Business Concern

219.301 Representation by the offeror.

(a) A concern must qualify as a small disadvantaged business (SDB) on the date of submission of its initial offer including price to be eligible for—

(i) Award under a small disadvantaged business set-aside;

(ii) Preferential consideration as an SDB under a partial set-aside; or

(iii) An evaluation preference for SDBs.

(b) The contracting officer shall protest an offeror's representation that it is a small disadvantaged business concern when—

(i) There is conflicting evidence;

(ii) The offeror certifies that the Small Business Administration previously determined the concern to be non-disadvantaged; or

(iii) The offeror represents its ownership as other than Black American, Hispanic American, Native American (including Indian tribes and Native Hawaiian organizations), Asian Pacific American, or Subcontinent Asian American; unless the offeror—

(A) Represents that it currently is in the section 8(a) program; or

(B) Certifies that—

(*1*) Within the six months preceding submission of its offer, the offeror was determined by the Small Business Administration to be socially and economically disadvantaged; and

(*2*) No circumstances have changed to vary that determination.

[56 FR 36353, July 31, 1991, as amended at 59 FR 22131, Apr. 29, 1994]

219.302 Protesting a small business representation.

219.302–70 Protesting a small disadvantaged business representation.

This section applies to protests of a small business concern's status as socially and economically disadvantaged. Protests of a concern's size are processed under FAR 19.302. Any offeror, the contracting officer, or the Small Business Administration (SBA) may protest a concern's representation of disadvantaged status.

(a) An offeror may protest a concern's representation of disadvantaged status by filing a protest with the contracting officer. The protest—

(1) Must be filed within the times specified in FAR 19.302(d)(1); and

(2) Must contain specific detailed evidence supporting the basis of protest.

(b) The contracting officer or the SBA may protest a concern's representation of disadvantaged status at any time.

(1) If a contracting officer's protest is based on information brought to his/her attention by a party ineligible to protest directly or ineligible to protest under the timeliness standard, the contracting officer must be persuaded by the evidence presented before adopting the grounds for protest as his or her own.

(2) The SBA protests a concern's representation of disadvantaged status by filing directly with its Office of Program Eligibility and notifying the contracting officer.

(c) The contracting officer shall return untimely protests to the protestor. This includes protests filed before bid opening or notification of apparent successful offeror.

(d) Upon receipt of a timely protest, the contracting officer shall withhold award and forward the protest to the SBA Office of Program Eligibility, Office of Minority Small Business and Capitol Ownership Development, 409 3rd Street, SW., Washington, DC 20416. Send SBA—

(1) The protest;

(2) The date the protest was received and a determination of timeliness;

(3) A copy of the protested concern's self-certification of disadvantaged status; and

(4) The date of bid opening or date on which notification of apparent successful offeror was sent to unsuccessful offerors.

(e) Do not withhold award when—

(1) The contracting officer makes a written determination that award must be made to protect the public interest or

(2) The offeror has certified that—

(i) Within the six months preceding submission of its offer, the SBA has determined the concern to be socially and economically disadvantaged; and

(ii) No circumstances have changed to vary that determination.

(f) The SBA Director, Office of Program Eligibility, will determine the disadvantaged status of the challenged offeror and notify the contracting officer, the challenged offeror, and the protestor. Award may be made on the basis of that determination. The determination is final for purposes of the instant acquisition, unless—

(1) It is appealed; and

(2) The contracting officer receives the appeal decision before award.

(g) If the contracting officer does not receive an SBA determination within 15 working days after the SBA's receipt of the protest, the contracting officer shall presume that the challenged offeror is socially and economically disadvantaged. Do not use the presumption as a basis for award without first inquiring as to when a determination can be expected and waiting for the determination, unless further delay in award would be disadvantageous to the Government.

(h) An SBA determination may be appealed by—

(1) The interested party whose protest has been denied;

(2) The concern whose status was protested; or

(3) The contracting officer.

The appeal must be filed with the SBA's Associate Administrator for Minority Small Business and Capital Ownership Development within five working days after receipt of the determination. If the contracting officer receives the SBA's decision on the appeal before award, the decision shall apply to the instant acquisition. If the decision is received after award, it will apply to future acquisitions.

219.304 Solicitation provisions.

(b) Use the provision at 252.219–7000, Small Disadvantaged Business Concern Representation (DoD Contracts) instead of the provision at FAR 52.219–2, Small Disadvantaged Business Concern Representation.

Subpart 219.4—Cooperation With the Small Business Administration

219.401 General.

(b) The contracting activity small business specialist is the primary activity focal point for interface with the SBA.

Subpart 219.5—Set-Asides for Small Business

219.501 General.

(g) This repetitive set-aside procedure applies to DoD.

(S–70) When a product or service has been acquired successfully by a contracting office as a small disadvantaged business set-aside, all future requirements of that office for that product or service shall be acquired as small disadvantaged business set-asides, except those—

(1) Processed under small purchase procedures; or

(2) For which the contracting officer determines there is no reasonable expectation that the criteria for a small disadvantaged business set-aside can be met (see 219.502–2–70(a)).

EFFECTIVE DATE NOTE: At 60 FR 54955, Oct. 27, 1995, in §219.501, (S–70) was stayed indefinitely.

219.502 Setting aside acquisitions.

219.502–1 Requirements for setting aside acquisitions.

Do not set aside acquisitions for—

(1) Supplies which were developed and financed, in whole or in part, by Canadian sources under the U.S.-Canadian Defense Development Sharing Program; or

(2) Architect-engineer services for military construction or family housing projects of $85,000 or more (10 U.S.C. 2855), including indefinite delivery and indefinite quantity contracts if the value of all anticipated orders is expected to total $85,000 or more.

[58 FR 28465, May 13, 1993]

219.502–2 Total set-asides.

(a) Unless the contracting officer determines that the criteria for set-aside cannot be met, set aside for small business concerns acquisitions for—

(i) Construction, including maintenance and repairs, under $2 million;

(ii) Dredging under $1 million; and

(iii) Architect-engineer services for military construction or family housing projects of under $85,000.

[58 FR 28465, May 13, 1993]

219.502–2–70 Total set-asides for small disadvantaged business concerns.

(a) Except as provided in paragraphs (b) and (c), the contracting officer shall set aside an acquisition for small disadvantaged businesses when there is a reasonable expectation that—

(1) Offers will be received from at least two responsible small disadvantaged business (SDB) concerns who—

(i) Can comply with the FAR 52.219–14 limitations on subcontracting; or

(ii) In the case of an SDB regular dealer owned by an Indian tribe, including an Alaska Native Corporation, will provide the supplies of a small business for contracts awarded during fiscal years 1994 and 1995, as provided in section 8051 of Pub. L. 103–139 and section 8012 of Pub. L. 103–335; or,

(iii) In the case of other SDB regular dealers, will provide the supplies of SDBs (except as provided in Alternate I of the clause at 252.219–7002, Notice of Small Disadvantaged Business Set-Aside).

(2) Award will be made at not more than ten percent above fair market price; and

(3) Scientific and/or technological talent consistent with the demands of the acquisition will be offered.

(b) Do not set aside acquisitions for SDBs when—

(1) The product or service has been successfully acquired as a small business set-aside (see FAR 19.501(g));

(2) The acquisition is for construction, including maintenance and repairs, and is under $2 million, or is for dredging under $1 million;

(3) The acquisition is for architect-engineer services or construction design for military construction projects, without regard to dollar value;

(4) The acquisition is reserved for the 8(a) program;

(5) The acquisition is processed under small purchase procedures; or

(6) The acquisition is for commissary or exchange resale items.

(c) Pursuant to 10 U.S.C. 2323(g), the Office of Small and Disadvantaged Business Utilization, Office of the Under Secretary of Defense (Acquisition & Technology), is responsible for determining whether use of small disadvantaged business (SDB) set-asides has caused a particular industry category to bear a disproportionate share of the contracts awarded by a particular contracting activity to achieve its SDB goal. Upon making a determination that a particular industry is bearing a disproportionate share, the OUSD(A&T) SADBU shall limit the use of total SDB set-asides in the affected industry category, at the contracting activity. This limitation shall not apply to solicitations that already had been synopsized as SDB set-asides. Forward requests for a determination through agency channels to OUSD(A&T) SADBU and include—

(1) The standard industrial (SIC) code(s) affected;

(2) Supporting information to justify the request, including dollars and percentages by the contracting activity, under the affected SIC code(s) for the previous two fiscal years and current fiscal year to date for—

(i) Total awards;

(ii) Total awards to small businesses;

(iii) Total awards to SDBs; and

(iv) Awards to SDBs under the SDB set-aside program.

(d) See 205.207(d) for information on Commerce Business Daily synopsis.

[56 FR 36353, July 31, 1991, as amended at 59 FR 24959, May 13, 1994; 59 FR 27670, May 27, 1994; 60 FR 29498, June 5, 1995]

EFFECTIVE DATE NOTE: At 60 FR 54955, Oct. 27, 1995, §219.502–2–70 was stayed indefinitely.

219.502–3 Partial set-asides.

When a portion of an acquisition is to be set aside for small business concerns, except acquisitions for commissary or exchange resale, the contracting officer shall give small disadvantaged business concerns preferential consideration by using the procedures in 252.219–7001, Notice of Partial Small Business Set-Aside with Preferential Consideration for Small Disadvantaged Business (SDB) Concerns.

219.502–4 Methods of conducting set-asides.

(b) Offers on a small disadvantaged business (SDB) set-aside from concerns that do not qualify as SDB concerns shall be considered nonresponsive and shall be rejected.

EFFECTIVE DATE NOTE: At 60 FR 54955, Oct. 27, 1995, §219.502–4 was stayed indefinitely.

219.504 Set-aside program order of precedence.

(b) The order of precedence for DoD is (except see 219.803(c) and 226.71)—

(i) Total set-aside for small disadvantaged business concerns;

(ii) Total set-aside for small business concerns;

(iii) Partial set-aside for small business concerns with preferential consideration for small disadvantaged business concerns.

[56 FR 36353, July 31, 1991, as amended at 59 FR 12192, Mar. 16, 1994]

EFFECTIVE DATE NOTE: At 60 FR 54955, Oct. 27, 1995, in §219.504, paragraph (b)(i) was stayed indefinitely.

219.505 Rejecting Small Business Administration recommendations.

(b) The designee shall be at a level no lower than chief of the contracting office.

219.506 Withdrawing or modifying set-asides.

(a) Do not withdraw small disadvantaged business set-asides for reasons of price reasonableness unless the low responsive responsible offer exceeds fair market price by more than ten percent.

EFFECTIVE DATE NOTE: At 60 FR 54955, Oct. 27, 1995, §219.506 was stayed indefinitely.

219.508 Solicitation provisions and contract clauses.

(d) Use the clause at 252.219–7001, Notice of Partial Small Business Set-Aside with Preferential Consideration for Small Disadvantaged Business Concerns, instead of the clause in FAR 52.219–7, Notice of Partial Small Business Set-Aside. Use the clause with its Alternate I when the contracting officer determines that there are no small disadvantaged business manufacturers that can meet the requirements of the solicitation.

(e) Use the clause at 52.219–14, Limitations on Subcontracting, also in small disadvantaged business set-asides.

[56 FR 36353, July 31, 1991, as amended at 57 FR 42630, Sept. 15, 1992]

EFFECTIVE DATE NOTE: At 60 FR 54955, Oct. 27, 1995, in §219.508, paragraph (e) was stayed indefinitely.

219.508–70 Solicitation provisions and contract clauses.

Use the clause at 252.219–7002, Notice of Small Disadvantaged Business Set-Aside, in solicitations and contracts for small disadvantaged business set-asides. Use the clause with its Alternate I when the contracting officer determines that there are no small disadvantaged business manufacturers that can meet the requirements of the solicitation.

EFFECTIVE DATE NOTE: At 60 FR 54955, Oct. 27, 1995, §219.508–70 was stayed indefinitely.

Subpart 219.6—Certificates of Competency and Determinations of Eligibility

219.602 Procedures.

219.602–1 Referral.

When making a nonresponsibility determination on a small business concern, the contracting officer shall notify the contracting activity's small business specialist.

[58 FR 28465, May 13, 1993, as amended at 60 FR 40107, Aug. 7, 1995]

219.602–3 Resolving differences between the agency and the Small Business Administration.

(c)(i) If the contracting officer believes the agency should appeal, the contracting officer shall immediately inform the departmental director of the Office of Small and Disadvantaged Business Utilization, and send the director, through departmental channels—

(A) A request for appeal, summarizing the issues. The request must be sent to arrive within five working days after receipt of the SBA Central Office's written position.

(B) An appeal file, documenting the contracting activity's position. The file must be sent to arrive within five working days after transmission of the request.

(ii) The departmental director will determine whether the agency will appeal and will notify the SBA of the agency's intent.

Subpart 219.7—Subcontracting with Small Business, Small Disadvantaged Business and Women-Owned Small Business Concerns

219.702 Statutory requirements.

(a) Section 834 of Public Law 101–189, as amended, requires the DoD to establish a test program to determine whether comprehensive subcontracting

plans on a corporate, division, or plant-wide basis will reduce administrative burdens while enhancing subcontracting opportunities for small and small disadvantaged business concerns.

(i) The test program—

(A) Will be conducted—

(*1*) From October 1, 1990, through September 30, 1998;

(*2*) In accordance with the DoD test plan, ''Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans;'' and

(*3*) By the military departments and agencies through specifically designated contracting activities; and

(B) Permits contractors selected by the designated contracting activities to—

(*1*) Negotiate plant, division, or company-wide comprehensive subcontracting plans instead of individual contract subcontracting plans; and

(*2*) Use the comprehensive plans in all DoD contracts which require a subcontracting plan.

(ii) The comprehensive subcontracting plans will—

(A) Be negotiated on an annual basis by the designated contracting activities;

(B) Be incorporated by the contractors' cognizant contract administration activity into all of the contractors' active DoD contracts which require a plan;

(C) Be used by all DoD contracting officers in contracts, which require a plan, awarded the selected contractors during the test period; and

(D) Not be subject to application of liquidated damages during the period of the test program (section 402, Pub. L. 101–574).

[56 FR 36353, July 31, 1991, as amended at 60 FR 35668, July 10, 1995; 61 FR 39900, July 31, 1996]

219.703 Eligibility requirements for participating in the program.

(a) Qualified nonprofit agencies for the blind and other severely disabled, that have been approved by the Committee for Purchase from People Who Are Blind or Severely Disabled under the Javits-Wagner-O'Day Act (41 U.S.C. 46–48), are eligible as a result of section 9077 of Pub. L. 102–396, and subsequent Appropriations Acts, and sections 808 of Pub. L. 102–484 and 804 of Pub. L. 103–337 through September 30, 1997, to participate in the program. Under this authority, subcontracts awarded to such entities may be counted toward the prime contractor's small business subcontracting goal through fiscal year 1997.

(2)(A) To be eligible as an SDB subcontractor, a concern must meet the definition in the provision at 252.219–7000, Small Disadvantaged Business Concern Representation (DoD Contracts).

(B) To be eligible as a historically black college or university or minority institution subcontractor, such entity must meet the definition in the clause at 252.219–7003, Small Business and Small Disadvantaged Business Subcontracting Plan (DoD Contracts).

(b) A contractor may also rely on the written representation as to status of—

(i) A historically black college or university or minority institution; or

(ii) A qualified nonprofit agency for the blind and other severely handicapped approved by the Committee for Purchase from the Blind and Other Severely Handicapped.

[57 FR 42630, Sept. 15, 1992, as amended at 58 FR 28465, May 13, 1993; 60 FR 13075, Mar. 10, 1995; 60 FR 41157, Aug. 11, 1995; 60 FR 61596, Nov. 30, 1995; 61 FR 50535, Sept. 26, 1996]

219.704 Subcontracting plan requirements.

(a)(1) The goal for use of small disadvantaged business concerns shall include subcontracts with historically black colleges and universities and minority institutions (see subpart 226.70), in addition to subcontracts with small disadvantaged business concerns. Subcontracts with historically black colleges and universities and minority institutions do not have to be included in the small disadvantaged business goal in commercial items subcontracting plans.

(4) In those subcontracting plans which specifically identify small, small disadvantaged, and women-owned small businesses, prime contractors shall notify the administrative contracting officer of any substitutions of firms that are not small, small disadvantaged, or women-owned small businesses for the firms listed in the

subcontracting plan. Notifications shall be in writing and shall occur within a reasonable period of time after award of the subcontract. Contractor-specified formats shall be acceptable.

[60 FR 61596, Nov. 30, 1995, as amended at 61 FR 18687, Apr. 29, 1996]

219.705 Responsibilities of the contracting officer under the subcontracting assistance program.

219.705–2 Determining the need for a subcontracting plan.

(d) See 215.605 for unique DoD requirements.

[59 FR 27670, May 27, 1994]

219.705–4 Reviewing the subcontracting plan.

(d) Challenge any subcontracting plan that does not contain positive goals and consider the extent to which an offeror plans to use competition restricted to small disadvantaged business concerns, historically black colleges and universities, or minority institutions. A small disadvantaged business goal of less than five percent must be approved two levels above the contracting officer.

219.706 Responsibilities of the cognizant administrative contracting officer.

(a)(i) The contract administration office also is responsible for reviewing, evaluating, and approving master subcontracting plans.

(ii) The small business specialist supports the administrative contracting officer in evaluating a contractor's performance and compliance with its subcontracting plan.

219.708 Solicitation provisions and contract clauses.

(b)(1)(A) Use the clause at 252.219–7003, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan (DoD Contracts), in solicitations and contracts that contain the clause at FAR 52.219–9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan.

(B) In contracts with contractors which have comprehensive subcontracting plans approved under the test program described in 219.702(a), use the clause at 252.219–7004, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan (Test Program), instead of the clauses at 252.219–7003, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan (DoD Contracts), and FAR 52.219–9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan.

(2) In contracts with contractors which have comprehensive subcontracting plans approved under the test program described in 219.702(a), do not use the clause at FAR 52.219–16, Liquidated Damages—Small Business Subcontracting Plan.

(c)(1) Do not use the clause at FAR 52.219–10, Incentive Subcontracting Program for Small and Small Disadvantaged Business Concerns.

(A) When contracting by negotiation, use the clause at 252.219–7005, Incentive for Subcontracting with Small Businesses, Small Disadvantaged Businesses, Historically Black Colleges and Universities, and Minority Institutions, in all solicitations and contracts that contain the clause at FAR 52.219–9, Small, Small Disadvantaged and Women-Owned Small Business Subcontracting Plan. Incentives for exceeding SDB subcontracting goals shall be paid only if an SDB subcontracting goal was exceeded as a result of actual subcontract awards to SDBs, and not as a result of developmental assistant credit under the Pilot Mentor-Protege Program (see subpart 219.71).

(B) Use the clause at 252.219–7005 with its Alternate I when, in the judgement of the contracting officer, inclusion of an incentive is necessary to increase subcontracting opportunities for other small businesses.

(C) Determine the percentage to be negotiated and used in the clause by considering the type and extent of effort required to exceed the goal, for example—

(*1*) Unique outreach programs;

(*2*) Use of small disadvantaged businesses, historically black colleges and universities, and minority institutions in nontraditional areas;

(*3*) Technical assistance to qualify or assist these entities; and

(*4*) Proximity of subcontractors to the prime.

(D) Do not use the clauses at 252.219–7005 and FAR 52.219–10 in contracts with contractors which have comprehensive subcontracting plans approved under the test program described in 219.702(a).

(c)(2) For negotiated acquisitions of $10 million or more, the contracting officer may use an award fee provision instead of the incentive provision required by (c)(1)(A). When an award fee provision is used, do not use the clauses at 252.219–7005, Incentive for Subcontracting with Small Businesses, Small Disadvantaged Businesses, Historically Black Colleges and Universities, and Minority Institutions, and FAR 52.219–10, Incentive Subcontracting Program for Small and Small Disadvantaged Business Concerns. Do not use award fee provisions in contracts with contractors which have comprehensive subcontracting plans approved under the test program described in 219.702(a).

[56 FR 36353, July 31, 1991, as amended at 56 FR 67213, Dec. 30, 1991; 61 FR 39901, July 31, 1996]

Subpart 219.8—Contracting With the Small Business Administration (The 8(a) Program)

219.803 Selecting acquisitions for the 8(a) Program.

(b) Contracting activities should respond to SBA requests for contract support within 30 calendar days after receipt.

(c) Before considering the set-aside order of precedence in 219.504(b), review the acquisition for offering under the 8(a) Program.

219.804 Evaluation, offering, and acceptance.

219.804–1 Agency evaluation.

When SBA asks for a requirement for the 8(a) Program, offer the requirement if appropriate, and do not use the small disadvantaged business set-aside procedure. If an acquisition, other than a repetitive acquisition (as described in FAR 19.804–4), was synopsized using either of the notices in 205.207(d) (i) or (ii) before receipt of the SBA request, the request does not have to be honored.

(f) The 8(a) firms should be offered the opportunity to give a technical presentation.

219.808 Contract negotiation.

219.808–1 Sole source.

(b) Section 813 of Pub. L. 102–190 authorizes DoD to waive Miller Act requirements for performance and payment bonds under 8(a) construction contracts awarded before October 1, 1994. Section 813 requires for each of fiscal years 1992, 1993, and 1994, that DoD make every reasonable effort to award no fewer than 30 contracts using this bond waiver authority.

(i) A determination to waive bonds shall be approved at a level above the contracting officer. The contracting officer may consider waiver of bonding when—

(A) The contractor is unable to obtain the requisite bonds from a surety. The contracting officer will verify with surety companies, SBA, and other appropriate sources that the contractor cannot obtain the required bonding.

(B) The contractor has received less than five bond waivers while a participant in the 8(a) program.

(C) The contractor is otherwise responsible as determined in accordance with FAR 9.104. Also, see 232.172.

(ii) The authority of Section 813 shall not be used—

(A) When SBA notifies the contracting officer that it will waive bonding requirements in accordance with 13 CFR 124.305;

(B) For requirements expected to exceed $3 million; or

(C) When competitive procedures described in 19.805 are anticipated.

(iii) The contracting officer shall require the contractor to establish a special bank account before award (see 252.219–7007) to ensure protection of all suppliers and subcontractors expected to provide materials or services for performance of the contract.

(iv) Upon award of a contract using these procedures, the contracting officer shall prepare a report to include the following information (RCS DD–ACQ(AR)1930). Accumulate reports at each buying activity and forward, at

the end of each fiscal quarter, through agency channels to the Director, Office of Small and Disadvantaged Business Utilization, Office of the Under Secretary of Defense for Acquisition and Technology.

(A) Title/Description of construction project.

(B) Estimated dollar amount of the contract.

(C) Name of contracting activity and contracting officer.

(D) Name and address of contractor.

(E) Contract number and award date.

[57 FR 38287, Aug. 24, 1992, as amended at 58 FR 28465, May 13, 1993; 59 FR 27670, May 27, 1994]

219.811 Preparing the contracts.

219.811–1 Sole source.

(b)(5) See also 219.808–1(b).

[57 FR 38287, Aug. 24, 1992]

219.811–3 Contract clauses.

(a) Use the clause at FAR 52.219–11, Special 8(a) Contract Conditions, with 252.219–7007, Alternate A, when the contracting office has waived performance and payment bond requirements in accordance with 219.808–1(b).

(b) Use the clause at FAR 52.219–12, Special 8(a) Subcontract Conditions, with 252.219–7007, Alternate B, when the contracting office has waived performance and payment bond requirements in accordance with 219.808–1(b).

(c) Use the clause at FAR 52.219–17, Section 8(a) Award, with 252.219–7007, Alternate C, when the contracting office has waived performance and payment bond requirements in accordance with 219.808–1(b).

[57 FR 38287, Aug. 24, 1992]

Subpart 219.10—Small Business Competitiveness Demonstration Program

219.1005 Applicability.

(a) Dredging (SIC 1629, FPDS Y216 and Z216) applies only to the Army Corps of Engineers.

(3)(A) Architect-engineering services in support of military construction projects or military family housing projects are exempt from the Small Business competitiveness Demonstration Program, except for the emerging small business (ESB) set-aside requirements. Accordingly, these shall—

(*1*) Be reviewed for possible award under the 8(a) program regardless of dollar value.

(*2*) Not be set-aside for small business or small disadvantaged business if the estimated value is $85,000 or more (including indefinite delivery-indefinite quantity contracts if the value of all anticipated orders exceeds $85,000).

(*3*) Be considered for ESB set-aside if the estimated value is both less than the emerging small business reserve amount and less than $85,000.

(*4*) Be considered for small business set-aside (but not SDB set-aside) if the estimated value is less than $85,000, regardless of whether small business set-asides for other architect-engineer services are prohibited under the Small Business Competitiveness Demonstration Program, when an ESB set-aside is not appropriate.

(B) All requirements of the Small Business Competitiveness Demonstration Program apply to architect-engineer services in support of other than military construction projects or military housing objects, which otherwise meet criteria at FAR 19.1005(a)(3).

(b) The targeted industry categories for DoD are:

Standard industrial classification (SIC)	SIC Code
(1) Pharmaceutical preparations	2834
(2) Ammunition, except for small arms	3483
(3) Ordnance and accessories, not elsewhere classified	3489
(4) Turbines and turbine generator sets	3511
(5) Aircraft engines and engine parts	3724
(6) Guided missiles and space vehicles	3761
(7) Space vehicle equipment, NEC	3769
(8) Tanks and tank components	3795
(9) Search and navigation equipment	3812
(10) Communication services, NEC	4899

[56 FR 36353, July 31, 1991, as amended at 59 FR 27670, May 27, 1994]

219.1006 Procedures.

(b)(1) During the period when small business set-asides cannot be considered for acquisitions in the four designated industry groups—

(A) The restrictions at 219.502–2–70(b)(1) and (2) do not apply and the acquisitions shall be considered for small disadvantaged business set-asides; and

(B) The evaluation preference at 219.70 shall not be used. However, note the test program at 219.72 for construction acquisitions.

(2) The Director, Office of Small and Disadvantaged Business Utilization, Office of the Under Secretary of Defense (Acquisition & Technology), will determine whether reinstatement of small business set-asides are necessary to meet the agency goal and will recommend reinstatement to the Director, Defense Procurement. Military departments and defense agencies shall not reinstate small business set-asides unless directed by the Director, Defense Procurement.

(d) Reporting requirements are at 204.670–9.

[58 FR 28466, May 13, 1993, as amended at 60 FR 61596, Nov. 30, 1995; 61 FR 18687, Apr. 29, 1996]

219.1007 Solicitation provisions.

Do not use the clause at 252.219–7006, Notice of Evaluation Preference for Small Disadvantaged Business Concerns, in solicitations or contracts for the four designated industry groups.

[56 FR 36353, July 31, 1991, as amended at 57 FR 42630, Sept. 15, 1992]

Subpart 219.70—Evaluation Preference for Small Disadvantaged Business (SDB) Concerns

219.7000 Policy.

Offers from small disadvantaged business concerns shall be given an evaluation preference in accordance with this subpart.

219.7001 Applicability.

(a) The evaluation preference shall be used in competitive acquisitions except as provided in paragraph (b) of this section and in 219.1006(b)(1)(B).

(b) Do not use the evaluation preference in acquisitions which—

(1) Use small purchase procedures;

(2) Are set-aside for small disadvantaged businesses;

(3) Are set-aside for small businesses;

(4) Are for commissary or exchange resale; or

(5) Are for long distance telecommunications services.

[56 FR 36353, July 31, 1991, as amended at 60 FR 43563, Aug. 22, 1995; 61 FR 18687, Apr. 29, 1996]

219.7002 Procedures.

(a) Give offers from small disadvantaged business concerns a preference in evaluation by adding a factor of ten percent to the price of all offers, except—

(1) Offers from small disadvantaged business concerns, which have not waived the evaluation preference;

(2) Offers from historically black colleges and universities or minority institutions, which have not waived the evaluation preference;

(3) Otherwise successful offers of—

(i) Eligible products under the Trade Agreements Act when the acquisition equals or exceeds the dollar threshold in FAR 25.402; or

(ii) Qualifying country end products (see the definition in 225.101); and

(4) Offers where application of the factor would be inconsistent with a Memorandum of Understanding or other international agreement with a foreign government.

(b) Apply the factor on a line item by line item basis or apply it to any group of items on which award may be made. Add other evaluation factors such as transportation costs or rent-free use of Government facilities to the offers before applying the ten percent factor.

(c) Do not evaluate offers using the preference when it would cause award to be made at a price which exceeds fair market price by more than ten percent.

(d) In partial small business set-asides, use the evaluation preference procedures set forth in the clause at 252.219–7001, Notice of Partial Small Business Set-Aside with Preferential Consideration for Small Disadvantaged Business Concerns, instead of the procedures in paragraphs (a) through (c) of this section.

219.7003 Solicitation provisions and contract clauses.

Use the clause at 252.219–7006, Notice of Evaluation Preference for Small Disadvantaged Business Concerns, in solicitations and contracts involving the

evaluation preference, except those which include the clause at 252.219–7001, Notice of Partial Small Business Set-Aside with Preferential Consideration for Small Disadvantaged Business Concerns. Use the clause with its Alternate I when the contracting officer determines that there are no small disadvantaged business manufacturers that can meet the requirements of the solicitation.

Subpart 219.71—Pilot Mentor-Protege Program

SOURCE: 59 FR 27670, May 27, 1994, unless otherwise noted.

219.7100 Scope.

This subpart implements the Pilot Mentor-Protege Program established under section 831 of the National Defense Authorization Act for Fiscal Year 1991, Public Law 101–510, as amended. The purpose of the Program is to provide incentives for DoD contractors to assist small disadvantaged businesses in enhancing their capabilities and to increase participation of such firms in Government and commercial contracts. Qualified organizations employing the severely disabled, as defined in section 8064A of Public Law 102–172, are also eligible to participate as protege firms.

219.7101 Policy.

DoD policy and procedures for implementation of the Program are contained in appendix I to chapter 2, Policy and Procedures for the DoD Pilot Mentor-Protege Program.

219.7102 General.

The Program includes—

(a) Mentor firms, which are prime contractors with at least one active subcontracting plan negotiated under FAR subpart 19.7.

(b) Protege firms, which are small disadvantaged business (SDB) concerns or qualified organizations employing the severely disabled, eligible for receipt of Federal contracts and selected by the mentor firm.

(c) Mentor-protege agreements, which establish a developmental assistance program for a protege firm.

(d) Incentives, which may be provided to mentor firms by the DoD including:

(1) Reimbursement for developmental assistance costs through—

(i) A separate contract;

(ii) A separately priced contract line item on a DoD contract; or

(iii) Inclusion of program cost in indirect expense pools.

(2) Credit toward SDB subcontracting goals, established under a subcontracting plan negotiated under FAR subpart 19.7, for developmental assistance costs which are either reimbursed through indirect expense pools or are not reimbursed; or

(3) A combination of reimbursement and credit.

219.7103 Procedures.

219.7103–1 General.

The procedures for application, acceptance, and participation in the program are in appendix I to chapter 2, Policy and Procedures for the DoD Pilot Mentor-Protege Program. The Director of Small and Disadvantaged Business Utilization, Office of the Under Secretary of Defense (Acquisition and Technology) approves contractors as mentor firms, approves mentor-protege agreements, and forwards approved mentor-protege agreements to the contracting officer when program funding is available through a DoD Program Manager.

219.7103–2 Contracting officer responsibilities.

Contracting officers shall—

(a) Negotiate an advance agreement on the treatment of developmental assistance costs for credit, reimbursement, or both, if the mentor firm proposes such an agreement, or delegate authority to negotiate to the administrative contracting officer (see FAR 31.109).

(b) Modify (without consideration) applicable contract(s) to incorporate the clause at 252.232–7005, Reimbursement of Subcontractor Advance Payments-DoD Pilot Mentor-Protege Program, when advance payments are provided by a mentor firm to a protege firm under the Program and the mentor firm requests reimbursement of advance payments.

(c) Modify (without consideration) applicable contract(s) to incorporate other than customary progress payments for small disadvantaged businesses in accordance with FAR 32.504(c) if such payments are provided by a mentor firm to a protege firm and the mentor firm requests reimbursement.

(d) Modify applicable contract(s) to establish a contract line item for reimbursement of developmental assistance costs—

(1) When funds have been made available for that purpose by a DoD program manager; and

(2) The contractor has an approved mentor-protege agreement.

(e) Advise contractors of reporting requirements in appendix I to chapter 2.

219.7104 Developmental assistance costs eligible for reimbursement or credit.

(a) Developmental assistance provided under an approved mentor-protege agreement is distinct from, and shall not duplicate, any effort that is the normal and expected product of the award and administration of the mentor firm's subcontracts. Costs associated with the latter shall be accumulated and charged in accordance with the contractor's approved accounting practices. Mentor firm costs which are eligible for reimbursement are set forth in appendix I to chapter 2.

(b) Before incurring any costs under the Program, mentor firms need to establish the accounting treatment of developmental assistance costs eligible for reimbursement or credit. Advance agreements are encouraged. To be eligible for reimbursement under the Program, costs must be incurred before October 1, 1996.

(c) If the mentor firm is suspended or debarred while performing under an approved mentor-protege agreement, the mentor firm may not be reimbursed or credited for developmental assistance costs incurred more than 30 days after the imposition of the suspension or debarment.

(d) Developmental assistance costs, incurred by a mentor firm before October 1, 1999, that are eligible for crediting under the Program may be credited towards subcontracting plan goals as set forth in appendix I to chapter 2.

219.7105 Reporting.

Mentor firms shall report on the progress made under active mentor-protege agreements semi-annually as indicated in section I–111 of appendix I to chapter 2.

Subpart 219.72—Evaluation Preference for Small Disadvantaged Business (SDB) Concerns in Construction Acquisitions—Test Program

SOURCE: 61 FR 18688, Apr. 29, 1996, unless otherwise noted.

219.7200 Policy.

DoD policy is to ensure that, during this test program, offers from small disadvantaged business (SDB) concerns shall be given an evaluation preference in construction acquisitions.

219.7201 Administration of the test program.

The test program will be conducted over a 36-month period. The test program will be conducted by all DoD contracting activities that award construction contracts. The focal point for the test program is the Director, Small and Disadvantaged Business Utilization (SADBU), Office of the Deputy Under Secretary of Defense (International and Commercial Programs). The military departments and defense agencies shall submit status reports to the Director, SADBU. The first status report shall be submitted 18 months after initiation of the test program; the second status report shall be submitted 36 months after initiation of the test program. These reports shall specify the impact of the evaluation preference over each of the reporting periods of the test program, and shall provide recommendations with respect to continuation and/or modification of the evaluation preference.

[61 FR 18688, Apr. 29, 1996, as amended at 61 FR 50452, Sept. 26, 1996]

219.7202 Applicability.

(a) The evaluation preference shall be used in competitive acquisitions for construction (see definition in FAR Subpart 36.1) when work is to be performed inside the United States, its territories or possessions, Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia.

(b) Do not use the evaluation preference in acquisitions which—

(1) Are less than or equal to the simplified acquisition threshold;

(2) Are set aside for small businesses; or

(3) Are awarded under section 8(a) procedures.

(c) The evaluation preference need not be applied when the head of the contracting activity determines that the evaluation preference is having a disproportionate impact on non-SDB concerns or nondisadvantaged small business concerns.

219.7203 Procedures.

(a) Solicitations that require bonding shall require offerors to separately state bond costs in the offer. Bond costs include the costs of bid, performance, and payment bonds.

(b) Evaluate total offers. If the apparently successful offeror is an SDB concern, no preference-based evaluation is required under this subpart.

(c) If the apparently successful offeror is not an SDB concern, evaluate offers excluding bond costs. If, after excluding bond costs, the apparently successful offeror is an SDB concern, add bond costs back to all offers, and give offers from SDB concerns a preference in evaluation by adding a factor of 10 percent to the total price of all offers, except—

(1) Offers from SDBs which have not waived the evaluation preference; and

(2) Offers from historically black colleges and universities or minority institutions, which have not waived the evaluation preference.

(d) When using the procedures in 236.303–70, Additive or deductive items, the evaluation preference in this subpart shall be applied.

219.7204 Contract clause.

Use the clause at 252.219–7008, Notice of Evaluation Preference for Small Disadvantaged Business Concerns—Construction Acquisitions—Test Program, in all solicitations—

(1) That involve the evaluation preference of this subpart; and

(2) Where work is to be performed inside the United States, its territories or possessions, Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia.

PART 222—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

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AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36358, July 31, 1991, unless otherwise noted.

222.001 Definition.

Labor advisor, as used in this part, means the departmental or agency headquarters labor advisor.

Subpart 222.1—Basic Labor Policies

222.101 Labor relations.

222.101–1 General.

(a) Contracting offices shall—

(i) Obtain departmental approval before contacting a national office of a labor organization, a Government agency headquarters, or any other organization on a labor relations matter;

(ii) Notify departmental headquarters as required in departmental procedures when contacted by the national office of any labor organization or Government agency headquarters;

(iii) Obtain the approval of the agency head on major policy decisions regarding labor relations matters such as recommendations for plant seizure or injunctive action relating to potential or actual work stoppages; and

(iv) Submit questions involving FAR part 22 or other contractor labor relations matters to the labor advisor.

222.101–3 Reporting labor disputes.

The contract administration office shall—

(1) Notify the labor advisor, the contracting officer, and the head of the contracting activity when interference is likely;

(2) Disseminate information on labor disputes in accordance with departmental procedures; and

(3) File an initial labor dispute report using DD Form 1507, Work Stoppage Report, when a work stoppage is imminent or when a work stoppage occurs. File a follow-up report when a significant change occurs in the dispute. This reporting requirement is assigned Report Control Symbol DD–ACQ (AR) 1153.

[56 FR 36358, July 31, 1991, as amended at 56 FR 67215, Dec. 30, 1991; 59 FR 27671, May 27, 1994]

222.101–3–70 Impact of labor disputes on defense programs.

(a) Each department and agency shall determine the degree of impact of potential or actual labor disputes on its own programs and requirements. In making these determinations, consider, for example—

(1) Whether the dispute involves a product, project (including construction), or service which must be obtained in order to meet schedules for urgently needed military programs or requirements; and

(2) Whether alternative sources of supply for the product, project, or service are reasonably available to fulfill the requirement or program in time to maintain essential military schedules.

(b) Each contracting activity involved shall obtain and develop data reflecting the impact of a labor dispute on its requirements and programs. Upon determining the impact, the head of the contracting activity shall submit a report of findings and recommendations to the labor advisor. The report must be in narrative form and include—

(1) Location of dispute and name of contractor or subcontractor involved;

(2) A description of the impact, including how the specific items or services affect the specific programs or requirements;

(3) Identity of alternate sources available to furnish the supply or service within the time required; and

(4) A description of any action taken to reduce the impact.

(c) The head of the contracting activity shall submit impact reports to the agency head when—

(1) Specifically requested; or

(2) The department or agency considers the impact to be of sufficient urgency to warrant the attention of the agency head.

(d) The labor advisor will expand the report submitted under paragraph (c) of this subsection by addressing the following, as appropriate—

(1) *Description of military program, project, or service.* Identify item, project, or service which will be or is being affected by the work stoppage. Describe its normal use and current functions in combat, combat support, or deterrent operations. For components or raw materials, identify the end item(s) for which they are used.

(2) *Requirements and assets.* Identify requirements and assets in appropriate detail in terms commonly used by the DoD component.

(i) For production programs, include requirements for each using military service. Where applicable, state in detail production schedule, inventory objectives, assets against these objectives, and critical shortages. For spares and highly expendable items, such as ground and air ammunition, show usage (consumption) rates and assets in absolute terms and in terms of daily, weekly, or monthly supplies. For components, include requirements for spares.

(ii) For projects, describe the potential adverse effects of a delay in meeting schedules, and its impact on the national security.

(iii) For services, describe how a loss or interruption affects the ability to support Defense operations in terms of traffic requirements, assets, testing programs, etc.

(3) *Possible measures to minimize strike impact.* Describe—

(i) Capabilities, if any, to substitute items or to use alternate sources and indicate the number of other facilities available and the relative capabilities of such facilities in meeting total requirements;

(ii) How much time would be required to replace the loss of the facilities or service affected by a work stoppage; and

(iii) The feasibility of transferring assets from theater to theater to relieve deficits in some areas of urgency.

(4) *Conclusion.* (i) Describe the impact on operations of a 15–30, 30–60, and a 60–90 day work stoppage.

(ii) Project the degree of criticality of a program, project, or service resulting from a work stoppage on a calendar basis, indicating the increased impact, if any, as the stoppage lengthens. Criticality is measured by the number of days required for the work stoppage to have an effect on operational capability. This time must be stated in terms of days.

222.101–4 Removal of items from contractors' facilities affected by work stoppages.

(a) When a contractor is unable to deliver urgent and critical items because of a work stoppage at its facility, the contracting officer, before removing any items from the facility, shall—

(i) Before initiating any action, contact the labor advisor to obtain the opinion of the national office of the Federal Mediation and Conciliation Service or other mediation agency regarding the effect movement of the items would have on labor negotiations. Normally removals will not be made if they will adversely affect labor negotiations.

(ii) Upon the recommendation of the labor advisor, provide a written request for removal of the material to the cognizant contract administration office. Include the following information in the request—

(A) Contract number;

(B) A statement as to the urgency and criticality of the item needed;

(C) A description of the items to be moved (nature of the item, amount, approximate weight and cubic feet, item number, etc.);

(D) Mode of transportation by which the items are to be moved, if different than in the contract, and whether by Government or commercial bill of lading; and

(E) Destination of the material, if different from that specified in the contract.

(iii) With the assistance of the labor advisor or the commander of the contract administration office, attempt to have both the management and the labor representatives involved agree to shipment of the material by normal means.

(iv) If agreement for removal of the needed items cannot be reached following the procedures in paragraphs (a) (i) through (iii) of this subsection, the commander of the contract administration office, after obtaining approval from the labor advisor, may seek the concurrence of the parties to the dispute to permit movement of the material by military vehicles with military personnel. On receipt of such concurrences, the commander may proceed to make necessary arrangements to move the material.

(v) If agreement for removal of the needed items cannot be reached following any of the procedures in paragraphs (a) (i) through (iv) of this subsection, refer the matter to the labor advisor with the information required by 222.101–3–70(b). If the labor advisor is unsuccessful in obtaining concurrence of the parties for the movement of the material and further action to obtain the material is deemed necessary, refer the matter to the agency head. Upon review and verification that the items are urgently or critically needed and cannot be moved with the consent of the parties, the agency head, on a nondelegable basis, may order removal of the items from the facility.

222.101–70 Acquisition of stevedoring services during labor disputes.

(a) Use the following procedures only in the order listed when a labor dispute delays performance of a contract for stevedoring services which are urgently needed.

(1) Attempt to have management and labor voluntarily agree to exempt military supplies from the labor dispute by continuing the movement of such material.

(2) Divert vessels to alternate ports able to provide necessary stevedoring services.

(3) Consider contracting with reliable alternative sources of supply within the stevedoring industry.

(4) Utilize civil service stevedores to perform the work performed by contract stevedores.

(5) Utilize military personnel to handle the cargo which was being handled by contract stevedores prior to the labor dispute.

(b) Notify the labor advisor when a deviation from the procedures in paragraph (a) of this subsection is required.

222.102 Federal and State labor requirements.

222.102–1 Policy.

(1) The Department of Labor is responsible for the administration and enforcement of the Occupational Safety and Health Act (OSHA). Contracting officers shall—

(i) Direct all inquiries from contractors or contractor employees regarding the applicability or interpretation of the OSHA regulations to the Department of Labor; and

(ii) Upon request, provide the address of the appropriate field office of the Occupational Safety and Health Administration of the Department of Labor.

(2) Do not initiate any application for the suspension or relaxation of labor requirements without prior coordination with the labor advisor.

222.103 Overtime.

222.103–4 Approvals.

(a) The department/agency approving official shall—

(i) Obtain the concurrence of other appropriate approving officials; and

(ii) Seek agreement as to the contracts under which overtime premiums will be approved when—

(A) Two or more contracting offices have current contracts at the same contractor facility; and

(B) The approval of overtime by one contracting office will affect the performance or cost of contracts of another office. In the absence of evidence to the contrary, a contracting officer may rely on a contractor's statement that approval of overtime premium pay for one contract will not affect performance or payments under any other contract.

Subpart 222.3—Contract Work Hours and Safety Standards Act

222.302 Liquidated damages and overtime pay.

Upon receipt of notification of Contract Work Hours and Safety Standards Act violations, the contracting officer shall—

(1) Immediately withhold such funds as are available;

(2) Give the contractor written notification of the withholding and a statement of the basis for the liquidated damages assessment. The written notification shall also inform the contractor of its 60 days right to appeal the assessment, through the contracting officer, to the agency official responsible for acting on such appeals; and

(3) If funds available for withholding are insufficient to cover liquidated damages, ask the contractor to pay voluntarily such funds as are necessary to cover the total liquidated damage assessment.

(d)(i) The assessment shall become the final administrative determination of contractor liability for liquidated damages when—

(A) The contractor fails to appeal to the contracting agency within 60 days from the date of the withholding of funds;

(B) The department agency, following the contractor's appeals, issues a final order which affirms the assessment of liquidated damages or waives damages of $500 or less; or

(C) The Secretary of Labor takes final action on a recommendation of the agency head to waive or adjust liquidated damages in excess of $500.

(ii) Upon final administrative determination of the contractor's liability for liquidated damages, the contracting officer shall transmit withheld or collected funds determined to be owed the Government as liquidated damages to the servicing finance and accounting officer for crediting to the appropriate Government Treasury account. The contracting officer shall return any excess withheld funds to the contractor.

Subpart 222.4—Labor Standards for Contracts Involving Construction

222.402 Applicability.

222.402–70 Installation support contracts.

(a) Apply both the Service Contract Act (SCA) and the Davis-Bacon Act (DBA) to installation support contracts if—

(1) The contract is principally for services but also requires a substantial and segregable amount of construction, alteration, renovation, painting, or repair work; and

(2) The aggregate dollar value of such construction work exceeds or is expected to exceed $2,000.

(b) SCA coverage under the contract. Contract installation support requirements, such as plant operation and installation services (i.e., custodial, snow

removal, etc.) are subject to the SCA. Apply SCA clauses and minimum wage and fringe benefit requirements to all contract service calls or orders for such maintenance and support work.

(c) DBA coverage under the contract. Contract construction, alteration, renovation, painting, and repair requirements (i.e., roof shingling, building structural repair, paving repairs, etc.) are subject to the DBA. Apply DBA clauses and minimum wage requirements to all contract service calls or orders for construction, alteration, renovation, painting, or repairs to buildings or other works.

(d) Repairs versus maintenance. Some contract work may be characterized as either DBA painting/repairs or SCA maintenance. For example, replacing broken windows, spot painting, or minor patching of a wall could be covered by either the DBA or the SCA. In those instances where a contract service call or order requires construction trade skills (i.e., carpenter, plumber, painter, etc.), but it is unclear whether the work required is SCA maintenance or DBA painting/repairs, apply the following rules—

(1) Individual service calls or orders which will require a total of 32 or more work-hours to perform shall be considered to be repair work subject to the DBA.

(2) Individual service calls or orders which will require less than 32 work-hours to perform shall be considered to be maintenance subject to the SCA.

(3) Painting work of 200 square feet or more to be performed under an individual service call or order shall be considered to be subject to the DBA regardless of the total work-hours required.

(e) The determination of labor standards application shall be made at the time the solicitation is prepared in those cases where requirements can be identified. Otherwise, the determination shall be made at the time the service call or order is placed against the contract. The service call or order shall identify the labor standards law and contract wage determination which will apply to the work required.

(f) Contracting officers may not avoid application of the DBA by splitting individual tasks between orders or contracts.

222.403 Statutory and regulatory requirements.

222.403–4 Department of Labor regulations.

Direct all questions regarding Department of Labor regulations to the labor advisor.

222.404 Davis-Bacon Act wage determinations.

Not later than April 1 of each year, each department and agency shall furnish the Administrator, Wage and Hour Division, with a general outline of its proposed construction program for the coming fiscal year. The Department of Labor uses this information to determine where general wage determination surveys will be conducted.

(1) Indicate by individual project of $500,000 or more—

(i) The anticipated type of construction;

(ii) The estimated dollar value; and

(iii) The location in which the work is to be performed (city, town, village, county, or other civil subdivision of the state).

(2) The report format is contained in Department of Labor All Agency Memo 144, December 27, 1985.

(3) The report control number is 1671–DOL–AN.

222.404–2 General requirements.

(c)(5) Information concerning the proper application of wage rate schedules to the type or types of construction involved shall be obtained from the appropriate district commander, Corps of Engineers, for the Army; from the cognizant Naval Facilities Engineering Command division for the Navy; from the appropriate Regional Industrial Relations Office for the Air Force; and from the appropriate Defense Contract Management District, ATTN: Industrial Labor Relations Office, for the Defense Logistics Agency.

222.404–3 Procedures for requesting wage determinations.

(b) *Requests for project wage determinations.* Submit requests for project wage

determinations directly to the Department of Labor.

222.404–11 Wage determination appeals.

Send a copy of a petition for review filed by the contracting agency to the labor advisor.

222.406 Administration and enforcement.

222.406–1 Policy.

(a) *General.* The program shall also include—

(i) Training appropriate contract administration, labor relations, inspection, and other labor standards enforcement personnel in their responsibilities; and

(ii) Periodic review of field enforcement activities to ensure compliance with applicable regulations and instructions.

(b) *Preconstruction letters and conferences.* (1) Promptly after award of the contract, the contracting officer shall provide a preconstruction letter to the prime contractor. This letter should accomplish the following, as appropriate—

(A) Indicate that the labor standards requirements contained in the contract are based on the following statutes and regulations—

(*1*) Davis-Bacon Act;

(*2*) Contract Work Hours and Safety Standards Act;

(*3*) Copeland (Anti-Kickback) Act;

(*4*) Parts 3 and 5 of the Secretary of Labor's Regulations (parts 3 and 5, subtitle A, title 29, CFR); and

(*5*) Executive Order 11246 (Equal Employment Opportunity);

(B) Call attention to the labor standards requirements in the contract which relate to—

(*1*) Employment of foremen, laborers, mechanics, and others;

(*2*) Wages and fringe benefits payments, payrolls, and statements;

(*3*) Differentiation between subcontractors and suppliers;

(*4*) Additional classifications;

(*5*) Benefits to be realized by contractors and subcontractors in keeping complete work records;

(*6*) Penalties and sanctions for violations of the labor standards provisions; and

(*7*) The applicable provisions of FAR 22.403; and

(C) Ensure that the contractor sends a copy of the preconstruction letter to each subcontractor.

(2) Before construction begins, the contracting officer shall confer with the prime contractor and any subcontractor designated by the prime to emphasize their labor standards obligations under the contract when—

(A) The prime contractor has not performed previous Government contracts;

(B) The prime contractor experienced difficulty in complying with labor standards requirements on previous contracts; or

(C) It is necessary to determine whether the contractor and its subcontractors intend to pay any required fringe benefits in the manner specified in the wage determination or to elect a different method of payment. If the latter, inform the contractor of the requirements of FAR 22.406–2.

222.406–6 Payrolls and statements.

(a) *Submission.* Contractors who do not use Department of Labor Form WH 347 or its equivalent must submit a DD Form 879, Statement of Compliance, with each payroll report.

222.406–8 Investigations.

(a) The following guidance and procedures apply to investigations conducted by the contracting activity. (i) *Beginning of the investigation.* The investigator shall—

(A) Inform the contractor of the investigation in advance;

(B) Verify the exact legal name of the contractor, its address, and the names and titles of its principal officers;

(C) Outline the general scope of the investigation and that it includes examining pertinent records and interviewing employees; and

(D) Inform the contractor that the names of the employees to be interviewed will not be divulged to the contractor;

(E) When requested, provide a letter from the contracting officer verifying the investigator's authority.

(ii) *Conduct of the investigation*—(A) *Review of the contract.*

(*1*) Verify that all required labor standards and clauses and the wage determination are included in the contract.

(*2*) Review the following items in the contract file, if applicable—

(*i*) List of subcontractors;

(*ii*) Payroll statements for the contractor and subcontractors;

(*iii*) Approvals of additional classifications;

(*iv*) Data regarding apprentices and trainees as required by FAR 22.406–4;

(*v*) Daily inspector's report or other inspection reports;

(*vi*) Employee interview statements; and

(*vii*) SF 1413, Statement and Acknowledgement.

(B) *Interview of the complainant.* Interview the complainant except when this is impractical. The interview shall cover all aspects of the complaint to ensure that all pertinent information is obtained. Whenever an investigation does not include an interview of the complainant, explain such omission in the investigator's report.

(C) *Interview of employees and former employees.* (*1*) Interview a sufficient number of employees or former employees, who represent all classifications, to develop information regarding the method and amount of payments, deductions, hours worked, and the type of work performed.

(*2*) Interview employees at the job site if the interviews can be conducted privately and in such a manner so as to cause the least inconvenience to the employer and employees.

(*3*) Former employees may be interviewed elsewhere.

(*4*) Do not disclose to any employee any information, finding, recommendation, or conclusion relating to the investigation except to the extent necessary to obtain required information.

(*5*) Do not disclose any employee's statement to anyone, except a Government representative working on the case, without the employee's written permission.

(*6*) Obtain information by mail when personal interviews are impractical.

(*7*) Use SF 1445, Labor Standards Interview, for employee interviews.

(*8*) Request employees to sign their statements and to initial any changes.

(*9*) Provide an evaluation of each employee's credibility.

(D) *Interview of foremen.* Interview foremen to obtain information concerning the contractor's compliance with the labor standards provisions with respect to employees under the foreman's supervision and the correctness of the foreman's classification as a supervisory employee. All procedures established for the conduct of employee interviews, and the recording and use of information obtained, apply to foremen interviews.

(E) *Interview of the contractor.* (*1*) Interview the contractor whenever the investigation indicates the possibility of a violation.

(*2*) Inform the contractor that—

(*i*) The interview does not mean that a violation has been found or that a requirement for corrective action exists; and

(*ii*) The purpose of the interview is to obtain only such data as the contractor may desire to present in connection with the investigation.

(*3*) Do not disclose the identity of any individual who filed a complaint or was interviewed.

(F) *Review of contractor and subcontractor records.* (*1*) Review contractor and subcontractor records such as basic time cards, books, cancelled payroll checks, fringe benefits, and payment records. Compare them with submitted payrolls. When discrepancies are found, include pertinent excerpts or copies of the records in the investigation report with a statement of the discrepancy and any explanation the investigator obtains. When wages include contributions or anticipated costs for fringe payments requiring approval of the Secretary of Labor, examine the contractor records to ensure such approval has been obtained and that any requirements specified in the approval have been met. (See FAR 22.406–2(a)(3)).

(*2*) Review contractor's and subcontractor's weekly payrolls and payroll statements for completeness and accuracy regarding the following—

(*i*) Identification of employees, payroll amount, the contract, contractor, subcontractor, and payroll period;

(*ii*) Inclusion of only job classifications and wage rates specified in the contract specifications, or otherwise established for the contract or subcontract;

(*iii*) Computation of daily and weekly hours;

(*iv*) Computation of time-and-one half for work in excess of 40 hours per week in accordance with FAR 22.406–2(c);

(*v*) Gross weekly wages;

(*vi*) Deductions;

(*vii*) Computation of net weekly wages paid to each employee;

(*viii*) Ratio of helpers, apprentices, and trainees to laborers and mechanics;

(*ix*) Apprenticeship and trainee registration and ratios; and

(*x*) Computation of fringe benefits payments.

(*3*) Transcribe the contractor's records whenever they contain information at variance with payrolls or other submitted documents.

(*i*) Make the transcriptions in sufficient detail to permit them to be used to check computations of restitution and to determine amounts to be withheld from the contractor.

(*ii*) Follow the form used by the contractor.

(*iii*) Place comments or explanations concerning the transcriptions on separate memoranda or in the narrative report.

(*iv*) Determine whether the wage determination, any modifications of the determination, and any additional classifications are posted as required.

(iii) *Submission of the report of investigation*. The investigator shall submit a report of the investigation in accordance with agency procedures. Each report shall include at least the—

(A) Basis for the investigation, including the name of the complainant;

(B) Names and addresses of prime contractors and subcontractors involved, and names and titles of their principal officers;

(C) Contract number, date, dollar value of prime contract, and date and number of wage determination included in the contract;

(D) Description of the contract and subcontract work involved;

(E) Summary of the findings with respect to each of the items listed in 222.406–8(a)(ii);

(F) Concluding statement concerning—

(*1*) The types of violations, including the amount of kickbacks under the Copeland Act, underpayments of basic hourly rates and fringe benefits under the Davis-Bacon Act, or underpayments and liquidated damages under the Contract Work Hours and Safety Standards Act;

(*2*) Whether violations are considered to be willful or due to the negligence of the contractor or its agent;

(*3*) The amount of funds withheld from the contractor; and

(*4*) Other violations found.

(G) Exhibits indexed and appropriately tabbed, including copies of the following, when applicable—

(*1*) Complaint letter;

(*2*) Contract wage determination;

(*3*) Preconstruction letter and memorandum of preconstruction conference;

(*4*) Payrolls and statements indicating violations;

(*5*) Transcripts of pertinent records of the contractor, and approvals of fringe benefit payments;

(*6*) Employee interview statements;

(*7*) Foreman interview statements;

(*8*) Statements of others interviewed, including Government personnel;

(*9*) Detailed computations showing kickbacks, underpayments, and liquidated damages;

(*10*) Summary of all payments due to each employee or to a fund plan or program, and liquidated damages; and

(*11*) Receipts and cancelled checks.

(c) *Notification to the contractor.*

(4)(A) Notify the contractor by certified mail of any finding that it is liable for liquidated damages under the Contract Work Hours and Safety Standards Act (CWHSSA). The notification shall inform the contractor that—

(*1*) It has 60 days after receipt of the notice to appeal the assessment of liquidated damages; and

(*2*) The appeal must demonstrate either that the alleged violations did not occur at all, occurred inadvertently notwithstanding the exercise of due

care, or the assessment was computed improperly.

(B) If an appeal is received, the contracting officer shall process the appeal in accordance with department or agency regulations.

(d) *Contracting officer's report.* (1) In accordance with agency procedures, the contracting officer shall forward a detailed enforcement report or summary report in duplicate. These reports shall include at least the following—

(A) SF 1446, Labor Standards Investigation Summary Sheet;

(B) Contracting officer's findings;

(C) Statement as to the disposition of any contractor rebuttal to the findings;

(D) Statement as to whether the contractor has accepted the findings and has paid any restitution or liquidated damages;

(E) Statement as to the disposition of funds available;

(F) Recommendations as to disposition or further handling of the case (when appropriate, include recommendations as to the reduction, waiver, or assessment of liquidated damages, whether the contractor should be debarred, and whether the file should be referred for possible criminal prosecution); and

(G) When applicable the following exhibits—

(*1*) Investigator's report;

(*2*) Copy of the contractor's written rebuttal or a summary of the contractor's oral rebuttal of the contracting officer's findings;

(*3*) Copies of correspondence between the contractor and contracting officer, including a statement of specific violations found, corrective action requested, and the contractor's letter of acceptance or rejection;

(*4*) Evidence of the contractor's payment of restitution or liquidated damages. (Copies of receipts, canceled checks, or supplemental payrolls); and

(*5*) Letter from the contractor requesting relief from the liquidated damage provisions of the CWHSSA.

222.406–9 Withholding from or suspension of contract payments.

(a) *Withholding from contract payments.* The contracting officer shall contact the labor advisor for assistance when payments due a contractor are not available to satisfy that contractor's liability for Davis-Bacon or CWHSSA wage underpayments or liquidated damages.

(c) *Disposition of contract payments withheld or suspended.*

(3) *Limitation on forwarding or returning funds.* When disposition of withheld funds remains the final action necessary to close out a contract, the Department of Labor has given blanket approval to forward withheld funds to the Comptroller General pending completion of an investigation or other administrative proceedings.

(4) *Liquidated damages.*

(A) The agency head may adjust liquidated damages of $500 or less when the amount assessed is incorrect or waive the assessment when the violations—

(*1*) Were nonwillful or inadvertent; and

(*2*) Occurred notwithstanding the exercise of due care by the contractor, its subcontractor, or their agents.

(B) The agency head may recommend to the Administrator, Wage and Hour Division, that the liquidated damages over $500 be adjusted because the amount assessed is incorrect. The agency head may also recommend the assessment be waived when the violations—

(*1*) Were nonwillful or inadvertent; and

(*2*) Occurred notwithstanding the exercise of due care by the contractor, the subcontractor, or their agents.

222.406–10 Disposition of disputes concerning construction contract labor standards enforcement.

(d) Forward the contracting officer's findings and the contractor's statement through the labor advisor.

222.406–13 Semiannual enforcement reports.

Forward these reports through the head of the contracting activity to the labor advisor within 15 days following the end of the reporting period. These reports shall not include information from investigations conducted by the Department of Labor. These reports shall contain the following information, as applicable, for construction

work subject to the Davis-Bacon Act and the CWHSSA—

(1) Period covered;

(2) Number of prime contracts awarded;

(3) Total dollar amount of prime contracts awarded;

(4) Number of contractors/subcontractors against whom complaints were received;

(5) Number of investigations conducted;

(6) Number of contractors/subcontractors found in violation;

(7) Amount of wage restitution found due under—

(i) Davis-Bacon Act

(ii) CWHSSA;

(8) Number of employees due wage restitution under—

(i) Davis-Bacon Act

(ii) CWHSSA;

(9) Amount of liquidated damages assessed under the CWHSSA—

(i) Total amount

(ii) Number of contracts involved;

(10) Number of employees and amount paid/withheld under—

(i) Davis-Bacon Act

(ii) CWHSSA

(iii) Copeland Act; and

(11) Preconstruction activities—

(i) Number of compliance checks performed

(ii) Preconstruction letters sent.

222.407 Contract clauses.

In contracts with a State or political subdivision, use the contract clauses prescribed in FAR 22.407, but preface these clauses with the following—

The Contractor agrees to comply with the requirements of the Contract Work Hours and Safety Standards Act and to insert the following clauses in all subcontracts under this contract with private persons or firms.

Subpart 222.6—Walsh-Healey Public Contracts Act

222.604 Exemptions.

222.604–2 Regulatory exemptions.

(c) Submit all applications for such exemptions through contracting channels to the labor advisor.

222.608 Procedures.

222.608–4 Award pending final determination.

(b)(1) The head of the contracting activity is the approval authority for the contracting officer's certification.

Subpart 222.8—Equal Employment Opportunity

222.804 Affirmative action programs.

222.804–2 Construction.

(b) Contracting officers forward requests for instructions directly to the servicing Office of Federal Contract Compliance Programs (OFCCP) regional office (see FAR 22.609).

222.805 Procedures.

(a)(2) See FAR 22.609 for a list of OFCCP regional offices.

222.806 Inquiries.

(b) Refer inquiries through the labor advisor.

222.807 Exemptions.

(c) Submit the request for exemption with a justification through contracting channels to the labor advisor who will forward them to the agency head. If the request is submitted under FAR 22.807(a)(1), the agency head shall act on the request. If the exemption is granted, the agency head shall notify the Director, OFCCP of such action within 30 days. If the request is submitted under FAR 22.807(a)(2) or (b)(5), the agency head will forward it to the Director, OFCCP for action.

Subpart 222.10—Service Contract Act of 1965, as Amended

222.1003 Applicability.

222.1003–1 General.

For contracts having a substantial amount of construction, alteration, renovation, painting, or repair work, see 222.402–70.

222.1003–7 Questions concerning applicability of the Act.

Contracting officers may contact the labor advisor by telephone for informal

advice. Submit requests for formal determinations as to the Act's applicability to the labor advisor in writing through appropriate channels.

222.1008 Procedures for preparing and submitting Notice (SF 98/98a).

222.1008–2 Preparation of SF 98a.

(b)(1) The contracting officer shall secure the assistance of cognizant customer/technical personnel to ensure maximum use of the Service Contract Act Directory of Occupations (Directory) and incorporation of all service employee classes (Directory and nondirectory) expected to be utilized.

(2)(A) When the statement of work job title, for which there is a Directory equivalent, differs from the Directory job title, make a written cross-reference either directly on the SF 98a file copy or on an attached sheet to the SF 98a file copy.

(B) Include and note as such any classifications and minimum hourly wage rates conformed under any predecessor contract. Where a previously conformed classification is not included in the Directory, attach the job description to the SF 98a.

222.1008–7 Required time of submission of notice.

(d) Submit requests for immediate wage determination responses for emergency acquisitions through the labor advisor. If the request is justified, the labor advisor will contact Department of Labor headquarters officials.

222.1014 Delay of acquisition dates over 60 days.

Send update requests in writing directly to the Wage and Hour Division and provide a copy to the labor advisor. The update request shall—

(1) State that one or more dates on the original notice have been delayed more than 60 days;

(2) List the new dates; and

(3) Include a copy of the original notice and SF 98a as enclosures.

Subpart 222.13—Special Disabled and Vietnam Era Veterans

222.1303 Waivers.

(c) The contracting officer shall submit a waiver request through contracting channels to the labor advisor. If the request is justified, the labor advisor will endorse the request and forward it for action to—

(i) The agency head for waivers under FAR 22.1303(a); or

(ii) The Secretary of Defense, without the power of redelegation, for waivers under FAR 22.1303(b).

222.1306 Complaint procedures.

The contracting officer shall—

(1) Forward each complaint received as indicated in FAR 22.1306; and

(2) Notify the complainant of the referral. The contractor in question shall not be advised in any manner or for any reason of the complainant's name, the nature of the complaint, or the fact that the complaint was received.

222.1308 Contract clauses.

(a)(1) Use of the clause at FAR 52.222–35, Affirmative Action for Special Disabled and Vietnam Era Veterans, with its paragraph (c), Listing Openings, also satisfies the requirement of 10 U.S.C. 2410d.

[58 FR 28466, May 13, 1993]

Subpart 222.14—Employment of the Handicapped

222.1403 Waivers.

(c) The contracting officer shall submit a waiver request through contracting channels to the labor advisor. If the request is justified, the labor advisor will endorse the request and forward it for action to—

(i) The agency head for waivers under FAR 22.1403(a). For the defense agencies, waivers must be approved by the Under Secretary of Defense for Acquisition.

(ii) The Secretary of Defense, without the power of redelegation, for waivers under FAR 22.1403(b).

222.1406 Complaint procedures.

The contracting officer shall—

(1) Forward each complaint received as indicated in FAR 22.1406 (see FAR 22.609 for a listing of Department of Labor regional/area offices); and

(2) Notify the complainant of such referral. The contractor in question shall not be advised in any manner or for any reason of the complainant's name, the nature of the complaint, or the fact that the complaint was received.

Subpart 222.70—Restrictions on the Employment of Personnel for Work on Construction/Service Contracts in Alaska and Hawaii

222.7000 Scope of subpart.

(a) This subpart implements section 8078 of the 1986 Defense Appropriations Act, Public Law 99–190, and similar sections in subsequent Defense Appropriations Acts.

(b) This subpart applies only—

(1) To construction and service contracts to be performed in whole or in part within the states of Alaska or Hawaii; and

(2) When the unemployment rate in the state is in excess of the national average rate of unemployment as determined by the Secretary of Labor.

[56 FR 36358, July 31, 1991, as amended at 57 FR 14993, Apr. 23, 1992]

222.7001 General.

A contractor awarded a contract subject to this subpart must employ for the purpose of performing that portion of the contract work within the state, individuals who are residents of that state, and who, in the case of any craft or trade, possess or would be able to acquire promptly the necessary skills to perform the contract.

222.7002 Waivers.

Waivers may be granted, in the interest of national security, at a level no lower than the Assistant Secretary of any department.

222.7003 Contract clause.

Use the clause at 252.222–7000, Restrictions on Employment of Personnel, in all solicitations and contracts subject to this subpart.

Subpart 222.71—Right of First Refusal of Employment

SOURCE: 57 FR 52593, Nov. 4, 1992, unless otherwise noted.

222.7100 Scope of subpart.

This subpart prescribes policies and procedures for use in acquisitions arising from closure of military installations.

222.7101 Policy.

(a) DoD policy is to minimize the adverse impact on civil service employees affected by the closure of military installations. One means of implementing this policy is to give employees adversely affected by closure of a military installation the right of first refusal for jobs created by award of contracts arising from the closure effort that the employee is qualified to fill.

(b) Closure efforts include the acquisitions for preparing the installation for closure (such as environmental restoration and utilities modification) and maintaining the property after closure (such as security and fire prevention services).

222.7102 Contract clause

Use the clause at 252.222–7001, Right of First Refusal of Employment—Closure of Military Installations, in all solicitations and contracts arising from the closure of the military installation where the contract will be performed.

PART 223—ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

Sec.

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Subpart 223.72—Safeguarding Sensitive Conventional Arms, Ammunition, and Explosives

223.7200 Definition.
223.7201 Policy.
223.7202 Preaward responsibilities.
223.7203 Contract clause.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36365, July 31, 1991, unless otherwise noted.

Subpart 223.1—Pollution Control and Clean Air and Water

223.104 Exemptions.

(c) The authority to act for the agency head under this subpart is limited to a level no lower than an official who is appointed by and with the advice of the Senate. For the defense agencies, this is the Under Secretary of Defense (Acquisition and Technology).

[60 FR 61596, Nov. 30, 1995]

Subpart 223.3—Hazardous Material Identification and Material Safety Data

223.300 Scope of subpart.

DoD procedures for use in acquisitions involving ammunition and explosives are in 223.370.

223.302 General.

(b) Successful offerors are also required to submit hazard warning labels under the clause at 252.223–7001, Hazard Warning Labels.

(e) The contracting officer shall also provide hazard warning labels received from apparent successful offerors to the cognizant safety officer or other designated official in order to facilitate—

(i) Inclusion of relevant data in the department/agency's material safety data sheet information system or label information system; and

(ii) Other control, safety, or information purposes.

[56 FR 67215, Dec. 30, 1991]

223.303 Contract clause.

Use the clause at 252.223–7001, Hazard Warning Labels, in solicitations and contracts which require submission of hazardous material data sheets (see FAR 23.302(c)).

[56 FR 67215, Dec. 30, 1991]

223.370 Safety precautions for ammunition and explosives.

223.370–1 Scope.

(a) This section applies to all acquisitions involving the use of ammunition and explosives, including acquisitions for—

(1) Development;
(2) Testing;
(3) Research;
(4) Manufacturing;
(5) Handling or loading;
(6) Assembling;
(7) Packaging;
(8) Storage;
(9) Transportation;
(10) Renovation;
(11) Demilitarization;
(12) Modification;
(13) Repair;
(14) Disposal;

(15) Inspection; or

(16) Any other use, including acquisitions requiring the use or the incorporation of materials listed in paragraph (b) of this subsection for initiation, propulsion, or detonation as an integral or component part of an explosive, an ammunition, or explosive end item or weapon system.

(b) This section does not apply to acquisitions solely for—

(1) Inert components containing no explosives, propellants, or pyrotechnics;

(2) Flammable liquids;

(3) Acids;

(4) Oxidizers;

(5) Powdered metals; or

(6) Other materials having fire or explosive characteristics.

223.370–2 Definition.

Ammunition and explosives, as used in this section, is defined in the clause at 252.223–7002, Safety Precautions for Ammunition and Explosives.

223.370–3 Policy.

(a) DoD policy is to ensure that its contractors take reasonable precautions in handling ammunition and explosives so as to minimize the potential for mishaps that could—

(1) Interrupt DoD operations;

(2) Delay project or product completion dates;

(3) Adversely impact DoD mission readiness, production base, or production capabilities;

(4) Damage or destroy DoD property; or

(5) Cause injury to DoD personnel.

(b) This policy is implemented by DoD Manual 4145.26–M, DoD Contractors' Safety Manual for Ammunition and Explosives, which is incorporated into contracts under which ammunition and explosives are handled. The manual contains mandatory safety requirements for contractors. When work is to be performed on a Government-owned installation, the contracting officer may use the ammunition and explosives regulation of the DoD component or installation as a substitute for, or supplement to, DoD Manual 4145.26–M, as long as the contract cites these regulations.

223.370–4 Procedures.

(a) *Preaward phase*—(1) *Waiver of the mandatory requirements.* (i) Before either omitting the clause at 252.223–7002, Safety Precautions for Ammunition and Explosives, from solicitations and contracts or waiving the mandatory requirements of the manual, obtain approval of—

(A) The safety personnel responsible for ammunition and explosives safety; and

(B) The head of the contracting activity.

(ii) If the contracting officer decides to waive the mandatory requirements before award, the contracting officer shall set forth in the solicitation, or in an amendment of the solicitation, the specific requirements to be waived.

(iii) If the head of the contracting activity declines to approve a request for waiver, but the prospective contractor agrees to take corrective action to bring the operation into compliance, make the corrective action a part of the resulting contract.

(2) *Transportation considerations*—If shipment of ammunition and explosives is involved in the contract, address in the schedule of the contract the applicable Department of Transportation or Military Traffic Management Command requirements and any other requirements for transportation, packaging, marking, and labeling.

(3) *Disposition of excess*—Include instructions within the contract concerning final disposition of excess Government furnished material containing ammunition and explosives, including defective or rejected supplies.

(4) *Preaward survey*—Before awarding any contract, including purchase orders, involving ammunition and explosives, obtain a preaward ammunition and explosives safety survey. If the prospective contractor proposes subcontracting any ammunitions or explosive work, include a review of the subcontractor's facility in the preaward survey.

(b) *Postaward phase*—(1) *Contract administration office responsibility*. (i) The contract administration office is responsible for verifying that the safety requirements of the clause at 252.223–

7002, Safety Precautions for Ammunition and Explosives, are being implemented in a manner that will reduce, to the maximum extent practicable, or eliminate the probability of a mishap occurring.

(ii) The clause at 252.223–7002, Safety Precautions for Ammunition and Explosives, requires the contractor to submit to the administrative contracting officer (ACO) any postaward requests for a waiver of the contract safety standards, a site plan modification, or a construction review. The ACO shall review any request and make recommendations to the contracting officer. The contracting officer shall make a decision after considering recommendations of the ACO and safety personnel responsible for ammunition and explosive safety.

(A) If the request arrives at the contracting office without evidence that the ACO has seen it, immediately send it to the ACO for review and recommendations.

(B) When the contracting officer has made a determination approving or disapproving the contractor's request, send the determination to the ACO for transmission to the contractor.

(2) *Subcontracts*—(i) The clause at 252.223–7002, Safety Precautions for Ammunition and Explosives, requires the contractor to notify the contracting officer when placing a subcontract for ammunition and explosives. The contracting officer should coordinate with the safety personnel and request supporting contract administration in accordance with FAR 42.204. If the contracting officer believes the nature of the subcontract work poses a potential danger to Government property, Government personnel, production capability, or contract completion, request supporting contract administration.

(ii) If the preaward safety survey identified areas in which a subcontractor was not complying with the manual, and the subcontractor was supposed to correct the deficiencies before start-up, the contracting officer shall require a preoperations survey to verify that the corrections were made.

(iii) When postaward safety reviews by the Government uncover any safety deficiencies in the subcontractor's operation, the review team shall inform the ACO cognizant of the subcontractor, who shall immediately notify the ACO cognizant of the prime contractor. The ACO cognizant of the prime shall inform the prime contractor of deficiencies requiring correction. The notifications shall be made by the most expeditious means appropriate to the circumstance. If a critical safety deficiency poses an imminent danger, the ACO cognizant of the prime shall make the notifications by the most expeditious means available.

[56 FR 36365, July 31, 1991, as amended at 59 FR 27671, May 27, 1994]

223.370–5 Contract clauses.

Use the clauses at 252.223–7002, Safety Precautions for Ammunition and Explosives, and 252.223–7003, Change in Place of Performance—Ammunition and Explosives, in all solicitations and contracts for acquisition to which this section applies.

Subpart 223.4—Use of Recovered Materials

223.404 Procedures.

(b)(3) A contract for an EPA designated item which does not meet the EPA or agency minimum recovered material standards shall not be awarded before approval of the written determination required by FAR 23.404(b)(3). The approving official shall be—

(A) A general or flag officer, or a member of the Senior Executive Service, of the requiring activity; or

(B) For requiring activities without a general or flag officer or member of the Senior Executive Service, the commander of the activity.

(4) Annual contractor certifications shall be submitted for consolidation and reporting in accordance with department/agency procedures.

[60 FR 61596, Nov. 30, 1995]

Subpart 223.5—Drug-Free Workplace

SOURCE: 57 FR 32737, July 23, 1992, unless otherwise noted.

223.570 Drug-free work force.

223.570–1 Definitions.

Employee in a sensitive position and *illegal drugs,* as used in this section, are defined in the clause at 252.223–7004, Drug-Free Work Force.

223.570–2 Policy.

DoD policy is to ensure that its contractors maintain a program for achieving a drug-free work force.

223.570–3 General.

(a) The use of illegal drugs is inconsistent with the law-abiding behavior expected of all citizens. Employees who use illegal drugs tend to be less productive, less reliable, and prone to greater absenteeism. The use of illegal drugs by contractor employees results in the potential for increased cost, delay, and risk in the performance of a Government contract.

(b) If a contractor's employees use illegal drugs at any time, it can—

(1) Impair their ability to perform tasks that are critical to proper contract performance;

(2) Increase the potential for accidents and for failures that can pose a serious threat to the national security, health, and safety;

(3) Cause less than the complete reliability, stability, and good judgment required of an individual who has access to sensitive information;

(4) Create the possibility of coercion, influence, and irresponsible action under pressure that may post a serious risk to national security, health, and safety.

223.570–4 Contract clause.

(a) Use the clause at 252.223–7004, Drug-Free Work Force, in all solicitations and contracts—

(1) That involve access to classified information; or

(2) When the contracting officer determines that the clause is necessary for reasons of national security or for the purpose of protecting the health or safety of those using or affected by the product of, or performance of, the contract.

(b) Do not use the clause in solicitations and contracts for—

(1) Commercial items; or

(2) Performance or partial performance outside the United States, its territories, and possessions, unless the contracting officer determines such inclusion to be in the best interest of the Government.

[57 FR 32737, July 23, 1992, as amended at 60 FR 61597, Nov. 30, 1995]

Subpart 223.8—Ozone-Depleting Substances

223.803 Policy.

Section 211.271, Elimination of use of class I ozone-depleting substances, places restrictions on award or modification of DoD contracts requiring the use of class I ozone-depleting substances. These restrictions are in addition to any imposed by the Clean Air Act and apply after June 1, 1993, to all DoD contracts, regardless of place of performance.

[61 FR 50452, Sept. 26, 1996]

Subpart 223.70—Hazardous Waste Disposal

223.7000 Scope of subpart.

This subpart implements section 331 of the Defense Authorization Act for Fiscal Year 1992 (Pub. L. 102–190) and similar sections in subsequent Defense authorization acts.

[58 FR 28466, May 13, 1993]

223.7001 Definitions.

As used in this subpart—

(a) *Remedial action* has the meaning given that term by section 101(24) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(24)).

(b) *Corrective action* has the meaning given that term under section 3004(u) of the Solid Waste Disposal Act (42 U.S.C. 6924(u)).

[57 FR 14993, Apr. 23, 1992]

223.7002 Contract clause.

(a) Use the clause at 252.223–7005, Hazardous Waste Liability, in all solicitations and contracts for the offsite treatment or disposal of hazardous waste from a facility under the jurisdiction of the Secretary of Defense—

(1) Entered into during or after fiscal year 1992;

(2) With an owner or operator of a hazardous waste treatment or disposal facility.

(b) The clause at 252.223–7005 does not apply to contracts—

(1) For performance of remedial action or corrective action under—

(i) The Defense Environmental Restoration Program;

(ii) Other programs or activities of the Department of Defense; or

(iii) Authorized State hazardous waste programs;

(2) Under which the generation of the hazardous waste to be disposed of is incidental to the performance of the contract; or

(3) For disposition of ammunition or solid rocket motors.

Use of the clause at 252.223–7005 may be waived if the Secretary of Defense or the Secretary of the military department concerned determines that—

(1) There is only one responsible offeror or there is no responsible offeror willing to provide the reimbursement required by paragraph (b) of the clause; or

(2) Failure to award the contract would place the facility concerned in violation of any requirement of the Solid Waste Disposal Act (42 U.S.C. 6901 *et seq.*).

[57 FR 14993, Apr. 23, 1992, as amended at 57 FR 53599, Nov. 12, 1992; 58 FR 28466, May 13, 1993]

Subpart 223.71—Storage and Disposal of Toxic and Hazardous Materials

SOURCE: 58 FR 28466, May 13, 1993, unless otherwise noted.

223.7100 Policy.

10 U.S.C. 2692 prohibits storage or disposal of non-DoD-owned toxic or hazardous materials on DoD installations, except as provided in 223.7102. DoD Directive 6050.8, Storage and Disposal of Non-DoD-Owned Hazardous or Toxic Materials on DoD Installations, implements 10 U.S.C. 2692.

223.7101 Procedures.

(a) If the contracting officer is uncertain as to whether particular activities are prohibited or fall under one of the exceptions in 223.7102, the contracting officer should seek advice from the cognizant office of counsel.

(b) When storage, treatment, or disposal of non-DoD-owned toxic or hazardous materials is authorized in accordance with this subpart, the contract or authorization should specify the types, conditions, and quantities of toxic or hazardous materials that may be temporarily stored, treated, or disposed of in connection with the contract or as a result of the authorized commercial use of a DoD industrial-type facility.

[60 FR 61597, Nov. 30, 1995]

223.7102 Exceptions.

(a) The prohibition of 10 U.S.C. 2692 does not apply to—

(1) The storage of strategic and critical materials in the National Defense Stockpile under an agreement for such storage with the Administrator of General Services Administration;

(2) The temporary storage or disposal of explosives in order to protect the public or to assist agencies responsible for Federal law enforcement in storing or disposing of explosives when no alternative solution is available, if such storage or disposal is made in accordance with an agreement between the Secretary of Defense and the head of the Federal agency concerned;

(3) The temporary storage or disposal of explosives in order to provide emergency lifesaving assistance to civil authorities;

(4) The disposal of excess explosives produced under a DoD contract, if the head of the military department concerned determines, in each case, that an alternative feasible means of disposal is not available to the contractor, taking into consideration public safety, available resources of the contractor, and national defense production requirements;

(5) The temporary storage of nuclear materials or nonnuclear classified materials in accordance with an agreement with the Secretary of Energy;

(6) The storage of materials that constitute military resources intended to be used during peacetime civil emergencies in accordance with applicable DoD regulations;

(7) The temporary storage of materials of other Federal agencies in order to provide assistance and refuge for commercial carriers of such material during a transportation emergency;

(8) The storage of any material that is not owned by DoD, if the Secretary of the military department concerned determines that the material is required or generated by a private person in connection with the authorized and compatible use by that person of an industrial-type DoD facility; or

(9) The treatment and disposal of any non-DoD-owned material if the Secretary of the military department concerned—

(i) Determines that the material is required or generated by a private person in connection with the authorized and compatible commercial use by that person of an industrial-type facility of that military department; and

(ii) Enters into a contract with that person that—

(A) Is consistent with the best interest of national defense and environmental security; and

(B) Provides for that person's continued financial and environmental responsibility and liability with regard to the material.

(b) The Secretary of Defense, where DoD Directive 6050.8 applies, may grant exceptions to the prohibition of 10 U.S.C. 2692 when essential to protect the health and safety of the public from imminent danger.

[58 FR 28466, May 13, 1993, as amended at 60 FR 13076, Mar. 10, 1995; 60 FR 61597, Nov. 30, 1995]

223.7103 Contract clause.

(a) Use the clause at 252.223–7006, Prohibition on Storage and Disposal of Toxic and Hazardous Materials, in all solicitations and contracts which require, may require, or permit contractor performance on a DoD installation.

(b) Use the clause at 252.223–7006 with its Alternate I, when the Secretary of the military department issues a determination under the exception at 223.7102(a)(9).

[60 FR 13076, Mar. 10, 1995]

Subpart 223.72—Safeguarding Sensitive Conventional Arms, Ammunition, and Explosives

SOURCE: 61 FR 7743, Feb. 29, 1996, unless otherwise noted.

223.7200 Definition.

''Arms, ammunition, and explosives (AA&E),'' as used in this subpart, means those items within the scope (chapter 1, paragraph B) of DoD 5100.76–M, Physical Security of Sensitive Conventional Arms, Ammunition, and Explosives.

223.7201 Policy.

(a) The requirements of DoD 5100.76–M, Physical Security of Sensitive Conventional Arms, Ammunition, and Explosives, shall be applied to contracts when—

(1) AA&E will be provided to the contractor or subcontractor as Government-furnished property; or

(2) The principal development, production, manufacture, or purchase of AA&E is for DoD use.

(b) The requirements of DoD 5100.76–M need not be applied to contracts when—

(1) The AA&E to be acquired under the contract is a commercial item within the meaning of FAR 2.101; or

(2) The contract will be performed in a Government-owned contractor-operated ammunition production facility. However, if subcontracts issued under such a contract will meet the criteria of paragraph (a) of this section, the requirements of DoD 5100.76–M shall apply.

223.7202 Preaward responsibilities.

When an acquisition involves AA&E, technical or requirements personnel shall specify in the purchase request—

(a) That AA&E is involved; and

(b) Which physical security requirements of DoD 5100.76–M apply.

223.7203 Contract clause.

Use the clause at 252.223–7007, Safeguarding Sensitive Conventional Arms, Ammunition, and Explosives, in all solicitations and contracts to which DoD 5100.76–M applies, in accordance with the policy at 223.7201. Complete paragraph (b) of the clause based on information provided by cognizant technical or requirements personnel.

[61 FR 7743, Feb. 29, 1996; 61 FR 18195, Apr. 24, 1996]

PART 224—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

Sec.

Subpart 224.1—Protection of Individual Privacy

224.102 General.
224.103 Procedures.

Subpart 224.2—Freedom of Information Act

224.202 Policy.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36367, July 31, 1991, unless otherwise noted.

Subpart 224.1—Protection of Individual Privacy

224.102 General.

The Act does not apply to—

(1) Systems of records the contractor maintains on its employees; or

(2) The records generated by a State or private educational organization under a contract with the Government to provide training, when the records (admission forms, grade reports) are similar to and commingled with those maintained on other students.

224.103 Procedures.

(b)(2) DoD rules and regulations are contained in DoDD 5400.11, Department of Defense Privacy Program, and DoD 5400.11–R, Department of Defense Privacy Program.

Subpart 224.2—Freedom of Information Act

224.202 Policy.

(a) DoD implementation is in DoDD 5400.7, DoD Freedom of Information Act Program, and DoD 5400.7–R, DoD Freedom of Information Act Program.

PART 225—FOREIGN ACQUISITION

Sec.

225.000 Scope of part.
225.000–70 Definitions.
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Subpart 225.1—Buy American Act—Supplies

225.102 Policy.
225.103 Agreements with certain foreign governments.
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225.109 Solicitation provisions and contract clauses.
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Subpart 225.2—Buy American Act—Construction Materials

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Subpart 225.3—Balance of Payments Program

225.302 Policy.
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225.871 North Atlantic Treaty Organization (NATO) cooperative projects.
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225.871–3 General.
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225.872 Contracting with qualifying country sources.
225.872–1 General.
225.872–2 Applicability.
225.872–3 Solicitation procedures.
225.872–4 Evaluation of offers.
225.872–5 Contract administration.
225.872–6 Audit.
225.872–7 Industrial security for qualifying countries.
225.872–8 Subcontracting with qualifying country sources.
225.873 Waiver of United Kingdom commercial exploitation levies.
225.873–1 Policy.
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225.9—Additional Foreign Acquisition Clauses

225.970 Clause deviations in overseas contracts.

Subpart 225.70—Authorization Acts, Appropriations Acts, and Other Statutory Restrictions on Foreign Purchases

225.7000 Scope of subpart.
225.7001 Definitions.
225.7002 Restrictions on food, clothing, fabrics, specialty metals and hand or measuring tools.
225.7002–1 Restrictions.
225.7002–2 Exceptions.
225.7002–3 Contract clauses.
225.7003 [Reserved]
225.7004 Restriction on machine tools and powered and non-powered valves.
225.7004–1 Restriction.
225.7004–2 Applicability.
225.7004–3 Exception.
225.7004–4 Waiver.
225.7004–5 U.S. or Canadian origin.
225.7004–6 Contract clauses.
225.7005 [Reserved]
225.7006 Restrictions on construction or repair of vessels in foreign shipyards.
225.7007 Restriction on acquisition of foreign buses.
225.7007–1 Restriction.
225.7007–2 Applicability.
225.7007–3 Exceptions.
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225.7008 Restriction on research and development.
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225.7011 Restriction on Ballistic Missile Defense research, development, test, and evaluation.
225.7011–1 Definitions.
225.7011–2 Restriction.
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225.7012 Restrictions on anchor and mooring chain.
225.7012–1 Restrictions.
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225.7013 Restriction on polyacrylonitrile (PAN) based carbon fiber.
225.7013–1 Restriction.
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225.7015 Restriction on night vision image intensifier tubes and devices.
225.7015–1 Restriction.
225.7015–2 Exception.
225.7015–3 Contract clause.
225.7016 Restriction on air circuit breakers for naval vessels.
225.7016–1 Restriction.
225.7016–2 Exceptions.
225.7016–3 Waiver.

225.7016–4 Contract clause.
225.7017 Restriction on carbon, alloy, and armor steel plate.
225.7017–1 Restriction.
225.7017–2 Exceptions.
225.7017–3 Waiver.
225.7017–4 Contract clause.
225.7018 Restriction on four ton dolly jacks.
225.7018–1 Restriction.
225.7018–2 Waiver.
225.7018–3 Contract clause.
225.7019 Restrictions on ball and roller bearings.
225.7019–1 Restrictions.
225.7019–2 Exceptions.
225.7019–3 Waiver.
225.7019–4 Contract clause.
225.7020 Restriction on coal and petroleum pitch carbon fiber.
225.7020–1 Restriction.
225.7020–2 Contract clause.
225.7021 Restriction on aircraft fuel cells.
225.7021–1 Restriction.
225.7021–2 Waiver.
225.7021–3 Contract clause.
225.7022 Restrictions on totally enclosed lifeboat survival systems.
225.7022–1 Restrictions.
225.7022–2 Exceptions.
225.7022–3 Waiver.
225.7022–4 Contract clause.
225.7023 Restriction on supercomputers.
225.7023–1 Restriction.
225.7023–2 Waiver.
225.7023–3 Contract clause.

Subpart 225.71—Other Restrictions on Foreign Purchases

225.7100 Scope of subpart.
225.7101 Definitions.
225.7102 Policy.
225.7103 Exceptions.
225.7104 Waiver.
225.7105 Contract clause.

Subpart 225.72—Reporting Contract Performance Outside the United States

225.7200 Scope of subpart.
225.7201 Exception.
225.7202 Distribution of reports.
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Subpart 225.73—Acquisitions for Foreign Military Sales

225.7300 Scope of subpart.
225.7301 General.
225.7302 Procedures.
225.7303 Pricing acquisitions for foreign military sales.
225.7303–1 Contractor sales to other foreign customers.
225.7303–2 Cost of doing business with a foreign government or an international organization.
225.7303–3 Government-to-government agreements.
225.7303–4 Sales commissions and contingent fees.
225.7303–5 Acquisitions wholly paid for from nonrepayable funds.
225.7304 Source selection.
225.7305 Limitation of liability.
225.7306 Exercise of options for foreign military sales.
225.7307 Implementation of offset arrangements negotiated pursuant to foreign military sales agreements.
225.7307–1 General.
225.7307–2 Procedures.
225.7308 Contract clauses.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36367, July 31, 1991, unless otherwise noted.

225.000 Scope of part.

This part also provides policy and procedures for—

(1) Purchasing foreign defense supplies, services, and construction materials;

(2) Foreign military sale acquisitions;

(3) Coordinating acquisitions involving work to be performed in foreign countries;

(4) Cooperative programs.

225.000–70 Definitions.

As used in this part—

(a) *Defense equipment* means any equipment, item of supply, component, or end product purchased by the DoD.

(b) *Domestic concern* means a concern incorporated in the United States or an unincorporated concern having its principal place of business in the United States.

(c) *Domestic end product* has the meaning given in the clause at 252.225–7001, Buy American Act and Balance of Payments Program, instead of the meaning in FAR 25.101.

(d) *Foreign concern* means any concern other than a domestic concern.

(e) *Nondesignated country end product* means any end product which is not a U.S. made end product or a designated country end product.

(f) *Nonqualifying country* means a country other than the United States or a qualifying country.

(g) *Nonqualifying country end product* means an end product which is neither

a domestic nor qualifying country end product.

(h) *Nonqualifying country offer* means an offer of a nonqualifying country end product, including the price of transportation to destination.

(i) *Qualifying country* is a term used to describe certain countries with memoranda of understanding or international agreements with the United States. These countries are listed in 225.872–1.

(j) *Qualifying country component* and *qualifying country end product* are defined in the clause at 252.225–7001, Buy American Act and Balance of Payments Program.

(k) *Qualifying country offer* means an offer of a qualifying country end product, including the price of transportation to destination.

(l) *Source,* when restricted by such words as foreign, domestic, qualifying country, etc., refers to the actual manufacturer or producer of the end product or component.

(m) *U.S. made end product* is defined in the clause at 252.225–7007, Trade Agreements.

[56 FR 36367, July 31, 1991, as amended at 59 FR 1289, Jan. 10, 1994]

225.000–71 General guidelines.

To apply the policies and procedures of this part, analyze and evaluate offers of foreign end products generally as follows—

(a) *Statutory or policy restrictions.* (1) Determine whether the product is restricted by—

(i) DoD Authorization or Appropriations Acts (see subpart 225.70); or

(ii) DoD policy (see subpart 225.71 and FAR 6.302–3).

(2) Where an exception to or waiver of a restriction would result in award of a foreign end product, apply the policies and procedures of the Buy American Act or the Balance of Payments Program, and, if applicable, the trade agreements.

(b) *Memoranda of understanding or other international agreements.* (1) Determine whether the offered product is the product of one of the countries (qualifying country), listed in 225.872–1.

(2) If the product is the product of a qualifying country, evaluate the offer under 225.105 and 225.872–4.

(c) *Trade agreements.* (1) Determine whether the product is covered by the Trade Agreements Act or the North American Free Trade Agreement Implementation Act (see subpart 225.4).

(2) If the product is an eligible product under subpart 225.4, evaluate the offer under FAR 25.402 and 225.105.

(3) If the product is not an eligible product, a qualifying country end product, or a U.S. made end product, purchase of the foreign end product may be prohibited (see FAR 25.402(c) and 225.402(c)).

(d) *Contractors controlled by terrorist nations.* (1) Determine whether the contractor is controlled by a terrorist nation.

(2) If the contractor is controlled by a terrorist nation, comply with 209.104–1(g).

(e) *Buy American Act and Balance of Payments Program.* See the evaluation procedures in 225.105.

[56 FR 36367, July 31, 1991, as amended at 59 FR 1289, Jan. 10, 1994]

Subpart 225.1—Buy American Act—Supplies

225.102 Policy.

(a)(2) The cost of a domestic end product is unreasonable if it is not the low evaluated offer when evaluated under 225.105.

(3)(A) Specific public interest exceptions for DoD are in 225.872.

(B) Normally, use the evaluation procedures in 225.105, but consider recommending a public interest exception where the purposes of the Buy American Act are not served, or in order to meet a need set forth in 10 U.S.C. 2533. For example, a public interest exception may be appropriate—

(*1*) If accepting the low domestic offer will involve substantial foreign expenditures, or accepting the low foreign offer will involve substantial domestic expenditures;

(*2*) To ensure access to advanced state-of-the-art commercial technology; or

(*3*) To maintain the same source of supply for spare and replacement parts (also see paragraph (b)(iii)(B) of this section)—

(*i*) For an end item that qualifies as an American good; or

(*ii*) In order not to impair integration of the military and commercial industrial base.

(C) A determination whether to grant a public interest exception shall be made after consideration of the factors in 10 U.S.C. 2533—

(*1*) At a level above the contracting officer for acquisitions valued at less than $100,000;

(*2*) By the head of the contracting activity for acquisitions valued at $100,000 or more but less than $1,000,000; or

(*3*) By the agency head for acquisitions valued at $1,000,000 or more.

(b)(i) A determination that an article, material, or supply is not reasonably available is required where no domestic offer is received or when domestic offers are insufficient to meet the requirement and award is to be made on a nonqualifying country end product.

(ii) Except as provided in FAR 25.102(b)(1), the determination must be approved—

(A) At a level above the contracting officer, if the acquisition is estimated not to exceed $25,000;

(B) By the chief of the contracting office if the acquisition is estimated not to exceed $250,000;

(C) By the head of the contracting activity (HCA) or immediate deputy if the acquisition is estimated not to exceed $2 million; or

(D) By the head of the agency, or designee at a level no lower than an HCA, if the acquisition is estimated to exceed $2 million.

(iii) A determination as to whether an article, material, or supply is reasonably available is not required for—

(A) End products or components listed in 225.108(d)(1) or FAR 25.108(d)(1);

(B) Acquisitions for spare/replacement parts when the acquisition is restricted to the original manufacturer or supplier; or

(C) Acquisition of foreign drugs by the Defense Personnel Support Center when the Chief of the Technical Operations Division, Directorate of Medical Materiel, determines that only the requested foreign drug will fulfill the requirements.

(iv) Under coordinated acquisition (see 208.70), the determination is the responsibility of the requiring department when the requiring department specifies acquisition of a foreign end product.

[56 FR 36367, July 31, 1991, as amended at 56 FR 67215, Dec. 30, 1991; 60 FR 34470, July 3, 1995]

225.103 Agreements with certain foreign governments.

See 225.872.

225.105 Evaluating offers.

Use the following procedures instead of those in FAR 25.105.

(1) Evaluate offers by adding a 50 percent factor to the price (including duty) of each nonqualifying country offer (see Example 1 in Table 25–1, Evaluation).

(i) Nonqualifying country offers include duty in the offered price. When applying the factor, evaluate based on the inclusion of duty, whether or not duty is to be exempted. If award is made on the nonqualifying country offer and duty is to be exempted through inclusion of the clause at FAR 52.225–10, Duty-Free Entry, award at the offered price minus the amount of duty identified in the provision at 252.225–7003, Information for Duty-Free Entry Evaluation. See Example 1, Alternate II, in Table 25–1, Evaluation.

(ii) When a nonqualifying country offer includes more than one line item, apply the 50 percent factor—

(A) On an item-by-item basis; or

(B) On a group of items, if the solicitation specifically provides for award on a group basis.

(2) When application of the factor would not result in the award of a domestic end product, e.g., when no domestic offers are received (see Example 3 of Table 25–1, Evaluation) or when a qualifying country offer is lower than the domestic offer (see Example 2 of Table 25–1, Evaluation), evaluate offers without the 50 percent factor.

(i) If duty is to be exempted through inclusion of the clause at FAR 52.225–10, Duty-Free Entry, evaluate the nonqualifying country offer exclusive of duty by reducing the offered price by the amount of duty identified in the clause at 252.225–7003, Information for Duty-Free Entry Evaluation (see Examples 2 and 3, Alternate II, of Table

25–1, Evaluation). If award is made on the nonqualifying country offer, award at the offered price minus duty.

(ii) If duty is not to be exempted and duty is to be paid by the Government, evaluate the nonqualifying country offer inclusive of duty. (See Examples 2 and 3, Alternate I, of Table 25–1, Evaluation.)

(3) Treat offers of eligible products under acquisitions subject to the Trade Agreements Act or NAFTA as if they were qualifying country offers. (See Example 4 of Table 25–1, Evaluation.)

(4) If these evaluation procedures result in a tie between a nonqualifying country offer and a domestic offer, make award on the domestic offer.

(5)(i) There are two tests that must be met to determine whether a manufactured item is a domestic end product—

(A) The end product must have been manufactured in the United States; and

(B) The cost of its U.S. and qualifying country components must exceed 50 percent of the cost of all of its components. This test is applied to end products only, and not to individual components.

(ii) Because of the component test, the definition of ''domestic end product'' is more restrictive than the definition for—

(A) ''U.S. made end product'' under trade agreements;

(B) ''Domestically produced or manufactured products'' under small business set-asides or small business-small purchase set-asides; and

(C) Products of small businesses under FAR part 19.

(iii) If an offer is for a ''U.S. made end product,'' ''domestically produced end product,'' or the product of a small business, but is not a ''domestic end product'' as defined in the clause at 252.225–7001, Buy American Act and Balance of Payments Program, treat the offer as a nonqualifying country offer. (See Example 4 of Table 25–1, Evaluation.)

TABLE 25–1, EVALUATION

Example 1

Alternate I: Duty Not Exempted for Nonqualifying Country Offers:

Nonqualifying Country Offer (including $100 duty)—$6,000

Domestic Offer—$8,900

Qualifying Country Offer—$9,100

Award on Domestic Offer. The 50% evaluation factor is added to the nonqualifying country offer, inclusive of duty, yielding an evaluated price of $9,000.

Alternate II: Duty Exempted:

Nonqualifying Country Offer (including $1,000 duty)—$600,000

Domestic Offer—$910,000

Qualifying Country Offer—$920,000

Award on Nonqualifying Country Offer. The addition of the evaluation factor yields an evaluated price of $900,000. Since duty is being exempted for nonqualifying country offers, the duty is subtracted from the offered price which is awarded at $599,000.

Example 2

Alternate I: Duty Not Exempted for Nonqualifying Country Offers:

Nonqualifying Country Offer (including $100 duty)—$6,000

Domestic Offer—$8,500

Qualifying Country Offer—$7,800

Award on Nonqualifying Country Offer. In this case, the application of the evaluation factor to the nonqualifying country offer results in a price ($9,000) that is higher than the other two offers, but would not result in award of a domestic offer, since the qualifying country offer is lower. Therefore, all offers are evaluated without the factor. Since duty is not being exempted for nonqualifying country offers, the offer is evaluated and award is made at the price inclusive of duty ($6,000).

Alternate II: Duty Exempted:

Nonqualifying Country Offer (including $1,000 duty)—$880,500

Domestic Offer—$950,000

Qualifying Country Offer—$880,000

Award on Nonqualifying Country Offer. Again, the addition of the evaluation factor would not result in the award of a domestic offer and all offers are evaluated without the factor. Since duty is being exempted for nonqualifying country offers, the duty identified by the offeror is subtracted from the offered price, which is evaluated and awarded at $879,500.

Example 3

Alternate I: Duty Not Exempted for Nonqualifying Country Offers:

Nonqualifying Country Offer (including $1,000 duty)—$10,000

Qualifying Country Offer—$9,500

Award on Qualifying Country Offer. Since no domestic offers are received, the foreign offers are evaluated without the evaluation factor. Since duty is not being exempted and

would be paid by the Government, the nonqualifying country offer is evaluated inclusive of duty.

Alternate II: Duty Exempted:

Nonqualifying Country Offer (including $1,000 duty)—$880,500

Qualifying Country Offer—$880,000

Award on Nonqualifying Country Offer. Since duty is being exempted, duty is subtracted from the nonqualifying country offer, which is evaluated and awarded at $879,500.

Example 4

Alternate I:

Offer of U.S. Made End Product which is not a Domestic Offer—$800,000

Domestic Offer—$820,000

Eligible Product—$830,000

Award on Domestic End Product. U.S. made end products which are not also domestic end products are evaluated the same as nonqualifying country end products. Adding the 50% evaluation factor yields an evaluated price of $1,200,000.

Alternate II:

Offer of U.S. Made End Product which is not a Domestic Offer—$800,000

Eligible Product—$820,000

Domestic Offer—$830,000

Award on U.S. Made End Product. Adding the 50% evaluation factor to the U.S. made end product would not result in the award of a domestic end product since the eligible product, which is evaluated the same as a qualifying country offer, is lower. All offers are evaluated without the factor.

[56 FR 36367, July 31, 1991, as amended at 59 FR 1289, Jan. 10, 1994]

225.107 Acquisition from or through other Government agencies.

Contracting activities must apply the evaluation procedures in 225.105 when using Federal supply schedules.

225.108 Excepted articles, materials, and supplies.

(a)(i)DoD has determined that the articles, materials, and supplies listed in FAR 25.108(d)(1) and in paragraph (d)(1) of this section, when purchased as end items or components, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. Regard these items or components as being of domestic origin when incorporated in—

(A) An end product or construction material manufactured in the United States; or

(B) A qualifying country end product or construction material. (For construction material, see FAR 25.2.)

(ii) Scrap is domestic in origin if generated in, collected in, and prepared for processing in the United States.

(d)(1) Aluminum clad steel wire. Sperm oil.

225.109 Solicitation provisions and contract clauses.

(a) Use the provision at 252.225–7000, Buy American Act—Balance of Payments Program Certificate, instead of the provisions at FAR 52.225–1, Buy American Certificate, and FAR 52.225–6, Balance of Payments Program Certificate. Use the provision in any solicitation which includes the clause at 252.225–7001, Buy American Act and Balance of Payments Program, unless the solicitation includes either the clause at 252.225–7007, Trade Agreements Act, or the clause at 252.225–7036, North American Free Trade Agreements Implementation Act.

(b) For oral solicitations inform prospective vendors that only domestic and qualifying country end products are acceptable, except nonqualifying country end products are acceptable if—

(i) The items are excepted either on a blanket or an individual basis; or

(ii) The price of the nonqualifying country end product is the low offer under the evaluation procedures in 225.105.

(d) Use the clause at 252.225–7001, Buy American Act and Balance of Payments Program, instead of the clauses at FAR 52.225–3, Buy American Act-Supplies, and FAR 52.225–7, Balance of Payments Program, in solicitations and contracts for supplies or services which require the furnishing of supplies.

(i) Do not use the clause if an exception to the Buy American Act or Balance of Payments Program is known to apply.

(ii) The clause need not be used if nonqualifying country end products are ineligible for award, including—

(A) End products restricted to domestic or domestic and qualifying country sources under Appropriations and Authorization Act restrictions (see 225.70);

(B) End products restricted to domestic or domestic and Canadian sources (see 225.71); and

(C) End products restricted under the authority of FAR 6.302–3.

(iii) The clause may be used if the contracting officer anticipates a waiver of the restrictions in paragraphs (d)(ii) (A) or (B) of this section.

[56 FR 36367, July 31, 1991, as amended at 57 FR 42630, Sept. 15, 1992; 59 FR 1289, Jan. 10, 1994]

225.109–70 Additional provisions and clauses.

(a) Use the clause at 252.225–7002, Qualifying Country Sources as Subcontractors, in all solicitations and contracts that include the clause at 252.225–7001, Buy American Act and Balance of Payments Program.

(b) Use the provision at 252.225–7003, Information for Duty-Free Entry Evaluation, in all solicitations that include the clause at 252.225–7001, Buy American Act and Balance of Payments Program.

(c) When only domestic end products are acceptable, the solicitation must make a statement to that effect.

Subpart 225.2—Buy American Act—Construction Materials

225.202 Policy.

(b) A nonavailability determination is not required for construction materials listed in FAR 25.108(d)(1) or in 225.108(d)(1). For other materials, a nonavailability determination must be approved at the levels specified in 225.102(b)(ii). Use the estimated value of the construction materials to determine the approval level.

225.205 Solicitation provision and contract clause.

225.205–70 Additional clause.

Use the clause at 252.225–7004, Nondomestic Construction Materials, in solicitations and contracts if construction materials may be used without regard to the Buy American Act. List the excepted items in the clause.

Subpart 225.3—Balance of Payments Program

225.302 Policy.

(a) DoD implements the Balance of Payments Program using evaluation factors similar to those which implement the Buy American Act. The Balance of Payments Program restrictions—

(i) Apply to acquisitions for foreign military sales;

(ii) Do not apply to services, except services which primarily involve the acquisition of supplies;

(iii) Do not apply to qualifying country end products; and

(iv) Do not apply to articles, materials, or supplies produced or manufactured in Panama when purchased by and for the use of U.S. forces in Panama.

(b)(i) Before solicitation, the determinations required by FAR 25.302(b)(2) and (3), or a determination that the cost of acquiring domestic end products or services is unreasonable (FAR 25.303(b)), may be made by the following individuals or their immediate deputies—

ARMY

Deputy Chief of Staff for Procurement, U.S. Army Material Command
Commander-in-Chief, U.S. Army, Europe and DCSLOG, U.S. Army, Europe
Commander, Eighth U.S. Army and Chief of Staff, Eighth U.S. Army
Commander, Corps of Engineers Command
Commander, U.S. Army, Japan
Commander, U.S. Army Medical Research and Development Command
Commander, U.S. Army Forces Command
Commander, U.S. Army, South

NAVY

Commander-in-Chief, U.S. Naval Forces, Europe
Commander, U.S. Naval Forces, Japan
Commander, U.S. Naval Forces, Philippines
Commander-in-Chief, U.S. Atlantic Fleet
Commander-in-Chief, U.S. Pacific Fleet
Commander, Military Sealift Command
Commandant, U.S. Marine Corps
Commander, Naval Facilities Engineering Command
Commanding General, III Marine Amphibious Force

AIR FORCE

Commander, U.S. Air Forces in Europe
Commander, Pacific Air Force

Commander, Air Mobility Command
Commander, Air Force Materiel Command
Commander, Air Combat Command
Commander, Air Force Space Command

ADVANCED RESEARCH PROJECTS AGENCY

Director, Contracts Management Office

DEFENSE INFORMATION SYSTEMS AGENCY

Director

DEFENSE LOGISTICS AGENCY

Executive Director, Procurement

DEFENSE MAPPING AGENCY

Deputy Director for Acquisition, Installations, and Logistics

DEPARTMENT OF DEFENSE OFFICE OF DEPENDENTS SCHOOLS

Director

ON-SITE INSPECTION AGENCY

Principal Deputy Director

(ii) The authority to make the determinations required by 225.302(b)(i) may be redelegated below the levels in paragraph (b)(i) for acquisitions estimated at $500,000 or less in foreign cost.

(3)(A) This authority is not intended for use in making repetitive supply acquisitions or acquisitions of total annual supply requirements of items available in the United States but not available within the time required.

(B) DoD has determined that requirements for the items on the lists at FAR 25.108(d)(1) and at 225.108(d)(1) can only be filled by a foreign end product.

(4) DoD has determined the following items can only be acquired or performed in the country concerned—

(A) Maintenance and repair of, and acquisition of spare parts for, foreign-manufactured vehicles, equipment, machinery, and systems; provided, in the case of spare parts, the acquisition is restricted to the original manufacturer or its supplier in accordance with DoD standardization policy (see DoD Directive 4120.3, Defense Standardization and Specification Program);

(B) Industrial gases;

(C) Brand drugs specified by the Defense Medical Materiel Board;

(D) Bulk construction materials: sand, gravel, and other soil materials, stone, concrete masonry units, and fired brick; and

(E) Overhaul and repair of vessels, aircraft, and vehicles which—

(*1*) Are home-ported/stationed/deployed overseas; and

(*2*) Cannot practically return to the United States or to U.S. operated repair facilities.

(F) Ready-mixed asphalt and portland cement concrete, provided that foreign cost is estimated at not more than $100,000.

(c)(i) Purchase of materials, equipment, and supplies for construction overseas shall generally be the responsibility of the contractor performing the work; but where necessary to comply with foreign law, to avoid taxation, or to obtain other advantages, consider direct purchase. Consider savings that may be obtained by exemptions from import and other taxes and, to the extent economical, take advantage of tax exemptions available under existing agreements.

(ii) When purchase of materials is the responsibility of the construction contractor, the evaluation differential is determined through the estimating process and applied before solicitation.

[56 FR 36367, July 31, 1991, as amended at 56 FR 67215, Dec. 30, 1991; 57 FR 42630, Sept. 15, 1992; 59 FR 27671, May 27, 1994; 60 FR 61597, Nov. 30, 1995]

225.303 Procedures.

(a) *Solicitation of offers.* When soliciting orally, advise vendors that only domestic and qualifying country end products are acceptable unless an exception applies or the price of a domestic end product is unreasonable.

(b) *Evaluation.* (i) Use the evaluation procedures in 225.105 instead of the evaluation procedures in FAR 25.303(b). Treatment of duty may differ when delivery is overseas.

(A) Duty may not be applicable to nonqualifying country offers.

(B) The U.S. Government cannot guarantee the exemption of duty for components or end products imported into foreign countries.

(C) Foreign governments may impose duties, and offers including such duties must be evaluated as offered.

(ii) Where the evaluation procedures in 225.105 result in the award of a nonqualifying country end product, the acquisition of domestic end products is

unreasonable or inconsistent with public interest. If no domestic end product offers are received, the determination in FAR 25.302(b)(3) is not required.

225.305 Solicitation provision and contract clause.

225.305–70 Additional clause.

In order to allow accurate reporting, by cognizant accounting and disbursing officers, of foreign and domestic expenditures, use the clause at 252.225–7005, Identification of Expenditures in the United States, in all negotiated contracts over $25,000 where—

(a) For supply contracts, the contract requires end products manufactured or produced in the United States; and

(1) The contractor is a foreign concern; or

(2) The contractor is a domestic concern and the Government will take title outside the United States.

(b) For contracts for construction, repair, and maintenance of real property, or services to be performed outside the United States—

(1) The contractor is a domestic concern; or

(2) The contractor is a foreign concern and the contract requires acquisition of materials, equipment, or services from U.S. sources.

Subpart 225.4—Purchases Under the Trade Agreements Act of 1979

225.401 Definitions.

Caribbean Basin country end product includes petroleum or any product derived from petroleum.

Eligible product means, instead of the definition at FAR 25.401, a designated, NAFTA, or Caribbean Basin country end product in the categories listed in 225.403.70.

[59 FR 1289, Jan. 10, 1994, as amended at 59 FR 23169, May 5, 1994]

225.402 Policy.

(a) To estimate the value of the acquisition, use the total estimated value of end products subject to trade agreement acts (see 225.403–70).

(1) See 225.105 for evaluation of eligible products and U.S. made end products.

(c)(i) Except as provided in paragraphs (c) (ii) and (iii) of this section, do not purchase nondesignated country end products subject to the Trade Agreements Act unless they are NAFTA, Caribbean Basin, or qualifying country end products (see 225.872–1).

(ii) The prohibition in paragraph (c)(i) of this section does not apply when the contracting officer determines that offers of U.S. made, qualifying country, or eligible products from responsive, responsible offerors are either—

(A) Not received; or

(B) Insufficient to fill the Government's requirements. In these cases, accept all responsive, responsible offers of U.S. made, qualifying country, and eligible products before accepting any other offers.

(iii) National interest waivers under Section 302(b)(2) of the Trade Agreements Act are approved on a case-by-case basis. Except as delegated in paragraphs (c)(iii) (A) and (B) of this section, a request for a national interest waiver shall include supporting rationale and be submitted under department/agency procedures to the Director of Defense Procurement.

(A) The head of the contracting activity may approve a national interest waiver for a purchase by an overseas purchasing activity of products critical to the support of U.S. forces stationed abroad. The waiver must be supported by a written statement from the requiring activity stating that the requirement is critical for the support of U.S. forces stationed abroad.

(B) The Commander, Defense Fuel Supply Center, may approve national interest waivers for purchases of fuel for use by U.S. forces overseas.

[56 FR 36367, July 31, 1991, as amended at 59 FR 1289, Jan. 10, 1994; 59 FR 39974, Aug. 5, 1994; 61 FR 130, Jan. 3, 1996; 61 FR 7744, Feb. 29, 1996]

225.403 Exceptions.

(c) The evaluation preference for small disadvantaged businesses in subpart 219.70 does not displace an offer of an eligible product.

(d)(1)(A) If a department or agency considers an individual acquisition of a

product to be indispensable for national security or national defense purposes and appropriate for exclusion from the provisions of FAR subpart 25.4, it may submit a request with supporting rationale to the Director of Defense Procurement (USD(A&T)DP).

(B) The following national security/national defense exceptions do not require approval by USD(A&T)DP—

(*1*) Where purchase from foreign sources is restricted by the DoD annual Appropriations or Authorization Acts (see subpart 225.70) or by the establishment of required sources of supplies and services under FAR part 8.

(*2*) Where competition from foreign sources is restricted under the authority of FAR 6.302–3(a)(2)(i). Provide USD(A&T)DP a copy of the justification for restricting competition in accordance with FAR 25.402(e) and FAR 6.303–1(d).

(*3*) Where competition from foreign sources is restricted under subpart 225.71.

(g)(4) In accordance with Section 8094 of the Fiscal Year 1994 Defense Appropriations Act (Public Law 103–139), the exception for petroleum and any product derived from petroleum does not apply.

[56 FR 36367, July 31, 1991, as amended at 59 FR 23169, May 5, 1994; 60 FR 61597, Nov. 30, 1995; 61 FR 37841, July 22, 1996; 61 FR 50453, Sept. 26, 1996]

225.403–70 Products subject to trade agreement acts.

Foreign end products subject to the Trade Agreements Act and NAFTA are those in the following Federal supply groups (FSG). If a product is not in one of the listed groups, the Trade Agreements Act and NAFTA do not apply. The definition of Caribbean Basin country end products in FAR 25.401 excludes those end products which are not eligible for duty-free treatment under 19 U.S.C. 2703(b). However, 225.401 expands the definition of Caribbean Basin country end products to include petroleum and any product derived from petroleum. The list of products has been annotated to indicate those products which are eligible for designated and NAFTA countries, but are not presently eligible for Caribbean Basin countries.

FSG	Category/Description
22	Railway equipment
23	Motor vehicles, trailers, and cycles (except 2350 and buses under 2310)
24	Tractors
25	Vehicular equipment components
26	Tires and tubes
29	Engine accessories
30	Mechanical power transmission equipment
32	Woodworking machinery and equipment
34	Metalworking machinery (except 3408, 3410–3419, 3426, 3433, 3441–3443, 3446, 3448, 3449, 3460, 3461)
35	Service and trade equipment
36	Special industry machinery (except 3690)
37	Agricultural machinery and equipment
38	Construction, mining, excavating, and highway maintenance equipment
39	Materials handling equipment
40	Rope, cable, chain and fittings
41	Refrigeration and air conditioning equipment
42	Fire fighting, rescue and safety equipment
43	Pumps and compressors
44	Furnace, steam plant and drying equipment (except 4470)
45	Plumbing, heating, and sanitation equipment
46	Water purification and sewage treatment equipment
47	Piping, tubing, hose, and fitting
48	Valves
49	Maintenance and repair shop equipment (except 4920–4927, 4931–4935, 4960)
53	Hardware and abrasives
54	Prefabricated structures and scaffolding
55	Lumber, millwork, plywood, and veneer
56	Construction and building materials
61	Electric wire, and power and distribution equipment
62	Lighting fixtures and lamps
63	Alarm and signal systems
65	Medical, dental, and veterinary equipment and supplies
66	Instruments and laboratory equipment (except aircraft clocks under 6645)—See FAR 25.401 exclusion of certain watches and watch parts for certain Caribbean Basin countries
67	Photographic equipment
68	Chemicals and chemical products
69	Training aids and devices
70	General purpose ADPE, software, supplies, and support equipment
71	Furniture
72	Household and commercial furnishings and appliances

FSG	Category/Description
73	Food preparation and serving equipment
74	Office machines, visible record equipment and ADP equipment
75	Office supplies and devices
76	Books, maps, and other publications
77	Musical instruments, phonographs, and home type radios
78	Recreational and athletic equipment
79	Cleaning equipment and supplies
80	Brushes, paints, sealers, and adhesives
81	Containers, packaging and packing supplies (except 8140)
84	Luggage (only 8460)—See FAR 25.401 for exclusion of luggage for Caribbean Basin countries
85	Toiletries
87	Agricultural supplies
88	Live animals
91	Fuels, oils and waxes
93	Nonmetallic fabricated materials
94	Nonmetallic crude materials
96	Ores, minerals, and their primary products
99	Miscellaneous

[56 FR 36367, July 31, 1991, as amended at 59 FR 1289, Jan. 10, 1994; 59 FR 23169, May 5, 1994; 61 FR 37841, July 22, 1996]

225.405 Procedures.

(d) The requirements of FAR 25.405(d) do not apply to offshore acquisitions or to Defense Fuel Supply Center post, camp, or station overseas requirements.

225.408 Solicitation provisions and contract clauses.

(a)(1) Use the provision at 252.225–7006, Buy American Act-Trade Agreements-Balance of Payments Program Certificate, instead of the provision at FAR 52.225–8, Buy American Act-Trade Agreements-Balance of Payments Program Certificate, in all solicitations that include the clause at 252.225–7007, Trade Agreements.

(2) Use the clause at 252.225–7007, Trade Agreements, instead of the clause at FAR 52.225–9, Buy American Act—Trade Agreements—Balance of Payments Program. The clause need not be used where purchase from foreign sources is restricted (see 225.403(d)(1)(B)). The clause may be used where the contracting officer anticipates a waiver of the restriction. For procurements by the U.S. Army Corps of Engineers, use the clause with its Alternate I.

(3) Use the provision at 252.225–7035, Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program Certificate, instead of the provision at FAR 52.225–20, Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program Certificate, in all solicitations that include the clause at 252.225–7036, North American Free Trade Agreement Implementation Act.

(4)(A) Use the clause at 252.225–7036, North American Free Trade Agreement Implementation Act, instead of the clause at FAR 52.225–21, Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program. The clause need not be used where purchase from foreign sources is restricted (see 225.403(d)(1)(B)). The clause may be used where the contracting officer anticipates a waiver of the restriction.

(B)(i) Use the clause in all solicitations and contracts for the items listed at 225.403–70, when the estimated value is $50,000 or more and the Trade Agreements Act does not apply. Include the clause in solicitations for multiple line items if any line item is subject to NAFTA.

(ii) Use the clause with its Alternate I when the estimated value is between $25,000 and $50,000.

(C) Application of the procedures in 225.402(a) and the acquisition of noneligible and eligible products under the same solicitation may result in the application of the North American Free Trade Agreement Implementation Act to only some of the items solicited. In such case, indicate in the schedule those items covered by the Act.

[56 FR 36367, July 31, 1991, as amended at 57 FR 42630, Sept. 15, 1992. Redesignated and amended at 59 FR 1289, Jan. 10, 1994; 60 FR 29498, June 5, 1995; 61 FR 16880, Apr. 18, 1996]

Subpart 225.6—Customs and Duties

225.602 Policy.

(1) Section XXII, chapter 98, subchapter VIII, Item 9808.00.30 of the Harmonized Tariff Schedule of the United

States authorizes duty-free importation of defense supplies.

(2) 19 U.S.C. 1309 authorizes duty-free importation of certain supplies (not including equipment) for vessels or aircraft operated by the United States (see FAR 25.604(b)).

(3) DoD will issue duty-free entry certificates for—

(i) Qualifying country supplies (end products and components) on all defense contracts;

(ii) Eligible products (end products but not components) on defense contracts subject to the Trade Agreements Act or NAFTA; and

(iii) Other foreign supplies, if there is reasonable assurance that the administrative and other costs of processing and controlling the certificates will not exceed the amount of duty that would be paid.

[56 FR 36367, July 31, 1991, as amended at 59 FR 1290, Jan. 10, 1994]

225.603 Procedures.

(1) Issue duty-free entry certificates—

(i) In accordance with the policy in 225.602;

(ii) On contracts containing the clauses in—

(A) FAR 52.225–10, Duty-Free Entry; or

(B) 252.225–7009, Duty-Free Entry—Qualifying Country End Products and Supplies; or

(C) 252.225–7037, Duty-Free Entry—NAFTA Country End Products and Supplies; or

(iii) On other contracts that fall within one of the following categories—

(A) Direct purchases of foreign supplies under a DoD prime contract, whether title passes at point of origin or at destination in the United States; provided, the contract states that the final price is exclusive of duty;

(B) Purchases of foreign supplies by a domestic prime contractor under a cost-reimbursement type contract or by a cost-reimbursement type subcontractor (where no fixed-price prime or fixed-price subcontract intervenes between the purchaser and the Government), whether title passes at point of origin or at destination in the United States. If a fixed-price prime or fixed-price subcontract intervenes, follow the criteria stated in paragraph (1)(iii)(C) of this section; or

(C) Purchases of foreign supplies by a fixed-price domestic prime contractor, a fixed-price subcontractor, or a cost-type subcontractor where a fixed-price prime contract, or fixed-price subcontract intervenes; provided—

(*1*) The fixed-price prime contract and, where applicable, fixed-price subcontract prices are, or are amended to be, exclusive of duty;

(*2*) The prime contractor and, if applicable, the subcontractors concerned certify that—

(*i*) The supplies so purchased will be delivered to the Government or incorporated in Government-owned property or in an end product to be furnished to the Government; and

(*ii*) The duty will be paid if such supplies or any portion are used for other than the performance of the Government contract or disposed of other than for the benefit of the Government in accordance with the contract terms; and

(*3*) Such acquisition abroad is authorized by the terms of the contract, the subcontract, or by the contracting officer. In any case, follow the procedures required by the clauses in FAR 52.225–10, Duty-Free Entry, and 252.225–7009, Duty-Free Entry—Qualifying Country End Products and Supples, and 252.225–7037, Duty-Free Entry—NAFTA Country End Products and Supplies, to the extent practicable.

(2) Do not issue duty-free entry certificates or exempt duty for end products, components, or supplies already entered into the customs territory of the United States for which duty has already been paid.

(3) If a duty-free entry certificate is issued a contractor under a fixed-price contract based on the contractor's providing a domestic or qualifying country end product, component, or supply, negotiate an equitable reduction in the contract price if the contractor subsequently furnishes a nonqualifying country end product, component, or supply.

(4) Exclude duty from the contract price for end products, components, or supplies that are being accorded duty-free entry.

(5) Except as required under the evaluation procedures in 225.105 for the Buy American Act, do not evaluate duty for items accorded duty-free entry.

(6) Even if duty is evaluated under Subpart 225.1, the supplies may still be authorized duty-free entry if to do so is consistent with the policies in 225.602. However, if the Government will pay a duty, then the cost of the duty must be included in the contract price and evaluated as part of the offer.

(b) *Formal entry and release.* (i) The administrative contracting officer must—

(A) Ensure that prime contractors are aware of and understand any Duty-Free Entry clause requirements. Contractors should understand that failure by them or their subcontractors to include the data required by the clause will result in treatment of the shipment as without benefit of free entry under section XXII, chapter 98, subchapter VIII, Item 9808.00.30 of the Harmonized Tariff Schedule of the United States.

(B) Upon receipt of the required notice of purchase of foreign supplies from the contractor or any tier subcontractor—

(*1*) Verify the duty-free entitlement of goods entering under the contract; and

(*2*) Review the prime contract to ensure that performance of the contract requires the foreign supplies (quantity and price) identified in the notice.

(C) Upon receipt of notification from the contractor that it is placing a foreign purchase that was not identified at the time of contract award—

(*1*) Determine whether a reduction in the contract price is required under the clause at FAR 52.225–10, Duty-Free Entry;

(*2*) If so, make an equitable adjustment in the contract price, unless the procuring contracting officer waives this adjustment;

(*3*) Determine the price of the foreign supplies exclusive of duty, and advise the contractor that that amount will be the maximum dollar value of supplies for which duty-free entry certificates will be issued.

(D) Within 20 days after receiving the notification of purchase of foreign supplies, forward the following information in the format indicated to the Commander, DCMAO New York, ATTN Customs Team, DCMDN–GNIC, 207 New York Avenue, Staten Island, NY 10305-5013—

We have received a contractor notification of the purchase of foreign supplies. I have verified that foreign supplies are required for the performance of the contract. If required, the prime contract price has been or will be adjusted.

Prime Contractor Name and Address:

Prime Contractor CAGE Code:

Prime Contract Number plus Delivery Order Number, if applicable:

Total Dollar Value of the Prime Contract or Delivery Order:

Expiration Date of the Prime Contract or Delivery Order:

Foreign Supplier Name and Address:

Number of Subcontract/Purchase Order for Foreign Supplies:

Total Dollar Value of the Subcontract for Foreign Supplies:

Expiration Date of the Subcontract for Foreign Supplies:

CAO Activity Address Number:

ACO Name and Telephone Number:

ACO Code:

Signature:

Title:

(E) If a contract modification results in a change to any data verifying duty-free entitlement previously furnished, forward a revised notification including the changed data to DCMAO New York.

(ii) The responsibility for issuing duty-free entry certificates for foreign supplies purchased under a DoD contract or subcontract rests with the Customs Team, DCMDN–GNIC, DCMAO New York. Upon receipt of import documentation for incoming shipments from the contractor, its agent, or the U.S. Customs Service, DCMAO New York will verify the duty-free entitlement and execute the duty-free entry certificate.

(iii) Upon arrival of foreign supplies at ports of entry, the consignee, generally the contractor or its agent (import broker) for shipments to other than a military installation, will file U.S. Customs Form 7501, 7501A, or 7506, with the District Director of Customs.

(c) *Immediate entry and release.* Importations made in the name of a DoD

military facility or being shipped directly to a military facility are entitled to release under the immediate delivery procedure.

(i) A DoD immediate delivery application has been approved and is on file at Customs Headquarters.

(ii) The application is for an indefinite period and is good for all Customs districts, areas, and ports.

[56 FR 36367, July 31, 1991, as amended at 59 FR 1290, Jan. 10, 1994; 60 FR 29498, June 5, 1995]

225.604 Exempted supplies.

(b)(i) The term ''supplies''—

(A) Includes articles known as ''stores,'' such as food, medicines, and toiletries, as well as all consumable articles necessary and appropriate for the propulsion, operation, and maintenance of the vessel or aircraft, such as fuel, oil, gasoline, grease, paint, cleansing compounds, solvents, wiping rags, and polishes.

(B) Does not include portable articles necessary and appropriate for the navigation, operation, or maintenance of vessel or aircraft and for the comfort and safety of the persons on board, such as rope, bolts and nuts, bedding, china and cutlery, which are included in the term ''equipment.''

(ii) The duty-free certificate shall be printed, stamped, or typed on the face of Customs Form 7501, or attached, and shall be executed by a duly designated officer or civilian official of the appropriate department or agency in the following form—

(Date)_____

I certify that the acquisition of this material constituted a purchase of supplies by the United States for vessels or aircraft operated by the United States, and is admissible free of duty pursuant to 19 U.S.C. 1309.

(Name)_____

(Title)_____

(Organization)_____

225.605 Contract clause.

(b) The dollar amount in paragraphs (b)(1) and (i)(2) of the FAR 52.225–10 clause may be reduced appropriately in solicitations and contracts of $100,000 or less.

225.605–70 Additional solicitation provisions and contract clauses.

(a) Use the clause at 252.225–7008, Supplies to be Accorded Duty-Free Entry, in all solicitations and contracts when—

(1) Duty-free entry will be granted under the resultant contract; and

(2) The solicitation and contract include the clauses at—

(i) FAR 52.225–10, Duty-Free Entry; or

(ii) 252.225–7009, Duty-Free Entry—Qualifying Country End Products and Supplies.

(b) Use the clause at 252.225–7009, Duty-Free Entry—Qualifying Country End Products and Supplies, in all solicitations and contracts for supplies and in all solicitations and contracts for services involving the furnishing of supplies. Do not use the clause in a contract for supplies for exclusive use outside the United States.

(c) Use the clause at 252.225–7037, Duty-Free Entry—NAFTA Country End Products and Supplies, in all solicitations and contracts for supplies and services when the clause at FAR 52.225–10, Duty-Free Entry, is not used and NAFTA applies (see 225.403–70).

(d) Use the clause at 252.225–7010, Duty-Free Entry—Additional Provisions, in all solicitations and contracts which include the clause at FAR 52.225–10, Duty-Free Entry.

[56 FR 36367, July 31, 1991, as amended at 59 FR 1290, Jan. 10, 1994]

Subpart 225.7—Restrictions on Certain Foreign Purchases

225.702 Restrictions.

See 209.104–1(g)(i) for restrictions on contracting with firms owned or controlled by foreign governments that support terrorism. See 209.104–1(g)(ii) for prohibition on award of a DoD contract under a national security program to an entity controlled by a foreign government when access to proscribed information is required to perform the contract.

[59 FR 51133, Oct. 7, 1994]

225.770 Secondary Arab boycott of Israel.

225.770–1 Restriction.

In accordance with 10 U.S.C. 2410i, do not enter into a prime contract with a foreign person, company, or entity unless it has certified that it does not comply with the secondary Arab boycott of Israel.

[58 FR 28467, May 13, 1993]

225.770–2 Procedures.

For contracts awarded to the Canadian Commercial Corporation (CCC), the CCC will submit a certification from its proposed subcontractor with the other required precontractual material (see 225.870).

[57 FR 53599, Nov. 12, 1992]

225.770–3 Exceptions.

The restriction does not apply to—

(a) Purchases below the small purchase threshold in FAR 13.101;

(b) Contracts for consumable supplies, provisions, or services for the support of the United States or of allied forces in a foreign country; or

(c) Contracts pertaining to any equipment, technology, data, or services for intelligence or classified purposes, or the acquisition or lease thereof in the interest of national security.

[57 FR 53599, Nov. 12, 1992]

225.770–4 Waivers.

The Secretary of Defense may waive the restriction on the basis of national security interests. Waiver requests should be forwarded to the Director of Defense Procurement, OUSD(A&T)DP.

[57 FR 53599, Nov. 12, 1992, as amended at 60 FR 61597, Nov. 30, 1995]

225.770–5 Solicitation provision and contract clause.

Unless an exception applies or a waiver has been granted, use the clause at 252.225–7031, Secondary Arab Boycott of Israel, in all solicitations and contracts.

[57 FR 53599, Nov. 12, 1992]

Subpart 225.8—International Agreements and Coordination

225.801 International agreements.

(1) Treaties and agreements between the U.S. and foreign governments affect both—

(i) The way offers from foreign contractors are evaluated in DoD acquisitions; and

(ii) Performance of DoD contracts in foreign countries.

(2) This subpart covers acquisition policy and procedures based on treaties and international agreements.

(3) Information on specific agreements is available as follows—

(i) Memoranda of understanding (MOU) and other international agreements between the United States and the countries listed in 225.872–1 are maintained in the Office of the Deputy Assistant Secretary of Defense (Procurement) (Foreign Contracting) (703) 697–9351, DSN 227–9351).

(ii) Military Assistance Advisory Groups, Naval Missions, and Joint U.S. Military Aid Groups normally have copies of the agreements applicable to the countries concerned.

(iii) Copies of international agreements covering existing agreements in the United Kingdom of Great Britain and Northern Ireland, Western European countries, North Africa, and in the Middle East are filed with the U.S. European Command (EUCOM).

(iv) Agreements with countries in the Pacific and Far East are filed with the U.S. Pacific Command (CINCPAC).

225.802 Procedures.

225.802–70 Contracts for performance outside the United States and Canada.

(a) When a purchasing activity anticipates placement of a contract for performance outside the United States or Canada and the contracting activity is not under the command jurisdiction of a unified or specified command for the country involved, the purchasing activity shall maintain liaison with the cognizant contract administration office (CAO) (as specified in DLAH 4105.5) during preaward negotiations and postaward administration. The CAO will provide pertinent information

for contract negotiations, effect appropriate coordination, and obtain required approvals for the performance of the contract.

(b) Where the acquisition requires the performance of work in the foreign country by U.S. personnel or a third country contractor, or where the acquisition will require logistics support for contract employees, source inspection, or additional Government employees—

(1) The contracting activity must coordinate with the cognizant contract administration office before contract award.

(2) The contracting officer shall request the following information from the contract administration office—

(i) The applicability of any international agreements to the acquisition;

(ii) Security requirements applicable to the area;

(iii) The standards of conduct required to be observed by the prospective contractor and its employees, and any action that may be taken in the event required standards are not maintained;

(iv) Requirements for use of foreign currencies, including applicability of U.S. holdings of excess foreign currencies;

(v) Availability of logistics support for contractor employees; and

(vi) Information on taxes and duties from which the Government may be exempt.

(3) The contracting officer shall furnish the following information to the contract administration office—

(i) A synopsis of the work to be performed and, if practical, a copy of the solicitation;

(ii) Any contractor logistical support desired in support of U.S. or foreign military sale requirements;

(iii) Contract performance period and estimated contract value;

(iv) Number and nationality of contractor employees and date of planned arrival of contractor personnel;

(v) Contract security requirements; and

(vi) Other pertinent information to effect complete coordination and cooperation.

225.802–71 End user certificates.

Contracting officers considering the purchase of an item from a foreign source may encounter a request for the signing of a certificate to the effect that the Armed Forces of the United States is the end user of the equipment, and that it will not be transferred to third parties without authorization from the Government of the country selling the item. When encountering this situation, refer to DoD Directive 2040.3, End User Certificates, for guidance.

[57 FR 42630, Sept. 15, 1992]

225.870 Contracting with Canadian contractors.

225.870–1 General.

(a) The Canadian Government guarantees to the U.S. Government all commitments, obligations, and covenants of the Canadian Commercial Corporation under any contract or order issued to the Corporation by any contracting activity of the U.S. Government. The Canadian Government has waived notice of any change or modification which may be made, from time to time, in these commitments, obligations, or covenants.

(b) For production planning purposes, Canada is considered to be part of the defense industrial base (see 225.870–2(b)).

(c) Contracts with contractors located in Canada should be awarded to and administered by the Canadian Commercial Corporation, except for—

(1) Negotiated purchases for experimental, developmental, or research work unless the contract is for a project under the Defense Development Sharing Program;

(2) Purchases of unusual or compelling urgency;

(3) Small purchases; or

(4) Purchases made by DoD activities located in Canada.

(d) The Canadian Commercial Corporation, in placing contracts with Canadian or U.S. concerns, uses provisions in the contracts that give DoD the same production rights, data, and information that DoD would obtain in contracts with U.S. concerns.

(e) When contracts are placed with the Canadian Commercial Corporation, the government of Canada will provide the following services, without charge to DoD departments and agencies—

(1) *Contract administration services*, including—

(i) Cost and pricing analysis;

(ii) Industrial security;

(iii) Accountability and disposal of Government property;

(iv) Production expediting;

(v) Compliance with Canadian labor laws;

(vi) Processing termination claims and disposing of termination inventory;

(vii) Customs documentation;

(viii) Processing of disputes and appeals; and

(ix) Such other related contract administration functions as may be required with respect to the Canadian Commercial Corporation contract with the Canadian supplier; and

(2) *Audits*. When required, audits are performed by the Audit Service Group, Supply and Services Canada. Requests for audit on non-Canadian Commercial Corporation contracts should be routed through the cognizant contract administration office of Defense Contract Management Command.

(3) *Inspection*. The Department of National Defence (Canada) provides inspection personnel, services, and facilities, at no charge to DoD departments and agencies (see 225.870–7).

225.870–2 Solicitation of Canadian contractors.

(a) Except for the acquisitions in 225.870–1(c) (1) through (4), include Canadian firms on bidders mailing lists and comparable source lists only at the request of the Canadian Commercial Corporation.

(b) Include Canadian planned producers under the Industrial Readiness Planning Program on bidders mailing lists for their planned items (see FAR 14.205–1).

(c) Send solicitations directly to Canadian firms appearing on the appropriate bidders mailing lists. Send a complete copy of the solicitation and a listing of Canadian firms solicited to the Canadian Commercial Corporation, 11th Floor, 50 O'Connor Street, Ottawa, Ontario, K1A–0S6, Canada.

(d) Furnish a solicitation, if requested, to the Canadian Commercial Corporation even if no Canadian firm is solicited.

(e) Handle small purchases (see FAR part 13) directly with Canadian firms and not through the Canadian Commercial Corporation.

[56 FR 36367, July 31, 1991, as amended at 57 FR 42630, Sept. 15, 1992]

225.870–3 Submission of offers.

(a) As indicated in 225.870–4, the Canadian Commercial Corporation is the prime contractor. To indicate acceptance of offers by individual Canadian companies, the Canadian Commercial Corporation issues a letter, supporting the Canadian offer, containing the following information—

(1) Name of the Canadian offeror;

(2) Confirmation and endorsement of the offer in the name of the Canadian Commercial Corporation; and

(3) A statement that the Corporation shall subcontract 100 percent with the offeror.

(b) When a Canadian offer cannot be processed through the Canadian Commercial Corporation in time to meet the bid-opening requirement or the closing date for receipt of proposals, the Corporation may permit Canadian firms to submit offers directly. The Canadian Commercial Corporation's endorsement of award, however, must be received by the contracting officer before contract award.

(c) All sealed bids will be submitted by the Canadian Commercial Corporation in terms of U.S. currency. Do not adjust contracts awarded under sealed bidding for losses or gains from fluctuation in exchange rates.

(d) Except for sealed bids, all offers and quotations submitted by the Canadian Commercial Corporation are normally in terms of Canadian currency. The Corporation may, at the time of submitting an offer, elect to quote and receive payment in terms of U.S. currency, in which case the contract shall—

(1) Provide for payment in U.S. currency; and

(2) Shall not be adjusted for losses or gains from fluctuation in exchange rates.

225.870–4 Contracting procedures.

(a) Award individual contracts covering purchases from suppliers located in Canada, except for those in 225.870–1(c)(1) through (4), to the Canadian Commercial Corporation, 11th Floor, 50 O'Connor Street, Ontario, Canada, K1A–0S6.

(b) Direct communication with the Canadian supplier is authorized and encouraged in connection with all technical aspects of the contract; provided, that the Corporation's approval is obtained on any matters involving changes to the contract.

(c) Identify in the contract, the type of currency, i.e., U.S. or Canadian. Contracts that provide for payment in Canadian currency shall quote the contract price in terms of Canadian dollars and shall identify the amount by the initials CN; e.g., $1,647.23CN. The contract shall clearly indicate on its face the U.S./Canadian conversion rate at the time of award and the U.S. dollar equivalent of the Canadian dollar contract amount.

[56 FR 36367, July 31, 1991, as amended at 57 FR 42630, Sept. 15, 1992]

225.870–5 Contract administration.

(a) Assign contract administration in accordance with part 242. When contract administration is performed in Canada by the cognizant contract administration office of the Defense Contract Management Command, the paying office to be named in the contract for disbursement of DoD funds (DoD Department Code: 17-Navy; 21-Army; 57-Air Force; 97-all other DoD components), whether payment is in Canadian or U.S. dollars, shall be: Disbursing Office, Defense Contract Management Area Office, Cleveland 1240 East 9th Street, Anthony J. Celebrezze Federal Building, Cleveland, Ohio 44199.

(b) For cost-reimbursement type contracts—

(1) Audits on contracts with the Canadian Commercial Corporation (CCC) are automatically arranged by the Department of Supplies and Services (DSS), Canada. Audit reports are furnished to DSS. Upon advice from DSS, the CCC will certify the invoice and forward it with SF 1034, Public Voucher, to the administrative contracting officer for further processing and transmittal to the disbursing office.

(2) On contracts placed directly with Canadian firms, the administrative contracting officer requests audits from the Audit Services Bureau (ASB), Ottawa, Ontario, Canada.

(i) Invoices are approved by the ASB/DSS auditor on a provisional basis pending completion of the contract and final audit.

(ii) The ASB/DSS forwards these invoices, accompanied by SF 1034, Public Voucher, to the administrative contracting officer for further processing and transmittal to the disbursing officer.

(iii) ASB/DSS furnishes periodic advisory audit reports directly to the administrative contracting officer.

225.870–6 Termination procedures.

(a) The Canadian Commercial Corporation will continue administering contracts that may be terminated by the U.S. contracting officer.

(b) The Corporation will settle all Canadian subcontracts in accordance with the policies, practices, and procedures of the Canadian Government.

(c) The U.S. agency administering the contract with the Canadian Commercial Corporation shall provide any services required by the Canadian Commercial Corporation, including disposal of inventory, for settlement of any subcontracts placed in the United States. Settlement of such U.S. subcontracts is made under this regulation.

225.870–7 Acceptance of Canadian supplies.

(a) When contracts placed in Canada, either with the Canadian Commercial Corporation or directly with Canadian suppliers, require contract quality assurance (CQA) and/or acceptance before shipment, CQA and/or acceptance, as applicable, will be performed by the Department of National Defence (Canada), under paragraph 6 of the Letter of Agreement.

(b) Signature by the Department of National Defence (Canada) quality assurance representative on the DoD inspection and acceptance form is satisfactory evidence of acceptance for payment purposes.

225.870–8 Industrial security.

Industrial security for Canada shall be in accordance with the U.S.-Canada Industrial Security Agreement of March 31, 1952, as amended.

225.871 North Atlantic Treaty Organization (NATO) cooperative projects.

225.871–1 Scope.

(a) This section provides guidance on awarding contracts based on NATO cooperative projects.

(b) The authority is 22 U.S.C. 2767 and 10 U.S.C. 2350b.

225.871–2 Definitions.

(a) *Cooperative project* means a jointly managed arrangement—

(1) Described in a written agreement between the parties;

(2) Undertaken to further the objectives of standardization, rationalization, and interoperability of the armed forces of North Atlantic Treaty Organization member countries; and

(3) Providing for—

(i) One or more of the other participants to share with the United States the cost of research and development, testing, evaluation, or joint production (including follow-on support) of certain defense articles;

(ii) Concurrent production in the United States and in another member country of a defense article jointly developed; or

(iii) Acquisition by the United States of a defense article or defense service from another member country.

(b) *Other participant* means a cooperative project participant other than the United States.

225.871–3 General.

(a) Cooperative project authority. (1) Departments or agencies, that have authority to do so, may enter into a cooperative project agreement with NATO or with one or more member countries of that organization under DoD Directive 5530.3, International Agreements.

(2) Under laws and regulations governing the negotiation and implementation of cooperative project agreements, departments and agencies may enter into contracts, or incur other obligations, on behalf of other participants without charge to any appropriation or contract authorization.

(3) Agency heads have authority to solicit and award contracts to implement cooperative projects.

(b) Contracts implementing cooperative projects shall comply with all applicable laws relating to Government acquisition, unless a waiver is granted under 225.871–4. A waiver of certain laws and regulations may be obtained if—

(1) Required by the terms of a written cooperative project agreement;

(2) It will significantly further NATO standardization, rationalization, and interoperability; and

(3) It is approved by the appropriate DoD official.

225.871–4 Statutory waivers.

(a) The Deputy Secretary of Defense may waive for contracts or subcontracts placed outside the United States any provision of law that specifically prescribes—

(1) Procedures for the formation of contracts;

(2) Terms and conditions for inclusion in contracts;

(3) Requirements for, or preferences to be given—

(i) To goods grown, produced, or manufactured in the United States or in U.S. Government-owned facilities; or

(ii) For services to be performed in the United States; or

(4) Requirements regulating the performance of contracts.

(b) There is no authority for waiver of—

(1) Any provision of the Arms Export Control Act (22 U.S.C. 2751);

(2) Any provision of 10 U.S.C. 2304;

(3) The cargo preference laws of the United States, including the Military Cargo Preference Act of 1904 (10 U.S.C. 2631) and the Cargo Preference Act of 1954 (46 U.S.C. 1241(b)); or

(4) Any of the financial management responsibilities administered by the Secretary of the Treasury.

(c) If a waiver is contemplated under the terms of a cooperative project agreement, forward a request for the waiver to the Deputy Secretary of Defense, through the Director of Defense Procurement. The waiver request must include a draft Determination and Findings for signature by the Deputy Secretary of Defense establishing that the waiver is necessary to significantly further NATO standardization, rationalization, and interoperability.

(d) The approval of the Deputy Secretary of Defense must be obtained before committing to make waivers in an agreement or an amendment to an agreement or contract.

225.871–5 Directed subcontracting.

(a) The Director of Defense Procurement may authorize the direct placement of subcontracts with particular subcontractors. Directed subcontracting is not authorized unless specifically addressed in the cooperative project agreement.

(b) In some instances, it may not be feasible to name specific subcontractors at the time the agreement is concluded. The general provisions for work sharing at the prime and subcontractor level, however, must be clearly delineated in the agreement. This will provide the authority necessary to implement such arrangements during the acquisition phase.

(c) The agreement is the authority necessary for including a contractual provision requiring the prime contractor to place certain subcontracts with particular subcontractors. No separate justification and approval during the acquisition process is required.

225.871–6 Disposal of property.

Dispose of property that is jointly acquired by the members of a cooperative project under the procedures established in the agreement or in a manner consistent with the terms of the agreement.

225.871–7 Congressional notification.

(a) Congress must be notified whenever DoD determines to award a prime contract or subcontract to a particular contractor if the determination was not part of the certification made under Section 27(f) of the Arms Export Control Act before finalizing the cooperative agreement.

(1) Departments and agencies must provide a proposed Congressional notice to USD(A&T)DP in sufficient time to forward to Congress before the time of contract award.

(2) The proposed notice shall include the reason why the authority to designate a particular contractor or subcontractor should be used.

(b) Congressional notification is also required each time a statutory waiver is exercised under 225.871–4, if such information was not provided in the certification to Congress before finalizing the cooperative agreement. Exercise of the waiver means a contract award or modification which provides for a statutory exception.

[56 FR 36367, July 31, 1991, as amended at 60 FR 61597, Nov. 30, 1995]

225.872 Contracting with qualifying country sources.

225.872–1 General.

(a) As a result of memoranda of understanding and other international agreements, the DoD has determined it inconsistent with the public interest to apply restrictions of the Buy American Act/Balance of Payments Program to the acquisition of defense equipment which is mined, produced, or manufactured in any of the following countries (referred to in this part as ''qualifying countries'')—

Australia
Belgium
Canada
Denmark
Egypt
Federal Republic of Germany
France
Greece
Israel
Italy
Luxembourg
Netherlands
Norway
Portugal
Spain
Turkey
United Kingdom of Great Britain and Northern Ireland

(b) Individual acquisitions for products of the following qualifying countries may, on a purchase-by-purchase basis, be exempted from application of

the Buy American Act and Balance of Payments Program as inconsistent with the public interest—

Austria
Finland
Sweden
Switzerland

(c) The determination in paragraph (a) of this subsection does not limit the authority of the cognizant Secretary to restrict acquisitions to domestic sources or reject an otherwise acceptable offer from a qualifying country source in instances where considered necessary for national defense reasons.

[56 FR 36367, July 31, 1991, as amended at 57 FR 53599, Nov. 12, 1992; 60 FR 61597, Nov. 30, 1995]

225.872–2 Applicability.

(a) This section applies to all acquisitions of supplies except where restricted by—

(1) Provision of U.S. National Disclosure Policy (NDP), DOD Directive 5230.11, Disclosure of Classified Military Information to Foreign Governments and International Organizations;

(2) U.S. defense mobilization base requirements purchased under the authority of FAR 6.302–3(a)(2)(i) except for quantities in excess of that required to maintain the defense mobilization base. This restriction does not apply to Canadian planned producers—

(i) Review individual solicitations to determine whether this restriction applies.

(ii) Information concerning restricted items may be obtained from the Deputy Assistant Secretary of Defense (Industrial Affairs);

(3) U.S. laws or regulations (e.g., the annual DoD Appropriations Act); and

(4) U.S. industrial security requirements.

(b) This section does not apply to construction contracts.

[56 FR 36367, July 31, 1991, as amended at 60 FR 61597, Nov. 30, 1995]

225.872–3 Solicitation procedures.

(a) Include qualifying country sources on bidders mailing lists and comparable source lists upon their request (see FAR 14.205).

(b) Except for items developed under the U.S./Canadian Development Sharing Program, use the criteria for soliciting and making awards under FAR part 19 for small business concerns without regard to whether there are potential qualifying country sources for the end product. Do not consider an offer of a qualifying country end product if the solicitation is identified for the exclusive participation of small business firms.

(c) Send solicitations directly to qualifying country sources. Solicit Canadian sources through the Canadian Commercial Corporation in accordance with 225.870.

(d) Use international air mail if solicitation destinations are outside the United States and security classification permits such use (see FAR 14.202 and FAR 14.203).

(e) If unusual technical or security requirements preclude the acquisition of otherwise acceptable defense equipment from qualifying country sources, review the need for such requirements. Do not impose unusual technical or security requirements solely for the purpose of precluding the acquisition of defense equipment from qualifying countries.

(f) Do not automatically exclude qualifying country sources from submitting offers because their supplies have not been tested and evaluated by the department/agency.

(1) Consider the adequacy of qualifying country service testing on a case-by-case basis. Departments or agencies that must limit solicitations to sources whose items have been service tested and evaluated by the department/agency shall consider supplies from qualifying country sources that have been tested and accepted by the qualifying country for service use.

(2) The department/agency may perform a confirmatory test, if necessary.

(3) Apply U.S. test and evaluation standards, policies, and procedures when the department/agency decides that confirmatory tests of qualifying country end products are necessary.

(4) Where it appears that these provisions might adversely delay service programs, obtain the concurrence of the DoD Acquisition Executive, Under Secretary of Defense (Acquisition & Technology), before excluding the

qualifying country source from consideration.

(g) Permit industry representatives from a qualifying country to attend symposia, program briefings, prebid conferences (FAR 14.207 and FAR 15.409), and similar meetings that address U.S. defense equipment needs and requirements. When practical, structure these meetings to allow attendance by representatives of qualifying country concerns.

[56 FR 36367, July 31, 1991, as amended at 60 FR 61597, Nov. 30, 1995]

§ 225.872–4 Evaluation of offers.

(a) Qualifying country sources competing for DoD requirements must be responsive to the terms and conditions of DoD solicitations.

(b) Evaluate offers of end products from the qualifying country sources in 225.872–1(a) without application of the 50 percent Buy American Act or Balance of Payments Program evaluation factor, in accordance with 225.105 and 225.303.

(c) Evaluate offers of end products from the qualifying country sources in 225.872–1(b) without application of the 50 percent Buy American Act or Balance of Payments Program evaluation factor. If the offer, as evaluated, is low or otherwise eligible for award, the contracting officer shall request an exemption of the Buy American Act/Balance of Payments Program as inconsistent with the public interest.

(1) To obtain an exemption, process a Determination and Findings for signature—

(i) At a level above the contracting officer, for acquisitions of $25,000 or less;

(ii) By the chief of the contracting office, for acquisitions of $250,000 or less;

(iii) By the head of the contracting activity (HCA), for acquisitions of $2 million or less; or

(iv) By the head of the agency, or designee at a level no lower than an HCA, for acquisitions over $2 million.

(2) The Determination and Findings shall be substantially as follows for end items, or modified as necessary for components—

SERVICE OR AGENCY

Exemption of the Buy American Act/Balance of Payments Program

Determination and Findings

Upon the basis of the following findings and determination which I hereby make in accordance with the provisions of FAR 25.102, acquisition of (*qualifying country—identify country*) (*describe item*) may be made as provided below.

Findings

1. The (*contracting activity*) proposes to purchase under contract number, _____, mined, produced, or manufactured in (*country of origin*). The total estimated cost of this acquisition is _____.

2. The United States Government and the Government of _____ have agreed to remove barriers to procurement at the prime and subcontract level for defense equipment produced in each other's countries insofar as laws and regulations permit.

3. The agreement provides that competitive offers of (*qualifying country*) end products will be evaluated by the Department of Defense without imposing any price differential under the Buy American Act or Balance of Payments Program and without taking applicable U.S. customs and duties into consideration so that (*qualifying country*) items may better compete for sales of defense equipment to the Department of Defense. In addition, the Agreement stipulates that acquisitions of (*qualifying country*) items must fully satisfy Department of Defense requirements for performance, quality, and delivery and shall cost the Department of Defense no more than would comparable U.S. source or other foreign source defense equipment eligible for award.

4. In order to achieve the above objectives, the solicitation contained the Buy American Act and Balance of Payments Program clause, 252.225–7001. Offers were solicited from other sources and the offer received for (*qualifying country end item*) is found to be otherwise eligible for award.

Determination

Pursuant to the Buy American Act and Balance of Payments Program, I hereby determine that it is inconsistent with the public interest to apply the restrictions of the Buy American Act or the Balance of Payments Program to the proposed offer.

(Date)

[56 FR 36367, July 31, 1991, as amended at 57 FR 42630, Sept. 15, 1992]

225.872–5 Contract administration.

(a) Arrangements exist with some qualifying countries to provide reciprocal contract administration services. Some arrangements are at no cost to either government. To determine whether such an arrangement has been negotiated and what contract administration functions are covered, contact the Deputy Director of Defense Procurement (Foreign Contracting), ((703) 697–9351, DSN 227–9351).

(b) When contract administration services are required on contracts to be performed in qualifying countries, direct the request to the cognizant activity under DLAH 4105.4, section II, part 2 (DoD Directory of Contract Administration Services Components). Contract administration services for DoD subcontracts placed by qualifying country sources in the United States will be arranged by the cognizant activity under DLAH 4105.4, section II, part 2.

(c) The contract administration activity receiving a delegation or secondary delegation shall review the delegation to determine whether any portion of the delegation are covered by memoranda of understanding annexes, and delegate those functions to the appropriate organization in the qualifying country's government.

(d) Information on quality assurance delegations to foreign governments is in subpart 246.4, Government Contract Quality Assurance.

[56 FR 36367, July 31, 1991, as amended at 60 FR 29498, June 5, 1995]

225.872–6 Audit.

(a) Memoranda of understanding with some qualifying countries contain annexes that provide for reciprocal ''no-cost'' audits of contracts and subcontracts (pre- and post-award).

(b) To determine if such an annex is applicable to a particular qualifying country, contact the Deputy Director of Defense Procurement (Foreign Contracting) ((703) 697–9351, DSN 227–9351).

(c) Handle requests for audits in qualifying countries under 215.805–5(c)(1).

(1) Except for the United Kingdom (UK), send the request to the administrative contracting officer at the cognizant activity listed in DLAH 4105.4, section II, part 2 (DoD Directory of Contract Administration Services Components). Send the request for audit from the UK directly to their Ministry of Defence. See section VII, DLAH 4105.4 for guidance.

(2) Send an advance copy of the request to the focal point identified by the Foreign Contracting Directorate, Office of the Director of Defense Procurement.

[56 FR 36367, July 31, 1991, as amended at 60 FR 29498, June 5, 1995]

225.872–7 Industrial security for qualifying countries.

The required procedures for safeguarding classified defense information necessary for the performance of contracts awarded to qualifying country sources are in the DoD Industrial Security Regulation DoD 5220.22–R (implemented for the Army by AR 380–49; for the Navy by OPNAV Instruction 5540.8L; for the Air Force by AFR 205–4; for the Defense Information Systems Agency by DCA Instruction 240–110–8; and for the Defense Mapping Agency by DMA Instruction 5220.22).

[56 FR 36367, July 31, 1991, as amended at 56 FR 67215, Dec. 30, 1991]

225.872–8 Subcontracting with qualifying country sources.

In reviewing contractor subcontracting procedures, the contracting officer shall ensure that the prime contract does not preclude qualifying country sources from competing for subcontracts, except when restricted by national security interest reasons, mobilization base considerations, or applicable U.S. laws or regulations. (See the clause at 252.225–7002, Qualifying Country Sources as Subcontractors.)

225.873 Waiver of United Kingdom commercial exploitation levies.

225.873–1 Policy.

DoD and the Government of the United Kingdom (U.K.) have agreed to waive U.K. commercial exploitation levies and U.S. nonrecurring cost recoupment charges on a reciprocal basis. In order for U.K. levies to be waived, they must be identified and a waiver must be requested before award

of the contract or subcontract under which the levies are charged.

[57 FR 53599, Nov. 12, 1992]

225.873–2 Procedures.

(a) Waiver of U.K. levies must be approved by the Government of the U.K. When an offeror or contractor identifies a levy included in an offered or contract price, the contracting officer shall provide written notification to the Defense Security Assistance Agency, Operations Management Division, room 4B740, the Pentagon, Washington, DC 20301–2800, telephone (703) 697–8108, which will request a waiver of the levy from the Government of the U.K. The notification shall include—

(1) Name of the U.K. firm;

(2) Prime contract number;

(3) Description of item for which waiver is being sought;

(4) Quantity being acquired; and

(5) Amount of levy.

(b) Waiver may occur after contract award. Where levies are waived before contract award, the offer will be evaluated without the levy. Where levies are identified but not waived before contract award, the offer will be evaluated inclusive of the levies.

[57 FR 53599, Nov. 12, 1992]

225.873–3 Contract clause.

Use the clause at 252.225–7032, Waiver of United Kingdom Levies, in all solicitations and contracts for supplies—

(a) Where U.K. firms are expected to participate as offerors/prime contractors; or

(b) If a subcontract over $1 million with a U.K. firm is anticipated.

[57 FR 53599, Nov. 12, 1992]

Subpart 225.9—Additional Foreign Acquisition Clauses

225.970 Clause deviations in overseas contracts.

See 201.402(2) for approval authority for clause deviations in overseas contracts with governments of North Atlantic Treaty Organization (NATO) countries or other allies or with United Nations or NATO organizations.

[61 FR 50453, Sept. 26, 1996]

Subpart 225.70—Authorization Acts, Appropriations Acts, and Other Statutory Restrictions on Foreign Purchases

225.7000 Scope of subpart.

(a) This subpart contains restrictions on the acquisition of foreign products, imposed by DoD Appropriations and Authorization Acts and other statutes. Refer to the Acts to verify current applicability of the restrictions.

(b) Nothing in this subpart affects the applicability of the Buy American Act or Balance of Payments Program.

225.7001 Definitions.

As used in this subpart—

(a) *Bearing components* and *miniature and instrument ball bearings* are defined in the clause at 252.225–7016, Restriction on Acquisition of Ball and Roller Bearings.

(b) *Hand or measuring tools* means those tools listed in Federal supply classifications 51 and 52, respectively.

(c) *Possessions*, as used in the phrase ''United States or its possessions,'' includes Puerto Rico.

(d) *Specialty metals* is defined in the clause at 252.225–7014, Preference for Domestic Specialty Metals.

[61 FR 10899, Mar. 18, 1996, as amended at 61 FR 50453, Sept. 26, 1996]

225.7002–1 Restrictions.

(a) In accordance with section 9009 of Public Law 101–165 and similar sections in subsequent Defense appropriations acts, do not acquire supplies consisting in whole or in part of any of the following, that have not been grown or produced in the United States or its possessions—

(1) Food, but this does not restrict acquisition of foods manufactured or processed in the United States or its possessions;

(2) Clothing;

(3) Tents, tarpaulins, or covers;

(4) Cotton and other natural fiber products, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles), but this does not restrict acquisition of cotton or wool reprocessed or reused in the United States or its possessions;

(5) Woven silk or woven silk blends;

(6) Spun silk yarn for cartridge cloth;

(7) Synthetic fabric or coated synthetic fabric;

(8) Canvas products; or

(9) Any item of individual equipment manufactured from or containing any of the listed fibers, yarns, fabrics, or materials.

(b) Do not acquire specialty metals, including stainless steel flatware, that were not melted in steel manufacturing facilities located within the United States or its possessions.

(c) Do not acquire hand or measuring tools that were not produced in the United States or its possessions.

[56 FR 36367, July 31, 1991, as amended at 57 FR 14993, Apr. 23, 1992; 59 FR 27671, May 27, 1994]

225.7002–2 Exceptions.

Acquisitions in the following categories are not subject to the restrictions in 225.7002–1—

(a) Any of the items in 225.7002–1(a) or (b), if the Secretary concerned, or designee, determines that they cannot be acquired when needed in a satisfactory quality and sufficient quantity grown or produced in the United States or its possessions at U.S. market prices.

(b) Outside the United States—

(1) In support of combat operations;

(2) Perishable foods by activities located outside the United States for their personnel; or

(3) Emergency acquisitions by such activities for their personnel.

(c) Acquisitions by vessels in foreign waters.

(d) Acquisitions of those supplies listed in FAR section 25.108(d)(1), unless the supplies are hand or measuring tools.

(e) Acquisitions using simplified acquisition procedures.

(f) Acquisitions of end items incidentally incorporating cotton or wool, for which the estimated value of the cotton or wool is not more than 10 percent of the total price of the end item; provided the estimated value of the cotton or wool does not exceed the simplified acquisition threshold.

(g) Supplies purchased specifically for commissary resale.

(h) Purchases of specialty metals by subcontractors at any tier for programs, except—

(1) Aircraft;

(2) Missile and space systems;

(3) Ships;

(4) Tank-automotive;

(5) Weapons; and

(6) Ammunition.

(i) Purchases of specialty metals and chemical warfare protective clothing when the acquisition furthers an agreement with a qualifying country (see section 225.872).

(j) Commercial items or components purchased by contractors from subcontractors/suppliers.

[56 FR 36367, July 31, 1991, as amended at 58 FR 28467, May 13, 1993; 59 FR 27671, May 27, 1994; 60 FR 61597, Nov. 30, 1995; 61 FR 50453, Sept. 26, 1996]

225.7002–3 Contract clauses.

Unless an exception is known to apply—

(a) Use the clause at 252.225–7012, Preference for Certain Domestic Commodities, in all solicitations and contracts which meet or exceed the simplified acquisition threshold.

(b) Use the clause at 252.225–7014, Preference for Domestic Specialty Metals, in all solicitations and contracts over the simplified acquisition threshold that require delivery of an article containing specialty metals. Use the clause with its Alternate I in all solicitations and contracts over the simplified acquisition threshold requiring delivery, for one of the following major programs, of an article containing specialty metals—

(1) Aircraft;

(2) Missile and space systems;

(3) Ships;

(4) Tank-automotive;

(5) Weapons; or

(6) Ammunition.

(c) Use the clause at 252.225–7015, Preference for Domestic Hand or Measuring Tools, in all solicitations and contracts over the simplified acquisition threshold calling for delivery of hand or measuring tools.

[61 FR 50453, Sept. 26, 1996]

225.7003 [Reserved]

225.7004 Restriction on machine tools and powered and non-powered valves.

225.7004–1 Restriction.

In accordance with 10 U.S.C. 2534, through fiscal year 1996, do not acquire, either directly as end items or indirectly on behalf of the Government, the machine tools or powered and non-powered valves in 225.7004–2 unless they are of U.S. or Canadian origin.

[60 FR 19532, Apr. 19, 1995]

225.7004–2 Applicability.

(a) Machine tools restricted under this section are those tools listed in Federal supply classes of metalworking machinery in the following categories—

Federal Supply Classification (FSC)	Name
3405	Saw and filing machines.
3408	Machine centers and way type machines.
3410	Electrical and ultrasonic erosion machines.
3411	Boring machines.
3412	Broaching machines.
3413	Drilling and tapping machines.
3414	Gear cutting and finishing machines.
3415	Grinding machines.
3416	Lathes.
3417	Milling machines.
3418	Planers and shapers.
3419	Miscellaneous machine tools.
3426	Metal finishing equipment.
3433	Gas welding, heat cutting, and metalizing equipment.
3438	Miscellaneous welding equipment.
3441	Bending and forming machines.
3442	Hydraulic and pneumatic presses, power driven.
3443	Mechanical presses, power driven.
3445	Punching and shearing machines.
3446	Forging machinery, and hammers.
3448	Riveting machines.
3449	Miscellaneous secondary metal forming and cutting machines.
3460	Machine tool accessories.
3461	Accessories for secondary metalworking machinery.

(b) Machine tool accessories classified under FSC 3460 or 3461 are not components under 225.7004–5. Where a solicitation for machine tools includes machine tool accessories, list known machine tool accessories which are not separate line items in the provision at 252.225–7040, Machine Tool List. Identify accessories which are separate line items in the schedule. The contracting activity must exercise judgment in determining whether an item is an accessory or a component. This determination should be based on the use of the item in the machine tool being purchased.

(c) Valves restricted under this section are those powered and non-powered valves listed in Federal supply classes 4810 (valves, powered) and 4820 (valves, non-powered) used in piping for naval surface ships and submarines.

[60 FR 19532, Apr. 19, 1995, as amended at 60 FR 29498, June 5, 1995]

225.7004–3 Exception.

This restriction does not apply if the acquisition is below the simplified acquisition threshold.

[60 FR 19532, Apr. 19, 1995]

225.7004–4 Waiver.

(a) The head of the contracting activity may waive the restriction on a case-by-case basis upon execution of a determination and findings that any of the following applies:

(1) The restriction would cause unreasonable delays.

(2) United States producers of the item would not be jeopardized by competition from a foreign country, and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country.

(3) Application of the restriction would impede cooperative programs entered into between DoD and a foreign country, and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country.

(4) Satisfactory quality items manufactured in the United States or Canada are not available.

(5) Application of the restriction would result in the existence of only one source for the item in the United States or Canada.

(6) Application of the restriction is not in the national security interests of the United States.

(7) Application of the restriction would adversely affect a U.S. company.

(b) The restriction is waived when it would cause unreasonable costs. The cost of the item of U.S. or Canadian origin is unreasonable if it exceeds 150 percent of the offered price, inclusive of duty, of items which are not of U.S. or Canadian origin.

[60 FR 19532, Apr. 19, 1995, as amended at 60 FR 61597, Nov. 30, 1995]

225.7004–5 U.S. or Canadian origin.

(a) A valve or machine tool shall be considered to be of U.S. or Canadian origin if—

(1) It is manufactured in the United States or Canada; and

(2) The cost of its components manufactured in the U.S. or Canada exceeds 50 percent of the cost of all its components.

(b) The cost of components shall include transportation costs to the place of incorporation into the end product and duty (whether or not a duty-free certificate may be issued).

[60 FR 19532, Apr. 19, 1995]

225.7004–6 Contract clauses.

(a) Unless an exception applies or a waiver has been granted, use the clause at 252.225–7017, Preference for United States and Canadian Valves and Machine Tools, in all solicitations and contracts for valves and machine tools.

(b) Consider using the clause at 252.225–7001, Buy American Act and Balance of Payments Program, and, if applicable, the clause at 252.225–7007, Trade Agreements Act, whenever an exception or waiver is anticipated. Where these clauses are used, state in the solicitation that offers which do not conform to the restrictions of the more restrictive clause will only be considered if an exception applies or a waiver is granted.

(c) Use the provision at 252.225–7040, Machine Tool List, in all solicitations for machine tools which contain the clause at 252.225–7017 except where—

(1) All machine tool accessories are listed as separate line items; and

(2) The solicitation does not allow offerors to provide accessories which are not specifically required by the specifications.

[60 FR 19532, Apr. 19, 1995, as amended at 60 FR 29498, June 5, 1995]

225.7005 [Reserved]

225.7006 Restrictions on construction or repair of vessels in foreign shipyards.

10 U.S.C. 7309 restricts constructing or repairing vessels in foreign shipyards.

(a) Do not award a contract to construct either of the following in a foreign shipyard—

(1) A vessel constructed for any of the armed forces; or

(2) A major component of the hull or superstructure of any such vessel.

(b) Do not overhaul, repair, or maintain in a foreign shipyard, a naval vessel (or any other vessel under the jurisdiction of the Secretary of the Navy) homeported in the United States. This restriction does not apply to voyage repairs.

225.7007 Restriction on acquisition of foreign buses.

225.7007–1 Restriction.

In accordance with 10 U.S.C. 2534, do not acquire a multipassenger motor vehicle (bus) unless it is manufactured in the United States or Canada.

[60 FR 19533, Apr. 19, 1995]

225.7007–2 Applicability.

Apply this restriction if the buses are purchased, leased, rented, or made available under contracts for transportation services.

[60 FR 19533, Apr. 19, 1995]

225.7007–3 Exceptions.

This restriction does not apply in any of the following circumstances:

(a) Buses manufactured outside the United States and Canada are needed for temporary use because buses manufactured in the United States or Canada are not available to satisfy requirements that cannot be postponed. Such use may not, however, exceed the lead time required for acquisition and delivery of buses manufactured in the United States or Canada.

(b) The requirement for buses is temporary in nature. For example, to meet a special, nonrecurring requirement or a sporadic and infrequent recurring requirement, buses manufactured outside the United States and Canada may be used for temporary periods of time. Such use may not, however, exceed the period of time needed to meet the special requirement.

(c) Buses manufactured outside the United States and Canada are available at no cost to the U.S. Government.

(d) The acquisition is below the simplified acquisition threshold.

[60 FR 19533, Apr. 19, 1995]

225.7007–4 Waiver.

The waiver criteria at 225.7004–4 also apply to this restriction.

[60 FR 61597, Nov. 30, 1995]

225.7008 Restriction on research and development.

(a) Public Law 92–570 precludes use of DoD appropriations for award to any foreign corporation, organization, person, or entity for research and development in connection with any weapon system or other military equipment if there is a U.S. corporation, organization, person, or entity—

(1) Equally competent; and

(2) Willing to perform at a lower cost.

(b) The statutory restriction in paragraph (a) of this section does not change the rules for selecting research and development contractors in FAR part 35. However, when a U.S. source and a foreign source are equally competent, award to the source that will provide the services at the lower cost.

225.7009 Restriction on aircraft ejection seats.

(a) Do not use funds appropriated for DoD for FY1984 through 1989 to acquire aircraft ejection seats manufactured in a foreign nation if that foreign nation does not permit U.S. manufacturers to compete for its ejection seat requirements.

(b) This limitation applies only to ejection seats acquired for installation on aircraft produced or assembled in the United States.

225.7010 Restriction on certain chemical weapons antidote.

225.7010–1 Restriction.

In accordance with 10 U.S.C. 2534, do not acquire chemical weapons antidote contained in automatic injectors, or the components for such injectors, unless the injector or component is manufactured in the United States or Canada by a company that—

(a) Is a producer under the Industrial Preparedness Program at the time of contract award;

(b) Has received all required regulatory approvals; and

(c) Has the plant, equipment, and personnel to perform the contract in the United States or Canada at the time of contract award.

[60 FR 19533, Apr. 19, 1995]

225.7010–2 Exception.

This restriction does not apply if the acquisition is below the simplified acquisition threshold.

[60 FR 19533, Apr. 19, 1995]

225.7010–3 Waiver.

The waiver criteria at 225.7004–4 also apply to this restriction.

[60 FR 61597, Nov. 30, 1995]

225.7011 Restriction on Ballistic Missile Defense research, development, test, and evaluation.

225.7011–1 Definitions.

Competent, foreign firm, and U.S. firm have the meanings given in the provision at 252.225–7018, Notice of Prohibition of Certain Contracts with Foreign Entities for the Conduct of Ballistic Missile Defense RDT&E.

[56 FR 36367, July 31, 1991, as amended at 59 FR 27672, May 27, 1994]

225.7011–2 Restriction.

(a) Section 222 of the Defense Authorization Act for FY1988 and 1989 (Pub. L. 100–180) prohibits the award of certain contracts for the conduct of Ballistic Missile Defense (BMD) Program research, development, test, and evaluation (RDT&E), to foreign governments or firms unless the Secretary of Defense certifies to Congress in writing at

any time during the applicable fiscal year that work cannot be competently performed by a U.S. firm at a price equal to or less than the price of the foreign government or firm.

(b) For purposes of implementing this section, heads of contracting activities are authorized to make this certification (see 225.7011–3(b)).

(c) Except as provided in 225.7011–3, do not use any funds appropriated to, or for the use of, DoD to enter into or carry out any contract, including any contract awarded as a result of a broad agency announcement, with a foreign government or firm if the contract provides for the conduct of RDT&E in connection with the BMD.

(d) This prohibition is not intended to deny access to foreign expertise when contract performance requires a level of competency unavailable in the United States.

[56 FR 36367, July 31, 1991, as amended at 59 FR 27672, May 27, 1994]

225.7011–3 Exceptions.

This prohibition shall not apply—

(a) To contracts awarded to a foreign government or firm if the contracting officer determines that—

(1) The contract will be performed within the United States;

(2) The contract is exclusively for RDT&E in connection with antitactical ballistic missile systems; or

(3) The foreign government or foreign firm agrees to share a substantial portion of the total contract cost. Consider the foreign share as substantial if it is equitable with respect to the relative benefits to be derived from the contract by the United States and the foreign parties. For example, if the contract is more beneficial to the foreign party, its share of the cost should be correspondingly higher; or

(b) If the head of the contracting activity certifies in writing, before contract award, that a contract for research, development, testing, or evaluation (other than for RDT&E described in paragraph (a)(2) of this subsection) cannot be competently performed by a U.S. firm at a price equal to or less than the price at which the RDT&E would be performed by a foreign government or firm.

225.7011–4 Procedures.

(a) When awarding a prime contract to a foreign government or firm under 225.7011–3(b), the contracting officer or source selection authority, as applicable, shall make a determination that will be the basis for the certification.

(1) The determination must—

(i) Describe the contract effort;

(ii) State the number of proposals solicited and received from both U.S. and foreign firms;

(iii) Identify the proposed awardee and the amount of the contract;

(iv) State that selection of the contractor was based on the evaluation factors contained in the solicitation, or the criteria contained in the broad agency announcement; and

(v) State that the effort cannot be competently performed by a U.S. firm at a price equal to, or less than, the price at which it would be performed by the foreign awardee.

(2) When either a broad agency announcement (BAA) or program research and development announcement (PRDA) is used, or when the determination is otherwise not based on direct competition between foreign and domestic proposals, the determination must not be merely conclusory.

(i) The determination must specifically explain its basis, include a description of the method used to determine the competency of U.S. firms, and describe the cost or price analysis performed.

(ii) Alternately, the determination may contain—

(A) A finding, including the basis for such finding, that the proposal was submitted solely in response to the terms of a BAA or PRDA, or other solicitation document without any technical guidance from the program office; and

(B) A finding, including the basis for such finding, that disclosure of the information in the proposal for the purpose of conducting a competitive acquisition is prohibited.

(b) Forward a copy of the certification (from 225.7011–3(b)) and, as appropriate, the determination or justification and approval (J&A) within 30 days of contract award to the Ballistic Missile Defense Organization, Attn: BMDO/DRI, 7100 Defense Pentagon,

Washington, DC 20301–7100, if award is based on—

(1) A determination under paragraph (a) of this subsection;

(2) Other than full and open competition under FAR subpart 6.3; or

(3) An unsolicited proposal under FAR subpart 15.5.

[56 FR 36367, July 31, 1991, as amended at 59 FR 27672, May 27, 1994; 61 FR 50453, Sept. 26, 1996]

225.7011–5 Solicitation provision.

Use the provision at 252.225–7018, Notice of Prohibition of Certain Contracts With Foreign Entities for the Conduct of Ballistic Missile Defense RDT&E, in all competitively negotiated BMD solicitations for research, development, test, and evaluation, unless foreign participation is otherwise excluded.

[56 FR 36367, July 31, 1991, as amended at 59 FR 27672, May 27, 1994]

225.7012 Restrictions on anchor and mooring chain.

225.7012–1 Restrictions.

(a) Under Public Law 101–511, Section 8041, and similar sections in subsequent Defense appropriations acts, DoD appropriations for fiscal years 1991 and after may not be used to acquire welded shipboard anchor and mooring chain, four inches in diameter and under, unless—

(1) It is manufactured in the United States, including cutting, heat treating, quality control, testing, and welding (both forging and shot blasting process); and

(2) The cost of the components manufactured in the United States exceeds 50 percent of the total cost of components.

(b) Acquisition of welded shipboard anchor and mooring chain, four inches in diameter and under, when used as a component of a naval vessel, is also restricted under 10 U.S.C. 2534(a)(3)(ii). However, the more stringent restriction under 225.7012–1(a) takes precedence.

[61 FR 13107, Mar. 26, 1996]

225.7012–2 Waiver.

The restriction in 225.7012–1(a) may be waived by the Secretary of the Department responsible for acquisition, on a case-by-case basis, where sufficient domestic suppliers are not available to meet DoD requirements on a timely basis and the acquisition is necessary to acquire capability for national security purposes.

(a) Document the waive in a written D&F containing—

(1) The factors supporting the waiver; and

(2) A certification that the acquisition must be made in order to acquire capability for national security purposes.

(b) Provide a copy of the D&F to the House and Senate Committees on Appropriations.

[61 FR 13107, Mar. 26, 1996]

225.7012–3 Contract clause.

Use the clause at 252.225–7019, Restriction on Acquisition of Foreign Anchor and Mooring Chain, in all solicitations and contracts—

(a) Using fiscal year 1991 or later funds; and

(b) Requiring welded shipboard anchor or mooring chain of four inches in diameter or less.

[61 FR 13107, Mar. 26, 1996, as amended at 61 FR 50453, Sept. 26, 1996]

225.7013 Restriction on polyacrylonitrile (PAN) based carbon fiber.

225.7013–1 Restriction.

(a) Section 8088, Public Law 100–202, and subsequent appropriations acts, require the Secretary of Defense to take such action as necessary to ensure by FY1992 that a minimum of 50 percent of the annual DoD requirements for PAN carbon fibers is acquired from domestic sources.

(b) To meet this goal, all new major systems must use domestic or Canadian sources for all PAN carbon fiber requirements. ‘‘Domestic or Canadian sources’’ include U.S. and Canadian manufacturers and producers.

225.7013–2 Contract clause.

(a) Use the clause at 252.225–7022, Restriction on Acquisition of Polyacrylonitrile (PAN) Based Carbon Fiber, in all major systems acquisition

programs (as defined in FAR part 34) that are not yet in production (milestone III as defined in DoDI 5000.2, Defense Acquisition Program Procedures).

(b) Contracting officers may, with the approval of the head of the contracting activity, waive, in whole or in part, the requirement in the clause. For example, a waiver is justified if a qualified domestic or Canadian source cannot meet scheduling requirements.

225.7014 [Reserved]

225.7015 Restriction on night vision image intensifier tubes and devices.

225.7015–1 Restriction.

In accordance with Pub. L. 101–165 and 101–511, fiscal years 1990 and 1991 funds may not be used to acquire second and third generation night vision image intensifier tubes and devices unless they are manufactured in the United States or Canada.

[58 FR 28467, May 13, 1993]

225.7015–2 Exception.

Second and third generation night vision image intensifier tubes and devices manufactured outside the United States or Canada may be acquired if—

(a) Adequate domestic supplies are not available to meet DoD requirements on a timely basis; and

(b) The Secretary of the Department responsible for the acquisition certifies to the House and Senate Committees on Appropriations that the acquisition of tubes and devices manufactured outside the United States or Canada is necessary in order to acquire capability for national security purposes.

225.7015–3 Contract clause.

Use the clause at 252.225–7024, Restriction on Acquisition of Night Vision Image Intensifier Tubes and Devices, in all solicitations and contracts which—

(a) Use fiscal year 1990 or 1991 funds; and

(b) Require second and third generation night vision image intensifier tubes and devices.

[58 FR 28467, May 13, 1993]

225.7016 Restriction on air circuit breakers for naval vessels.

225.7016–1 Restriction.

In accordance with 10 U.S.C. 2534, do not acquire air circuit breakers for naval vessels unless they are manufactured in the United States or Canada.

[60 FR 19533, Apr. 19, 1995]

225.7016–2 Exceptions.

This restriction does not apply if—

(a) The acquisition is below the simplified acquisition threshold; or

(b) Spares and repair parts are needed to support air circuit breakers manufactured outside the United States or Canada. Support includes the purchase of spare air circuit breakers where those from alternate sources are not interchangeable.

[60 FR 19533, Apr. 19, 1995]

225.7016–3 Waiver.

The waiver criteria at 225.7004–4 also apply to this restriction.

[60 FR 61597, Nov. 30, 1995]

225.7016–4 Contract clause.

Use the clause at 252.225–7029, Preference for United States or Canadian Air Circuit Breakers, in all solicitations and contracts requiring air circuit breakers for naval vessels, unless—

(a) An exception under 225.7016–2 is known to apply; or

(b) A waiver has been granted in accordance with 225.7016–3.

[60 FR 19534, Apr. 19, 1995]

225.7017 Restriction on carbon, alloy, and armor steel plate.

225.7017–1 Restriction.

In accordance with section 8111 of Pub. L. 102–172, and similar sections in subsequent appropriations acts, all carbon, alloy, and armor steel plate in Federal stock class 9515 or described by American Society for Testing Materials (ASTM) or American Iron and Steel Institute (AISI) specifications, purchased by the Government or a contractor for use in a Government-owned facility or in a facility controlled (e.g.,

leased) by DoD, shall be melted and rolled in the United States or Canada.

[58 FR 28468, May 13, 1993]

225.7017–2 Exceptions.

This restriction does not apply to—

(a) Contracts in effect as of November 26, 1991;

(b) Direct purchases by DoD using other than fiscal year 1992 or subsequent year funds; or

(c) Purchases by contractors unless the prime contract uses fiscal year 1992 or subsequent year funds.

[58 FR 28468, May 13, 1993]

225.7017–3 Waiver.

The restriction may be waived by the Secretary of the department responsible for acquisition, on a case-by-case, by certifying to the House and Senate Committees on Appropriations that—

(a) Adequate U.S. or Canadian supplies are not available to meet DoD requirements on a timely basis; and

(b) The acquisition must be made in order to acquire capability for national security purposes.

[57 FR 14994, Apr. 23, 1992]

225.7017–4 Contract clause.

Unless an exception under 225.7017–2 is known to apply or a waiver has been granted in accordance with 225.7017–3, use the clause at 252.225–7030, Restriction on Acquisition of Carbon, Alloy, and Armor Steel Plate, in all solicitations and contracts which—

(a) Require the delivery to the Government of carbon, alloy, or armor steel plate which will be used in a facility owned by the Government or under the control of DoD; or

(b) Require contractors operating in a Government-owned facility or a facility under the control of DoD to purchase carbon, alloy, or armor steel plate.

[57 FR 14994, Apr. 23, 1992, as amended at 57 FR 53600, Nov. 12, 1992]

225.7018 Restriction on four ton dolly jacks.

§ 225.7018–1 Restriction.

In accordance with section 9108 of Public Law 102–396, no fiscal year 1993 funds shall be used to procure four ton dolly jacks manufactured outside the United States.

[59 FR 27672, May 27, 1994]

225.7018–2 Waiver.

The restriction is 225.7018–1 may be waived on a case-by-case basis where the Secretary of the Military Department or the Under Secretary of Defense (Acquisition & Technology) certifies to the Committees on Appropriations of the House and Senate that—

(a) Adequate domestic supplies are available to meet requirements on a timely basis; and

(b) The acquisition must be made in order to acquire capability for national security purposes.

[58 FR 28468, May 13, 1993, as amended at 60 FR 61597, Nov. 30, 1995]

§ 225.7018–3 Contract clause.

Use the clause at section 252.225–7033, Restriction on Acquisition of Four Ton Dolly Jacks, in solicitations and contracts that use fiscal year 1993 funds for the acquisition of four ton dolly jacks.

[59 FR 27672, May 27, 1994]

225.7019 Restrictions on ball and roller bearings.

225.7019–1 Restrictions.

(a) In accordance with 10 U.S.C. 2534, through fiscal year 2000, do not acquire ball and roller bearings or bearing components which are not manufactured in the United States or Canada.

(b) In accordance with Section 8099 of Public Law 104–61, do not use fiscal year 1996 funds to acquire ball and roller bearings other than those produced by a domestic source and of domestic origin, i.e., bearings and bearing components manufactured in the United States or Canada.

[61 FR 10900, Mar. 18, 1996]

225.7019–2 Exceptions.

(a) The restriction in 225.7019–1(a) does not apply to—

(1) Acquisitions using simplified acquisition procedures, unless ball or roller bearings or bearing components are the end items being purchased;

(2) Purchases of commercial items incorporating ball or roller bearings;

(3) Miniature and instrument ball bearings when necessary to meet urgent military requirements;

(4) Items acquired overseas for use overseas; or

(5) Ball and roller bearings or bearing components or items containing bearings for use in a cooperative or co-production project under an international agreement. This exception does not apply to miniature and instrument ball bearings.

(b) The restriction in 225.7019–1(b) does not apply to contracts for acquisition of commercial items or subcontracts for acquisition of commercial items or subcontracts for acquisition of commercial items or commercial components (see 212.503(a)(xi) and 212.504(a)(xxxvi)).

[61 FR 50453, Sept. 26, 1996]

225.7019–3 Waiver.

(a) The head of the contracting activity may waive the restriction in 225.7019–1(a)—

(1) Upon execution of a determination and findings that—

(i) No domestic (U.S. or Canadian) bearing manufacturer meets the requirement;

(ii) It is not in the best interests of the United States to qualify a domestic bearing to replace a qualified nondomestic bearing. This determination must be based on a finding that the qualification of a domestically manufactured bearing would cause unreasonable costs or delay. A finding that a cost is unreasonable should take into consideration DoD policy to assist the domestic industrial mobilization base. Contracts should be awarded to domestic bearing manufacturers to increase their capability to reinvest and become more competitive;

(iii) United States producers of the item would not be jeopardized by competition from a foreign country, and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country;

(iv) Application of the restriction would impede cooperative programs entered into between DoD and a foreign country, and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country;

(v) Application of the restriction would result in the existence of only one source for the item in the United States or Canada;

(vi) Application of the restriction is not in the national security interests of the United States; or

(vii) Application of the restriction would adversely affect a U.S. company.

(2) For multiyear contracts or contracts exceeding 12 months, except those for miniature and instrument ball bearings, only if—

(i) The head of the contracting activity executes a determination and findings in accordance with paragraph (a) of this subsection;

(ii) The contractor submits a written plan for transitioning from the use of nondomestic to domestically manufactured bearings;

(iii) The plan—

(A) States whether a domestically manufactured bearing can be qualified, at a reasonable cost, for use during the course of the contract period;

(B) Identifies any bearings that are not domestically manufactured, their application, and source of supply; and

(C) Describes, including cost and timetable, the transition to a domestically manufactured bearing. (The timetable for the transition should normally take no longer than 24 months from the date the waiver is granted); and

(iv) The contracting officer accepts the plan and incorporates it in the contract.

(3) For miniature and instrument ball bearings, only if the contractor agrees to acquire a like quantity and type of domestic manufacture for nongovernmental use.

(b) The Secretary of the department responsible for the acquisition may waive the restriction in 225.7019–1(b) on a case-by-case basis, by certifying to the House and Senate Committees on Appropriations that—

(1) Adequate domestic supplies are not available to meet DoD requirements on a timely basis; and

(2) The acquisition must be made in order to acquire capability for national security purposes.

[61 FR 10900, Mar. 18, 1996, as amended at 61 FR 50453, Sept. 26, 1996]

225.7019–4 Contract clause.

Use the clause at 252.225–7016, Restriction on Acquisition of Ball and Roller Bearings, in all solicitations and contracts, unless—

(a) The restrictions in 225.7019–1 do not apply or a waiver has been granted; or

(b) The contracting officer knows that the items being acquired do not contain ball or roller bearings.

[61 FR 10900, Mar. 18, 1996]

225.7020 Restriction on coal and petroleum pitch carbon fiber.

225.7020–1 Restriction.

(a) Section 8040A of Public Law 102–172, and section 9040A of Public Law 102–396, require the Secretary of Defense to take such action as necessary to ensure by fiscal year 1994 that a minimum of 75 percent of the annual DoD requirements for coal and petroleum pitch carbon fibers is acquired from domestic sources.

(b) To meet this goal, all new major systems must use U.S. or Canadian manufacturers or producers for all coal and petroleum pitch carbon fiber requirements.

[59 FR 27672, May 27, 1994]

225.7020–2 Contract clause.

(a) Use the clause at 252.224–7034, Restriction on Acquisition of Coal and Petroleum Pitch Carbon Fiber, in all acquisitions for major systems (as defined in FAR part 34) that are not yet in production (milestone III as defined in DoDI 5000.2, Defense Acquisition Program Procedures.)

(b) Contracting officers may, with the approval of the head of the contracting activity, waive, in whole or in part, the manufacturing/production requirement in paragraph (b) of the clause at 252.225–7034. For example, a waiver is justified if a qualified U.S. or Canadian source cannot meet scheduling requirements.

[59 FR 27672, May 27, 1994]

225.7021 Restriction on aircraft fuel cells.

225.7021–1 Restriction.

In accordance with section 8090 of the Fiscal Year 1994 Defense Appropriations Act (Pub. L. 103–139) and section 8075 of the Fiscal Year 1995 Defense Appropriations Act (Pub. L. 103–335), do not purchase aircraft fuel cells unless they are produced or manufactured in the United States by a domestic-operated entity.

[60 FR 29498, June 5, 1995]

225.7021–2 Waiver.

The restriction may be waived by the Secretary of the department responsible for the acquisition, on a case-by-case basis, by certifying to the House and Senate Committees on Appropriations that—

(a) Adequate U.S. supplies are not available to meet requirements on a timely basis; and

(b) The acquisition must be made in order to acquire capability for national security purposes.

[59 FR 11729, Mar. 14, 1994]

225.7021–3 Contract clause.

Unless a waiver has been granted in accordance with 225.7021–2, use the clause at 252.225–7038, Restriction on Acquisition of Aircraft Fuel Cells, in all solicitations and contracts which—

(a) Use fiscal year 1994 or 1995 funds; and

(b) Require delivery of aircraft fuel cells.

[60 FR 29498, June 5, 1995]

225.7022 Restrictions on totally enclosed lifeboat survival systems.

225.7022–1 Restrictions.

(a) In accordance with Section 8124 of the Fiscal Year 1994 Defense Appropriations Act (Public Law 103–139) and Section 8093 of the Fiscal Year 1995 Defense Appropriations Act (Public Law 103–335), do not purchase a totally enclosed lifeboat survival system, which consists of the lifeboat and associated

davits and winches, unless 50 percent or more of the components are manufactured in the United States, and 50 percent or more of the labor in the final manufacture and assembly of the entire system is performed in the United States.

(b) In accordance with 10 U.S.C. 2534(a)(3)(B), do not purchase a totally enclosed lifeboat which is a component of a naval vessel, unless it is manufactured in the United States or Canada. In accordance with 10 U.S.C. 2534(h), this restriction may not be implemented through the use of a contract clause or certification. Implementation shall be effected through management and oversight techniques that achieve the objective of the restriction without imposing a significant management burden on the Government or the contractor involved.

[61 FR 13107, Mar. 26, 1996]

225.7022–2 Exceptions.

The restriction in 225.7022–1(b) does not apply if—

(a) The acquisition is at or below the simplified acquisition threshold; or

(b) Spare or repair parts are needed to support totally enclosed lifeboats manufactured outside the United States or Canada.

[61 FR 13107, Mar. 26, 1996]

225.7022–3 Waiver.

The waiver criteria at 225.7004–4 apply only to the restriction of 225.7022–1(b).

[61 FR 13107, Mar. 26, 1996]

225.7022–4 Contract clause.

Use the clause at 252.225–7039, Restriction on Acquisition of Totally Enclosed Lifeboat Survival Systems, in all solicitations and contracts which require delivery of totally enclosed lifeboat survival systems.

[61 FR 13107, Mar. 26, 1996]

225.7023 Restriction on supercomputers.

225.7023–1 Restriction.

In accordance with section 8112 of Pub. L. 100–202, and similar sections in subsequent Defense Appropriations Acts, do not purchase any supercomputer that is not manufactured in the United States.

[60 FR 34471, July 3, 1995, as amended at 60 FR 61597, Nov. 30, 1995]

225.7023–2 Waiver.

The restriction in 225.7023–1 may be waived by the Secretary of Defense on a case-by-case basis, after the Secretary of Defense certifies to the Armed Services and Appropriations Committees of Congress that—

(a) Adequate U.S. supplies are not available to meet requirements on a timely basis; and

(b) The acquisition must be made in order to acquire capability for national security purposes.

[60 FR 34471, July 3, 1995]

225.7023–3 Contract clause.

Use the clause at 252.225–7011, Restriction on Acquisition of Supercomputers, in solicitations and contracts for the acquisition of supercomputers.

[60 FR 34471, July 3, 1995, as amended at 60 FR 61597, Nov. 30, 1995]

Subpart 225.71—Other Restrictions on Foreign Purchases

225.7100 Scope of subpart.

This subpart contains foreign product restrictions which are based on policies designed to protect the defense industrial base.

225.7101 Definitions.

Relevant definitions are in the clause at 252.225–7025, Foreign Source Restrictions.

[56 FR 36367, July 31, 1991, as amended at 56 FR 67216, Dec. 30, 1991]

225.7102 Policy.

DoD requirements for the following forging items, whether as end items or components, shall be acquired from domestic sources (as described in the clause at 252.225–7025) to the maximum extent practicable—

Items	Categories
Ship propulsion shafts	Excludes service and landing craft shafts.
Periscope tubes	All.

Items	Categories
Ring forgings for bull gears ...	All greater than 120 inches in diameter.

[61 FR 50453, Sept. 26, 1996]

225.7103 Exceptions.

The policy in 225.7102 does not apply to acquisitions—

(a) Using simplified acquisition procedures, unless the restricted item is the end item being purchased;

(b) Overseas for overseas use; or

(c) When the quantity acquired exceeds the amount needed to maintain the U.S. defense mobilization base (provided such quantity is an economical purchase quantity). The restriction to domestic sources does not apply to the quantity above that required to maintain the base, in which case, qualifying country sources may compete.

[61 FR 50453, Sept. 26, 1996]

225.7104 Waiver.

Upon request from a prime contractor, the contracting officer may waive the requirement for domestic manufacture of the items covered by the policy in 225.7102.

[61 FR 50453, Sept. 26, 1996]

225.7105 Contract clause.

(a) Use the clause at 252.225–7025, Foreign Source Restrictions, in all solicitations and contracts, except—

(1) Those in 225.7103; or

(2) Those where the contracting officer knows that the supplies being acquired do not contain the restricted items.

(b) If an exception under 225.7103 applies to any portion of the acquisition, specify the exception in the solicitation and contract.

Subpart 225.72—Reporting Contract Performance Outside the United States

SOURCE: 58 FR 28469, May 13, 1993, unless otherwise noted.

225.7200 Scope of subpart.

This subpart prescribes procedures for contractor reporting and DoD monitoring of the volume, type, and nature of contract performance outside the United States, to include subcontracts, purchases, and intracompany transfers. It implements 10 U.S.C. 2410g which requires advance notification of contract performance outside the United States and Canada when the contract could have been performed inside the United States or Canada.

225.7201 Exception.

This subpart does not apply to contracts for commercial items, construction, ores, natural gas, utilities, petroleum products and crudes, timber (logs), or subsistence.

[60 FR 61597, Nov. 30, 1995]

225.7202 Distribution of reports.

The contracting officer shall forward a copy of reports submitted by successful offerors as required by the clause at 252.225–7026, Reporting of Contract Performance Outside the United States, to the Deputy Director of Defense Procurement (Foreign Contracting), OUSD(A&T)DP(FC), Washington, DC 20301–3060. This is necessary to satisfy the requirement of 10 U.S.C. 2410g that the notifications (or copies) be maintained in compiled form for five years after the date of submission.

[58 FR 28469, May 13, 1993, as amended at 60 FR 29499, June 5, 1995]

225.7203 Contract clause.

Except for acquisitions in 225.7201, use the clause at 252.225–7026, Reporting of Contract Performance Outside the United States, in all solicitations and contracts with an estimated or actual value exceeding $500,000, including those modified to exceed $500,000.

Subpart 225.73—Acquisitions for Foreign Military Sales

225.7300 Scope of subpart.

(a) This subpart contains policies and procedures for acquisitions for foreign military sales (FMS) under the Arms Export Control Act. Section 22 of the Arms Export Control Act (Pub. L. 90–629, as amended) authorizes DoD to enter into contracts for resale to foreign countries or international organizations.

(b) This subpart does not apply to—

(1) Foreign military sales made from inventories or stocks;

(2) Acquisitions for replenishment of inventories or stocks;

(3) Acquisitions made under DoD cooperative logistic supply support arrangements.

225.7301 General.

(a) The U.S. Government sells defense articles and services to foreign governments or international organizations through foreign military sales (FMS) agreements. The agreement is documented on a DD Form 1513, DoD Offer and Acceptance. The DD Form 1513—

(1) Lists the items and services, estimated costs, and terms and conditions of the sale;

(2) Is presented to the foreign customer; and

(3) Provides for signature of the foreign customer to indicate acceptance.

(b) Acquisitions for FMS are conducted under the same acquisition and contract management procedures as other defense acquisitions.

(c) Solicitations shall separately identify known FMS requirements and the FMS customer.

(d) Contracts for known FMS requirements shall clearly be marked ''FMS requirement'' on the face of the contract along with the FMS customer and the case identifier code.

225.7302 Procedures.

On FMS programs that will require an acquisition, the contracting officer assists the departmental/agency activity responsible for preparing the DoD Offer and Acceptance by—

(a) Working with prospective contractors to—

(1) Identify and review sales commissions and fees;

(2) Identify, in advance of the DoD Offer and Acceptance, any unusual provisions or deviations.

(3) Advise the contractor if the departmental/agency activity expands, modifies, or does not accept any requirements proposed by the contractor;

(4) Identify any logistics support necessary to perform the contract; and

(5) For acquisitions over $10,000 that are to be awarded noncompetitively, asking the prospective contractor(s) for information on price, delivery, and other relevant factors. The request for information must identify the fact that the information is for a potential foreign military sale and must identify the foreign customer.

(b) Working with the departmental/agency activity responsible for preparing the DoD Offer and Acceptance to—

(1) Assist, as necessary, in preparation of the DD Form 1513;

(2) Identify and explain all unusual contractual requirements or requests for deviations; and

(3) Assist in preparing the price and availability data.

225.7303 Pricing acquisitions for foreign military sales.

Price FMS contracts using the same principles as are used in pricing other defense contracts. Application of the pricing principles in FAR parts 15 and 31 to an FMS contract, however, may result in prices that differ from other defense contract prices for the same item due to the considerations in this section.

[56 FR 36367, July 31, 1991, as amended at 61 FR 50453, Sept. 26, 1996]

225.7303–1 Contractor sales to other foreign customers.

If the contractor has made sales of the item required for the foreign military sale to foreign customers under comparable conditions, including quantity and delivery, price the FMS contract in accordance with FAR part 15.

225.7303–2 Cost of doing business with a foreign government or an international organization.

(a) In pricing FMS contracts where non-U.S. Government prices as described in 225.7303–1 do not exist, except as provided in 225.7303–5, recognize the reasonable and allocable costs of doing business with a foreign government or international organization, even though such costs might not be recognized in the same amounts in pricing other defense contracts. Examples of such costs include, but are not limited to—

(1) Selling expenses (not otherwise limited by FAR part 31), e.g.—

(i) Maintaining international sales and service organizations;

(ii) Sales commissions and fees in accordance with FAR subpart 3.4;

(iii) Sales promotions, demonstrations, and related travel for sales to foreign governments. Paragraph 126.8 of the International Traffic in Arms Regulations (ITAR) (22 CFR part 121) may require Government approval for these costs to be allowable. If Government approval is required for promotion or demonstration costs to be allowable, the approval must be obtained.

(iv) Configuration studies and related technical services undertaken as a direct selling effort to a foreign country.

(2) Product support and post-delivery service expenses, such as—

(i) Operations or maintenance training, training or tactics films, manuals, or other related data; and

(ii) Technical field services provided in a foreign country related to accident investigations, weapon system problems, operations/tactics enhancement, and related travel to foreign countries.

(3) Offset implementation costs.

(i) A U.S. defense contractor may recover costs incurred to implement its offset agreement with a foreign government or international organization if the foreign military sale Letter of Offer and Acceptance is financed wholly with customer cash or repayable foreign military finance credits.

(ii) The U.S. Government assumes no obligation to satisfy or administer the offset requirement or to bear any of the associated costs.

(4) Costs that are the subject of advance agreement under the appropriate provisions of FAR part 31; or where the advance understanding places a limit on the amounts of cost that will be recognized as allowable in defense contract pricing, and the agreement contemplated that it will apply only to DoD contracts for the U.S. Government's own requirement (as distinguished from contracts for FMS).

(b) Costs not allowable under FAR part 31 are not allowable in pricing foreign military sale contracts, except as noted in paragraph (c) of this subsection.

(c) The provisions of 10 U.S.C. 2372 do not apply to contracts for foreign military sales. Therefore, the cost limitations on independent research and development and bid and proposal (IR&D/B&P) costs in FAR 31.205–18 do not apply to such contracts, except as provided in 225.7303–5. The allowability of IR&D/B&P costs on contracts for foreign military sales not wholly paid for from funds made available on a nonrepayable basis shall be limited to the contract's allocable share of the contractor's total IR&D/B&P expenditures. In pricing contracts for such foreign military sales—

(1) Use the best estimate of reasonable costs in forward pricing.

(2) Use actual expenditures, to the extent that they are reasonable, in determining final cost.

(d) Under section 21(e)(1)(A) of the Arms Export Control Act, as amended, the United States must charge for administrative services to recover the estimated cost of administration of sales made under the Arms Export Control Act.

[56 FR 36367, July 31, 1991, as amended at 56 FR 67216, Dec. 30, 1991; 57 FR 42631, Sept. 15, 1992; 57 FR 53600, Nov. 12, 1992; 59 FR 50511, Oct. 4, 1994; 61 FR 7744, Feb. 29, 1996; 61 FR 18987, Apr. 30, 1996]

225.7303–3 Government-to-government agreements.

If a government-to-government agreement between the United States and a foreign government for the sale, coproduction, or cooperative logistic support of a specifically defined weapon system, major end item, or support item, contains language in conflict with the provisions of this section, the language of the government-to-government agreement prevails.

225.7303–4 Sales commissions and contingent fees.

Sales commissions and contingent fees are allowable under defense contracts provided that the commissions or fees are paid to a bona fide employee or a bona fide established commercial or selling agency maintained by the prospective contractor for the purpose of securing business (see FAR part 31 and FAR subpart 3.4). For FMS, it is extremely difficult for DoD to verify the services, or the value of the services. Therefore, the cost of allowable

sales commissions and contingent fees (as defined in FAR subpart 3.4) is limited to $50,000 and must be identified to the FMS customer before, or at the time of, submitting the DoD Offer and Acceptance (DD Form 1513) to the customer.

(a) When requesting price and availability data for an Offer and Acceptance, require contractors to identify the amount of any sales commissions or fees. The fees, even if under $50,000 per contract, must be justified and supported. Except for those contracts excluded in FAR subpart 3.4—

(1) Require the contractor to submit a Contractor's Statement of Contingent or Other Fees (Standard Form 119) (Including any such fees claimed by subcontractors);

(2) Determine under FAR subpart 3.4 whether a bona fide employee or agency relationship exists (for the purposes of FMS, the definition in FAR subpart 3.4 of improper influence also extends to officials of the foreign government);

(3) Require the contractor to submit a breakdown of the fee for the sales representative's services. Even if a bona fide employee or agency relationship is determined to exist, the fee must be reasonable.

(i) Whether the fee is reasonable requires an assessment of the services provided, or to be provided, compared to the amount of the fee.

(ii) The proposed fee/commission may be compared with known costs for comparable services under non-FMS contracts, or for FMS sales of comparable scope and dollar amounts for the same or similar items.

(iii) In analyzing the fee, give consideration to whether the sale is the initial or a follow-on sale. Effort for follow-on sales of additional quantities, spares, and support equipment is normally not as great as the effort for the initial sale.

(4) The chief of the contracting office must approve the contracting officer's determination—

(i) As to whether there is a bona fide employee or agency relationship; and

(ii) Of the reasonableness of the commission or fee.

(b) If the foreign customer disapproves the fee, or a portion of the fee, the contracting officer must notify the prospective contractor and request that the contractor withdraw the fee for the sales representative from the proposal. If the contractor refuses to withdraw the fee, the contracting officer notifies the department/agency activity responsible for preparation of the DoD Offer and Acceptance, which notifies the foreign customer that DoD is unable to purchase the items or services from that contractor.

(c) It may not be possible to determine whether or not the price to be paid for material or services will include sales commissions and fees (for example, when FMS requirements are to be fulfilled by competitive acquisitions). In such cases, if contract negotiations indicate that costs for a sales representative will be claimed by the contractor, the department/agency responsible for presentation of the Offer and Acceptance notifies the foreign customer as soon as possible and asks for a reply within 30 days as to whether the customer will approve the costs.

(d) Under DoD 5105.38–M, Security Assistance Management Manual, Letters of Offer and Acceptance for requirements for the governments of Australia, Taiwan, Egypt, Greece, Israel, Japan, Jordan, Republic of Korea, Kuwait, Pakistan, Philippines, Saudi Arabia, Turkey, Thailand, or Venezuela (Air Force) must provide that all U.S. Government contracts resulting from the Letters of Offer prohibit the payment of sales commission and fee unless the payments have been identified and payment approved in writing by the foreign customer before contract award. (See 225.7308(a).)

225.7303–5 Aquisitions wholly paid for from nonrepayable funds.

(a) In accordance with 22 U.S.C. 2762(d), foreign military sales wholly paid for from funds made available on a nonrepayable basis shall be priced on the same costing basis with regard to profit, overhead, IR&D/B&P, and other costing elements, as is applicable to acquisitions of like items purchased by DoD for its own use.

(b) Direct costs associated with meeting a foreign customer's additional or unique requirements will be allowable under such contracts. Indirect burden rates applicable to such direct costs

shall be permitted at the same rates applicable to acquisitions of like items purchased by DoD for its own use.

(c) A U.S. defense contractor may not recover costs incurred to implement its offset agreement with a foreign government or international organization if the foreign military sale Letter of Offer and Acceptance is financed with funds made available on a nonrepayable basis.

[61 FR 18988, Apr. 30, 1996; 61 FR 49531, Sept. 20, 1996]

225.7304 Source selection.

(a) FMS customers may request that a defense article or defense service be obtained from a particular contractor. In such cases, FAR 6.302–4 provides authority to contract without full-and-open competition. The FMS customer may also request that a subcontract be placed with a particular firm. The contracting officer shall honor such requests from the FMS customer only if the Letter of Agreement or other written direction sufficiently fulfills the requirements of FAR 6.3.

(b) Do not allow representatives of the FMS customer to—

(1) Direct the deletion of names of firms from bidders mailing lists or slates of proposed A–E firms. (They may suggest the inclusion of certain firms);

(2) Interfere with a contractor's placement of subcontracts; or

(3) Participate in the price negotiations between the U.S. Government and the contractor.

(c) Do not accept directions from the FMS customer on source selection decisions or contract terms (other than the special contract provisions and warranties referred to in Condition A.2 of the DD Form 1513).

(d) Do not honor any requests by the FMS customer to reject any bid or proposal.

225.7305 Limitation of liability.

The contracting officer must advise the contractor whenever the foreign customer will assume the risk for loss or damage under the appropriate limitation of liability clause(s) (see FAR subpart 46.8). Consider the costs of necessary insurance, if any, obtained by the contractor to cover the risk of loss or damage in establishing the FMS contract price.

225.7306 Exercise of options for foreign military sales.

Consider changes to cost and profit attributable to pricing differences between U.S. and FMS requirements when exercising an option to satisfy an FMS requirement. Also consider such changes if the option is already identified for FMS, but it is exercised for country B requirements instead of the country A requirements for which it was priced.

225.7307 Implementation of offset arrangements negotiated pursuant to foreign military sales agreements.

225.7307–1 General.

(a) The purpose of an FMS/offset arrangement is to fulfill commitments negotiated pursuant to an FMS agreement. The general policy in fulfilling these commitments is to exempt the FMS country's products from the requirements of the Buy American Act on a case-by-case basis.

(b) Generally, it is not appropriate to establish an offset goal or objective. If in special circumstances it is in the national interest to establish an offset goal or objective, the goal or objective may be stated as—

(1) A certain percentage of the FMS agreement dollar value;

(2) A specific dollar amount; or

(3) A combination of the two.

(c) The Presidential policy statement of April 16, 1990 provides that DoD shall not encourage, enter directly into, or commit U.S. firms, to any FMS/offset arrangement. The decision whether to engage in offsets, and the responsibility for negotiating and implementing offset arrangements, resides with the companies involved. Exceptions to this policy must be approved by the President through the National Security Council. This does not prevent DoD from fulfilling obligations incurred through international agreements entered into before April 16, 1990.

(d) When authorized, offset provisions typically require the Military Departments or U.S. prime contractors, or both, to provide opportunities for foreign sources to obtain contracts under

the terms and conditions of the particular DoD offset agreement. Normally, FMS/offset arrangements are negotiated before the FMS agreement Offer and Acceptance so that—

(1) DoD and its contractors have an opportunity to assess in advance their ability to fulfill the FMS/offset arrangement; and

(2) The offer can include those DoD and contractor costs associated with such arrangements.

(e) If an exception is granted under paragraph (c) of this subsection, the domestic concerns involved in the FMS and the foreign customer will make suitable arrangements to fulfill an FMS/offset arrangement. Only if the Government determines that the FMS/offset arrangement cannot be fulfilled in this fashion will DoD seek to fulfill the offset commitments through other defense purchases. When practical, the U.S. contractor shall be contacted and coordination obtained before the Government commits the contractor's participation.

(f) The Defense Security Assistance Agency (DSAA) acts as the focal point within the Executive Branch for interagency coordination on offset policy. DSAA consults with, and derives its overall policy guidance from, the Office of the Assistant Secretary of Defense (International Security Affairs). The Director of Defense Procurement is responsible for matters pertaining to the fulfillment of the offset portion of FMS agreements. General information regarding the existence of FMS/offset arrangements with particular countries or implementation of such arrangements may be obtained by submitting inquiries to the Directorate for Foreign Contracting, OUSD(A&T)DP(FC).

[56 FR 36367, July 31, 1991, as amended at 60 FR 61597, Nov. 30, 1995]

225.7307–2 Procedures.

(a) Whenever an FMS agreement involves a single major weapon system, the department responsible for acquisition of the weapon system is responsible for managing any resulting FMS/offset arrangement.

(b) If an FMS agreement involves the sale of items from two or more departments, USD(A&T)DP may either direct that one department be responsible for coordinating the implementation of the FMS/offset arrangement, or apportion responsibility for managing the offset program among two or more departments.

[56 FR 36367, July 31, 1991, as amended at 60 FR 61597, Nov. 30, 1995]

225.7308 Contract clauses.

(a) Use the clause at 252.225–7027, Limitation on Sales Commissions and Fees, in all solicitations and contracts for foreign military sales for the countries in 225.7303–4(d), unless payment of sales commissions and fees has been approved by the foreign customer. Insert the name of the foreign country customer in the three blanks of the clause.

(b) Use the clause at 252.225–7028, Exclusionary Policies and Practices of Foreign Governments, in all solicitations and contracts for the purchase of goods and services for international military education training and foreign military sales.

PART 226—OTHER SOCIOECONOMIC PROGRAMS

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Subpart 226.72—Base Closures and Realignments

226.7200 Scope.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36388, July 31, 1991, unless otherwise noted.

Subpart 226.1—Indian Incentive Program.

226.103 Procedures.

Contracting officers shall contact the Office of Small and Disadvantaged Business Utilization, Office of the Under Secretary of Defense for Acquisition and Technology, OUSD(A&T) SADBU, Room 2A340, The Pentagon, Washington, DC 20301–3061, (703) 697–1688, to obtain funding for an approved Indian incentive payment request. Upon receipt of funding from OUSD(A&T) SADBU, the contracting officer shall issue a unilateral contract modification to add the incentive payment.

[60 FR 61597, Nov. 30, 1995]

Subpart 226.70—Historically Black Colleges and Universities and Minority Institutions

§ 226.7000 Scope of subpart.

This subpart implements the historically black college and university (HBCU) and minority institution (MI) provisions of 10 U.S.C. 2323, which—

(a) Set a goal for DoD for each of fiscal years 1987 through 2000 to award five percent of contract and subcontract dollars to small disadvantaged business concerns and HBCU/MIs; and

(b) Require a separate goal, for each of fiscal years 1991 through 2000, as a subset of the five percent goal, for the participation of HBCUs and MIs.

[59 FR 27672, May 27, 1994]

226.7001 Definitions.

Definitions of HBCUs and MIs are in the clause at 252.226–7000.

226.7002 General policy.

The DoD will use outreach efforts, technical assistance programs, advance payments, HBCU/MI set-asides, and evaluation preferences to meet its contract and subcontract goal for use of HBCUs and MIs. In addition, DoD will establish ''infrastructure assistance'' (e.g., scholarships, faculty development, teaming agreements with defense laboratories, and laboratory renovation) at colleges, universities, and institutions that agree to bear a substantial portion of the costs associated with the progams.

[56 FR 67216, Dec. 30, 1991]

226.7003 Set-asides for HBCUs and MIs.

226.7003–1 Set-aside criteria.

Set-aside acquisitions for exclusive HBCU and MI participation when the acquisition is for research, studies, or services of the type normally acquired from higher educational institutions and there is a reasonable expectation that—

(a) Offers will be submitted by at least two responsible HBCUs or MIs which can comply with the subcontracting limitations in the clause at FAR 52.219–14;

(b) Award will be made at not more than ten percent above fair market price; and

(c) Scientific and/or technological talent consistent with the demands of the acquisition will be offered.

226.7003–2 Set-aside procedures.

(a) As a general rule, use competitive negotiation for HBCU/MI set-asides.

(b) When using a broad agency announcement (FAR 35.016) for basic or applied research, make partial set-asides for HBCU/MIs as explained in 235.016.

(c) Follow the special synopsis instructions in 205.207(d) (iii), (iv), and (v).

(d) Cancel the set-aside if the low responsible offer exceeds the fair market price (defined in FAR part 19) by more than ten percent.

226.7004 Evaluation preference for HBCUs and MIs.

In acquisitions which use the evaluation preference described in subpart 219.70 for small disadvantaged business concerns, the preference also applies to offers from HBCUs or MIs.

226.7005 Eligibility as an HBCU or MI.

(a) To be eligible for award as an HBCU or MI under the preference procedures of this subpart, an offeror must—

(1) Be an HBCU or MI, as defined in the clause at 252.226–7000, Notice of Historically Black College or University and Minority Institution Set-Aside, at the time of submission of its initial offer including price; and

(2) Provide the contracting officer with evidence of its HBCU or MI status upon request.

(b) The contracting officer shall accept an offeror's certification under the provision at 252.226–7001 that it is an HBCU or MI, unless—

(1) Another offeror challenges the certification; or

(2) The contracting officer has reason to question the offeror's HBCU/MI status. (A list of HBCUs is published periodically by the Department of Education.)

[56 FR 36388, July 31, 1991, as amended at 59 FR 22131, Apr. 29, 1994]

226.7006 Protesting an HBCU or MI representation.

Any offeror or other interested party may challenge an offeror's HBCU or MI representation by filing a protest with the contracting officer. The protest must contain specific detailed evidence supporting the basis for the challenge. Such protests are handled in accordance with FAR 33.103 and are decided by the contracting officer.

226.7007 Goals and incentives for subcontracting with HBCU/MIs.

(a) In reviewing subcontracting plans submitted under the clause at FAR 52.219–9, Small Business and Small Disadvantaged Business Subcontracting Plan, the contracting officer shall—

(1) Ensure that the contractor included anticipated awards to HBCU/MIs in the small disadvantaged business goal;

(2) Consider whether subcontracts are contemplated which involve research or studies of the type normally performed by higher educational institutions.

(b) Use of incentives for subcontracting with HBCU/MIs is prescribed in 219.708(c)(1).

226.7008 Solicitation provision and contract clause.

(a) Use the clause at 252.226–7000, Notice of Historically Black College or University and Minority Institution Set-Aside, in solicitations and contracts set-aside for HBCU/MIs.

(b) Use the provision at 252.226–7001, Historically Black College or University and Minority Institution Certification, in solicitations set-aside for HBCU/MIs and in solicitations which contain the clause at 252.219–7006, Notice of Evaluation Preference for Small Disadvantaged Business Concerns.

[56 FR 36388, July 31, 1991, as amended at 57 FR 42631, Sept. 15, 1992]

Subpart 226.71—Preference for Local and Small Businesses

SOURCE: 59 FR 12192, Mar. 16, 1994, unless otherwise noted.

226.7100 Scope of subpart.

This subpart implements section 2912 of the Fiscal Year 1994 Defense Authorization Act (Pub. L. 103–160) and section 817 of the Fiscal Year 1995 Defense Authorization Act (Pub. L. 103–337).

[60 FR 5870, Jan. 31, 1995]

226.7101 Definition.

Vicinity, as used in this subpart, means the county or counties in which the military installation to be closed or realigned is located and all adjacent counties, unless otherwise defined by the agency head.

[60 FR 29499, June 5, 1995]

226.7102 Policy.

Businesses located in the vicinity of a military installation that is being closed or realigned under a base closure law, including 10 U.S.C. 2687, and small and small disadvantaged businesses shall be provided maximum practicable opportunity to participate in acquisitions that support the closure or realignment, including acquisitions for environmental restoration and mitigation.

226.7103 Procedure.

In considering acquisitions for award through the section 8(a) program (subpart 219.8 and FAR subpart 19.8) or in making set-aside decisions under subpart 219.5 and FAR subpart 19.5 for acquisitions in support of a base closure or realignment, the contracting officer shall—

(a) Determine whether there is a reasonable expectation that offers will be received from responsible business concerns located in the vicinity of the military installation that is being closed or realigned.

(b) If offers can not be expected from business concerns in the vicinity, proceed with section 8(a) or set-aside consideration as otherwise indicated in part 219 and FAR part 19.

(c) If offers can be expected from business concerns in the vicinity—

(1) Consider section 8(a) only if the 8(a) contractor is located in the vicinity.

(2) Set aside the acquisition for small disadvantaged business only if one of the expected offers is from a small disadvantaged business located in the vicinity.

(3) Set aside the acquisition for small business only if one of the expected offers is from a small business located in the vicinity.

[60 FR 29499, June 5, 1995]

226.7104 Other considerations.

When planning for contracts for services related to base closure activities at a military installation affected by a closure or realignment under a base closure law, contracting officers shall consider including, as a factor in source selection, the extent to which offerors specifically identify and commit, in their proposals, to a plan to hire residents of the vicinity of the military installation that is being closed or realigned.

[60 FR 61598, Nov. 30, 1995]

Subpart 226.72—Base Closures and Realignments

226.7200 Scope.

This subpart identifies the various policies and statutory authorities that affect contracts associated with the closure and realignment of military installations. These policies and authorities are—

(a) *Right of first refusal of employment.* This authority is embodied in a clause for use in solicitations and contracts arising from the closure of a military installation. The clause establishes employment rights for Government employees who are adversely affected by closure of the installation (see subpart 222.71).

(b) *Preference for local and small business.* This authority allows contracting officers, when entering into a contract as part of the closure or realignment of a military installation, to give preference, to the greatest extent practicable, to qualified businesses located in the vicinity of the installation and to small and small disadvantaged business concerns (see subpart 226.71).

(c) *Services at installations being closed.* This authority allows DoD, under certain conditions, to contract with local governments for police, fire protection, airfield operations and other community services at installations being closed (see subpart 237.74).

[59 FR 36089, July 15, 1994, as amended at 60 FR 29499, June 5, 1995]

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 227—PATENTS, DATA, AND COPYRIGHTS

Sec.

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AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36389, July 31, 1991, unless otherwise noted.

Subpart 227.3—Patent Rights Under Government Contracts

227.303 Contract clauses.

(a) Pursuant to FAR 27.304–1(e), the contracting officer shall insert the clause at 252.227–7039, Patents—Reporting of Subject Inventions, in solicitations and contracts containing the clause at FAR 52.227–11, Patent Rights—Retention by the Contractor (Short Form).

227.304 Procedures.

227.304–1 General.

Interim and final invention reports and notification of all subcontracts for experimental, developmental, or research work (FAR 27.304–1(e)(2)(ii)) may be submitted on DD Form 882, Report of Inventions and Subcontracts.

[56 FR 36389, July 31, 1991, as amended at 57 FR 53600, Nov. 12, 1992]

227.304–4 Subcontracts.

The contracting officer shall insert the clause at 252.227–7034, Patents-Subcontracts, in solicitations and contracts containing the clause at FAR 52.227–11, Patent Rights—Retention by the Contractor (Short Form).

Subpart 227.4—Rights in Data and Copyrights

227.400 Scope of subpart.

DoD activities shall use the guidance in subparts 227.71 and 227.72 instead of the guidance in FAR subpart 27.4.

[60 FR 33471, June 28, 1995]

Subpart 227.6—Foreign License and Technical Assistance Agreements

227.670 Scope.

This subpart prescribes policy with respect to foreign license and technical assistance agreements.

227.671 General.

In furtherance of the Military Assistance Program or for other national defense purposes, the Government may undertake to develop or encourage the development of foreign additional sources of supply. The development of such sources may be accomplished by an agreement, often called a foreign licensing agreement or technical assistance agreement, wherein a domestic concern, referred to in this subpart as a ''primary source,'' agrees to furnish to a foreign concern or government, herein referred to as a ''second source;'' foreign patent rights; technical assistance in the form of data, know-how, trained personnel of the primary source, instruction and guidance of the personnel of the second source, jigs, dies, fixtures, or other manufacturing aids, or such other assistance, information, rights, or licenses as are needed to enable the second source to produce particular supplies or perform particular services. Agreements calling for one or more of the foregoing may be entered into between the primary source and the Government, a foreign government, or a foreign concern. The consideration for providing such foreign license and technical assistance may be in the form of a lump sum payment, payments for each item manufactured by the second source, an agreement to exchange data and patent rights on improvements made to the article or service, capital stock transactions, or any combination of these. The primary source's bases for computing such consideration may include actual costs; charges for the use of patents, data, or know-how reflecting the primary source's investment in developing and engineering and production techniques; and the primary source's ''price'' for setting up a second source. Such agreements often refer to the compensation to be paid as a royalty or license fee whether or not patent rights are involved.

227.672 Policy.

It is Government policy not to pay in connection with its contracts, and not to allow to be paid in connection with contracts made with funds derived through the Military Assistance Program or otherwise through the United States Government, charges for use of patents in which it holds a royalty-free license or charges for data which it has a right to use and disclose to others, or which is in the public domain, or which the Government has acquired without restriction upon its use and disclosure to others. This policy shall be applied by the Departments in negotiating contract prices for foreign license technical assistance contracts (227.675) or supply contracts with second sources (227.674); and in commenting on such agreements when they are referred to the Department of Defense by the Department of State pursuant to section 414 of the Mutual Security Act of 1954 as amended (22 U.S.C. 1934) and the International Traffic in Arms Regulations (see 227.675).

227.673 Foreign license and technical assistance agreements between the Government and domestic concerns.

(a) Contracts between the Government and a primary source to provide technical assistance or patent rights to a second source for the manufacture of supplies or performance of services shall, to the extent practicable, specify the rights in patents and data and any other rights to be supplied to the second source. Each contract shall provide, in connection with any separate agreement between the primary source and the second source for patent rights or technical assistance relating to the articles or services involved in the contract, that—

(1) The primary source and his subcontractors shall not make, on account of any purchases by the Government or by others with funds derived through the Military Assistance Program or otherwise through the Government, any charge to the second source for royalties or amortization for patents or inventions in which the Government

holds a royalty-free license; or data which the Government has the right to possess, use, and disclose to others; or any technical assistance provided to the second source for which the Government has paid under a contract between the Government and the primary source; and

(2) The separate agreement between the primary and second source shall include a statement referring to the contract between the Government and the primary source, and shall conform to the requirements of the International Traffic in Arms Regulations (see 227.675–1).

(b) The following factors, among others, shall be considered in negotiating the price to be paid the primary source under contracts within (a) of this section:

(1) The actual cost of providing data, personnel, manufacturing aids, samples, spare parts, and the like;

(2) The extent to which the Government has contributed to the development of the supplies or services, and to the methods of manufacture or performance, through past contracts for research and development or for manufacture of the supplies or performance of the services; and

(3) The Government's patent rights and rights in data relating to the supplies or services and to the methods of manufacture or of performance.

227.674 Supply contracts between the Government and a foreign government or concern.

In negotiating contract prices with a second source, including the redetermination of contract prices, or in determining the allowability of costs under a cost-reimbursement contract with a second source, the contracting officer:

(a) Shall obtain from the second source a detailed statement (see FAR 27.204–1(a)(2)) of royalties, license fees, and other compensation paid or to be paid to a primary source (or any of his subcontractors) for patent rights, rights in data, and other technical assistance provided to the second source, including identification and description of such patents, data, and technical assistance; and

(b) Shall not accept or allow charges which in effect are—

(1) For royalties or amortization for patents or inventions in which the Government holds a royalty-free license; or

(2) For data which the Government has a right to possess, use, and disclose to others; or

(3) For any technical assistance provided to the second source for which the Government has paid under a contract between the Government and a primary source.

227.675 Foreign license and technical assistance agreements between a domestic concern and a foreign government or concern.

227.675–1 International Traffic in Arms Regulations.

Pursuant to section 414 of the Mutual Security Act of 1954, as amended (22 U.S.C. 1934), the Department of State controls the exportation of data relating to articles designated in the United States Munitions List as arms, ammunition, or munitions of war. (The Munitions List and pertinent procedures are set forth in the International Traffic in Arms Regulations, 22 CFR, *et seq.*) Before authorizing such exportation, the Department of State generally requests comments from the Department of Defense. On request of the Office of the Assistant Secretary of Defense (International Security Affairs), each Department shall submit comments thereon as the basis for a Department of Defense reply to the Department of State.

227.675–2 Review of agreements.

(a) In reviewing foreign license and technical assistance agreements between primary and second sources, the Department concerned shall, insofar as its interests are involved, indicate whether the agreement meets the requirements of §§124.07–124.10 of the International Traffic in Arms Regulations or in what respects it is deficient. Paragraphs (b) through (g) of this subsection provide general guidance.

(b) When it is reasonably anticipated that the Government will purchase from the second source the supplies or services involved in the agreement, or

that Military Assistance Program funds will be provided for the procurement of the supplies or services, the following guidance applies.

(1) If the agreement specifies a reduction in charges thereunder, with respect to purchases by or for the Government or by others with funds derived through the Military Assistance Program or otherwise through the Government, in recognition of the Government's rights in patents and data, the Department concerned shall evaluate the amount of the reduction to determine whether it is fair and reasonable in the circumstances, before indicating its approval.

(2) If the agreement does not specify any reduction in charges or otherwise fails to give recognition to the Government's rights in the patents or data involved, approval shall be conditioned upon amendment of the agreement to reflect a reduction, evaluated by the Department concerned as acceptable to the Government, in any charge thereunder with respect to purchases made by or for the Government or by others with funds derived through the Military Assistance Program or otherwise through the Government, in accordance with §124.10 of the International Traffic in Arms Regulations.

(3) If the agreement provides that no charge is to be made to the second source for data or patent rights to the extent of the Government's rights, the Department concerned shall evaluate the acceptability of the provision before indicating its approval.

(4) If time or circumstances do not permit the evaluation called for in (b)(1), (2), or (3) of this subsection, the guidance in (c) of this subsection shall be followed.

(c) When it is not reasonably anticipated that the Government will purchase from the second source the supplies or services involved in the agreement nor that Military Assistance Program funds will be provided for the purchase of the supplies or services, then the following guidance applies.

(1) If the agreement provides for charges to the second source for data or patent rights, it may suffice to fulfill the requirements of §124.10 insofar as the Department of Defense is concerned if:

(i) The agreement requires the second source to advise the primary source when he has knowledge of any purchase made or to be made from him by or for the Government or by others with funds derived through the Military Assistance Program or otherwise through the Government;

(ii) The primary source separately agrees with the Government that upon such advice to him from the second source or from the Government or otherwise as to any such a purchase or prospective purchase, he will negotiate with the Department concerned an appropriate reduction in his charges to the second source in recognition of any Government rights in patents or data; and

(iii) The agreement between the primary and second sources further provides that in the event of any such purchase and resulting reduction in charges, the second source shall pass on this reduction to the Government by giving the Government a corresponding reduction in the purchase price of the article or service.

(2) If the agreement provides that no charge is to be made to the second source for data or patent rights to the extent to which the Government has rights, the Department concerned shall:

(i) Evaluate the acceptability of the provision before indicating its approval; or

(ii) Explicitly condition its approval on the right to evaluate the acceptability of the provision at a later time.

(d) When there is a technical assistance agreement between the primary source and the Government related to the agreement between the primary and second sources that is under review, the latter agreement shall reflect the arrangements contemplated with respect thereto by the Government's technical assistance agreement with the primary source.

(e) Every agreement shall provide that any license rights transferred under the agreement are subject to existing rights of the Government.

(f) In connection with every agreement referred to in (b) of this section, a request shall be made to the primary source—

(1) To identify the patents, data, and other technical assistance to be provided to the second source by the primary source or any of his subcontractors,

(2) To identify any such patents and data in which, to the knowledge of the primary source, the Government may have rights, and

(3) To segregate the charges made to the second source for each such category or item of patents, data, and other technical assistance.

Reviewing personnel shall verify this information or, where the primary source does not furnish it, obtain such information from Governmental sources so far as practicable.

(g) The Department concerned shall make it clear that its approval of any agreement does not necessarily recognize the propriety of the charges or the amounts thereof, or constitute approval of any of the business arrangements in the agreement, unless the Department expressly intends by its approval to commit itself to the fairness and reasonableness of a particular charge or charges. In any event, a disclaimer should be made to charges or business terms not affecting any purchase made by or for the Government or by others with funds derived through the Military Assistance Program or otherwise through the Government.

Subpart 227.70—Infringement Claims, Licenses, and Assignments

227.7000 Scope.

This subpart prescribes policy, procedures, and instructions for use of clauses with respect to processing licenses, assignments, and infringement claims.

227.7001 Policy.

Whenever a claim of infringement of privately owned rights in patented inventions or copyrighted works is asserted against any Department or Agency of the Department of Defense, all necessary steps shall be taken to investigate, and to settle administratively, deny, or otherwise dispose of such claim prior to suit against the United States. This subpart 227.70 does not apply to licenses or assignments acquired by the Department of Defense under the Patent Rights clauses.

227.7002 Statutes pertaining to administrative claims of infringement.

Statutes pertaining to administrative claims of infringement in the Department of Defense include the following: the Foreign Assistance Act of 1961, 22 U.S.C. 2356 (formerly the Mutual Security Acts of 1951 and 1954); the Invention Secrecy Act, 35 U.S.C. 181–188; 10 U.S.C. 2386; 28 U.S.C. 1498; and 35 U.S.C. 286.

227.7003 Claims for copyright infringement.

The procedures set forth herein will be followed, where applicable, in copyright infringement claims.

227.7004 Requirements for filing an administrative claim for patent infringement.

(a) A patent infringement claim for compensation, asserted against the United States under any of the applicable statutes cited in 227.7002, must be actually communicated to and received by a Department, agency, organization, office, or field establishment within the Department of Defense. Claims must be in writing and should include the following:

(1) An allegation of infringement;

(2) A request for compensation, either expressed or implied;

(3) A citation of the patent or patents alleged to be infringed;

(4) A sufficient designation of the alleged infringing item or process to permit identification, giving the military or commercial designation, if known, to the claimant;

(5) A designation of at least one claim of each patent alleged to be infringed; or

(6) As an alternative to (a) (4) and (5) of this section, a certification that the claimant has made a bona fide attempt to determine the item or process which is alleged to infringe, but was unable to do so, giving reasons, and stating a reasonable basis for his belief that his patent or patents are being infringed.

(b) In addition to the information listed in (a) of this section, the following material and information is generally necessary in the course of processing a claim of patent infringement. Claimants are encouraged to furnish this information at the time of filing a claim to permit the most expeditious processing and settlement of the claim.

(1) A copy of the asserted patent(s) and identification of all claims of the patent alleged to be infringed.

(2) Identification of all procurements known to claimant which involve the alleged infringing item or process, including the identity of the vendor or contractor and the Government procuring activity.

(3) A detailed identification of the accused article or process, particularly where the article or process relates to a component or subcomponent of the item procured, an element by element comparison of the representative claims with the accused article or process. If available, this identification should include documentation and drawings to illustrate the accused article or process in suitable detail to enable verification of the infringement comparison.

(4) Names and addresses of all past and present licenses under the patent(s), and copies of all license agreements and releases involving the patent(s).

(5) A brief description of all litigation in which the patent(s) has been or is now involved, and the present status thereof.

(6) A list of all persons to whom notices of infringement have been sent, including all departments and agencies of the Government, and a statement of the ultimate disposition of each.

(7) A description of Government employment or military service, if any, by the inventor and/or patent owner.

(8) A list of all Government contracts under which the inventor, patent owner, or anyone in privity with him performed work relating to the patented subject matter.

(9) Evidence of title to the patent(s) alleged to be infringed or other right to make the claim.

(10) A copy of the Patent Office file of each patent if available to claimant.

(11) Pertinent prior art known to claimant, not contained in the Patent Office file, particularly publications and foreign art.

In addition in the foregoing, if claimant can provide a statement that the investigation may be limited to the specifically identified accused articles or processes, or to a specific procurement, it may materially expedite determination of the claim.

(c) Any Department receiving an allegation of patent infringement which meets the requirements of this paragraph shall acknowledge the same and supply the other Departments which may have an interest therein with a copy of such communication and the acknowledgement thereof.

(1) For the Department of the Army—Chief, Patents, Copyrights, and Trademarks Division, U.S. Army Legal Services Agency;

(2) For the Department of the Navy—The Patent Counsel for Navy, Office of Naval Research;

(3) For the Department of the Air Force—Chief, Patents Division, Office of The Judge Advocate General;

(4) For the Defense Logistics Agency—The Office of Counsel; for the National Security Agency, the General Counsel;

(5) For the Defense Information Systems Agency—the Counsel;

(6) For the Defense Special Weapons Agency—The General Counsel; and

(7) For the Defense Mapping Agency—The Counsel.

(d) If a communication alleging patent infringement is received which does not meet the requirements set forth in paragraph (c) of this section, the sender shall be advised in writing—

(1) That his claim for infringement has not been satisfactorily presented, and

(2) Of the elements considered necessary to establish a claim.

(e) A communication making a proffer of a license in which no infringement is alleged shall not be considered as a claim for infringement.

[56 FR 36389, July 31, 1991, as amended at 56 FR 67216, Dec. 30, 1991; 61 FR 50454, Sept. 26, 1996]

227.7005 Indirect notice of patent infringement claims.

(a) A communication by a patent owner to a Department of Defense contractor alleging that the contractor has committed acts of infringement in performance of a Government contract shall not be considered a claim within the meaning of 227.7004 until it meets the requirements specified therein.

(b) Any Department receiving an allegation of patent infringement which meets the requirements of 227.7004 shall acknowledge the same and supply the other Departments (see 227.7004(c)) which may have an interest therein with a copy of such communication and the acknowledgement thereof.

(c) If a communication covering an infringement claim or notice which does not meet the requirements of 227.7004(a) is received from a contractor, the patent owner shall be advised in writing as covered by the instructions of 227.7004(d).

227.7006 Investigation and administrative disposition of claims.

An investigation and administrative determination (denial or settlement) of each claim shall be made in accordance with instructions and procedures established by each Department, subject to the following:

(a) When the procurement responsibility for the alleged infringing item or process is assigned to a single Department or only one Department is the purchaser of the alleged infringing item or process, and the funds of that Department only are to be charged in the settlement of the claim, that Department shall have the sole responsibility for the investigation and administrative determination of the claim and for the execution of any agreement in settlement of the claim. Where, however, funds of another Department are to be charged, in whole or in part, the approval of such Department shall be obtained as required by 208.7002. Any agreement in settlement of the claim, approved pursuant to 208.7002 shall be executed by each of the Departments concerned.

(b) When two or more Departments are the respective purchasers of alleged infringing items or processes and the funds of those Departments are to be charged in the settlement of the claim, the investigation and administrative determination shall be the responsibility of the Department having the predominant financial interest in the claim or of the Department or Departments as jointly agreed upon by the Departments concerned. The Department responsible for negotiation shall, throughout the negotiation, coordinate with the other Departments concerned and keep them advised of the status of the negotiation. Any agreement in the settlement of the claim shall be executed by each Department concerned.

227.7007 Notification and disclosure to claimants.

When a claim is denied, the Department responsible for the administrative determination of the claim shall so notify the claimant or his authorized representative and provide the claimant a reasonable rationale of the basis for denying the claim. Disclosure of information or the rationale referred to above shall be subject to applicable statutes, regulations, and directives pertaining to security, access to official records, and the rights of others.

227.7008 Settlement of indemnified claims.

Settlement of claims involving payment for past infringement shall not be made without the consent of, and equitable contribution by, each indemnifying contractor involved, unless such settlement is determined to be in the best interests of the Government and is coordinated with the Department of Justice with a view to preserving any rights of the Government against the contractors involved. If consent of and equitable contribution by the contractors are obtained, the settlement need not be coordinated with the Department of Justice.

227.7009 Patent releases, license agreements, and assignments.

This section contains clauses for use in patent release and settlement agreements, license agreements, and assignments, executed by the Government, under which the Government acquires rights. Minor modifications of language (e.g., pluralization of ''Secretary'' or ''Contracting Officer'') in

multi-departmental agreements may be made if necessary.

227.7009–1 Required clauses.

(a) Covenant Against Contingent Fees. Insert the clause at FAR 52.203–5.

(b) Gratuities. Insert the clause at FAR 52.203–3.

(c) Assignment of Claims. Insert the clause at FAR 52.232–23.

(d) Disputes. Pursuant to FAR 33.014, insert the clause at FAR 52.233–1.

(e) Non-Estoppel. Insert the clause at 252.227–7000.

[56 FR 36389, July 31, 1991, as amended at 61 FR 50454, Sept. 26, 1996]

227.7009–2 Clauses to be used when applicable.

(a) *Release of past infringement.* The clause at 252.227–7001, Release of Past Infringement, is an example which may be modified or omitted as appropriate for particular circumstances, but only upon the advice of cognizant patent or legal counsel. (See footnotes at end of clause.)

(b) *Readjustment of payments.* The clause at 252.227–7002, Readjustment of Payments, shall be inserted in contracts providing for payment of a running royalty.

(c) *Termination.* The clause at 252.227–7003, Termination, is an example for use in contracts providing for the payment of a running royalty. This clause may be modified or omitted as appropriate for particular circumstances, but only upon the advice of cognizant patent or legal counsel (see 227.7004(c)).

227.7009–3 Additional clauses—contracts except running royalty contracts.

The following clauses are examples for use in patent release and settlement agreements, and license agreements not providing for payment by the Government of a running royalty.

(a) License Grant. Insert the clause at 252.227–7004.

(b) License Term. Insert one of the clauses at 252.227–7005 Alternate I or Alternate II, as appropriate.

227.7009–4 Additional clauses—contracts providing for payment of a running royalty.

The clauses set forth below are examples which may be used in patent release and settlement agreements, and license agreements, when it is desired to cover the subject matter thereof and the contract provides for payment of a running royalty.

(a) *License grant—running royalty.* No Department shall be obligated to pay royalties unless the contract is signed on behalf of such Department. Accordingly, the License Grant clause at 252.227–7006 should be limited to the practice of the invention by or for the signatory Department or Departments.

(b) *License term—running royalty.* The clause at 252.227–7007 is a sample form for expressing the license term.

(c) *Computation of royalties.* The clause at 252.227–7008 providing for the computation of royalties, may be of varying scope depending upon the nature of the royalty bearing article, the volume of procurement, and the type of contract pursuant to which the procurement is to be accomplished.

(d) *Reporting and payment of royalties.* (1) The contract should contain a provision specifying the office designated within the specific Department involved to make any necessary reports to the contractor of the extent of use of the licensed subject matter by the entire Department, and such office shall be charged with the responsibility of obtaining from all procuring offices of that Department the information necessary to make the required reports and corresponding vouchers necessary to make the required payments. The clause at 252.227–7009 is a sample for expressing reporting and payment of royalties requirements.

(2) Where more than one Department or Government Agency is licensed and there is a ceiling on the royalties payable in any reporting period, the licensing Departments or Agencies shall coordinate with respect to the pro rata share of royalties to be paid by each.

(e) *License to other government agencies.* When it is intended that a license on the same terms and conditions be available to other departments and

agencies of the Government, the clause at 252.227–7010 is an example which may be used.

227.7010 Assignments.

(a) The clause at 252.227–7011 is an example which may be used in contracts of assignment of patent rights to the Government.

(b) To facilitate proof of contracts of assignments, the acknowledgement of the contractor should be executed before a notary public or other officer authorized to administer oaths (35 U.S.C. 261).

227.7011 Procurement of rights in inventions, patents, and copyrights.

Even though no infringement has occurred or been alleged, it is the policy of the Department of Defense to procure rights under patents, patent applications, and copyrights whenever it is in the Government's interest to do so and the desired rights can be obtained at a fair price. The required and suggested clauses at 252.227–7004 and 252.227–7010 shall be required and suggested clauses, respectively, for license agreements and assignments made under this paragraph. The instructions at 227.7009–3 and 227.7010 concerning the applicability and use of those clauses shall be followed insofar as they are pertinent.

227.7012 Contract format.

The format at 252.227–7012 appropriately modified where necessary, may be used for contracts of release, license, or assignment.

227.7013 Recordation.

Executive Order No. 9424 of 18 February 1944 requires all executive Departments and agencies of the Government to forward through appropriate channels to the Commissioner of Patents and Trademarks, for recording, all Government interests in patents or applications for patents.

Subpart 227.71—Rights in Technical Data

SOURCE: 60 FR 33471, June 28, 1995, unless otherwise noted.

227.7100 Scope of subpart.

This subpart—

(a) Prescribes policies and procedures for the acquisition of technical data and the rights to use, modify, reproduce, release, perform, display, or disclose technical data. It implements requirements in the following laws and Executive Order:

(1) 10 U.S.C. 2302(4).

(2) 10 U.S.C. 2305 (subsection (d)(4)).

(3) 10 U.S.C. 2320.

(4) 10 U.S.C. 2321.

(5) 10 U.S.C. 2325.

(6) Pub. L. 103–355.

(7) Executive Order 12591 (Subsection 1(b)(6)).

(b) Does not apply to computer software or technical data that is computer software documentation (see subpart 227.72).

227.7101 Definitions.

(a) As used in this subpart, unless otherwise specifically indicated, the terms ''offeror'' and ''contractor'' include an offeror's or contractor's subcontractors, suppliers, or potential subcontractors or suppliers at any tier.

(b) Other terms used in this subpart are defined in the clause at 252.227–7013, Rights in Technical Data—Noncommercial Items.

[56 FR 36389, July 31, 1991, as amended at 60 FR 61598, Nov. 30, 1995]

227.7102 Commercial items, components, or processes.

Section 2320(b)(1) of Title 10 U.S.C. establishes a presumption that commercial items are developed at private expense whether or not a contractor submits a justification in response to a challenge notice. Therefore, do not challenge a contractor's assertion that a commercial item, component, or process was developed at private expense unless the Government can demonstrate that it contributed to development of the item, component or process. Follow the procedures in 227.7103–13 and the clause at 252.227–7037, Validation of Restrictive Markings on Technical Data, when information provided by the Department of Defense demonstrates that an item, component, or process was not developed exclusively at private expense. However,

when a challenge is warranted, a contractor's or subcontractor's failure to respond to the challenge notice cannot be the sole basis for issuing a final decision denying the validity of an asserted restriction.

227.7102–1 Policy.

(a) DoD shall acquire only the technical data customarily provided to the public with a commercial item or process, except technical data that—

(1) Are form, fit, or function data;

(2) Are required for repair or maintenance of commercial items or processes, or for the proper installation, operating, or handling of a commercial item, either as a stand alone unit or as a part of a military system, when such data are not customarily provided to commercial users or the data provided to commercial users is not sufficient for military purposes; or

(3) Describe the modifications made at Government expense to a commercial item or process in order to meet the requirements of a Government solicitation.

(b) To encourage offerors and contractors to offer or use commercial products to satisfy military requirements, offerors, and contractors shall not be required, except for the technical data described in paragraph (a) of this subsection, to—

(1) Furnish technical information related to commercial items or processes that is not customarily provided to the public; or

(2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose technical data pertaining to commercial items or processes except for a transfer of rights mutually agreed upon.

227.7102–2 Rights in technical data.

(a) The clause at 252.227–7015, Technical Data—Commercial Items, provides the Government specific license rights in technical data pertaining to commercial items or processes. DoD may use, modify, reproduce, release, perform, display, or disclose data only within the Government. The data may not be used to manufacture additional quantities of the commercial items and, except for emergency repair or overhaul, may not be released or disclosed to, or used by, third parties without the contractor's written permission. Those restrictions do not apply to the technical data described in 227.7102–1(a).

(b) If additional rights are needed, contracting activities must negotiate with the contractor to determine if there are acceptable terms for transferring such rights. The specific additional rights granted to the Government shall be enumerated in a license agreement made part of the contract.

227.7102–3 Contract clause.

(a) Except as provided in paragraph (b) of this subsection, use the clause at 252.227–7015, Technical Data—Commercial Items, in all solicitations and contracts when the contractor will be required to deliver technical data pertaining to commercial items, components, or processes. Do not require the contractor to include this clause in its subcontracts.

(b) Use the clause at 252.227–7013, Rights in Technical Data—Noncommercial Items, in lieu of the clause at 252.227–7015 if the Government will pay any portion of the development costs. Do not require the contractor to include this clause in its subcontracts for commercial items or commercial components.

(c) Use the clause at 252.227–7037, Validation of Restrictive Markings on Technical Data, in all solicitations and contracts for commercial items that include the clause at 252.227–7015 or the clause at 252.227–7013. Do not require the contractor to include this clause in its subcontracts for commercial items or commercial components.

[56 FR 36389, July 31, 1991, as amended at 60 FR 61598, Nov. 30, 1995]

227.7103 Noncommercial items or processes.

227.7103–1 Policy.

(a) DoD policy is to acquire only the technical data, and the rights in that data, necessary to satisfy agency needs.

(b) Solicitations and contracts shall—

(1) Specify the technical data to be delivered under a contract and delivery schedules for the data;

(2) Establish or reference procedures for determining the acceptability of technical data;

(3) Establish separate contract line items, to the extent practicable, for the technical data to be delivered under a contract and require offerors and contractors to price separately each deliverable data item; and

(4) Require offerors to identify, to the extent practicable, technical data to be furnished with restrictions on the Government's rights and require contractors to identify technical data to be delivered with such restrictions prior to delivery.

(c) Offerors shall not be required, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish to the Government any rights in technical data related to items, components or processes developed at private expense except for the data identified at 227.7103–5(a)(2) and (a)(4) through (9).

(d) Offerors and contractors shall not be prohibited or discouraged from furnishing or offering to furnish items, components, or processes developed at private expense solely because the Government's rights to use, modify, release, reproduce, perform, display, or disclose technical data pertaining to those items may be restricted.

(e) As provided in 10 U.S.C. 2305, solicitations for major systems development contracts shall not require offerors to submit proposals that would permit the Government to acquire competitively items identical to items developed at private expense unless a determination is made at a level above the contracting officer that—

(1) The offeror will not be able to satisfy program schedule or delivery requirements; or

(2) The offeror's proposal to meet mobilization requirements does not satisfy mobilization needs.

227.7103–2 Acquisition of technical data.

(a) Contracting officers shall work closely with data managers and requirements personnel to assure that data requirements included in solicitations are consistent with the policy expressed in 227.7103–1.

(b)(1) Data managers or other requirements personnel are responsible for identifying the Government's minimum needs for technical data. Data needs must be established giving consideration to the contractor's economic interests in data pertaining to items, components, or processes that have been developed at private expense; the Government's costs to acquire, maintain, store, retrieve, and protect the data; reprocurement needs; repair, maintenance and overhaul philosophies; spare and repair part considerations; and whether procurement of the items, components, or processes can be accomplished on a form, fit, or function basis. When it is anticipated that the Government will obtain unlimited or government purpose rights in technical data that will be required for competitive spare or repair parts procurements, such data should be identified as deliverable data items. Reprocurement needs may not be a sufficient reason to acquire detailed manufacturing or process data when items or components can be acquired using performance specifications, form, fit and function data, or when there are a sufficient number of alternate sources which can reasonably be expected to provide such items on a performance specification or form, fit, or function basis.

(2) When reviewing offers received in response to a solicitation or other request for data, data managers must balance the original assessment of the Government's data needs with data prices contained in the offer.

(c) Contracting officers are responsible for ensuring that, wherever practicable, solicitations and contracts—

(1) Identify the type and quantity of the technical data to be delivered under the contract and the format and media in which the data will be delivered;

(2) Establish each deliverable data item as a separate contract line item (this requirement may be satisfied by listing each deliverable data item on an exhibit to the contract);

(3) Identify the prices established for each deliverable data item under a fixed-price type contract;

(4) Include delivery schedules and acceptance criteria for each deliverable data item; and

(5) Specifically identify the place of delivery for each deliverable item of technical data.

227.7103–3 Early identification of technical data to be furnished to the Government with restrictions on use, reproduction or disclosure.

(a) 10 U.S.C. 2320 requires, to the maximum extent practicable, an identification prior to delivery of any technical data to be delivered to the Government with restrictions on use.

(b) Use the provision at 252.227–7017, Identification and Assertion of Use, Release, or Disclosure Restrictions, in all solicitations that include the clause at 252.227–7013, Rights in Technical Data—Noncommercial Items. The provision requires offerors to identify any technical data for which restrictions, other than copyright, on use, release, or disclosure are asserted and to attach the identification and assertions to the offer.

(c) Subsequent to contract award, the clause at 252.277–7013 permits a contractor, under certain conditions, to make additional assertions of use, release, or disclosure restrictions. The prescription for the use of that clause and its alternate is at 227.7103–6 (a) and (b).

227.7103–4 License rights.

(a) *Grant of license.* The Government obtains rights in technical data, including a copyright license, under and irrevocable license granted or obtained for the Government by the contractor. The contractor or licensor retains all rights in the data not granted to the Government. For technical data that pertain to items, components, or processes, the scope of the license is generally determined by the source of funds used to develop the item, component, or process. When the technical data do not pertain to items, components, or processes, the scope of the license is determined by the source of funds used to create the data.

(1) *Techical data pertaining to items, components, or processes.* Contractors or licensors may, with some exceptions (see 227.7103–5(a)(2) and (a)(4) through (9)), restrict the Government's rights to use, modify, release, reproduce, perform, display or disclose technical data pertaining to items, components, or processes developed exclusively at private expense (limited rights). They may not restrict the Government's rights in items, components, or processes developed exclusively at Government expense (unlimited rights) without the Government's approval. When an item, component, or process is developed with mixed funding, the Government may use, modify, release, reproduce, perform, display or disclose the data pertaining to such items, components, or processes within the Government without restriction but may release or disclose the data outside the Government only for government purposes (government purpose rights).

(2) *Technical data that do not pertain to items, components, or processes.* Technical data may be created during the performance of a contract for a conceptual design or similar effort that does not require the development, manufacture, construction, or production of items, components or processes. The Government generally obtains unlimited rights in such data when the data were created exclusively with Government funds, government purpose rights when the data were created with mixed funding, and limited rights when the data were created exclusively at private expense.

(b) *Source of funds determination.* The determination of the source of development funds for technical data pertaining to items, components, or processes should be made at any practical sub-item or subcomponent level or for any segregable portion of a process. Contractors may assert limited rights in a segregable sub-item, sub-component, or portion of a process which otherwise qualifies for limited rights under the clause at 252.227–7013, Rights in Technical Data—Noncommercial Items.

227.7103–5 Government rights.

The standard license rights that a licensor grants to the Government are unlimited rights, government purpose rights, or limited rights. Those rights are defined in the clause at 252.227–7013,

Rights in Technical Data—Noncommercial Items. In unusual situations, the standards rights may not satisfy the Government's needs or the Government may be willing to accept lesser rights in data in return for other consideration. In those cases, a special license may be negotiated. However, the licensor is not obligated to provide the Government greater rights and the contracting officer is not required to accept lesser rights than the rights provided in the standard grant of license. The situations under which a particular grant of license applies are enumerated in paragraphs (a) through (d) of this subsection.

(a) *Unlimited rights.* The Government obtains unlimited rights in technical data that are—

(1) Data pertaining to an item, component, or process which has been or will be developed exclusively with Government funds;

(2) Studies, analyses, test data, or similar data produced in the performance of a contract when the study, analysis, test, or similar work was specified as an element of performance;

(3) Created exclusively with Government funds in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes;

(4) Form, fit, and function data;

(5) Necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data);

(6) Corrections or changes to technical data furnished to the contractor by the Government;

(7) Publicly available or have been released or disclosed by the contractor or subcontractor without restrictions on further use, release or disclosure other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the software to another party or the sale or transfer of some or all of a business entity or its assets to another party;

(8) Data in which the Government has obtained unlimited rights under another Government contract or as a result of negotiations; or

(9) Data furnished to the Government, under a Government contract or subcontract thereunder, with—

(i) Government purpose license rights or limited rights and the restrictive condition(s) has/have expired; or

(ii) Government purpose rights and the contractor's exclusive right to use such data for commercial purposes has expired.

(b) *Government purpose rights.* (1) The Government obtains government purpose rights in technical data—

(i) That pertain to items, components, or processes developed with mixed funding except when the Government is entitled to unlimited rights as provided in paragraphs (a)(2) and (a)(4) through (9) of this subsection; or

(ii) Created with mixed funding in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.

(2) The period during which government purpose rights are effective is negotiable. The clause at 252.227–7013 provides a nominal five-year period. Either party may request a different period. Changes to the government purpose rights period may be made at any time prior to delivery of the technical data without consideration from either party. Longer periods should be negotiated when a five-year period does not provide sufficient time to apply the data for commercial purposes or when necessary to recognize subcontractors' interests in the data.

(3) The government purpose rights period commences upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise that required the development. Upon expiration of the Government rights period, the Government has unlimited rights in the data including the right to authorize others to use the data for commercial purposes.

(4) During the government purpose rights period, the government may not use, or authorize other persons to use, technical data marked with government purpose rights legends for commercial purposes. The Government shall not release or disclose data in which it has government purpose

rights to any person, or authorize others to do so, unless—

(i) Prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at 227.7103–7; or

(ii) The intended recipient is a Government contractor receiving access to the data for performance of a Government contract that contains the clause at 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(5) When technical data marked with government purpose rights legends will be released or disclosed to a Government contractor performing a contract that does not include the clause at 252–227–7025, the contract may be modified, prior to release or disclosure, to include that clause in lieu of requiring the contractor to complete a use and non-disclosure agreement.

(6) Contracting activities shall establish procedures to assure that technical data marked with government purpose rights legends are released or disclosed, including a release or disclosure through a Government solicitation, only to persons subject to the use and non-disclosure restrictions. Public announcements in the Commerce Business Daily or other publications must provide notice of the use and non-disclosure requirements. Class use and non-disclosure agreements (e.g., agreements covering all solicitations received by the XYZ company within a reasonable period) are authorized and may be obtained at any time prior to release or disclosure of the government purpose rights data. Documents transmitting government purpose rights data to persons under class agreements shall identify the technical data subject to government purpose rights and the class agreement under which such data are provided.

(c) *Limited rights.* (1) The Government obtains limited rights in technical data—

(i) That pertain to items, components, or processes developed exclusively at private expense except when the Government is entitled to unlimited rights as provided in paragraphs (a)(2) and (a)(4) through (9) of this subsection; or

(ii) Created exclusively at private expense in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.

(2) Data in which the Government has limited rights may not be used, released, or disclosed outside the Government without the permission of the contractor asserting the restriction except for a use, release or disclosure that is—

(i) Necessary for emergency repair and overhaul; or

(ii) To a foreign government, other than detailed manufacturing or process data, when use, release, or disclosure is in the interest of the United States and is required for evaluation or informational purposes.

(3) The person asserting limited rights must be notified of the Government's intent to release, disclose, or authorize others to use such data prior to release or disclosure of the data except notification of an intended release, disclosure, or use for emergency repair or overhaul which shall be made as soon as practicable.

(4) When the person asserting limited rights permits the Government to release, disclose, or have others use the data subject to restrictions on further use, release, or disclosure, or for a release under paragraph (c)(2)(i) or (ii) of this subsection, the intended recipient must complete the use and non-disclosure agreement at 227.7103–7 prior to release or disclosure of the limited rights data.

(d) *Specifically negotiated license rights.* (1) Negotiate specific licenses when the parties agree to modify the standard license rights granted to the government or when the government wants to obtain rights in data in which it does not have rights. When negotiating to obtain, relinquish, or increase the Government's rights in technical data, consider the acquisition strategy for the item, component, or process, including logistics support and other factors which may have relevance for a particular procurement. The Government may accept lesser rights when it has unlimited or government purpose rights in data but may not accept less than limited rights in such data. The

negotiated license rights must stipulate what rights the Government has to release or disclose the data to other persons or to authorize others to use the data. Identify all negotiated rights in a license agreement made part of the contract.

(2) When the Government needs additional rights in data acquired with government purpose or limited rights, the contracting officer must negotiate with the contractor to determine whether there are acceptable terms for transferring such rights. Generally, such negotiations should be conducted only when there is a need to disclose the data outside the Government or if the additional rights are required for competitive reprocurement and the anticipated savings expected to be obtained through competition are estimated to exceed the acquisition cost of the additional rights. Prior to negotiating for additional rights in limited rights data, consider alternatives such as—

(i) Using performance specifications and form, fit, and function data to acquire or develop functionally equivalent items, components, or processes;

(ii) Obtaining a contractor's contractual commitment to qualify additional sources and maintain adequate competition among the sources; or

(iii) Reverse engineering, or providing items from Government inventories to contractors who request the items to facilitate the development of equivalent items through reverse engineering.

227.7103–6 Contract clauses.

(a) Use the clause at 252.227–7013, Rights in Technical Data—Noncommercial Items, in solicitations and contracts when the successful offeror(s) will be required to deliver technical data to the Government. Do not use the clause when the only deliverable items are computer software or computer software documentation (see 227.72), commercial items (see 227.7102–3), existing works (see 227.7105), special works (see 227.7106), or when contracting under the Small Business Innovation Research Program (see 227.7104). Except as provided in 227.7107–2, do not use the clause in architect-engineer and construction contracts.

(b) Use the clause at 252.227–7013 with its Alternate I in research contracts when the contracting officer determines, in consultation with counsel, that public dissemination by the contractor would be—

(1) In the interest of the government; and

(2) Facilitated by the Government relinquishing its right to publish the work for sale, or to have others publish the work for sale on behalf of the Government.

(c) Use the clause at 252.227–7025, Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends, in solicitations and contracts when it is anticipated that the Government will provide the contractor, for performance of its contract, technical data marked with another contractor's restrictive legend(s).

(d) Use the provision at 252.227–7028, Technical Data or Computer Software Previously Delivered to the Government, in solicitations when the resulting contract will require the contractor to deliver technical data. The provision requires offerors to identify any technical data specified in the solicitations as deliverable data items that are the same or substantially the same as data items the offeror has delivered or is obligated to deliver, either as a contractor or subcontractor, under any other federal agency contract.

(e) Use the following clauses in solicitations and contracts that include the clause at 252.227–7013:

(1) 252.227–7016, Rights in Bid or Proposal Information;

(2) 252.227–7030, Technical Data—Withholding of Payment;

(3) 252.227–7036, Certification of Technical Data Conformity; and

(4) 252.227–7037, Validation of Restrictive Markings on Technical Data (paragraph (e) of the clause contains information that must be included in a challenge).

[60 FR 33471, June 28, 1995; 60 FR 41157, Aug. 11, 1995; 60 FR 61598, Nov. 30, 1995]

227.7103–7 Use and non-disclosure agreement.

(a) Except as provided in paragraph (b) of this subsection, technical data or computer software delivered to the

Government with restrictions on use, modification, reproduction, release, performance, display, or disclosure may not be provided to third parties unless the intended recipient completes and signs the use and non-disclosure agreement at paragraph (c) of this subsection prior to release, or disclosure of the data.

(1) The specific conditions under which an intended recipient will be authorized to use, modify, reproduce, release, perform, display, or disclose technical data subject to limited rights or computer software subject to restricted rights must be stipulated in an attachment to the use and non-disclosure agreement.

(2) For an intended release, disclosure, or authorized use of technical data or computer software subject to special license rights, modify paragraph (1)(d) of the use and non-disclosure agreement to enter the conditions, consistent with the license requirements, governing the recipient's obligations regarding use, modification, reproduction, release, performance, display or disclosure of the data or software.

(b) The requirement for use and non-disclosure agreements does not apply to Government contractors which require access to a third party's data or software for the performance of a Government contract that contains the clause at 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(c) The prescribed use and non-disclosure agreement is:

Use and Non-Disclosure Agreement

The undersigned, _____ (Insert Name) _____, an authorized representative of the _____ (Insert Company Name) _____, (which is hereinafter referred to as the ''Recipient'') requests the Government to provide the Recipient with technical data or computer software (hereinafter referred to as ''Data'') in which the Government's use, modification, reproduction, release, performance, display or disclosure rights are restricted. Those Data are identified in an attachment to this Agreement. In consideration for receiving such Data, the Recipient agrees to use the Data strictly in accordance with this Agreement:

(1) The Recipient shall—

(a) Use, modify, reproduce, release, perform, display, or disclose Data marked with government purpose rights or SBIR data rights legends only for government purposes and shall not do so for any commercial purpose. The Recipient shall not release, perform, display, or disclose these Data, without the express written permission of the contractor whose name appears in the restrictive legend (the ''Contractor''), to any person other than its subcontractors or suppliers, or prospective subcontractors or suppliers, who require these Data to submit offers for, or perform, contracts with the Recipient. The Recipient shall require its subcontractors or suppliers, or prospective subcontractors or suppliers, to sign a use and non-disclosure agreement prior to disclosing or releasing these Data to such persons. Such agreement must be consistent with the terms of this agreement.

(b) Use, modify, reproduce, release, perform, display, or disclose technical data marked with limited rights legends only as specified in the attachment to this Agreement. Release, performance, display, or disclosure to other persons is not authorized unless specified in the attachment to this Agreement or expressly permitted in writing by the Contractor. The Recipient shall promptly notify the Contractor of the execution of this Agreement and identify the Contractor's Data that has been or will be provided to the Recipient, the date and place the Data were or will be received, and the name and address of the Government office that has provided or will provide the Data.

(c) Use computer software marked with restricted rights legends only in performance of Contract Number _____ (insert contract number(s)) _____. The recipient shall not, for example, enhance, decompile, disassemble, or reverse engineer the software; time share, or use a computer program with more than one computer at a time. The recipient may not release, perform, display, or disclose such software to others unless expressly permitted in writing by the licensor whose name appears in the restrictive legend. The Recipient shall promptly notify the software licensor of the execution of this Agreement and identify the software that has been or will be provided to the Recipient, the date and place the software were or will be received, and the name and address of the Government office that has provided or will provide the software.

(d) Use, modify, reproduce, release, perform, display, or disclose Data marked with special license rights legends (To be completed by the contracting officer. See 227.7103–7(a)(2). Omit if none of the Data requested is marked with special license rights legends).

(2) The Recipient agrees to adopt or establish operating procedures and physical security measures designed to protect these Data

from inadvertent release or disclosure to unauthorized third parties.

(3) The Recipient agrees to accept these Data ''as is'' without any Government representation as to suitability for intended use or warranty whatsoever. This disclaimer does not affect any obligation the Government may have regarding Data specified in a contract for the performance of that contract.

(4) The Recipient may enter into any agreement directly with the Contractor with respect to the use, modification, reproduction, release, performance, display, or disclosure of these Data.

(5) The Recipient agrees to indemnify and hold harmless the Government, its agents, and employees from every claim or liability, including attorneys fees, court costs, and expenses arising out of, or in any way related to, the misuse or unauthorized modification, reproduction, release, performance, display, or disclosure of Data received from the Government with restrictive legends by the Recipient or any person to whom the Recipient has released or disclosed the Data.

(6) The Recipient is executing this Agreement for the benefit of the Contractor. The Contractor is a third party beneficiary of this Agreement who, in addition to any other rights it may have, is intended to have the rights of direct action against the Recipient or any other person to whom the Recipient has released or disclosed the Data, to seek damages from any breach of this Agreement or to otherwise enforce this Agreement.

(7) The Recipient agrees to destroy these Data, and all copies of the Data in its possession, no later than 30 days after the date shown in paragraph (8) of this Agreement, to have all persons to whom it released the Data do so by that date, and to notify the Contractor that the Data have been destroyed.

(8) This Agreement shall be effective for the period commencing with the Recipient's execution of this Agreement and ending upon _____ (Insert Date) _____. The obligations imposed by this Agreement shall survive the expiration or termination of the Agreement.

Recipient's Business Name _____

By _____

Authorized Representative

_____

Date

Representative's Typed Name _____

and Title _____

(End of use and non-disclosure agreement)

227.7103–8 Deferred delivery and deferred ordering of technical data.

(a) *Deferred delivery*. Use the clause at 252.227–7026, Deferred Delivery of Technical Data or Computer Software, when it is in the Government's interests to defer the delivery of technical data. The clause permits the contracting officer to require the delivery of technical data identified as ''deferred delivery'' data at any time until two years after acceptance by the Government of all items (other than technical data or computer software) under the contract or contract termination, whichever is later. The obligation of subcontractors or suppliers to deliver such technical data expires two years after the date the prime contractor accepts the last item from the subcontractor or supplier for use in the performance of the contract. The contract must specify which technical data is subject to deferred delivery. The contracting officer shall notify the contractor sufficiently in advance of the desired delivery date for such data to permit timely delivery.

(b) *Deferred ordering.* Use the clause at 252.227–7027, Deferred Ordering of Technical Data or Computer Software, when a firm requirement for a particular data item(s) has not been established prior to contract award but there is a potential need for the data. Under this clause, the contracting officer may order any data that has been generated in the performance of the contract or any subcontract thereunder at any time until three years after acceptance of all items (other than technical data or computer software) under the contract or contract termination, whichever is later. The obligation of subcontractors to deliver such data expires three years after the date the contractor accepts the last item under the subcontract. When the data are ordered, the delivery dates shall be negotiated and the contractor compensated only for converting the data into the prescribed form, reproduction costs, and delivery costs.

227.7103–9 Copyright.

(a) *Copyright license.* (1) The clause at 252.227–7013, Rights in Technical Data—Noncommercial Items, requires a contractor to grant or obtain for the Government license rights which permit the Government to reproduce data, distribute copies of the data, publicly perform or display the data or, through

the right to modify data, prepare derivative works. The extent to which the Government, and others acting on its behalf, may exercise these rights varies for each of the standard data rights licenses obtained under the clause. When non-standard license rights in technical data will be negotiated, negotiate the extent of the copyright license concurrent with negotiations for the data rights license. Do not negotiate a copyright license that provides less rights than the standard limited rights license in technical data.

(2) The clause at 252.227–7013 does not permit a contractor to incorporate a third party's copyrighted data into a deliverable data item unless the contractor has obtained an appropriate license for the Government and, when applicable, others acting on the Government's behalf, or has obtained the contracting officer's written approval to do so. Grant approval to use third party copyrighted data in which the Government will not receive a copyright license only when the Government's requirements cannot be satisfied without the third party material or when the use of the third party material will result in cost savings to the Government which outweigh the lack of a copyright license.

(b) *Copyright considerations—acquisition of existing and special works.* See 227.7105 or 227.7106 for copyright considerations when acquiring existing or special works.

227.7103–10 Contractor identification and marking of technical data to be furnished with restrictive markings.

(a) *Identification requirements.* (1) The solicitation provision at 252.227–7017, Identification and Assertion of Use, Release, or Disclosure Restrictions, requires offerors to identify to the contracting officer, prior to contract award, any technical data that the offeror asserts should be provided to the Government with restrictions on use, modification, reproduction, release or disclosure. This requirement does not apply to restrictions based solely on copyright. The notification and identification must be submitted as an attachment to the offer. If an offeror fails to submit the attachment or fails to complete the attachment in accordance with the requirements of the solicitation provision, such failure shall constitute a minor informality. Provide offerors an opportunity to remedy a minor informality in accordance with the procedures at FAR 14.405 or 15.607. An offeror's failure to correct the informality within the time prescribed by the contracting officer shall render the offer ineligible for award.

(2) The procedures for correcting minor informalities shall not be used to obtain information regarding asserted restrictions or an offeror's suggested asserted rights category. Questions regarding the justification for an asserted restriction or asserted rights category must be pursued in accordance with the procedures at 227.7103–13.

(3) The restrictions asserted by a successful offeror shall be attached to its contract unless, in accordance with the procedures at 227.7103–13, the parties have agreed that an asserted restriction is not justified. The contract attachment shall provide the same information regarding identification of the technical data, the asserted rights category, the basis for the assertion, and the name of the person asserting the restrictions as required by paragraph (d) of the solicitation provision at 252.227–7017. Subsequent to contract award, the clause at 252.227–7013, Rights in Technical Data—Noncommercial Items, permits the contractor to make additional assertions under certain conditions. The additional assertions must be made in accordance with the procedures and in the format prescribed by that clause.

(4) Neither the pre- or post-award assertions made by the contractor, nor the fact that certain assertions are identified in the attachment to the contract, determine the respective rights of the parties. As provided at 227.7103–13, the Government has the right to review, verify, challenge and validate restrictive markings.

(5) Information provided by offerors in response to the solicitation provision may be used in the source selection process to evaluate the impact on evaluation factors that may be created by restrictions on the Government's ability to use or disclose technical data. However, offerors shall not be

prohibited from offering products for which the offeror is entitled to provide the Government limited rights in the technical data pertaining to such products and offerors shall not be required, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish any greater rights in technical data when the offeror is entitled to provide the technical data with limited rights.

(b) *Contractor marking requirements.* The clause at 252.227–7013, Rights in Technical Data—Noncommercial Items—

(1) Requires a contractor that desires to restrict the Government's rights in technical data to place restrictive markings on the data, provides instructions for the placement of the restrictive markings, and authorizes the use of certain restrictive markings; and

(2) Requires a contractor to deliver, furnish, or otherwise provide to the Government any technical data in which the Government has previously obtained rights with the Government's pre-existing rights in that data unless the parties have agreed otherwise or restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose the data have expired. When restrictions are still applicable, the contractor is permitted to mark the data with the appropriate restrictive legend for which the data qualified.

(c) *Unmarked technical data.* (1) Technical data delivered or otherwise provided under a contract without restrictive markings shall be presumed to have been delivered with unlimited rights and may be released or disclosed without restriction. To the extent practicable, if a contractor has requested permission (see paragraph (c)(2) of this subsection) to correct an inadvertent omission of markings, do not release or disclose the technical data pending evaluation of the request.

(2) A contractor may request permission to have appropriate legends placed on unmarked technical data at its expense. The request must be received by the contracting officer within six months following the furnishing or delivery of such data, or any extension of that time approved by the contracting officer. The person making the request must:

(i) Identify the technical data that should have been marked;

(ii) Demonstrate that the omission of the marking was inadvertent, the proposed marking is justified and conforms with the requirements for the marking of technical data contained in the clause at 252.227–7013; and

(iii) Acknowledge, in writing, that the Government has no liability with respect to any disclosure, reproduction, or use of the technical data made prior to the addition of the marking or resulting from the omission of the marking.

(3) Contracting officers should grant permission to mark only if the technical data were not distributed outside the Government or were distributed outside the Government with restrictions on further use or disclosure.

227.7103–11 Contractor procedures and records.

(a) The clause at 252.227–7013, Rights in Technical Data—Noncommercial Items, requires a contractor, and its subcontractors or suppliers that will deliver technical data with other than unlimited rights, to establish and follow written procedures to assure that restrictive markings are used only when authorized and to maintain records to justify the validity of asserted restrictions on delivered data.

(b) The clause at 252.227–7037, Validation of Restrictive Markings on Technical Data requires contractors and their subcontractors at any tier to maintain records sufficient to justify the validity of restrictive markings on technical data delivered or to be delivered under a Government contract.

227.7103–12 Government right to establish conformity of markings.

(a) *Nonconforming markings.* (1) Authorized markings are identified in the clause at 252.227–7013, Rights in Technical Data—Noncommercial Items. All other markings are nonconforming markings. An authorized marking that is not in the form, or differs in substance, from the marking requirements in the clause at 252.227–7013 is also a nonconforming marking.

(2) The correction of nonconforming markings on technical data is not subject to 252.227–7037, Validation of Restrictive Markings on Technical Data. To the extent practicable, the contracting officer should return technical data bearing nonconforming markings to the person who has placed the nonconforming markings on such data to provide that person an opportunity to correct or strike the nonconforming marking at that person's expense. If that person fails to correct the nonconformity and return the corrected data within 60 days following the person's receipt of the data, the contracting officer may correct or strike the nonconformity at that person's expense. When it is impracticable to return technical data for correction, contracting officers may unilaterally correct any nonconforming markings at Government expense. Prior to correction, the data may be used in accordance with the proper restrictive marking.

(b) *Unjustified markings.* (1) An unjustified marking is an authorized marking that does not depict accurately restrictions applicable to the Government's use, modification, reproduction, release, performance, display, or disclosure of the marked technical data. For example, a limited rights legend placed on technical data pertaining to items, components, or processes that were developed under a Government contract either exclusively at Government expense or with mixed funding (situations under which the Government obtains unlimited or government purpose rights) is an unjustified marking.

(2) Contracting officers have the right to review and challenge the validity of unjustified markings. However, at any time during performance of a contract and notwithstanding existence of a challenge, the contracting officer and the person who has asserted a restrictive marking may agree that the restrictive marking is not justified. Upon such agreement, the contracting officer may, at his or her election, either—

(i) Strike or correct the unjustified marking at that person's expense; or

(ii) Return the technical data to the person asserting the restriction for correction at that person's expense. If the data are returned and that person fails to correct or strike the unjustified restriction and return the corrected data to the contracting officer within 60 days following receipt of the data, the unjustified marking shall be corrected or stricken at that person's expense.

227.7103–13 Government right to review, verify, challenge and validate asserted restrictions.

(a) *General.* An offeror's assertion(s) of restrictions on the Government's rights to use, modify, reproduce, release, or disclose technical data do not, by themselves, determine the extent of the Government's rights in the technical data. Under 10 U.S.C. 2321, the Government has the right to challenge asserted restrictions when there are reasonable grounds to question the validity of the assertion and continued adherence to the assertion would make it impractical to later procure competitively the item to which the data pertain.

(b) *Pre-award considerations.* The challenge procedures required by 10 U.S.C. 2321 could significantly delay awards under competitive procurements. Therefore, avoid challenging asserted restrictions prior to a competitive contract award unless resolution of the assertion is essential for successful completion of the procurement.

(c) *Challenge and validation.* Contracting officers must have reasonable grounds to challenge the current validity of an asserted restriction. Before issuing a challenge to an asserted restriction, carefully consider all available information pertaining to the assertion. All challenges must be made in accordance with the provisions of the clause at 252.227–7037, Validation of Restrictive Markings on Technical Data.

(1) *Challenge period.* Asserted restrictions should be reviewed before acceptance of technical data deliverable under the contract. Assertions must be challenged within three years after final payment under the contract or three years after delivery of the data, whichever is later. However, restrictive markings may be challenged at any time if the technical data—

(i) Are publicly available without restrictions;

(ii) Have been provided to the United States without restriction; or

(iii) Have been otherwise made available without restriction other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the technical data to another party or the sale or transfer of some or all of a business entity or its assets to another party.

(2) *Pre-challenge requests for information.* (i) After consideration of the situation described in paragraph (c)(3) of this subsection, contracting officers may request the person asserting a restriction to furnish a written explanation of the facts and supporting documentation for the assertion in sufficient detail to enable the contracting officer to ascertain the basis of the restrictive markings. Additional supporting documentation may be requested when the explanation provided by the person making the assertion does not, in the contracting officer's opinion, establish the validity of the assertion.

(ii) If the person asserting the restriction fails to respond to the contracting officer's request for information or additional supporting documentation, or if the information submitted or any other available information pertaining to the validity of a restrictive marking does not justify the asserted restriction, a challenge should be considered.

(3)*Transacting matters directly with subcontracts.* The clause at 252.227–7037 obtains the contractor's agreement that the Government may transact matters under the clause directly with a subcontractor, at any tier, without creating or implying privity of contract. Contracting officers should permit a subcontractor or supplier to transact challenge and validation matters directly with the Government when—

(i) A subcontractor's or supplier's business interests in its technical data would be compromised if the data were disclosed to a higher tier contractor;

(ii) There is reason to believe that the contractor will not respond in a timely manner to a challenge and an untimely response would jeopardize a subcontractor's or suppliers right to assert restrictions; or

(iii) Requested to do so by a subcontractor or supplier.

(4) *Challenge notice.* Do not issue a challenge notice unless there are reasonable grounds to question the validity of an assertion. Assertions may be challenged whether or not supporting documentation was requested from the person asserting the restriction. Challenge notices must be in writing and issued to the contractor or, after consideration of the situations described in paragraph (c)(3) of this subsection, the person asserting the restriction. The challenge notice must include the information in paragraph (e) of the clause at 252.227–7037.

(5) *Extension of response time.* The contracting officer, at his or her discretion, may extend the time for response contained in a challenge notice, as appropriate, if the contractor submits a timely written request showing the need for additional time to prepare a response.

(6) *Contracting officer's final decision.* Contracting officers must issue a final decision for each challenged assertion, whether or not the assertion has been justified.

(i) A contracting officer's final decision that an assertion is not justified must be issued a soon as practicable following the failure of the person asserting the restriction to respond to the contracting officer's challenge within 60 days, or any extension to that time granted by the contracting officer.

(ii) A contracting officer who, following a challenge and response by the person asserting the restriction, determines that an asserted restriction is justified, shall issue a final decision sustaining the validity of the asserted restriction. If the asserted restriction was made subsequent to submission of the contractor's offer, add the asserted restriction to the contract attachment.

(iii) A contracting officer who determine that the validity of an asserted restriction has not been justified shall issue a contracting officer's final decision within the time frames prescribed in 252.227–7037. As provided in paragraph (g) of that clause, the Government is obligated to continue to respect the asserted restrictions through final disposition of any appeal unless

the agency head notifies the person asserting the restriction that urgent or compelling circumstances do not permit the Government to continue to respect the asserted restriction.

(7) *Multiple challenges to an asserted restriction.* When more than one contracting officer challenges an asserted restriction, the contracting officer who made the earliest challenge is responsible for coordinating the Government challenges. That contracting officer shall consult with all other contracting officers making challenges, verify that all challenges apply to the same asserted restriction and, after consulting with the contractor, subcontractor, or supplier asserting the restriction, issue a schedule that provides that person a reasonable opportunity to respond to each challenge.

(8) *Validation.* Only a contracting officer's final decision, or actions of an agency board of contract appeals or a court of competent jurisdiction, that sustain the validity of an asserted restriction constitute validation of the asserted restriction.

227.7103–14 Conformity, acceptance, and warranty of technical data.

(a) *Statutory requirements.* 10 U.S.C. 2320—

(1) Requires contractors to furnish written assurance, at the time technical data are delivered or are made available to the Government, that the technical data are complete, accurate, and satisfy the requirements of the contract concerning such data;

(2) Provides for the establishment of remedies applicable to technical data found to be incomplete, inadequate, or not to satisfy the requirements of the contract concerning such data; and

(3) Authorizes agency heads to withhold payments (or exercise such other remedies an agency head considers appropriate) during any period if the contractor does not meet the requirements of the contract pertaining to the delivery of technical data.

(b) *Conformity and acceptance.* (1) Solicitations and contracts requiring the delivery of technical data shall specify the requirements the data must satisfy to be acceptable. Contracting officers, or their authorized representatives, are responsible for determining whether technical data tendered for acceptance conform to the contractual requirements.

(2) The clause at 252.227–7030, Technical Data—Withholding of Payment, provides for withholding up to 10 percent of the contract price pending correction or replacement of the nonconforming technical data or negotiation of an equitable reduction in contract price. The amount subject to withholding may be expressed as a fixed dollar amount or as a percentage of the contract price. In either case, the amount shall be determined giving consideration to the relative value and importance of the data. For example—

(i) When the sole purpose of a contract is to produce the data, the relative value of that data may be considerably higher than the value of data produced under a contract where the production of the data is a secondary objective; or

(ii) When the Government will maintain or repair items, repair and maintenance data may have a considerably higher relative value than data that merely describe the item or provide performance characteristics.

(3) Do not accept technical data that do not conform to the contractual requirements in all respects. Except for nonconforming restrictive markings (see paragraph (b)(4) of this subsection), correction or replacement of nonconforming data or an equitable reduction in contract price when correction or replacement of the nonconforming data is not practicable or is not in the Government's interests, shall be accomplished in accordance with—

(i) The provisions of a contract clause providing for inspection and acceptance of deliverables and remedies for nonconforming deliverables; or

(ii) The procedures at FAR 46.407(c) through (g), if the contract does not contain an inspection clause providing remedies for nonconforming deliverables.

(4) Follow the procedures at 227.7103–12(a)(2) if nonconforming markings are the sole reason technical data fail to conform to contractual requirements. The clause at 252.227–7030 may be used to withhold an amount for payment, consistent with the terms of the

clause, pending correction of the nonconforming markings.

(c) *Warranty*. (1) The intended use of the technical data and the cost, if any, to obtain the warranty should be considered before deciding to obtain a data warranty (see FAR 46.703). The fact that a particular item, component, or process is or is not warranted is not a consideration in determining whether or not to obtain a warranty for the technical data that pertain to the item, component, or process. For example, a data warranty should be considered if the Government intends to repair or maintain an item and defective repair or maintenance data would impair the Government's effective use of the item or result in increased costs to the Government.

(2) As prescribed in 246.710, use the clause at 252.246–7001, Warranty of Data, and its alternates, or a substantially similar clause when the Government needs a specific warranty of technical data.

227.7103–15 Subcontractor rights in technical data.

(a) 10 U.S.C. 2320 provides subcontractors at all tiers the same protection for their rights in data as is provided to prime contractors. The clauses at 252.227–7013, Rights in Technical Data—Noncommercial Items, and 252.227–7037, Validation of Restrictive Markings on Technical Data, implement the statutory requirements.

(b) 10 U.S.C. 2321 permits a subcontractor to transact directly with the Government matters relating to the validation of its asserted restrictions on the Government's rights to use or disclose technical data. The clause at 252.227–7037 obtains a contractor's agreement that the direct transaction of validation or challenge matters with subcontractors at any tier does not establish or imply privity of contract. When a subcontractor or supplier exercise its right to transact validation matters directly with the Government, contracting officers shall deal directly with such persons, as provided at 227.7103–13(c)(3).

(c) Require prime contractors whose contracts include the following clauses to include those clauses, without modification except for appropriate identification of the parties, in contracts with subcontractors or suppliers, at all tiers, who will be furnishing technical data for non-commercial items in response to a Government requirement:

(1) 252.227–7013, Rights in Technical Data—Noncommercial Items;

(2) 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends;

(3) 252.227–7028, Technical Data or Computer Software Previously Delivered to the Government; and

(4) 252.227–7037, Validation of Restrictive Markings on Technical Data.

(d) Do not require contractors to have their subcontractors or suppliers at any tier relinquish rights in technical data to the contractor, a higher tier subcontractor, or to the Government, as a condition for award of any contract, subcontract, purchase order, or similar instrument except for the rights obtained by the Government under the Rights in Technical Data—Noncommercial Items clause contained in the contractor's contract with the Government.

[56 FR 36389, July 31, 1991, as amended at 60 FR 61598, Nov. 30, 1995]

227.7103–16 Providing technical data to foreign governments, foreign contractors, or international organizations.

Technical data may be released or disclosed to foreign governments, foreign contractors, or international organizations only if release or disclosure is otherwise permitted both by Federal export controls and other national security laws or regulations. Subject to such laws and regulations, the Department of Defense—

(a) May release or disclose technical data in which it has obtained unlimited rights to such foreign entities or authorize the use of such data by those entities; and

(b) Shall not release or disclose technical data for which restrictions on use, release, or disclosure have been asserted to foreign entities, or authorize the use of technical data by those entities, unless the intended recipient is subject to the same provisions as included in the use and non-disclosure

agreement at 227.7103–7 and the requirements of the clause at 252.227–7103, Rights in Technical Data—Noncommercial Items, governing use, modification, reproduction, release, performance, display, or disclosure of such data have been satisfied.

227.7103–17 Overseas contracts with foreign sources.

(a) The clause at 252.227–7032, Rights in Technical Data and Computer Software (Foreign), may be used in contracts with foreign contractors to be performed overseas, except Canadian purchases (see paragraph (c) of this subsection), in lieu of the clause at 252.227–7013, Rights in Technical Data—Noncommercial Items, when the Government requires the unrestricted right to use, modify, reproduce, perform, display, release or disclose all technical data to be delivered under the contract. Do not use the clause in contracts for existing or special works.

(b) When the Government does not require unlimited rights, the clause at 252.227–7032 may be modified to accommodate the needs of a specific overseas procurement situation. The Government should obtain rights in the technical data that are not less than the rights the Government would have obtained under the data rights clause(s) prescribed in this part for a comparable procurement performed within the United States or its possessions.

(c) Contracts for Canadian purchases shall include the appropriate data rights clause prescribed in this part for a comparable procurement performed within the United States or its possessions.

227.7104 Contracts under the Small Business Innovation Research (SBIR) Program.

(a) Use the clause at 252.227–7018, Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program, when technical data or computer software will be generated during performance of contracts under the SBIR program.

(b) Under the clause at 252.227–7018, the Government obtains a royalty-free license to use technical data marked with an SBIR data rights legend only for government purposes during the period commencing with contract award and ending five years after completion of the project under which the data were generated. Upon expiration of the five-year restrictive license, the Government has unlimited rights in the SBIR data. During the license period, the Government may not release or disclose SBIR data to any person other than its support services contractors except—

(1) For evaluational purposes;

(2) As expressly permitted by the contractor; or

(3) A use, release, or disclosure that is necessary for emergency repair or overhaul of items operated by the Government.

(c) Do not make any release or disclosure permitted by paragraph (b) of this section unless, prior to release or disclosure, the intended recipient is subject to the use and nondisclosure agreement at 227.7103–7.

(d) Use the clause at 252.227–7018 with its Alternate I in research contracts when the contracting officer determines, in consultation with counsel, that public dissemination by the contractor would be—

(1) In the interest of the Government; and

(2) Facilitated by the Government relinquishing its right to publish the work for sale, or to have others publish the work for sale on behalf of the Government.

(e) Use the following provision and clauses in SBIR solicitations and contracts that include the clause at 252.227–7018:

(1) 252.227–7016, Rights in Bid or Proposal Information;

(2) 252.227–7017, Identification and Assertion of Use, Release, or Disclosure Restrictions;

(3) 252.227–7019, Validation of Asserted Restrictions—Computer Software;

(4) 252.227–7030, Technical Data—Withholding of Payment;

(5) 252.227–7036, Certification of Technical Data Conformity; and

(6) 252.227–7037, Validation of Restrictive Markings on Technical Data (paragraph (e) of the clause contains information that must be included in a challenge).

(f) Use the following clauses and provision in SBIR solicitations and contracts in accordance with the guidance at 227.7103–6 (c) and (d):

(1) 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends; and

(2) 252.227–7028, Technical Data or Computer Software Previously Delivered to the Government.

[56 FR 36389, July 31, 1991, as amended at 60 FR 61598, Nov. 30, 1995]

227.7105 Contracts for the acquisition of existing works.

227.7105–1 General.

(a) Existing works include motion pictures, television recordings, video recordings, and other audiovisual works in any medium; sound recordings in any medium; musical, dramatic, and literary works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; and works of a similar nature. Usually, these or similar works were not first created, developed, generated, originated, prepared, or produced under a Government contract. Therefore, the Government must obtain a license in the work if it intends to reproduce the work, distribute copies of the work, prepare derivative works, or perform or display the work publicly. When the Government is not responsible for the content of an existing work, it should require the copyright owner to indemnify the Government for liabilities that may arise out of the content, performance, use, or disclosure of such data.

(b) Follow the procedures at 227.7106 for works which will be first created, developed, generated, originated, prepared, or produced under a Government contract and the Government needs to control distribution of the work or has a specific need to obtain indemnity for liabilities that may arise out of the creation, content, performance, use, or disclosure of the work or from libelous or other unlawful material contained in the work. Follow the procedures at 227.7103 when the Government does not need to control distribution of such works or obtain such indemnities.

227.7105–2 Acquisition of existing works without modification

(a) Use the clause at 252.227–7021, Rights in Data—Existing Works, in lieu of the clause at 252.227–7013, Rights in Technical Data—Noncommercial Items, in solicitations and contracts exclusively for existing works when—

(1) The existing works will be acquired without modification; and

(2) The Government requires the right to reproduce, prepare derivative works, or publicly perform or display the existing works; or

(3) The Government has a specific need to obtain indemnity for liabilities that may arise out of the content, performance, use, or disclosure of such data.

(b) The clause at 252.227–7021 provides the Government, and others acting on its behalf, a paid-up, non-exclusive, irrevocable, world-wide license to reproduce, prepare derivative works and publicly perform or display the works called for by a contract and to authorize others to do so for government purposes.

(c) A contract clause is not required to acquire existing works such as books, magazines and periodicals, in any storage or retrieval medium, when the Government will not reproduce the books, magazines or periodicals, or prepare derivative works.

227.7105–3 Acquisition of modified existing works.

Use the clause at 252.227–7020, Rights in Special Works, in solicitations and contracts for modified existing works in lieu of the clause at 252.227–7021, Rights in Data—Existing Works.

227.7106 Contracts for special works.

(a) Use the clause at 252.227–7020, Rights in Special Works, in solicitations and contracts where the Government has a specific need to control the distribution of works first produced, created, or generated in the performance of a contract and required to be delivered under that contract, including controlling distribution by obtaining an assignment of copyright, or a specific need to obtain indemnity for liabilities that may arise out of the creation, delivery, use, modification, reproduction, release, performance,

display, or disclosure of such works. Use the clause—

(1) In lieu of the clause at 252.227–7013, Rights in Technical Data—Noncommercial Items, when the Government must own or control copyright in all works first produced, created, or generated and required to be delivered under a contract; or

(2) In addition to the clause at 252.227–7013 when the Government must own or control copyright in a portion of a work first produced, created, or generated and required to be delivered under a contract. The specific portion in which the Government must own or control copyright must be identified in a special contract requirement.

(b) Although the Government obtains an assignment of copyright and unlimited rights in a special work under the clause at 252.227–7020, the contractor retains use and disclosure rights in that work. If the Government needs to restrict a contractor's rights to use or disclose a special work, it must also negotiate a special license which specifically restricts the contractor's use or disclosure rights.

(c) The clause at 252.227–7020 does not permit a contractor to incorporate into a special work any works copyrighted by others unless the contractor obtains the contracting officer's permission to do so and obtains for the Government a non-exclusive, paid up, world-wide license to make and distribute copies of that work, to prepare derivative works, to perform or display publicly any portion of the work, and to permit others to do so for government purposes. Grant permission only when the Government's requirements cannot be satisfied unless the third party work is included in the deliverable work.

(d) Examples of works which may be procured under the Rights in Special Works clause include, but are not limited, to audiovisual works, computer data bases, computer software documentation, scripts, soundtracks, musical compositions, and adaptations; histories of departments, agencies, services or units thereof; surveys of Government establishments; instructional works or guidance to Government officers and employees on the discharge of their official duties; reports, books, studies, surveys or similar documents; collections of data containing information pertaining to individuals that, if disclosed, would violate the right of privacy or publicity of the individuals to whom the information relates; or investigative reports.

227.7107 Contracts for architect-engineer services.

This section sets forth policies and procedures, pertaining to data, copyrights, and restricted designs unique to the acquisition of construction and architect-engineer services.

227.7107–1 Architectural designs and data clauses for architect-engineer or construction contracts.

(a) Except as provided in paragraph (b) of this subsection and in 227.7107–2, use the clause at 252.227–7022, Government Rights (Unlimited), in solicitations and contracts for architect-engineer services and for construction involving architect-engineer services.

(b) When the purpose of a contract for architect-engineer services, or for construction involving architect-engineer services, is to obtain a unique architectural design of a building, a monument, or construction of similar nature, which for artistic, aesthetic or other special reasons the Government does not want duplicated, the Government may acquire exclusive control of the data pertaining to the design by including the clause at 252.227–7023, Drawings and Other Data to Become Property of Government, in solicitations and contracts.

(c) The Government shall obtain unlimited rights in shop drawings for construction. In solicitations and contracts calling for delivery of shop drawings, include the clause at 252.227–7033, Rights in Shop Drawings.

227.7107–2 Contracts for construction supplies and research and development work.

Use the provisions and clauses required by 227–7103–6 and 227.7203–6 when the acquisition is limited to—

(a) Construction supplies or materials;

(b) Experimental, developmental, or research work, or test and evaluation

studies of structures, equipment, processes, or materials for use in construction; or

(c) Both.

227.7107–3 Approval of restricted designs.

The clause at 252.227–7024, Notice and Approval of Restricted Designs, may be included in architect-engineer contracts to permit the Government to make informed decisions concerning noncompetitive aspects of the design.

227.7108 Contractor data repositories.

(a) Contractor data repositories may be established when permitted by agency procedures. The contractual instrument establishing the data repository must require, as a minimum, the data repository management contractor to—

(1) Establish and maintain adequate procedures for protecting technical data delivered to or stored at the repository from unauthorized release or disclosure;

(2) Establish and maintain adequate procedures for controlling the release or disclosure of technical data from the repository to third parties consistent with the Government's rights in such data;

(3) When required by the contracting officer, deliver data to the Government on paper or in other specified media;

(4) Be responsible for maintaining the currency of data delivered directly by Government contractors or subcontractors to the repository;

(5) Obtain use and non-disclosure agreements (see 227.7103–7) from all persons to whom government purpose rights data is released or disclosed; and

(6) Indemnify the Government from any liability to data owners or licensors resulting from, or as a consequence of, a release or disclosure of technical data made by the data repository contractor or its officers, employees, agents, or representatives.

(b) If the contractor is or will be the data repository manager, the contractor's data management and distribution responsibilities must be identified in the contract or the contract must reference the agreement between the Government and the contractor that establishes those responsibilities.

(c) If the contractor is not and will not be the data repository manager, do not require a contractor or subcontractor to deliver technical data marked with limited rights legends to a data repository managed by another contractor unless the contractor or subcontractor who has asserted limited rights agrees to release the data to the repository or has authorized, in writing, the Government to do so.

(d) Repository procedures may provide for the acceptance, delivery, and subsequent distribution of technical data in storage media other than paper, including direct electronic exchange of data between two computers. The procedures must provide for the identification of any portions of the data provided with restrictive legends, when appropriate. The acceptance criteria must be consistent with the authorized delivery format.

Subpart 227.72—Rights in Computer Software and Computer Software Documentation

SOURCE: 60 FR 33482, June 28, 1995, unless otherwise noted.

227.7200 Scope of subpart.

This subpart—

(a) Prescribes policies and procedures for the acquisition of computer software and computer software documentation, and the rights to use, modify, reproduce, release, perform, display, or disclose such software or documentation. It implements requirements in the following laws and Executive Order:

(1) 10 U.S.C. 2302(4).

(2) 10 U.S.C. 2305 (subsection (d)(4)).

(3) 10 U.S.C. 2320.

(4) 10 U.S.C. 2321.

(5) 10 U.S.C. 2325.

(6) Executive Order 12591 (subsection 1(b)(6)).

(b) Does not apply to computer software or computer software documentation acquired under GSA schedule contracts.

227.7201 Definitions.

(a) As used in this subpart, unless otherwise specifically indicated, the

terms ''offeror'' and ''contractor'' include an offeror's or contractor's subcontractors, suppliers, or potential subcontractors or suppliers at any tier.

(b) Other terms used in this subpart are defined in the clause at 252.227–7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation.

227.7202 Commercial computer software and commercial computer software documentation.

227.7202–1 Policy.

(a) Commercial computer software or commercial computer software documentation shall be acquired under the licenses customarily provided to the public unless such licenses are inconsistent with Federal procurement law or do not otherwise satisfy user needs.

(b) Commercial computer software and commercial computer software documentation shall be obtained competitively, to the maximum extent practicable, using firm-fixed-price contracts or firm-fixed-priced orders under available pricing schedules.

(c) Offerors and contractors shall not be required to—

(1) Furnish technical information related to commercial computer software or commercial computer software documentation that is not customarily provided to the public except for information documenting the specific modifications made at Government expense to such software or documentation to meet the requirements of a Government solicitation; or

(2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose commercial computer software or commercial computer software documentation except for a transfer of rights mutually agreed upon.

227.7202–2 [Reserved]

227.7202–3 Rights in commercial computer software or commercial computer software documentation.

(a) The Government shall have only the rights specified in the license under which the commercial computer software or commercial computer software documentation was obtained.

(b) If the Government has a need for rights not conveyed under the license customarily provided to the public, the Government must negotiate with the contractor to determine if there are acceptable terms for transferring such rights. The specific rights granted to the Government shall be enumerated in the contract license agreement or an addendum thereto.

227.7202–4 Contract clause.

A specific contract clause governing the Government's rights in commercial computer software or commercial computer software documentation is not prescribed. As required by 227.7202–3, the Government's rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation shall be identified in a license agreement.

227.7203 Noncommercial computer software and noncommercial computer software documentation.

227.7203–1 Policy.

(a) DoD policy is to acquire only the computer software and computer software documentation, and the rights in such software or documentation, necessary to satisfy agency needs.

(b) Solicitations and contracts shall—

(1) Specify the computer software or computer software documentation to be delivered under a contract and the delivery schedules for the software or documentation;

(2) Establish or reference procedures for determining the acceptability of computer software or computer software documentation;

(3) Establish separate contract line items, to the extent practicable, for the computer software or computer software documentation to be delivered under a contract and require offerors and contractors to price separately each deliverable data item; and

(4) Require offerors to identify, to the extent practicable, computer software or computer software documentation to be furnished with restrictions on the Government's rights and require contractors to identify computer software or computer software documentation

to be delivered with such restrictions prior to delivery.

(c) Offerors shall not be required, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish to the Government any rights in computer software developed exclusively at private expense except for the software identified at 227.7203–5(a) (3) through (6).

(d) Offerors and contractors shall not be prohibited or discouraged from furnishing or offering to furnish computer software developed exclusively at private expense solely because the Government's rights to use, modify, release, reproduce, perform, display, or disclose the software may be restricted.

227.7203–2 Acquisition of noncommercial computer software and computer software documentation.

(a) Contracting officers shall work closely with data managers and requirements personnel to assure that computer software and computer software documentation requirements included in solicitations are consistent with the policy expressed in 227.7203–1.

(b)(1) Data managers or other requirements personnel are responsible for identifying the Government's minimum needs. In addition to desired software performance, compatibility, or other technical considerations, needs determinations should consider such factors as multiple site or shared use requirements, whether the Government's software maintenance philosophy will require the right to modify or have third parties modify the software, and any special computer software documentation requirements.

(2) When reviewing offers received in response to a solicitation or other request for computer software or computer software documentation, data managers must balance the original assessment of the Government's needs with prices offered.

(c) Contracting officers are responsible for ensuring that, wherever practicable, solicitations and contracts—

(1) Identify the types of computer software and the quantity of computer programs and computer software documentation to be delivered, any requirements for multiple users at one site or multiple site licenses, and the format and media in which the software or documentation will be delivered;

(2) Establish each type of computer software or computer software documentation to be delivered as a separate contract line item (this requirement may be satisfied by an exhibit to the contract);

(3) Identify the prices established for each separately priced deliverable item of computer software or computer software documentation under a fixed-price type contract;

(4) Include delivery schedules and acceptance criteria for each deliverable item; and

(5) Specifically identify the place of delivery for each deliverable item.

227.7203–3 Early identification of computer software or computer software documentation to be furnished to the Government with restrictions on use, reproduction or disclosure.

(a) Use the provision at 252.227–7017, Identification and Assertion of Use, Release, or Disclosure Restrictions, in all solicitation that include the clause at 252.227–7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation. The provision requires offerors to identify any computer software or computer software documentation for which restrictions, other than copyright, on use, modification, reproduction, release, performance, display, or disclosure are asserted and to attach the identification and assertion to the offer.

(b) Subsequent to contract award, the clause at 252.227–7014 permits a contractor, under certain conditions, to make additional assertions of restrictions. The prescriptions for the use of that clause and its alternates are at 227.7203–6(a).

227.7203–4 License rights.

(a) *Grant of license.* The Government obtains rights in computer software or computer software documentation, including a copyright license, under an irrevocable license granted or obtained by the contractor which developed the

software or documentation or the licensor of the software or documentation if the development contractor is not the licensor. The contractor or licensor retains all rights in the software or documentation not granted to the Government. The scope of a computer software license is generally determined by the source of funds used to develop the software. Contractors or licensors may, with some exceptions, restrict the Government's rights to use, modify, reproduce, release, perform, display, or disclose computer software developed exclusively or partially at private expense (see 227.7203–5 (b) and (c)). They may not, without the Government's agreement (see 227.7203–5(d)), restrict the Government's rights in computer software developed exclusively with Government funds or in computer software documentation required to be delivered under a contract.

(b) *Source of funds determination.* The determination of the source of funds used to develop computer software should be made at the lowest practicable segregable portion of the software or documentation (e.g., a software sub-routine that performs a specific function). Contractors may assert restricted rights in a segregable portion of computer software which otherwise qualifies for restricted rights under the clause at 252.227–7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation.

227.7203–5 Government rights.

The standard license rights in computer software that a licensor grants to the Government are unlimited rights, government purpose rights, or restricted rights. The standard license in computer software documentation conveys unlimited rights. Those rights are defined in the clause at 252.227–7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation. In unusual situations, the standard rights may not satisfy the Government's needs or the Government may be willing to accept lesser rights in return for other consideration. In those cases, a special license may be negotiated. However, the licensor is not obligated to provide the Government greater rights and the contracting officer is not required to accept lesser rights than the rights provided in the standard grant of license. The situations under which a particular grant of license applies are enumerated in paragraphs (a) through (d) of this subsection.

(a) *Unlimited rights.* The Government obtains an unlimited rights license in—

(1) Computer software developed exclusively with Government funds;

(2) Computer software documentation required to be delivered under a Government contract;

(3) Corrections or changes to computer software or computer software documentation furnished to the contractor by the Government;

(4) Computer software or computer software documentation that is otherwise publicly available or has been released or disclosed by the contractor or subcontractor without restrictions on further use, release or disclosure other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the software to another party or the sale or transfer of some or all of a business entity or it assets to another party;

(5) Computer software or computer software documentation obtained with unlimited rights under another Government contract or as a result of negotiations; or

(6) Computer software or computer software documentation furnished to the Government, under a Government contract or subcontract with—

(i) Restricted rights in computer software, limited rights in technical data, or government purpose license rights and the restrictive conditions have expired; or

(ii) Government purpose rights and the contractor's exclusive right to use such software or documentation for commercial purposes has expired.

(b) *Government purpose rights.* (1) Except as provided in paragraph (a) of this subsection, the Government obtains government purpose rights in computer software developed with mixed funding.

(2) The period during which government purpose rights are effective is negotiable. The clause at 252.227–7014 provides a nominal five-year period. Either party may request a different period. Changes to the government purpose rights period may be made at any time prior to delivery of the software without consideration from either party. Longer periods should be negotiated when a five-year period does not provide sufficient time to commercialize the software or, for software developed by subcontractors, when necessary to recognize the subcontractors' interests in the software.

(3) The government purpose rights period commences upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise that required development of the computer software. Upon expiration of the government purpose rights period, the Government has unlimited rights in the software including the right to authorize others to use data for commercial purposes.

(4) During the government purpose rights period, the Government may not use, or authorize other persons to use, computer software marked with government purpose rights legends for commercial purposes. The Government shall not release or disclose, or authorize others to release or disclose, computer software in which it has government purpose rights to any person unless—

(i) Prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at 227.7103–7; or

(ii) The intended recipient is a Government contractor receiving access to the software for performance of a Government contract that contains the clause at 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(5) When computer software marked with government purpose rights legends will be released or disclosed to a Government contractor performing a contract that does not include the clause at 252.227–7025, the contract may be modified, prior to release or disclosure, to include such clause in lieu of requiring the contractor to complete a use and non-disclosure agreement.

(6) Contracting activities shall establish procedures to assure that computer software or computer software documentation marked with government purpose rights legends are released or disclosed, including a release or disclosure through a Government solicitation, only to persons subject to the use and non-disclosure restrictions. Public announcements in the Commerce Business Daily or other publications must provide notice of the use and non-disclosure requirements. Class use and non-disclosure agreements (e.g., agreements covering all solicitations received by the XYZ company within a reasonable period) are authorized and may be obtained at any time prior to release or disclosure of the government purpose rights software or documentation. Documents transmitting government purpose rights software or documentation to persons under class agreements shall identify the specific software or documentation subject to government purpose rights and the class agreement under which such software or documentation are provided.

(c) *Restricted rights.* (1) The Government obtains restricted rights in noncommercial computer software required to be delivered or otherwise provided to the Government under a contract that were developed exclusively at private expense.

(2) Contractors are not required to provide the Government additional rights in computer software delivered or otherwise provided to the Government with restricted rights. When the Government has a need for additional rights, the Government must negotiate with the contractor to determine if there are acceptable terms for transferring such rights. List or describe all software in which the contractor has granted the Government additional rights in a license agreement made part of the contract (see paragraph (d) of this subsection). The license shall enumerate the specific additional rights granted to the Government.

(d) *Specifically negotiated license rights.* Negotiate specific licenses when

the parties agree to modify the standard license rights granted to the Government or when the Government wants to obtain rights in computer software in which it does not have rights. When negotiating to obtain, relinquish, or increase the Government's rights in computer software, consider the planned software maintenance philosophy, anticipated time or user sharing requirements, and other factors which may have relevance for a particular procurement. If negotiating to relinquish rights in computer software documentation, consider the administrative burden associated with protecting documentation subject to restrictions from unauthorized release or disclosure. The negotiated license rights must stipulate the rights granted the Government to use, modify, reproduce, release, perform, display, or disclose the software or documentation and the extent to which the Government may authorize others to do so. Identify all negotiated rights in a license agreement made part of the contract.

(e) *Rights in derivative computer software or computer software documentation.* The clause at 252.227–7014 protects the Government's rights in computer software, computer software documentation, or portions thereof that the contractor subsequently uses to prepare derivative software or subsequently embeds or includes in other software or documentation. The Government retains the rights it obtained under the development contract in the unmodified portions of the derivative software or documentation.

227.7203–6 Contract clauses.

(a)(1) use the clause at 252.227–7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation, in solicitations and contracts when the successful offeror(s) will be required to deliver computer software or computer software documentation. Do not use the clause when the only deliverable items are technical data (other than computer software documentation), commercial computer software or commercial computer software documentation, commercial items (see 227.7102–3), special works (see 227.7205), or contracts under the Small Business Innovative Research Program (see 227.7104), Except as provided in 227.7107–2, do not use the clause in architect-engineer and construction contracts..

(2) Use the clause at 252.227–7014 with its Alternate I in research contracts when the contracting officer determines, in consultation with counsel, that public dissemination by the contractor would be—

(i) In the interest of the Government; and

(ii) Facilitated by the Government relinquishing its right to publish the work for sale, or to have others publish the work for sale on behalf of the Government.

(b) Use the clause at 252.227–7016, Rights in Bid or Proposal Information, in solicitations and contracts that include the clause at 252.227–7014.

(c) Use the clause at 252.227–7019, Validation of Asserted Restrictions—Computer Software, in solicitations and contracts that include the clause at 252.227–7014. The clause provides procedures for the validation of asserted restrictions on the Government's rights to use, release, or disclose computer software.

(d) Use the provision at 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, in solicitations and contracts when it is anticipated that the Government will provide the contractor, for performance of its contract, computer software or computer software documentation marked with another contractor's restrictive legend(s).

(e) Use the provision at 252.227–7028, Technical Data or Computer Software Previously Delivered to the Government, in solicitations when the resulting contract will require the contractor to deliver computer software or computer software documentation. The provision requires offerors to identify any software or documentation specified in the solicitation as deliverable items that are the same or substantially the same as software or documentation which the offeror has delivered or is obligated to deliver, either as a contractor or subcontractor, under any other federal agency contract.

(f) Use the clause at 252.227–7037, Validation of Restrictive Markings on

Technical Data, in solicitations and contracts that include the clause at 252.227–7014 when the contractor will be required to deliver noncommercial computer software documentation (technical data). The clause implements statutory requirements under 10 U.S.C. 2321. Paragraph (e) of the clause contains information that must be included in a formal challenge.

227.7203–7 [Reserved]

227.7203–8 Deferred delivery and deferred ordering of computer software and computer software documentation.

(a) *Deferred delivery*. Use the clause at 252.227–7026, Deferred Delivery of Technical Data or Computer Software, when it is in the Government's interests to defer the delivery of computer software or computer software documentation. The clause permits the contracting officer to require the delivery of data identified as ''deferred delivery'' data or computer software at any time until two years after acceptance by the Government of all items (other than technical data or computer software) under the contract or contract termination, whichever is later. The obligation of subcontractors or suppliers to deliver such data expires two years after the date the prime contractor accepts the last item from the subcontractor or supplier for use in the performance of the contract. The contract must specify the computer software or computer software documentation that is subject to deferred delivery. The contracting officer shall notify the contractor sufficiently in advance of the desired delivery date for such software or documentation to permit timely delivery.

(b) *Deferred ordering*. Use the clause at 252.227–7027, Deferred Ordering of Technical Data or Computer Software, when a firm requirement for software or documentation has not been established prior to contract award but there is a potential need for computer software or computer software documentation. Under this clause the contracting officer may order any computer software or computer software documentation generated in the performance of the contract or any subcontract thereunder at any time until three years after acceptance of all items (other than technical data or computer software) under the contract or contract termination, whichever is later. The obligation of subcontractors to deliver such technical data or computer software expires three years after the date the contractor accepts the last item under the subcontract. When the software or documentation are ordered, the delivery dates shall be negotiated and the contractor compensated only for converting the software or documentation into the prescribed form, reproduction costs, and delivery costs.

227.7203–9 Copyright.

(a) *Copyright license*. (1) The clause at 252.227–7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation, requires a contractor to grant, or obtain for the Government license rights which permit the Government to reproduce the software or documentation, distribute copies, perform or display the software or documentation and, through the right to modify data, prepare derivative works. The extent to which the Government, and others acting on its behalf, may exercise these rights varies for each of the standard data rights licenses obtained under the clause. When non-standard license rights in computer software or computer software documentation will be negotiated, negotiate the extent of the copyright license concurrent with negotiations for the data rights license. Do not negotiate copyright licenses for computer software that provide less rights than the standard restricted rights in computer software license. For computer software documentation, do not negotiate a copyright license that provides less rights than the standard limited rights in technical data license.

(2) The clause at 252.227–7013, Rights in Technical Data—Noncommercial Items, does not permit a contractor to incorporate a third party's copyrighted software into a deliverable software item unless the contractor has obtained an appropriate license for the Government and, when applicable, others acting on the Government's behalf, or has obtained the contracting officer's written approval to do so. Grant

approval to use third party copyrighted software in which the Government will not receive a copyright license only when the Government's requirements cannot be satisfied without the third party material or when the use of the third party material will result in cost savings to the Government which outweigh the lack of a copyright license.

(b) *Copyright considerations—special works.* See 227.7205 for copyright considerations when acquiring special works.

227.7203–10 Contractor identification and marking of computer software or computer software documentation to be furnished with restrictive markings.

(a) *Identification requirements.* (1) The solicitation provision at 252.227–7017, Identification and Assertion of Use, Release, or Disclosure Restrictions, requires offerors to identify, prior to contract award, any computer software or computer software documentation that an offeror asserts should be provided to the Government with restrictions on use, modification, reproduction, release or disclosure. This requirement does not apply to restrictions based solely on copyright. The notification and identification must be submitted as an attachment to the offer. If an offeror fails to submit the attachment or fails to complete the attachment in accordance with the requirements of the solicitation provision, such failure shall constitute a minor informality. Provide offerors an opportunity to remedy a minor informality in accordance with the procedures at FAR 14.405 or 15.607. An offeror's failure to correct an informality within the time prescribed by the contracting officer shall render the offer ineligible for award.

(2) The procedures for correcting minor informalities shall not be used to obtain information regarding asserted restrictions or an offeror's suggested asserted rights category. Questions regarding the justification for an asserted restriction or asserted rights category must be pursued in accordance with the procedures at 227.7203–13.

(3) The restrictions asserted by a successful offeror shall be attached to its contract unless, in accordance with the procedures at 227.7203–13, the parties have agreed that an asserted restriction is not justified. The contract attachment shall provide the same information regarding identification of the computer software or computer software documentation, the asserted rights category, the basis for the assertion, and the name of the person asserting the restrictions as required by paragraph (d) of the solicitation provision at 252.227–7017. Subsequent to contract award, the clause at 252.227–7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation, permits a contractor to make additional assertions under certain conditions. The additional assertions must be made in accordance with the procedures and in the format prescribed by that clause.

(4) Neither the pre- or post-award assertions made by the contractor nor the fact that certain assertions are identified in the attachment to the contract, determine the respective rights of the parties. As provided at 227.7203–13, the Government has the right to review, verify, challenge and validate restrictive markings.

(5) Information provided by offerors in response to the solicitation provision at 252.227–7017 may be used in the source selection process to evaluate the impact on evaluation factors that may be created by restrictions on the Government's ability to use or disclose computer software or computer software documentation.

(b) *Contractor marking requirements.* The clause at 252.227–7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation—

(1) Requires a contractor who desires to restrict the Government's rights in computer software or computer software documentation to place restrictive markings on the software or documentation, provides instructions for the placement of the restrictive markings, and authorizes the use of certain restrictive markings. When it is anticipated that the software will or may be used in combat or situations which simulate combat conditions, do not permit contractors to insert instructions into computer programs that interfere with or delay operation of the software to display a restrictive rights legend or other license notice; and

(2) Requires a contractor to deliver, furnish, or otherwise provide to the Government any computer software or computer software documentation in which the Government has previously obtained rights with the Government's pre-existing rights in that software or documentation unless the parties have agreed otherwise or restrictions on the Government's rights to use, modify, produce, release, or disclose the software or documentation have expired. When restrictions are still applicable, the contractor is permitted to mark the software or documentation with the appropriate restrictive legend.

(c) *Unmarked computer software or computer software documentation.* (1) Computer software or computer software documentation delivered or otherwise provided under a contract without restrictive markings shall be presumed to have been delivered with unlimited rights and may be released or disclosed without restriction. To the extent practicable, if a contractor has requested permission (see paragraph (c)(2) of this subsection) to correct an inadvertent omission of markings, do not release or disclose the software or documentation pending evaluation of the request.

(2) A contractor may request permission to have appropriate legends placed on unmarked computer software or computer software documentation at its expense. The request must be received by the contracting officer within six months following the furnishing or delivery of such software or documentation, or any extension of that time approved by the contracting officer. The person making the request must—

(i) Identify the software or documentation that should have been marked;

(ii) Demonstrate that the omission of the marking was inadvertent, the proposed marking is justified and conforms with the requirements for the marking of computer software or computer software documentation contained in the clause at 252.227–7014; and

(iii) Acknowledge, in writing, that the Government has no liability with respect to any disclosure, reproduction, or use of the software or documentation made prior to the addition of the marking or resulting from the omission of the marking.

(3) Contracting officers should grant permission to mark only if the software or documentation were not distributed outside the Government or were distributed outside the Government with restrictions on further use or disclosure.

227.7203–11 Contractor procedures and records.

(a) The clause at 252.227–7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation, requires a contractor, and its subcontractors or suppliers that will deliver computer software or computer software documentation with other than unlimited rights, to establish and follow written procedures to assure that restrictive markings are used only when authorized and to maintain records to justify the validity of restrictive markings.

(b) The clause at 252.227–7019, Validation of Asserted Restrictions—Computer Software, requires contractors and their subcontractors or suppliers at any tier to maintain records sufficient to justify the validity of markings that assert restrictions on the use, modification, reproduction, release, performance, display, or disclosure of computer software.

227.7203–12 Government right to establish conformity of markings.

(a) *Nonconforming markings.* (1) Authorized markings are identified in the clause at 252.227–7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation. All other markings are nonconforming markings. An authorized marking that is not in the form, or differs in substance, from the marking requirements in the clause at 252.227–7014 is also a nonconforming marking.

(2) The correction of nonconforming markings on computer software is not subject to 252.227–7019, Validation of Asserted Restrictions—Computer Software, and the correction of nonconforming markings on computer software documentation (technical data) is not subject to 252.227–7037, Validation of Restrictive Markings on

Technical Data. To the extent practicable, the contracting officer should return computer software or computer software documentation bearing nonconforming markings to the person who has placed the nonconforming markings on the software or documentation to provide that person an opportunity to correct or strike the nonconforming markings at that person's expense. If that person fails to correct the nonconformity and return the corrected software or documentation within 60 days following the person's receipt of the software or documentation, the contracting officer may correct or strike the nonconformity at the person's expense. When it is impracticable to return computer software or computer software documentation for correction, contracting officers may unilaterally correct any nonconforming markings at Government expense. Prior to correction, the software or documentation may be used in accordance with the proper restrictive marking.

(b) *Unjustified markings.* (1) An unjustified marking is an authorized marking that does not depict accurately restrictions applicable to the Government's use, modification, reproduction, release, or disclosure of the marked computer software or computer software documentation. For example, a restricted rights legend placed on computer software developed under a Government contract either exclusively at Government expense or with mixed funding (situations under which the Government obtains unlimited or government purpose rights) is an unjustified marking.

(2) Contracting officers have the right to review and challenge the validity of unjustified markings. However, at any time during performance of a contract and notwithstanding existence of a challenge, the contracting officer and the person who has asserted a restrictive marking may agree that the restrictive marking is not justified. Upon such agreement, the contracting officer may, at his or her election, either——

(i) Strike or correct the unjustified marking at that person's expense; or

(ii) Return the computer software or computer software documentation to the person asserting the restriction for correction at that person's expense. If the software or documentation are returned and that person fails to correct or strike the unjustified restriction and return the corrected software or documentation to the contracting officer within 60 days following receipt of the software or documentation, the unjustified marking shall be corrected or stricken at that person's expense.

227.7203–13 Government right to review, verify, challenge and validate asserted restrictions.

(a) *General.* An offeror's or contractor's assertion(s) of restrictions on the Government's rights to use, modify, reproduce, release, or disclose computer software or computer software documentation do not, by themselves, determine the extent of the Government's rights in such software or documentation. The Government may require an offeror or contractor to submit sufficient information to permit an evaluation of a particular asserted restriction and may challenge asserted restrictions when there are reasonable grounds to believe that an assertion is not valid.

(b) *Requests for information.* Contracting officers should have a reason to suspect that an asserted restriction might not be correct prior to requesting information. When requesting information, provide the offeror or contractor the reason(s) for suspecting that an asserted restriction might not be correct. A need for additional license rights is not, by itself, a sufficient basis for requesting information concerning an asserted restriction. Follow the procedures at 227.7203–5(d) when additional license rights are needed but there is no basis to suspect that an asserted restriction might not be valid.

(c) *Transacting matters directly with subcontractors.* The clause at 252.227–7019, Validation of Asserted Restrictions—Computer Software, obtains the contractor's agreement that the Government may transact matters under the clause directly with a subcontractor or supplier, at any tier, without creating or implying privity of contract. Contracting officers should permit a subcontractor or supplier to

transact challenge and validation matters directly with the Government when—

(1) A subcontractor's or supplier's business interests in its technical data would be compromised if the data were disclosed to a higher tier contractor.

(2) There is reason to believe that the contractor will not respond in a timely manner to a challenge and an untimely response would jeopardize a subcontractor's or supplier's right to assert restrictions; or

(3) Requested to do so by a subcontractor or supplier.

(d) *Challenging asserted restrictions*—(1) *Pre-award considerations.* The challenge procedures in the clause at 252.227–7019 could significantly delay competitive procurements. Therefore, avoid challenging asserted restrictions prior to a competitive contract award unless resolution of the assertion is essential for successful completion of the procurement.

(2) *Computer software documentation.* Computer software documentation is technical data. Challenges to asserted restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose computer software documentation must be made in accordance with the clause at 252.227–7037, Validation of Restrictive Markings on Technical Data, and the guidance at 227.7103–13. The procedures in the clause at 252.227–7037 implement requirements contained in 10 U.S.C. 2321. Resolution of questions regarding the validity of asserted restrictions using the process described at 227.7103–12(b)(2) is strongly encouraged.

(3) *Computer software.* (i) Asserted restrictions should be reviewed before acceptance of the computer software deliverable under a contract. The Government's right to challenge an assertion expires three years after final payment under the contract or three years after delivery of the software, whichever is later. Those limitations on the Government's challenge rights do not apply to software that is publicly available, has been furnished to the Government without restrictions, or has been otherwise made available without restrictions.

(ii) Contracting officers must have reasonable grounds to challenge the current validity of an asserted restriction. Before challenging an asserted restriction, carefully consider all available information pertaining to the asserted restrictions. Resolution of questions regarding the validity of asserted restrictions using the process described at 227.7203–12(b)(2) is strongly encouraged. After consideration of the situations described in paragraph (c) of this subsection, contracting officers may request the person asserting a restriction to furnish a written explanation of the facts and supporting documentation for the assertion in sufficient detail to enable the contracting officer to determine the validity of the assertion. Additional supporting documentation may be requested when the explanation provided by that person does not, in the contracting officer's opinion, establish the validity of the assertion.

(iii) Assertions may be challenged whether or not supporting documentation was requested. Challenges must be in writing and issued to the person asserting the restriction.

(4) *Extension of response time.* The contracting officer, at his or her discretion, may extend the time for response contained in a challenge, as appropriate, if the contractor submits a timely written request showing the need for additional time to prepare a response.

(e) *Validating or denying asserted restrictions.* (1) Contracting officers must promptly issue a final decision denying or sustaining the validity of each challenged assertion unless the parties have agreed on the disposition of the assertion. When a final decision denying the validity of an asserted restriction is made following a timely response to a challenge, the Government is obligated to continue to respect the asserted restrictions through final disposition of any appeal unless the agency head notifies the person asserting the restriction that urgent or compelling circumstances do not permit the Government to continue to respect the asserted restriction. See 252.227–7019(g) for restrictions applicable following a determination of urgent and compelling circumstances.

(2) Only a contracting officer's final decision, or actions of an agency Board of Contract Appeals or a court of competent jurisdiction, that sustain the validity of an asserted restriction constitute validation of the restriction.

(f) *Multiple challenges to an asserted restriction.* When more than one contracting officer challenges an asserted restriction, the contracting officer who made the earliest challenge is responsible for coordinating the Government challenges. That contracting officer shall consult with all other contracting officers making challenges, verify that all challenges apply to the same asserted restriction and, after consulting with the contractor, subcontractor, or supplier asserting the restriction, issue a schedule that provides that person a reasonable opportunity to respond to each challenge.

227.7203–14 Conformity, acceptance, and warranty of computer software and computer software documentation.

(a) *Computer software documentation.* Computer software documentation is technical data. See 227.7103–14 for appropriate guidance and statutory requirements.

(b) *Computer software.* (1) *Conformity and acceptance.* Solicitations and contracts requiring the delivery of computer software shall specify the requirements the software must satisfy to be acceptable. Contracting officers, or their authorized representatives, are responsible for determining whether computer software tendered for acceptance conforms to the contractual requirements. Except for nonconforming restrictive markings (follow the procedures at 227.7203–12(a) if nonconforming markings are the sole reason computer software tendered for acceptance fails to conform to contractual requirements), do not accept software that does not conform in all respects to applicable contractual requirements. Correction or replacement of nonconforming software, or an equitable reduction in contract price when correction or replacement of the nonconforming data is not practicable or is not in the Government's interests, shall be accomplished in accordance with—

(i) The provisions of a contract clause providing for inspection and acceptance of deliverables and remedies for nonconforming deliverables; or

(ii) The procedures at FAR 46.407(c) through (g), if the contract does not contain an inspection clause providing remedies for nonconforming deliverables.

(2) *Warranties*—(i) *Weapon systems.* Computer software that is a component of a weapon system or major subsystem should be warranted as part of the weapon system warranty. Follow the procedures at 246.770.

(ii) *Non-weapon systems.* Approval of the chief of the contracting office must be obtained to use a computer software warranty other than a weapon system warranty. Consider the factors at FAR 46.703 in deciding whether to obtain a computer software warranty. When approval for a warranty has been obtained, the clause at 252.246–7001, Warranty of Data, and its alternates, may be appropriately modified for use with computer software or a procurement specific clause may be developed.

227.7203–15 Subcontractor rights in computer software or computer software documentation.

(a) Subcontractors and suppliers at all tiers should be provided the same protection for their rights in computer software or computer software documentation as are provided to prime contractors.

(b) The clauses at 252.227–7019, Validation of Asserted Restrictions—Computer Software, and 252.227–7037, Validation of Restrictive Markings on Technical Data, obtain a contractor's agreement that the Government's transaction of validation or challenge matters directly with subcontractors at any tier does not establish or imply privity of contract. When a subcontractor or supplier exercises its right to transact validation matters directly with the Government, contracting officers shall deal directly with such persons, as provided at 227.7203–13(c) for computer software and 227.7103–13(c)(3) for computer software documentation (technical data).

(c) Require prime contractors whose contracts include the following clauses

to include those clauses, without modification except for appropriate identification of the parties, in contracts with subcontractors or suppliers who will be furnishing computer software in response to a Government requirement (see 227.7103–15(c) for clauses required when subcontractors or suppliers will be furnishing computer software documentation (technical data)):

(1) 252.227.7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation;

(2) 252.227.7019, Validation of Asserted Restrictions—Computer Software;

(3) 252.227.7025, Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends; and

(4) 252.227.7028, Technical Data or Computer Software Previously Delivered to the Government.

(d) Do not require contractors to have their subcontractors or suppliers at any tier relinquish rights in technical data to the contractor, a higher tier subcontractor, or to the Government, as a condition for award of any contract, subcontract, purchase order, or similar instrument except for the rights obtained by the Government under the provisions of the Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation clause contained in the contractor's contract with the Government.

227.7203–16 Providing computer software or computer software documentation to foreign governments, foreign contractors, or international organizations.

Computer software or computer software documentation may be released or disclosed to foreign governments, foreign contractors, or international organizations only if release or disclosure is otherwise permitted both by Federal export controls and other national security laws or regulations. Subject to such laws and regulations, the Department of Defense—

(a) May release or disclose computer software or computer software documentation in which it has obtained unlimited rights to such foreign entities or authorize the use of such data by those entities; and

(b) Shall not release or disclose computer software or computer software documentation for which restrictions on use, release, or disclosure have been asserted to such foreign entities or authorize the use of such data by those entities, unless the intended recipient is subject to the same provisions as included in the use and non-disclosure agreement at 227.7103–7 and the requirements of the clause at 252.227–7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation, governing use, modification, reproduction, release, performance, display, or disclosure of such data have been satisfied.

227.7203–17 Overseas contracts with foreign sources.

(a) The clause at 252.227–7032, Rights in Technical Data and Computer Software (Foreign), may be used in contracts with foreign contractors to be performed overseas, except Canadian purchases (see paragraph (c) of this subsection) in lieu of the clause at 252.227–7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation, when the Government requires the unrestricted right to use, modify, reproduce, release, perform, display, or disclose all computer software or computer software documentation to be delivered under the contract. Do not use the clause in contracts for special works.

(b) When the Government does not require unlimited rights, the clause at 252.227–7032 may be modified to accommodate the needs of a specific overseas procurement situation. The Government should obtain rights to the computer software or computer software documentation that are not less than the rights the Government would have obtained under the software rights clause(s) prescribed in this part for a comparable procurement performed within the United States or its possessions.

(c) Contracts for Canadian purchases shall include the appropriate software rights clause prescribed in this part for a comparable procurement performed within the United States or its possessions.

227.7204 Contracts under the Small Business Innovative Research Program.

When contracting under the Small Business Innovative Research Program, follow the procedures at 227–7104.

227.7205 Contracts for special works.

(a) Use the clause at 252.227–7020, Rights in Special Works, in solicitations and contracts where the Government has a specific need to control the distribution of computer software or computer software documentation first produced, created, or generated in the performance of a contract and required to be delivered under that contract, including controlling distribution by obtaining an assignment of copyright, or a specific need to obtain indemnity for liabilities that may arise out of the creation, delivery, use, modification, reproduction, release, performance, display, or disclosure of such software or documentation. Use the clause—

(1) In lieu of the clause at 252.227–7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation, when the Government must own or control copyright in all computer software or computer software documentation first produced, created, or generated and required to be delivered under a contract; or

(2) In addition to the clause at 252.227–7014 when the Government must own or control copyright in some of the computer software or computer software documentation first produced, created, or generated and required to be delivered under a contract. The specific software or documentation in which the Government must own or control copyright must be identified in a special contract requirement.

(b) Although the Government obtains an assignment of copyright and unlimited rights in the computer software or computer software documentation delivered as a special work under the clause at 252.227–7020, the contractor retains use and disclosure rights in that software or documentation. If the Government needs to restrict a contractor's rights to use or disclose a special work, it must also negotiate a special license which specifically restricts the contractor's use or disclosure rights.

(c) The clause at 252.227–7020 does not permit a contractor to incorporate into a special work any work copyrighted by others unless the contractor obtains the contracting officer's permission to do so and obtains for the Government a non-exclusive, paid up, world-wide license to make and distribute copies of that work, to prepare derivative works, to perform or display any portion of that work, and to permit others to do so for government purposes. Grant permission only when the Government's requirements cannot be satisfied unless the third party work is included in the deliverable work.

(d) Examples of other works which may be procured under the clause at 252.227–7020 include, but are not limited to, audiovisual works, scripts, soundtracks, musical compositions, and adaptations; histories of departments, agencies, services or units thereof; surveys of Government establishments; instructional works or guidance to Government officers and employees on the discharge of their official duties; reports, books, studies, surveys or similar documents; collections of data containing information pertaining to individuals that, if disclosed, would violate the right of privacy or publicity of the individuals to whom the information relates; or investigative reports.

227.7206 Contracts for architect-engineer services.

Follow 227.7107 when contracting for architect-engineer services.

227.7207 Contractor data repositories.

Follow 227.7108 when it is in the Government's interests to have a data repository include computer software or to have a separate computer software repository. Contractual instruments establishing the repository requirements must appropriately reflect the repository manager's software responsibilities.

PART 228—BONDS AND INSURANCE

Sec.

Subpart 228.1—Bonds

228.102 Performance and payment bonds for construction contracts.
228.102–1 General.
228.105 Other types of bonds.
228.106 Administration.
228.106–7 Withholding contract payments.
228.170 Solicitation provision.

Subpart 228.3—Insurance

228.304 Risk-pooling arrangements.
228.305 Overseas workers' compensation and war-hazard insurance.
228.307 Insurance under cost-reimbursement contracts.
228.307–1 Group insurance plans.
228.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.
228.311–1 Contract clause.
228.370 Additional clauses.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36404, July 31, 1991, unless otherwise noted.

Subpart 228.1—Bonds

228.102 Performance and payment bonds for construction contracts.

228.102–1 General.

For Defense Environmental Restoration Program construction contracts entered into pursuant to 10 U.S.C. 2701 and executed between December 5, 1991, and December 31, 1999—

(1) Any rights of action under the performance bond shall only accrue to, and be for the exclusive use of, the obligee named in the bond.

(2) In the event of default, the surety's liability on the performance bond is limited to the cost of completion of the contract work, less the balance of unexpended funds. Under no circumstances shall the liability exceed the penal sum of the bond.

(3) The surety shall not be liable for indemnification or compensation of the obligee for loss or liability arising from personal injury or property damage, even if the injury or damage was caused by a breach of the bonded contract.

(4) Once it has taken action to meet its obligations under the bond, the surety is entitled to any indemnification and identical standard of liability to which the contractor was entitled under the contract or applicable laws and regulations.

(a) The requirement for performance and payment bonds is waived for cost-reimbursement contracts. However, for cost type contracts with fixed-price construction subcontracts over $25,000, require the prime contractor to obtain from each of its construction subcontractors—

(i) A payment bond in favor of the prime contractor sufficient to pay labor and material costs; and

(ii) A performance bond in an equal amount if available at no additional cost.

[56 FR 36404, July 31, 1991, as amended at 57 FR 42631, Sept. 15, 1992; 58 FR 28469, May 13, 1993; 60 FR 29499, June 5, 1995]

228.105 Other types of bonds.

Fidelity and forgery bonds generally are not required but may be used when—

(1) Necessary for the protection of the Government or the contractor; or

(2) The investigative and claims services of a surety company are desired.

228.106 Administration.

228.106–7 Withholding contract payments.

(a) Withholding may be appropriate in other than construction contracts (see 232.970–1(b)).

[57 FR 42707, Sept. 16, 1992]

228.170 Solicitation provision.

When a requirement for a performance bond or other security is included in a solicitation for dismantling, demolition, or removal of improvements (see

FAR 37.300), use the provision at 252.228–7004, Bonds or Other Security. Set a period of time (normally ten days) for return of executed bonds.

Subpart 228.3—Insurance

228.304 Risk-pooling arrangements.

The DoD has established the National Defense Projects Rating Plan, also known as the Special Casualty Insurance Rating Plan, as a risk-pooling arrangement to minimize the cost to the Government of purchasing the liability insurance listed in FAR 28.307–2. Use the plan in accordance with the following guidelines when it provides the necessary coverage more advantageously than commercially available coverage.

(1) The plan—

(i) Is implemented by attaching an endorsement to standard insurance policy forms for workers' compensation, employer's liability, comprehensive general, and automobile liability. The endorsement states that the instant policy is subject to the National Defense Projects Rating Plan.

(ii) Applies to eligible Defense projects of one or more departments/agencies. For purposes of this section, a Defense project is any eligible contract or group of contracts with the same contractor.

(A) A Defense project is eligible when—

(*1*) Eligible contracts represent, at the inception of the plan, at least 90 percent of the payroll for the total operations at project locations; and

(*2*) The annual insurance premium is estimated to be at least $10,000.

(B) A contract is eligible when it is—

(*1*) Either domestic or foreign;

(*2*) Cost-reimbursement type; or

(*3*) Fixed price with redetermination provisions.

(2) Under construction contracts, include construction subcontractors in the prime contractor's plan only when subcontractor operations are at the project site, and the subcontract provides that the prime contractor will furnish insurance.

(3) Use the agreement in Table 28–1, Insurance Rating Plan Agreement, when the Government assumes contractor premium payments upon contract termination or completion.

(4) The Federal Tort Claims Act provides protection for Government employees while driving Government-owned vehicles in the performance of their assigned duties. Include the endorsement in Table 28–2, Automobile Insurance Policy Endorsement, in automobile liability insurance policies provided under the National Defense Projects Rating Plan.

Table 28–1.—Insurance Rating Plan Rating Agreement

Special Casualty Insurance Rating Plan Assignment-Assumption of Premium Obligations

It is agreed that 100 percent* of the return premiums and premium refunds (and dividends) due or to become due the prime contractor under the policies to which the National Defense Projects Rating Plan Endorsement made a part of policy _____ applies are hereby assigned to and shall be paid to the United States of America, and the prime contractor directs the Company to make such payments to the office designated for contract administration acting for and on account of the United States of America.

The United States of America hereby assumes and agrees to fulfill all present and future obligations of the prime contractor with respect to the payment of 100 percent of the premiums under said policies.

This agreement, upon acceptance by the prime contractor, the United States of America, and the Company shall be effective from _____

Accepted _____
(Date)
(Name of Insurance Company) _____
By _____
(Title of Official Signing)
Accepted _____
(Date)
United States of America
By _____
(Authorized Representative)
Accepted _____
(Date)
(Prime Contractor) _____
By _____
(Authorized Representative)

*In the event the Government has less than a 100 percent interest in premium funds or dividends, modify the assignment to reflect the percentage of interest and extent of the Government's assumption of additional premium obligation.

Table 28–2.—Automobile Insurance Policy Endorsement

It is agreed that insurance provided by the policy with respect to the ownership, maintenance, or use of automobiles, including loading and unloading thereof, does not apply to the following as insureds: The United States of America, any of its agencies, or any of its officers or employees.

228.305 Overseas workers' compensation and war-hazard insurance.

(d) Submit requests for waiver through department/agency channels. Include the following—

(i) Name and address of contractor;

(ii) Contract number;

(iii) Date of award;

(iv) Place of performance;

(v) Name of insurance company providing Defense Base Act coverage;

(vi) Nationality of employees to whom waiver is to apply; and

(vii) Reason for waiver.

228.307 Insurance under cost-reimbursement contracts.

228.307–1 Group insurance plans.

The Defense Department Group Term Insurance Plan is available for contractor use under cost-reimbursement type contracts when approved as provided in department or agency regulations. A contractor is eligible if—

(a) The number of covered employees is 500 or more; and

(b) The contractor has all cost-reimbursement contracts; or

(c) At least 90 percent of the payroll for contractor operations to be covered by the Plan is under cost-reimbursement contracts.

228.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.

228.311–1 Contract clause.

Use the clause at FAR 52.228–7, Insurance—Liability to Third Persons, in solicitations and contracts, other than those for construction and those for architect-engineer services, when a cost-reimbursement contract is contemplated, unless the head of the contracting activity waives the requirement for use of the clause.

[56 FR 36404, July 31, 1991. Redesignated at 61 FR 50454, Sept. 26, 1996]

228.370 Additional clauses.

(a) Use the clause at 252.228–7000, Reimbursement for War-Hazard Losses, when—

(1) The clause at FAR 52.228–4, Worker's Compensation and War-Hazard Insurance Overseas, is used; and

(2) The head of the contracting activity decides not to allow the contractor to buy insurance for war-hazard losses.

(b)(1) Use the clause at 252.228–7001, Ground and Flight Risk, in negotiated fixed-price contracts for aircraft production, modification, maintenance, repair, or overhaul, unless—

(i) The aircraft is being acquired for a foreign military sale and the foreign government has not agreed to assume the risk; or

(ii) The cost of insurance for damage, loss, or destruction of aircraft does not exceed $500, and the contracting officer agrees to recognize the insurance costs.

(2) If appropriate, revise the clause at 252.228–7001, Ground and Flight Risk, as follows—

(i) Include a modified definition of ''aircraft'' if the contract covers other than conventional types of winged aircraft, i.e., helicopters, vertical take-off aircraft, lighter-than-air airships or other nonconventional aircraft. The modified definition should describe a stage of manufacture comparable to the standard definition.

(ii) Modify ''in the open'' to include ''hush houses,'' test hangars and comparable structures, and other designated areas.

(iii) Expressly define the ''contractor's premises'' where the aircraft will be located during and for contract performance. These locations may include contract premises which are owned, leased, or premises where the contractor is a permittee or licensee or has a right to use, including Government airfields.

(iv) Revise paragraph (d)(iii) of the clause to provide Government assumption of risk for transportation by conveyance on streets or highways when transportation is—

(A) Limited to the vicinity of contractor premises; and

(B) Incidental to work performed under the contract.

(c)(1) Use the clause at 252.228–7002, Aircraft Flight Risk, in cost reimbursement contracts—

(i) For the development, production, modification, maintenance, repair, or overhaul of aircraft; or

(ii) Otherwise involving the furnishing of aircraft to the contractor by the Government.

(iii) With the definition of ''aircraft'' modified, if appropriate, to include helicopters, vertical take-off aircraft, lighter-than-air airships or other nonconventional aircraft.

(2) Use the clause at 252.228–7002, Aircraft Flight Risk, appropriately modified, in fixed price contracts when—

(i) The clause at 252.228–7001, Ground and Flight Risk, is not used; and

(ii) Contract performance involves the flight of Government furnished aircraft.

(d) The clause at 252.228–7003, Capture and Detention, may be used when contractor employees are subject to capture and detention and may not be covered by the War Hazards Compensation Act (42 U.S.C. 1701 *et seq.*).

(e) The clause at 252.228–7005, Accident Reporting and Investigation Involving Aircraft, Missiles, and Space Launch Vehicles, may be used in solicitations and contracts which involve the manufacture, modification, overhaul, or repair of these items.

[56 FR 36404, July 31, 1991, as amended at 57 FR 42631, Sept. 15, 1992]

PART 229—TAXES

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

Subpart 229.1—General

229.101 Resolving tax problems.

(a) Within DoD, the agency-designated legal counsels are the defense agency General Counsels, the General Counsels of the Navy and Air Force, and for the Army, the Chief, Contract Law Division, Office of the Judge Advocate General.

(c) The contracting officer may direct the contractor to litigate the applicability of a particular tax if—

(i) The contract is either a cost reimbursement type or a fixed price type with a tax escalation clause; and

(ii) The direction is coordinated with the agency-designated legal counsel through the DoD Tax Policy and Advisory Group.

(d)(i) Review DoDD 5100.64, Department of Defense Foreign Tax Relief Program, before contracting with a foreign source. Refer questions on implementation of the program to the Commanding Officers in Table 29–1, Designated Commanding Officers, which have been designated under subsection E.7 of DoDD 5100.64 to serve as—

(A) Single point of contact for U.S. contracting offices for investigation and resolution of specific foreign tax relief matters; and

(B) Liaison with responsible diplomatic mission and local foreign tax authorities.

(ii) Refer foreign tax relief questions which have not been resolved by the designated Commanding Officer to the agency-designated legal counsel.

(iii) When an acquisition is for a contract to be performed in a country or area listed in Table 29–1, Designated Commanding Officers—

(A) Obtain from the designated Commanding Officer detailed information concerning the taxes and duties from which the Government of the United States is exempt, and

(B) Provide the information to prospective offerors.

(C) Do not provide prospective offerors any other information about foreign taxes or duties.

(D) Issue tax exemption certificates, as appropriate, to assist the contractor in obtaining relief from foreign taxes and duties which were excluded from the contract price.

(E) Seek advice and assistance from the designated Commanding Officer and, if necessary, the agency-designated legal counsel if the contractor notifies the contracting officer that it has been assessed a tax or duty by a foreign government which could increase the contract price.

TABLE 29–1—DESIGNATED COMMANDING OFFICERS

Country or area	Designated commanding officer
Australia	Commander in Chief, Pacific Representative, Australia.
Azores	Commander, U.S. Forces, Azores.
Bahrain	Commander in Chief, U.S. Naval Forces, Europe.
Belgium	Commander in Chief, U.S. Army, Europe.
Bermuda	Commanding Officer, U.S. Naval Air Station, Bermuda.
Canada	Commander, Space Command.
Caribbean Islands (including Bahamas).	Commander, Antilles Defense Command.
Denmark	Commander in Chief, U.S. Air Forces, Europe.
Ethiopia	Commander in Chief, U.S. Army, Europe.
France	Commander in Chief, U.S. Army, Europe.
Germany	Commander in Chief, U.S. Army, Europe.
Greece	Commander in Chief, U.S. Air Forces, Europe.
Greenland	Commander, Space Command.
Iceland	Commander, Iceland Defense Force.
Iran	Commander in Chief, U.S. Army, Europe.
Italy	Commander in Chief, U.S. Naval Forces, Europe.
Japan	Commander, U.S. Forces, Japan.
Korea	Commander, U.S. Forces, Korea.
Luxembourg.	Commander in Chief, U.S. Army, Europe.
Morocco	Commander in Chief, U.S. Naval Forces, Europe.
Netherlands.	Commander in Chief, U.S. Air Forces, Europe.
New Zealand.	Commander, U.S. Naval Support Forces, Antarctica.
Norway	Commander in Chief, U.S. Air Forces, Europe.
Philippines.	Commander in Chief, Pacific Representative, Philippines.
Portugal	Commander in Chief, U.S. Naval Forces, Europe.
Spain	Commander in Chief, U.S. Air Forces, Europe.
Taiwan	Commander, U.S. Military Assistance Command, Thailand.
Turkey	Commander in Chief, U.S. Air Forces, Europe.
United Kingdom.	Commander in Chief, U.S. Air Forces, Europe.

[56 FR 36405, July 31, 1991]

PART 230—COST ACCOUNTING STANDARDS

Sec.

Subpart 230.70—Facilities Capital Employed for Facilities in Use

230.7000 Contract facilities capital estimates.
230.7001 Use of DD Form 1861.
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230.7001–2 Completion instructions.
230.7002 Preaward facilities capital applications.
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230.7004 Administrative procedures.
230.7004–1 Forms CASB–CMF.
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Subpart 230.71—Facilities Capital Employed for Facilities Under Construction

230.7100 Definitions.
230.7101 Calculations.
230.7101–1 Cost of money.
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230.7102 Determining imputed cost of money.
230.7103 Preaward capital employed application.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36406, July 31, 1991, unless otherwise noted.

Subpart 230.70—Facilities Capital Employed for Facilities in Use

230.7000 Contract facilities capital estimates.

(a) The contracting officer will estimate the facilities capital cost of money and capital employed using—

(1) An analysis of the appropriate Forms CASB–CMF and cost of money factors; and

(2) DD Form 1861, Contract Facilities Capital Cost of Money.

230.7001 Use of DD Form 1861.

230.7001–1 Purpose.

The DD Form 1861 provides a means of linking the Form CASB–CMF and DD Form 1547, Record of Weighted Guidelines Application. It—

(a) Enables the contracting officer to differentiate profit objectives for various types of assets (land, buildings, equipment). The procedure is similar to applying overhead rates to appropriate overhead allocation bases to determine contract overhead costs.

(b) Is designed to record and compute the contract facilities capital cost of money and capital employed which is carried forward to DD Form 1547.

230.7001–2 Completion instructions.

Complete a DD Form 1861 only after evaluating the contractor's cost proposal, establishing cost of money factors, and establishing a prenegotiation

objective on cost. Complete the form as follows:

(a) List overhead pools and direct-charging service centers (if used) in the same structure as they appear on the contractor's cost proposal and Form CASB–CMF. The structure and allocation base units-of-measure must be compatible on all three displays.

(b) Extract appropriate contract overhead allocation base data, by year, from the evaluated cost breakdown or prenegotiation cost objective and list against each overhead pool and direct-charging service center.

(c) Multiply each allocation base by its corresponding cost of money factor to get the facilities capital cost of money estimated to be incurred each year. The sum of these products represents the estimated contract facilities capital cost of money for the year's effort.

(d) Total contract facilities cost of money is the sum of the yearly amounts.

(e) Since the facilities capital cost of money factors reflect the applicable cost of money rate in Column 1 of Form CASB–CMF, divide the contract cost of money by that same rate to determine the contract facilities capital employed.

230.7002 Preaward facilities capital applications.

To establish cost and price objectives, apply the facilities capital cost of money and capital employed, as determined under 230.7000, as follows:

(a) *Cost of Money*—(1) *Cost Objective.* Use the imputed facilities capital cost of money, with normal, booked costs, to establish a cost objective or the target cost when structuring an incentive type contract. Do not adjust target costs established at the outset even though actual cost of money rates become available during the period of contract performance.

(2) *Profit Objective.* When measuring the contractor's effort for the purpose of establishing a prenegotiation profit objective, restrict the cost base to normal, booked costs. Do not include cost of money as part of the cost base.

(b) *Facilities Capital Employed.* Assess and weight the profit objective or risk associated with facilities capital employed in accordance with the profit guidelines at 215.970–1(c).

230.7003 Postaward facilities capital applications.

230.7003–1 Interim billings based on costs incurred.

(a) The contractor may include contract facilities capital cost of money in cost reimbursement and progress payment invoices. To determine the amount that qualifies as cost incurred, multiply the incurred portions of the overhead pool allocation bases by the latest available cost of money factors. These cost of money calculations are interim estimates subject to adjustment.

(b) As actual cost of money factors under CAS 414 and FAR 31.205–10 are finalized, use the new factors to calculate contract facilities cost of money for the next accounting period.

230.7003–2 Final settlement.

(a) Contract facilities capital cost of money for final cost determination or repricing is based on each year's final cost of money factors determined under CAS 414 and supported by separate Forms CASB–CMF.

(b) Separately compute contract facilities cost of money in a manner similar to yearly final overhead rates. Also like overhead costs, include in the final settlement an adjustment from interim to final contract cost of money. Do not, however, adjust estimated or target cost.

230.7004 Administrative procedures.

230.7004–1 Forms CASB–CMF

(a) Forms CASB–CMF are normally initiated by the contractor under the same circumstances as Forward Pricing Rate Agreements (see FAR 15.809) and evaluated as complementary documents and procedures.

(b) Separate forms are required for each prospective cost accounting period of contract performance.

(c) The contractor may submit annually or with individual contract price proposals, as agreed with the administrative contracting officer (ACO).

(d) The contractor must submit a final form under CAS 414 as soon as

possible after the end of each accounting period, together with a proposal for actual overhead costs and rates.

230.7004–2 DD Form 1861.

(a) The contracting officer may ask the ACO to complete the forms as part of field pricing support.

(b) When the Weighted Guidelines Method is used, completion of the DD Form 1861 requires information not included on the Form CASB–CMF, i.e., distribution percentages of land, building, and equipment for the business unit performing the contract. Choose the most practical method for obtaining this information, for example—

(1) Contract administration offices could obtain the information through the process used to establish factors for facilities capital cost of money or could establish advance agreements on distribution percentages for inclusion in field pricing reports;

(2) The corporate ACO could obtain distribution percentages; or

(3) The contracting officer could request the information through a solicitation provision.

Subpart 230.71—Facilities Capital Employed for Facilities Under Construction

230.7100 Definitions.

(a) *Intangible capital asset* is an asset that has no physical substance, has more than minimal value, and is expected to be held by an enterprise for continued use or possession beyond the current accounting period for the benefit it yields.

(b) *Tangible capital asset* is an asset that has physical substance, more than minimal value, and is expected to be held by an enterprise for continued use or possession beyond the current accounting period for the service it yields.

(c) *Cost of money rate* is either—

(1) The interest rate determined by the Secretary of the Treasury under Public Law 92–41 (85 Stat. 97); or

(2) The time-weighted average of the interest rate for each cost accounting period during which the asset is being constructed, fabricated, or developed.

(d) *Representative investment* is the calculated amount considered invested by the contractor during the cost accounting period to construct, fabricate, or develop the asset.

230.7101 Calculations.

230.7101–1 Cost of money.

(a) The interest rate in 230.7100(c)(1) is established semi-annually and is published in the FEDERAL REGISTER during the fourth week of December and June.

(b) To calculate the time-weighted average interest rate—

(1) Multiply the various rates in effect during the months of construction by the number of months each rate was in effect; and

(2) Divide the sum of the products by the total number of months in which the rates were experienced.

230.7101–2 Representative investment.

(a) The calculation of the representative investment requires consideration of the rate or expenditure pattern of the costs to construct, fabricate, or develop a capital asset.

(b) If a majority of the costs were incurred toward the beginning, middle, or end of the cost accounting period, the contractor shall either—

(1) Determine a representative investment amount for the cost accounting period by calculating the average of the month-end balances for that cost accounting period; or

(2) Treat month-end balances as individual representative investment amounts.

(c) If the costs were incurred in a fairly uniform expenditure pattern throughout the construction, fabrication, or development period, the contractor may—

(1) Determine a representative investment amount for the cost accounting period by averaging the beginning and ending balances of the construction, fabrication, or development cost account for the cost accounting period; or

(2) Treat month-end balances as individual representative investment amounts.

230.7102 Determining imputed cost of money.

(a) Determine the imputed cost of money for an asset under construction, fabrication, or development by applying a cost of money rate (see 230.7101–1) to the representative investment amount (see 230.7101–2).

(1) When a representative investment amount is determined for a cost accounting period in accordance with 230.7101–2(b)(1) or 230.7101–2(c)(1), the cost of money will be the time-weighted average rate.

(2) When a monthly representative investment amount is used in accordance with 230.7101–2(b)(2) or 230.7101–2(c)(2), the cost of money will be the interest rate in effect each month. (Under this method, the cost of money is determined monthly and the total for the cost accounting period is the sum of the monthly amounts.)

(b) The imputed cost of money will be capitalized only once in any cost accounting period, either at the end of the period or at the end of the construction, fabrication, or development period, whichever comes first.

(c) When the construction of an asset takes more than one cost accounting period, the cost of money capitalized for the first cost accounting period will be included in determining the representative investment amount for any future cost accounting periods.

230.7103 Preaward capital employed application.

An offset to the profit objectives as set forth in FAR Subpart 15.9 is not required for CAS 417 cost of money.

PART 231—CONTRACT COST PRINCIPLES AND PROCEDURES

Sec.

Subpart 231.1—Applicability

231.100 Scope of subpart.
231.100–70 Contract clause.

Subpart 231.2—Contracts With Commercial Organizations

231.205 Selected costs.
231.205–6 Compensation for personal services.
231.205–10 Cost of money.
231.205–18 Independent research and development and bid and proposal costs.
231.205–22 Legislative lobbying costs.
231.205–70 External restructuring costs.
231.205–71 Defense capability preservation agreements.

Subpart 231.3—Contracts With Educational Institutions

231.303 Requirements.

Subpart 231.6—Contracts With State, Local, and Federally Recognized Indian Tribal Governments

231.603 Requirements.

Subpart 231.7—Contracts With Nonprofit Organizations

231.703 Requirements.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36408, July 31, 1991, unless otherwise noted.

Subpart 231.1—Applicability

231.100 Scope of subpart.

§ 231.100–70 Contract clause.

Use the clause at 252.231–7000, Supplemental Cost Principles, in all solicitations and contracts which are subject to the principles and procedures described in FAR subpart 31.1, 31.2, 31.6, or 31.7.

[59 FR 27672, May 27, 1994]

Subpart 231.2—Contracts With Commercial Organizations

231.205 Selected costs.

231.205–6 Compensation for personal services.

(a)(2)(i) Costs for individual compensation in excess of $250,000 per year are unallowable under DOD contracts that are awarded after April 15, 1995, and are funded by fiscal year 1995 appropriations (Section 8117 of Pub. L. 103–335).

(ii) Costs for individual compensation in excess of $200,000 per year are unallowable under DOD contracts that are awarded after July 1, 1996, and are funded by fiscal year 1996 appropriations (Section 8086 of Pub. L. 104–61).

(f)(1) Costs for bonuses or other payments in excess of the normal salary paid by the contractor to an employee, that are part of restructuring costs associated with a business combination, are unallowable under DoD contracts funded by fiscal year 1996 appropriations (Section 8122 of Pub. L. 104–61). This limitation does not apply to severance payments or early retirement incentive payments. (See 231.205–70(b) for the definitions of ''business combination'' and ''restructuring costs.'')

[57 FR 53600, Nov. 12, 1992, as amended at 58 FR 28469, May 13, 1993; 60 FR 2331, Jan. 9, 1995; 60 FR 61598, Nov. 30, 1995; 61 FR 7077, Feb. 26, 1996; 61 FR 36306, July 10, 1996; 61 FR 50454, Sept. 26, 1996]

231.205–10 Cost of money.

The contractor also must comply with subpart 230.70 and maintain records to demonstrate compliance.

231.205–18 Independent research and development and bid and proposal costs.

(c)(1)(i)(C)(*1*) Total incurred IR&D/B&P costs, including total IR&D/B&P ceiling amounts which are negotiated pursuant to FAR 31.205–18(c)(1), are fully allocable to all final cost objectives of the contractor. The amount of IR&D/B&P costs allowable under contracts which are subject to advance agreements negotiated by DoD shall not exceed the lesser of—

(*i*) Such contracts' allocable share of incurred IR&D/B&P costs;

(*ii*) Such contracts' allocable share of the total IR&D/B&P ceiling; or

(*iii*) The amount of incurred IR&D/B&P costs for projects having potential interest to DoD.

(*2*) Allowable IR&D/B&P costs are limited to those for projects which are of potential interest to DoD, including activities that—

(*i*) Strengthen the defense industrial and technology base of the United States;

(*ii*) Enhance the industrial competitiveness of the United States;

(*iii*) Promote the development of technologies identified as critical in the plan required under 10 U.S.C. 2508;

(*iv*) Increase the development of technologies useful for both the private commercial sector and the public sector; or

(*v*) Develop efficient and effective technologies for achieving such environmental benefits as improved environmental data gathering, environmental cleanup and restoration, pollution-reduction in manufacturing, environmental conservation, and environmentally safe management of facilities.

(*3*) The contracting officer will—

(*i*) Determine whether IR&D/B&P projects are of potential interest to DoD; and

(*ii*) Provide the results of the determination to the contractor.

(*4*) See 225.7303 for additional allowability provisions affecting foreign military sale contracts.

(2) Departments/agencies shall not supplement this regulation in any way that limits IR&D/B&P cost allowability. See 225.7303–2 for allowability exceptions for foreign military sales contracts.

(i) In addition to the limitations in FAR 31.205–18(c)(2)(i), for major contractors—

(*1*) The amount of IR&D/B&P costs allowability under DoD contracts shall not exceed the lesser of—

(*i*) Such contracts' allocable share of incurred IR&D/B&P costs;

(*ii*) Such contracts' allocable share of the contractor's total maximum allowable amount; or

(*iii*) The amount of incurred IR&D/B&P costs for projects having potential interest to DoD.

(*2*) Allowable IR&D/B&P costs are limited to those for projects which are of potential interest to the DoD, including activities intended to accomplish any of the following—

(*i*) Enable superior performance of future U.S. weapon systems and components;

(*ii*) Reduce acquisition costs and life-cycle costs of military systems;

(*iii*) Strengthen the defense industrial and technology base of the United States;

(*iv*) Enhance the industrial competitiveness of the United States;

(*v*) Promote the development of technologies identified as critical under 10 U.S.C. 2522;

(*vi*) Increase the development and promotion of efficient and effective applications of dual-use technologies;

(*vii*) Provide efficient and effective technologies for achieving such environmental benefits as: improved environmental data gathering, environmental cleanup and restoration, pollution reduction in manufacturing, environmental conservation, and environmentally safe management of facilities.

(ii) The cognizant contract administration office shall furnish contractors with guidance on financial information needed to support IR&D/B&P costs and on technical information needed from major contractors to support the potential interest to DoD determination (see also 242.771–3(a)).

(iii) The total maximum allowable amount limitation may be waived at a level above the contracting officer. A waiver may be appropriate for contractors whose significant growth in sales or IR&D/B&P spending justify higher levels of reimbursement.

[56 FR 67217, Dec. 30, 1991, as amended at 57 FR 53600, Nov. 12, 1992; 59 FR 27672, May 27, 1994]

231.205–22 Legislative lobbying costs.

(a) Preparing any material, report, list, or analysis on the actual or projected economic or employment impact in a particular State or congressional district of an acquisition program for which all research, development, testing and evaluation has not been completed (Section 9048 of Pub. L. 102–396).

[58 FR 28469, May 13, 1993]

231.205–70 External restructuring costs.

(a) *Scope.* This subsection prescribes policies and procedures for allowing contractor external restructuring costs when net savings would result for DoD. This subsection also implements Section 818 of the National Defense Authorization Act for Fiscal Year 1995 (Pub. L. 103–337).

(b) *Definitions.* As used in this subsection:

(1) *Business combination* means a transaction whereby assets or operations of two or more companies not previously under common ownership or control are combined, whether by merger, acquisition, or sale/purchase of assets.

(2) *External restructuring activities* means restructuring activities occurring after a business combination that affect the operations of companies not previously under common ownership or control. They do not include restructuring activities occurring after a business combination that affect the operations of only one of the companies not previously under common ownership or control, or, when there has been no business combination, restructuring activities undertaken within one company. External restructuring activities are a direct outgrowth of a business combination. They normally will be initiated within 3 years of the business combination.

(3) *Restructuring activities* means nonroutine, nonrecurring, or extraordinary activities to combine facilities, operations, or workforce, in order to eliminate redundant capabilities, improve future operations, and reduce overall costs. Restructuring activities do not include routine or ongoing repositionings and redeployments of a contractor's productive facilities or workforce (e.g., normal plant rearrangement or employee relocation), nor do they include other routine or ordinary activities charged as indirect costs that would otherwise have been incurred (e.g., planning and analysis, contract administration and oversight, or recurring financial and administrative support).

(4) *Restructuring costs* means the costs, including both direct and indirect, of restructuring activities. Restructuring costs that may be allowed include, but are not limited to, severance pay for employees, early retirement incentive payments for employees, employee retraining costs, relocation expense for retained employees, and relocation and rearrangement of plant and equipment. For purposes of this definition, if restructuring costs associated with external restructuring activities allocated to DoD contracts are less than $2.5 million, the costs shall not be subject to the audit, review, and certification requirements of 231.205–70(c)(1); instead, the normal rules for determining cost allowability

in accordance with FAR Part 31 shall apply.

(5) *Restructuring savings* means cost reductions, including both direct and indirect cost reductions, that result from restructuring activities. Reassignments of cost to future periods are not restructuring savings.

(c) *Limitations on cost allowability*. (1) Restructuring costs associated with external restructuring activities shall not be allowed unless—

(i) Such costs are allowable in accordance with FAR Part 31 and DFARS Part 231;

(ii) An audit of projected restructuring costs and restructuring savings is performed;

(iii) The cognizant administrative contracting officer (ACO) reviews the audit report and the projected costs and projected savings, determines that overall reduced costs should result for DoD, and negotiates an advance agreement in accordance with 231.205–70(d)(8); and

(iv) A certification is made by the Under Secretary of Defense (Acquisition & Technology), his Principal Deputy or designee (in all cases, an individual appointed by the President and confirmed by the Senate), that projections of future restructuring savings resulting for DoD from the business combination are based on audited cost data and should result in overall reduced costs for DoD.

(2) The audit, review, and certification required by 231.205–70(c)(1) shall not apply to any business combination for which payments for restructuring costs were made before August 15, 1994, or for which the cognizant ACO executed an advance agreement establishing cost ceilings based on audit/negotiation of detailed cost proposals for individual restructuring projects before August 15, 1994.

(d) *Procedures and ACO responsibilities*. As soon as it is known that the contractor will incur restructuring costs for external restructuring activities, the cognizant ACO shall:

(1) Promptly execute a novation agreement, if one is required, in accordance with FAR subpart 42.12 and DFARS subpart 242.12 and include the provision at DFARS 242.1204(e).

(2) Direct the contractor to segregate restructuring costs and to suspend these amounts from any billings, final contract price settlements, and overhead settlements until the certification in 231.205–70(c)(1)(iv) is obtained.

(3) Require the contractor to submit an overall plan of restructuring activities and an adequately supported proposal for planned restructuring projects. The proposal must include a breakout by year by cost element, showing the projected restructuring costs and projected restructuring savings.

(4) Notify major buying activities of contractor restructuring actions and inform them about any potential monetary impacts on major weapons programs, when known.

(5) Upon receipt of the contractor's proposal, as soon as practicable, adjust forward pricing rates to reflect the impact of projected restructuring savings. If restructuring costs are included in forward pricing rates prior to execution of an advance agreement in accordance with 231.205–70(d)(8), the contracting officer shall include a repricing clause in each fixed-price action that is priced based on the rates. The repricing clause must provide for a downward price adjustment to remove restructuring costs if the certification required by 231.205–70(c)(1)(iv) is not obtained.

(6) Upon receipt of the contractor's proposal, immediately request an audit review of the contractor's proposal.

(7) Upon receipt of the audit report, determine if restructuring savings will exceed restructuring costs on a present value basis.

(8) Negotiate an advance agreement with the contractor setting forth, at a minimum, a cumulative cost ceiling for restructuring projects and, when necessary, a cost amortization schedule. The cost may not exceed the amount of projected restructuring savings on a present value basis. The advance agreement shall not be executed until the certification required by 231.205–70(c)(1)(iv) is obtained.

(9) Submit to the Director of Defense Procurement, Office of the Under Secretary of Defense (Acquisition & Technology), ATTN: OUSD(A&T)DP/CPF, a recommendation for certification of

net benefit. Include the information described in 231.205–70(e).

(e) *Information needed to obtain certification of net benefit.* (1) The novation agreement (if one is required).

(2) The contractor's restructuring proposal.

(3) The proposed advance agreement.

(4) The audit report.

(5) Any other pertinent information.

(6) The cognizant ACO's recommendation for certification. This recommendation must clearly indicate that contractor projections of future cost savings resulting for DoD from the business combination are based on audited cost data and should result in overall reduced costs for the Department.

[61 FR 16881, Apr. 18, 1996; 61 FR 49531, Sept. 20, 1996, as amended at 61 FR 50454, Sept. 26, 1996]

231.205–71 Defense capability preservation agreements.

(a) *Scope and authority.* Where it would facilitate the achievement of the policy objectives relating to defense reinvestment, diversification, and conversion set forth in 10 U.S.C. 2501(b), DoD may enter into a ''defense capability preservation agreement'' with a contractor. As authorized by Section 808 of the National Defense Authorization Act for Fiscal Year 1996 (Public Law 104–106), such an agreement would permit the contractor to claim certain indirect costs attributable to its private sector work as allowable costs on its defense contracts.

(b) *Procedure.* A contractor may submit a request for such an agreement, together with appropriate justification, through the Deputy Under Secretary of Defense for Industrial Affairs and Installations, to the Under Secretary of Defense for Acquisition and Technology, who has exclusive approval or disapproval authority. The contractor should also provide an informational copy of any such request to the cognizant administrative contracting officer.

[61 FR 21975, May 13, 1996, as amended at 61 FR 50454, Sept. 26, 1996]

Subpart 231.3—Contracts With Educational Institutions

231.303 Requirements.

(1) Pursuant to section 841 of the National Defense Authorization Act for Fiscal Year 1994 (Pub. L. 103–160), no limitation may be placed on the reimbursement of otherwise allowable indirect costs incurred by an institution of higher education under a DoD contract awarded on or after November 30, 1993, unless that same limitation is applied uniformly to all other organizations performing similar work under DoD contracts. The 26 percent limitation imposed on administrative indirect costs by OMB Circular No. A–21 shall not be applied to DoD contracts awarded on or after November 30, 1993, to institutions of higher education because the same limitation is not applied to other organizations performing similar work.

(2) The cognizant administrative contracting officer may waive the prohibition in 231.303(1) if the governing body of the institution of higher education requests the waiver to simplify the institution's overall management of DoD cost reimbursements under DoD contracts.

(3) The limitations on allowable individual compensation at 231.205–6(a)(2)(i) and (ii) also apply to this subpart.

[59 FR 26144, May 19, 1994, as amended at 60 FR 2331, Jan. 9, 1995; 61 FR 36306, July 10, 1996]

Subpart 231.6—Contracts With State, Local, and Federally Recognized Indian Tribal Governments

231.603 Requirements.

The limitations on allowable individual compensation at 231.205–6(a)(2) (i) and (ii) also apply to this subpart.

[61 FR 36306, July 10, 1996]

Subpart 231.7—Contracts With Nonprofit Organizations

231.703 Requirements.

The limitations on allowable individual compensation at 231.205–6(a)(2) (i) and (ii) also apply to this subpart.

[61 FR 36306, July 10, 1996]

PART 232—CONTRACT FINANCING

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AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36409, July 31, 1991, unless otherwise noted.

Subpart 232.1—General

232.102 Description of contract financing methods.

(e)(2) Progress payments based on percentage or stage of completion are authorized only for contracts for construction (as defined in FAR 36.102), shipbuilding, and ship conversion, alteration, or repair.

232.102–70 Provisional delivery payments.

(a) The contracting officer may establish provisional delivery payments to pay contractors for the costs of supplies and services delivered to and accepted by the Government under the following contract actions, if undefinitized—

(1) Letter contracts contemplating a fixed-price contract;

(2) Orders under basic ordering agreements;

(3) Spares provisioning documents annexed to contracts;

(4) Unpriced equitable adjustments on fixed-price contracts; and

(5) Orders under indefinite delivery contracts.

(b) Provisional delivery payments shall be—

(1) Used sparingly;

(2) Priced conservatively; and

(3) Reduced by liquidating previous progress payments in accordance with the Progress Payments clause.

(c) Provisional delivery payments shall not—

(1) Include profit;

(2) Exceed funds obligated for the undefinitized contract action; or

(3) Influence the definitized contract price.

232.108 Financial consultation.

(1) Department/agency contract financing offices are—

(i) Army—Office, Assistant Secretary of the Army (Financial Management);

(ii) Navy—Executive Comptroller for Banking, Cash Management, Contract Financing and Compensation Systems, Assistant Comptroller of the Navy for Financial Management;

(iii) Air Force—Chief of Banking and Contract Financing, Directorate of Accounting, Air Force Accounting and Finance Center;

(iv) Defense agencies—Office of the agency comptroller.

(2) The Under or Assistant Secretary, or other designated official, responsible for the comptroller function within the department or agency is the focal point for financing matters at the departmental/agency headquarters. Departments/agencies may establish contract financing offices at operational levels.

(3) Contract financing offices should participate in—

(i) Developing regulations for contract financing;

(ii) Developing contract provisions for contract financing; and

(iii) Resolving specific cases which involve unusual contract financing requirements.

[56 FR 36409, July 31, 1991, as amended at 60 FR 29499, June 5, 1995]

232.111 Contract clauses.

232.111–70 Additional clause.

Use the clause at 252.232–7006, Reduction or Suspension of Contract Payments Upon Finding of Fraud, in all solicitations and contracts.

[57 FR 3358, Jan. 29, 1992]

232.170 Responsibilities.

(a) The Director of Defense Procurement, Office of the Under Secretary of Defense (Acquisition & Technology), USD(A&T)DP, is responsible for ensuring uniform administration of DoD contract financing, including DoD contract financing policies and important related procedures.

(b) The departments and agencies are responsible for their day-to-day contract financing operations. Refer specific cases involving financing policy or important procedural issues to USD(A&T)DP for consideration (see also 201.24 for deviation request and approval procedures).

[56 FR 36409, July 31, 1991, as amended at 60 FR 61598, Nov. 30, 1995]

232.171 Contract Finance Committee.

(a) The Contract Finance Committee consists of—

(1) A representative of the USD(A&T)DP, serving as chairman;

(2) A representative of the Comptroller of the Department of Defense; and

(3) Two representatives of each military department and the Defense Logistics Agency (one representing contracting and one representing the contract finance office).

(b) The Committee—

(1) Advises and assists the USD(A&T)DP in ensuring proper and uniform application of policies, procedures, and forms;

(2) Is responsible for formulating, revising, and promulgating uniform contract financing regulations;

(3) May recommend to the Secretary of Defense through the USD(A&T)DP further policy directives on financing; and

(4) Meets at the request of the Chair or a member.

[56 FR 36409, July 31, 1991, as amended at 60 FR 61598, Nov. 30, 1995]

232.172 Financial responsibility of contractors.

Use the policies and procedures in this section in determining the financial capability of current or prospective contractors.

232.172–1 Required financial reviews.

The contracting officer shall perform a financial review when the contracting officer does not otherwise have sufficient information to make a positive determination of financial responsibility. In addition, the contracting officer shall consider performing a financial review—

(a) Prior to award of a contract, when—

(1) The contractor is on a list requiring preaward clearance or other special clearance before award;

(2) The contractor is listed on the Consolidated List of Contractors Indebted to the Government (Hold-Up List), or is otherwise known to be indebted to the Government;

(3) The contractor may receive Government assets such as contract financing payments or Government property;

(4) The contractor is experiencing performance difficulties on other work; or

(5) The contractor is a new company or a new supplier of the item.

(b) At periodic intervals after award of a contract, when—

(1) Any of the conditions of paragraphs (a) (2) through (5) of this subsection are applicable; or

(2) There is any other reason to question the contractor's ability to finance performance and completion of the contract.

232.172–2 Appropriate information.

(a) The contracting officer shall obtain whatever type and depth of financial and other information is required to establish a contractor's financial capability or disclose a contractor's financial condition. While the contracting officer should not request information that is not necessary for the protection of the Government's interests, the contracting officer must insist upon obtaining that information which is necessary. The unwillingness or inability of a contractor to present reasonably requested information in a timely manner, especially information that a prudent business person would be expected to have and use in the professional management of a business, may be a material fact in the determination of the contractor's responsibility and prospects for contract completion.

(b) Obtain the following information to the extent required to protect the Government's interest. In addition, if the contracting officer concludes that information not listed below is required to comply with 232.172–1, that information should be requested. The information must be for the person(s) who are legally liable for contract performance. If the contractor is not a corporation, obtain the required information for each individual/joint venturer/partner—

(1) Balance sheet and income statement—

(i) For the current fiscal year (interim);

(ii) For the most recent fiscal year and preferably, for the two preceding fiscal years. These should be certified by an independent public accountant or by an appropriate officer of the firm; and

(iii) Forecasted for each fiscal year for the remainder of the period of contract performance;

(2) Summary history of the contractor and its principal managers, disclosing any previous insolvencies—corporate or personal, and describing its products or services;

(3) Statement of all affiliations disclosing—

(i) Material financial interests of the contractor;

(ii) Material financial interests in the contractor;

(iii) Material affiliations of owners, officers, directors, major stockholders; and

(iv) The major stockholders if the contractor is not a widely-traded, publicly-held corporation;

(4) Statement of all forms of compensation to each officer, manager, partner, joint venturer, or proprietor, as appropriate—

(i) Planned for the current year;

(ii) Paid during the past 2 years; and

(iii) Deferred to future periods.

(5) Business base and forecast which—

(i) Shows, by significant markets, existing contracts and outstanding offers, including those under negotiation; and

(ii) Is reconcilable to indirect cost rate projections.

(6) Cash forecast for the duration of the contract (see 232.172–3).

(7) Financing arrangement information which discloses—

(i) Availability of cash to finance contract performance;

(ii) Contractor's exposure to financial crisis from creditor's demands;

(iii) Degree to which credit security provisions could conflict with Government title terms under contract financing;

(iv) Clearly stated confirmations of credit with no unacceptable qualifications; and

(v) Unambiguous written agreement by a creditor if credit arrangements include deferred trade payments or creditor subordinations/repayment suspensions.

(8) Statement of all state, local, and Federal tax accounts, including special mandatory contributions, e.g., environmental superfund.

(9) Description and explanation of the financial effect of issues such as—

(i) Leases, deferred purchase arrangements, patent or royalty arrangements;

(ii) Insurance, when relevant to the contract;

(iii) Contemplated capital expenditures, changes in equity, or contractor debt load;

(iv) Pending claims either by or against the contractor;

(v) Contingent liabilities such as guarantees, litigation, environmental, or product liabilities;

(vi) Validity of accounts receivable and actual value of inventory, as assets; and

(vii) Status and aging of accounts payable.

(10) Significant ratios such as—

(i) Inventory to annual sales;

(ii) Inventory to current assets;

(iii) Liquid assets to current assets;

(iv) Liquid assets to current liabilities;

(v) Current assets to current liabilities; and

(vi) Net worth to net debt.

232.172–3 Cash flow forecasts.

(a) A contractor must be able to sustain a sufficient cash flow to perform the contract. Whenever there is a doubt about the sufficiency of a contractor's cash flow, the contracting officer should require the contractor to submit a cash flow forecast covering the duration of the contract.

(b) A contractor's inability or refusal to prepare and provide cash flow forecasts or to reconcile actual cash flow with previous forecasts is a strong indicator of serious managerial deficiencies or potential contract cost or performance problems.

(c) Single or one-time cash flow forecasts are of limited forecasting power. As such, they should be limited to preaward survey situations. Reliability of cash flow forecasts can be established only by comparing a series of previous actual cash flows with the corresponding forecasts and examining the causes of any differences.

(d) Cash flow forecasts must—

(1) Show the origin and use of all material amounts of cash within the entire business unit responsible for contract performance, period by period, for the length of the contract (or until the risk of a cash crisis ends); and

(2) Provide an audit trail to the data and assumptions used to prepare it.

(e) Cash flow forecasts can be no more reliable than the assumptions on which they are based. Most important of these assumptions are—

(1) Estimated amounts and timing of purchases and payments for materials, parts, components, subassemblies, and services;

(2) Estimated amounts and timing of payments for purchase or production of capital assets, test facilities, and tooling;

(3) Amounts and timing of fixed cash charges such as debt installments, interest, rentals, taxes, and indirect costs;

(4) Estimated amounts and timing of payments for projected labor, both direct and indirect;

(5) Reasonableness of projected manufacturing and production schedules;

(6) Estimated amounts and timing of billings to customers (including progress payments), and customer payments;

(7) Estimated amounts and timing of cash receipts from lenders or other credit sources, and liquidation of loans; and

(8) Estimated amounts and timing of cash receipts from other sources.

(f) The contracting officer should review the assumptions underlying the cash flow forecasts. In determining whether the assumptions are reasonable and realistic, the contracting officer should consult with—

(1) The contractor;

(2) Government personnel in the areas of finance, engineering, production, cost, and price analysis; or

(3) Prospective supply, subcontract, and loan or credit sources.

232.173 Reduction or suspension of contract payments upon finding of fraud.

232.173–1 General.

(a) 10 U.S.C. 2307(e)(2) provides for a reduction or suspension of further payments to a contractor when the agency head determines there is substantial evidence that the contractor's request for advance, partial, or progress payments is based on fraud.

(b) The agency head may not delegate his or her responsibilities under 10 U.S.C. 2307(e) below level IV of the Executive Schedule. For purposes of this section, the Under Secretary of Defense (Acquisition & Technology) is the agency head for the defense agencies.

(c) Authority to reduce or suspend payments under 10 U.S.C. 2307(e) is in addition to other Government rights, remedies, and procedures.

(d) In accordance with 10 U.S.C. 2310(a), agency head determinations and decisions under this section may be made for an individual contract or any group of contracts affected by the fraud.

[57 FR 3359, Jan. 29, 1992, as amended at 57 FR 42632, Sept. 15, 1992; 60 FR 61598, Nov. 30, 1995]

232.173–2 Definitions.

As used in this section—

(a) *Remedy coordination official* means the person or entity in the agency who coordinates within that agency the administration of criminal, civil, administrative, and contractual remedies resulting from investigations of fraud or corruption related to procurement activities.

(b) *Substantial evidence* means information sufficient to support the reasonable belief that a particular act or omission has occurred.

[57 FR 3359, Jan. 29, 1992]

232.173–3 Responsibilities.

(a) Agencies shall establish appropriate procedures to implement the policies and procedures of this section.

(b) Government personnel shall report suspected fraud related to advance, partial, or progress payments in accordance with agency regulations.

[57 FR 3359, Jan. 29, 1992]

232.173–4 Procedures.

(a) In any case in which an agency's remedy coordination official finds substantial evidence that a contractor's request for advance, partial, or progress payments under a contract

awarded by that agency is based on fraud, the remedy coordination official shall recommend that the agency head reduce or suspend further payments to the contractor. The remedy coordination official shall submit to the agency head a written report setting forth the remedy coordination official's findings that support each recommendation.

(b) Upon receiving a recommendation from the remedy coordination official under paragraph (a) of this subsection, the agency head shall determine whether substantial evidence exists that the request for payment under a contract is based on fraud.

(c) If the agency head determines that substantial evidence exists, the agency head may reduce or suspend further payments to the contractor under the affected contract(s). Such reduction or suspension shall be reasonably commensurate with the anticipated loss to the Government resulting from the fraud.

(d) In determining whether to reduce or suspend further payment(s), as a minimum, the agency head shall consider:

(1) A recommendation from investigating officers that disclosure of the allegations of fraud to the contractor may compromise an ongoing investigation;

(2) The anticipated loss to the Government as a result of the fraud;

(3) The contractor's overall financial condition and ability to continue performance if payments are reduced or suspended;

(4) The contractor's essentiality to the national defense;

(5) Assessment of all documentation concerning the alleged fraud, including documentation submitted by the contractor in its response to the notice required by paragraph (e) of this subsection.

(e) Before making a decision to reduce or suspend further payments, the agency head shall, in accordance with agency procedures—

(1) Notify the contractor in writing of the action proposed by the remedy coordination official and the reasons therefore; and

(2) Provide the contractor an opportunity to submit information within a reasonable time, in response to the action proposed by the remedy coordination official.

(f) When more than one agency has contracts affected by the fraud, the agencies shall consider designating one agency as the lead agency for making the determination and decision.

(g) The agency shall retain in its files the written justification for each—

(1) Decision of the agency head whether to reduce or suspend further payments; and

(2) Recommendation received by an agency head in connection with such decision.

(h) Not later than 180 calendar days after the date of the reduction or suspension action, the remedy coordination official shall—

(1) Review the agency head's determination on which the reduction or suspension decision is based; and

(2) Transmit a recommendation to the agency head as to whether the reduction or suspension should continue.

[57 FR 3359, Jan. 29, 1992, as amended at 57 FR 42632, Sept. 15, 1992]

232.173–5 Reporting.

Departments and agencies, in accordance with department/agency procedures, shall prepare and submit to the Under Secretary of Defense (Acquisition & Technology), through the Director of Defense Procurement, annual reports (Report control symbol DD–ACQ(A) 1891) containing—

(a) Each recommendation made by the remedy coordination official for payments reduction or suspension;

(b) The actions taken on the recommendation(s), with the reasons for such actions; and

(c) An assessment of the effects of each action on the Government.

[57 FR 3359, Jan. 29, 1992, as amended at 57 FR 42632, Sept. 15, 1992; 60 FR 61598, Nov. 30, 1995]

Subpart 232.3—Loan Guarantees for Defense Production

232.302 Authority.

(a) The use of guaranteed loans as a contract financing mechanism requires

the availability of certain congressional authority. The DoD has not requested such authority in recent years, and none is now available.

Subpart 232.4—Advance Payments

232.404 Exclusions.

(a)(9) The requirements of FAR subpart 32.4 do not apply to advertisements in high school and college publications for military recruitment efforts under 10 U.S.C. 503 when the contract cost does not exceed $500.

232.409 Contracting officer action.

232.409–1 Recommendation for approval.

To ensure uniform application of this subpart (see FAR 32.402(e)(1)), the departmental/agency contract financing office shall prepare the documents required by FAR 32.409–1 (e) and (f).

232.410 Findings, determination, and authorization.

(b) If an advance payment procedure is used without a special bank account, replace paragraph (a)(4) of the Findings, Determination, and Authorization for Advance Payments at FAR 32.410 with:

(4) The proposed advance payment clause contains appropriate provisions as security for advance payments. These provisions include a requirement that the outstanding advance payments will be liquidated from cost reimbursements as they become due the contractor. This security is considered adequate to protect the interest of the Government.

232.412 Contract clause.

232.412–70 Additional clauses.

(a) Use the clause at 252.232–7000, Advance Payment Pool, in any contract that will be subject to the terms of an advance payment pool agreement with a nonprofit organization or educational institution. Normally, use the clause in all cost reimbursement type contracts with the organization or institution.

(b) Use the clause at 252.232–7001, Disposition of Payments, in contracts when payments under the contract are to be made by a disbursing office not designated in the advance payment pool agreement.

(c) Use the clause at 252.232–7005, Reimbursement of Subcontractor Advance Payments-DoD Pilot Mentor-Protege Program, when advance payments will be provided by the contractor to a subcontractor pursuant to an approved mentor-protege agreement (See subpart 219.71).

[56 FR 36409, July 31, 1991, as amended at 56 FR 67217, Dec. 30, 1991]

232.470 Advance payment pool.

(a) An advance payment pool agreement—

(1) Is a means of financing the performance of more than one contract held by a single contractor;

(2) Is especially convenient for the financing of cost-type contracts with nonprofit educational or research institutions for experimental or research and development work when several contracts require financing by advance payments. When appropriate, pooled advance payments may also be used to finance other types of contracts held by a single contractor; and

(3) May be established—

(i) Without regard to the number of appropriations involved;

(ii) To finance contracts for one or more department(s) or contracting activity(ies); or

(iii) In addition to any other advance payment pool agreement at a single contractor location when it is more convenient or otherwise preferable to have more than one agreement.

Subpart 232.5—Progress Payments Based on Costs

232.501 General.

In DoD, customary progress payments may be either uniform or flexible (FAR 32.501–1(a)). See also 232.501–1 and 232.502–1–71.

232.501–1 Customary progress payment rates.

(a)(i) The customary uniform progress payment rate for DoD contracts is 75 percent for large businesses, 90 percent for small businesses, and 95 percent for small disadvantaged businesses.

(ii) The progress payment rates applicable to foreign military sale requirements are the same rates applicable to DoD requirements.

(iii) For customary flexible progress payments, determine the appropriate rate using the appropriate CASH computer program (see 232.502–1–71).

[56 FR 36409, July 31, 1991, as amended at 56 FR 67217, Dec. 30, 1991; 58 FR 62046, Nov. 24, 1993]

232.501–2 Unusual progress payments.

(a) Unusual progress payment arrangements require the advance approval of the USD(A&T)DP. Contracting officers shall submit all unusual progress payment requests to the department or agency contract financing office for approval, coordination with the Contract Finance Committee (232.171), and submission to the USD(A&T)DP.

[56 FR 36409, July 31, 1991, as amended at 60 FR 61598, Nov. 30, 1995]

232.501–3 Contract price.

(b) The contracting officer may approve progress payments when the contract price exceeds the funds obligated under the contract; provided, the contract contains an appropriate Limitation of Funds clause. However, the contracting officer shall limit such payments to the lesser of—

(i) The applicable rate (i.e., the lower of the progress payment rate, the liquidation rate, or the loss-ratio adjusted rate); or

(ii) 100 percent of the funds obligated.

232.502 Preaward matters.

232.502–1 Use of customary progress payments.

(b)(1) If the contractor is a small disadvantaged business, progress payments may be provided when the contract will involve $50,000 or more.

232.502–1–70 Customary foreign military sale progress payments.

(a) Foreign military sale (FMS) progress payments apply to DoD acquisitions on behalf of foreign governments or international organizations (Section 22 of the Arms Export Control Act).

(b) FMS progress payments do not apply to acquisitions—

(1) For replenishing U.S. Government inventories or stocks; and

(2) Made under DoD cooperative logistic support arrangements.

232.502–1–71 Customary flexible progress payments.

(a) *General.* (1) Progress payments reduce contractor investment in work in process inventory. In addition to progress payments, other factors influence a contractor's actual investment in work in process inventory, e.g., delivery schedules, cash management practices, and Government payment practices.

(2) Progress payment amounts that are determined by using customary uniform rates are insensitive to the other factors influencing contractor investment in work in process inventory. Consequently, contractor investments in work in process inventory vary among contractors and contracts.

(3) Flexible progress payment rates are designed to tailor the progress payment rate to more closely match the contractor's cash needs for financing contract performance. The flexible rate is expressed as a percentage which is applied to costs to determine the amount payable as a progress payment, in the same manner as customary uniform rates are applied.

(4) For flexible progress payments, cash needs are measured and projected based on the investment required for the work in process inventory over the life of the contract. Total investment is measured by a weighted average of total costs paid by the contractor. The contractor's investment is the weighted average of the amount not paid by the Government.

(5) DoD, as a matter of policy, requires contractors to retain a minimum investment level in work in process inventory over the life of the contract (see Table 32–1, Customary Uniform Progress Payment Rates). This minimum investment level is based on the customary uniform progress payment rate and its related investment percentage. Accordingly, the DoD will make progress payments at a rate (expressed as a whole number) that is the

highest rate which yields a corresponding investment by the contractor in work in process inventory of not less than the minimum investment percentage.

(6) The customary flexible progress payment rate will be determined by using the DoD Cash Flow Computer Model. The rate computed shall not—

(i) Exceed 100 percent; or

(ii) Be less than the customary uniform progress payment rate that would have been applied to the contract in the absence of customary flexible progress payments.

(7) Table 32–1, Customary Uniform Progress Payment Rates, shows the customary uniform progress payment rates for other than small or small disadvantaged businesses (see also 232.501–1), minimum contractor investment (except for contracts funded with FY87 appropriations), and the applicable DoD Cash Flow Computer Model. For contracts or line items that are funded with FY87 appropriations, a contractor must retain at least a 25 percent investment in work in process inventory over the life of the contract or over the contract performance period applicable to the contract line item.

TABLE 32–1—CUSTOMARY UNIFORM PROGRESS PAYMENT RATES

Contract award date	Uniform rate percentage	Investment percentage	Cash flow model
Prior to May 1, 1985	90	5	CASH–II
May 1, 1985 through October 17, 1986	80	15	CASH–III
October 18, 1986 through September 30, 1988	75	25	CASH–IV
October 1, 1988 through June 30, 1991	80	20	CASH–V
After June 30, 1991*	85	20	CASH–VI**

*Flexible progress payments shall not be used for contracts awarded as a result of solicitations issued on or after November 11, 1993.

**See paragraph (b)(5)(ii) for implementation instructions.

(b) *Using customary flexible progress payments.* (1) Use a flexible progress payment rate at the time of award or definitization instead of the customary uniform rate if—

(i) The contractor requests flexible progress payments;

(ii) The contractor agrees to the requirements of this section;

(iii) The contract contains the clause at FAR 52.232–16, Progress Payments. However, small business contractors may get flexible progress payments if they agree to use the clause at FAR 52.232–16 without its Alternate I; and

(iv) The criteria in paragraphs (b)(2) and (3) of this subsection are met.

(2) Do not use flexible progress payments for—

(i) Sealed bid contracts;

(ii) Undefinitized contract actions; or

(iii) Contracts awarded and performed entirely outside of the United States, its possessions or territories.

(3) Contractors who submit certified cost or pricing data, as defined in FAR 15.804–2, for negotiated fixed-price contracts in excess of $1 million may request flexible progress payments.

(4) Subcontractors who request flexible progress payments, meet the criteria in paragraph (b)(3) of this subsection, and agree to the requirements of this subsection are to receive flexible progress payments. The prime contractor determines the flexible progress payment rate without regard to the rate in the prime contract. In determining the appropriate customary flexible rate, the prime contractor will use the DoD Cash Flow Computer Model and review the cash flow data provided by the subcontractor.

(5) Prior to contract award, the contracting officer shall determine the customary flexible progress payment rate by applying the appropriate version of the DoD Cash Flow Computer Model.

(i) The model takes into account key cash flow factors including contract cost profile, delivery schedules, subcontractor progress payments, liquidation rates, and payment/reimbursement cycles. For contracts funded with FY87 appropriations, use the CASH–IV model.

(ii) From time to time the Department of Defense may change the uniform progress payment rate and/or the minimum contractor investment rate, which may have an effect upon the variables within the DoD Cash Flow Computer Program. In order to avoid frequent revision and redistribution of the computer program, the program is designed to permit use of either a particular model (CASH–II, CASH–V, etc.) or a program option to input the equivalent uniform progress payment rate and minimum contractor investment rate (90%/5%, 80%/20%, etc.), as shown in the table at (a)(7). Either method will result in the same flexible progress payment rate calculation. When the Cash Flow Computer Program does not contain the model needed for a particular situation, the contracting officer shall use the program option.

(6) If the contractor requests flexible progress payments after contract award or definitization, the contracting officer may, if warranted, grant their use. However, the contractor must provide adequate new consideration (see FAR 32.501–4).

(c) *Contractor cash flow and cost information.* (1) Contractors shall furnish to the contracting officer cash flow data in the form and context specified for use in the DoD Cash Flow Computer Model. Contractors should furnish cash flow data prior to the start of negotiations. This data includes—

(i) Actual and projected incurred cost, broken down by element of cost and by month, for the duration of the contract;

(ii) Float times for each element of cost;

(iii) Dates and lag times of actual and projected progress payment and delivery payment receipts; and

(iv) Associated contract price and profit percentage.

(2) Contracting officers shall verify the cash flow data using the procedures normally used to verify contractor cost and pricing data, and establish the customary flexible progress payment rate during the negotiation of the contract price.

(3) If any customary flexible progress payment rate is later determined to be overstated because factual data submitted in support of the rate computation was not current, accurate, or complete at the time the rate was established, the flexible progress payment clause at 252.232–7003 provides for—

(i) Reduction of the flexible progress payment rate; and

(ii) Contractor payment of interest.

(4) The contracting officer will assess the interest charge on the amount of the overpayment resulting from facts that were not current, accurate, or complete, whether or not the overpayment has been liquidated. Calculate the interest from the date of the overpayment to the date of liquidation of the overpayment. In determining the amount of interest, the contracting officer may determine an average overpayment amount and duration as the basis for the interest computation. Interest rates change periodically; therefore, calculate average amounts and durations separately for each interest period that has a different interest rate.

(5) Administrative contracting officers are encouraged to establish advance agreements at contractor locations for payment float and lag times which are common to several contracts. Float and lag times may vary significantly from one contract to another due to variances in efficiency at different payment offices or due to differing procedures for high dollar versus low dollar value contracts. It may, therefore, be appropriate to establish advance agreements on several different float and lag profiles to suit different contract situations.

(d) *Rate review.* (1) The flexible progress payment clause at 252.232–7003 provides for redetermination of the customary flexible progress payment rate whenever the computed investment percentage is more than two points above or below the specific minimum investment in work in process inventory (see Table at 232.502–1–71(a)(7)). When such a redetermination is made—

(i) Apply the new customary flexible progress payment rate to the next contractor progress payment request; and

(ii) Adjust the unliquidated progress payment balance.

(2) Either the Government or the contractor may request a rate review

at any time to determine if the computed investment percentage in work in process inventory is outside of the investment tolerance in paragraph (d)(1) of this subsection. For contracts funded with FY87 appropriations, the investment range is 23 to 27 percent with a target of 25 percent.

(3) The administrative contracting officer shall assess changes in the following factors during each periodic review required by FAR 32.503–5 and shall review the customary flexible progress payment rate whenever there has been—

(i) A significant change in the float or lag factors;

(ii) A significant change in the delivery schedule; or

(iii) Substantial work added to or deleted from the contract.

(e) *Letter contracts and undefinitized orders.* When flexible progress payments are contemplated for use on a definitized contract superseding a letter contract or an unpriced BOA order, the applicable uniform customary progress payment rate shall be used until definitization. The flexible progress payment rate shall be determined by the contracting officer before definitizing the contract or order.

(f) *Availability of CASH program and user's guide.* The flexible progress payment program CASH and the user's guide are available to offerors and contractors from the contracting officer.

[56 FR 36409, July 31, 1991, as amended at 56 FR 67217, Dec. 30, 1991; 58 FR 62046, Nov. 24, 1993; 58 FR 64353, Dec. 6, 1993]

232.502–4 Contract clauses.

232.502–4–70 Additional clauses.

(a) Use the clause at 252.232–7002, Progress Payments for Foreign Military Sales Acquisitions, in any contract that provides for progress payments and contains foreign military sale requirements.

(b) Use the clauses at 252.232–7003, Flexible Progress Payments, and 252.232–7004, DoD Progress Payment Rates, in contracts using a customary flexible progress payment rate.

(c) Use the clause at 252.232–7004, DoD Progress Payment Rates, in addition to the clauses prescribed at FAR 32.502–4.

[56 FR 36409, July 31, 1991, as amended at 56 FR 67217, Dec. 30, 1991]

232.503 Postaward matters.

232.503–6 Suspension or reduction of payments.

(b) *Contractor noncompliance.* See also 242.7503.

(g) *Loss contracts.* Use the following loss ratio adjustment procedures for making adjustments required by FAR 32.503–6(f) and (g)—

(i) Except as provided in paragraph (g)(ii) of this subsection, the contracting officer shall prepare a supplementary analysis of the contractor's request for progress payments and calculate the loss ratio adjustment using the procedures in FAR 32.503–6(g).

(ii) The contracting officer may request the contractor to prepare the supplementary analysis as an attachment to the progress payment request when the contracting officer determines that the contractor's methods of estimating the ''Costs to Complete'' are reliable, accurate, and not susceptible to improper influences.

(iii) To maintain an audit trail and permit verification of calculations, do not make the loss ratio adjustments by altering or replacing data on the contractor's original request for progress payment (SF 1443, Contractor's Request for Progress Payment, or computer generated equivalent).

[56 FR 36409, July 31, 1991, as amended at 60 FR 29499, June 5, 1995]

232.503–15 Application of Government title terms.

(d) An administrative contracting officer (ACO) determination that the contractor's material management and accounting system conforms to the standard at 252.242–7004(f)(7) constitutes the contracting officer approval requirement of FAR 32.503–15(d). Prior to granting blanket approval of cost transfers between contracts, the ACO should determine that—

(i) The contractor retains records of the transfer activity that took place in the prior month;

(ii) The contractor prepares, at least monthly, a summary of the transfer activity that took place in the prior month; and

(iii) The summary report includes as a minimum, the total number and dollar value of transfers.

[56 FR 36409, July 31, 1991, as amended at 57 FR 42632, Sept. 15, 1992]

Subpart 232.6—Contract Debts

232.605 Responsibilities and cooperation among Government officials.

(b) Disbursing officers are those officials designated to make payments under a contract or to receive payments of amounts due under a contract. At installations where integrated accounting is in effect, the finance and accounting officer is a disbursing officer. The disbursing officer is responsible for determining the amount and collecting contract debts whenever overpayments or erroneous payments have been made. The disbursing officer also has primary responsibility when the amounts due and dates for payment are contained in the contract, and a copy of the contract has been furnished to the disbursing officer with notice to collect as amounts become due.

232.606 Debt determination and collection.

(c)(9)(vii) Upon transfer of a case to the contract financing office, the contracting officer shall close the debt record by reference to the date of transfer.

232.610 Demand for payment of contract debt.

(a)(i) For contract debts resulting from other than a termination for default, the office which first determines an amount due, whether it be the contract administration office, the contracting office, the disbursing office, or the selling office/agency, shall—

(A) Make a demand for payment; and

(B) Provide a copy of the demand to the payment office cited in the contract.

(ii) For contract debts resulting from a termination for default, the contracting officer shall make the demand and direct the debtor to make such payment to the designated office.

(b)(3) The contracting office shall forward deferment requests to the contract financing office of the contracting department or agency for a decision on granting the deferment.

232.616 Compromise actions.

Only the department/agency contract financing offices (232.108(1)) are authorized to compromise debts covered by this subpart.

232.617 Contract clause.

(a) The DoD Contract Finance Committee, with the approval of the USD(A&T)DP, may exempt the contracts in FAR 32.617(a) (2) through (5) and other contracts, in exceptional circumstances, from the administrative interest charges required by this subpart.

(a)(7) Other exceptions—

(A) Contracts for instructions of military or ROTC personnel at civilian schools, colleges, and universities;

(B) Basic agreements with telephone companies for communications services and facilities, and purchases under such agreements; and

(C) Transportation contracts with common carriers for common carrier services.

[56 FR 36409, July 31, 1991, as amended at 60 FR 61598, Nov. 30, 1995]

232.670 Transfer of responsibility for debt collection.

Disbursing officers will transfer responsibility for debt collection to departmental/agency contract financing offices in accordance with comptroller regulations. Notwithstanding the transfer of the debt collection responsibility, contracting officers shall continue to provide assistance as requested by the debt collection office.

232.671 Bankruptcy reporting.

(a) For those debts covered by this subpart, the department or agency which awarded the contract shall furnish the Department of Justice any claims in bankruptcy, insolvency, or in proceedings for reorganization or arrangement. Furnish claims which—

(1) Have been transferred to a contract financing office;

(2) Are on the way to a contract financing office at the inception of bankruptcy or insolvency proceedings;

(3) Are pending and not forwarded to a contract financing office at the inception of bankruptcy or insolvency proceedings; and

(4) Are the result of bankruptcy or insolvency proceedings.

(b) The contract financing office or other office designated within a department or agency will furnish proof of claims to the Department of Justice.

(c) The office of origin of a debt will provide, as soon as possible, information on a bankruptcy, insolvency, reorganization, or rearrangement to the office designated within a department/agency to receive this information.

(d) The information and proof of claim requirements in paragraphs (b) and (c) of this section do not apply to debts of less than $600.

Subpart 232.7—Contract Funding

SOURCE: 58 FR 46092, Sept. 1, 1993, unless otherwise noted.

232.702 Policy.

Fixed-price contracts shall be fully funded except as permitted by 232.703–1.

232.703 Contract funding requirements.

232.703–1 General.

(1) A fixed-price contract may be incrementally funded only if—

(i) The contract is funded with research and development appropriations;

(ii) Congress has otherwise incrementally appropriated program funds; or

(iii) The head of the contracting activity approves the use of incremental funding for either base services contracts or hazardous/toxic waste remediation contracts.

(2) Incrementally funded fixed-price contracts shall be fully funded as soon as practicable after full funding is available.

232.703–70 Military construction appropriations act restriction.

Annual military construction appropriations acts restrict the use of funds appropriated by the acts for payments under cost-plus-fixed-fee contracts (see 216.306(c)).

[61 FR 7744, Feb. 29, 1996]

232.704 Limitation of cost or funds.

232.704–70 Incrementally funded fixed-price contracts.

(a) Upon receipt of the contractor's notice under paragraph (c) of the clause at 252.232–7007, Limitation of Government's Obligation, the contracting officer shall promptly provide written notice to the contractor that the Government is—

(1) Allotting additional funds for continued performance and increasing the Government's limitation of obligation in a specified amount;

(2) Terminating the contract; or

(3) Considering whether to allot additional funds; and

(i) The contractor is entitled by the contract terms to stop work when the Government's limitation of obligation is reached; and

(ii) Any costs expended beyond the Government's limitation of obligation are at the contractor's risk.

(b) Upon learning that the contract will receive no further funds, the contracting officer shall promptly give the contractor written notice of the Government's decision and terminate for the convenience of the Government.

(c) The contracting officer shall ensure that, in accordance with paragraph (b) of the clause at 252.232–7007, Limitation of Government's Obligation, sufficient funds are allotted to the contract to cover the total amount payable to the contractor in the event of termination for the convenience of the Government.

232.705 Contract clauses.

232.705–70 Clause for limitation of Government's obligation.

Use the clause at 252.232–7007, Limitation of Government's Obligation, in solicitations and resultant incrementally funded fixed-price contracts. The contracting officer may revise the contractor's notification period, in paragraph (c) of the clause, from ''ninety'' to ''thirty'' or ''sixty'' days, as appropriate.

Subpart 232.8—Assignment of Claims

232.803 Policies.

(b) Only contracts for personal services may prohibit the assignment of claims.

(d) Pursuant to Section 3737(e) of the Revised Statutes (41 U.S.C. 15), and in accordance with Presidential delegation dated October 3, 1995, Secretary of Defense delegation dated February 5, 1996, and Under Secretary of Defense for Acquisition and Technology delegation dated February 23, 1996, the Director of Defense Procurement determined on May 10, 1996, that a need exists for DoD to agree not to reduce or set off any money due or to become due under the contract when the proceeds under the contract have been assigned in accordance with the Assignment of Claims provision of the contract. This determination was published in the FEDERAL REGISTER on June 11, 1996, as required by law. Nevertheless, if departments/agencies decide it is in the Government's interests, or if the contracting officer makes a determination in accordance with FAR 32.803(d) concerning a significantly indebted offeror, they may exclude the no-setoff commitment.

[56 FR 36409, July 31, 1991, as amended at 61 FR 50454, Sept. 26, 1996]

232.805 Procedure.

(b) The assignee shall forward—

(i) To the administrative contracting officer (ACO), a true copy of the instrument of assignment and an original and three copies of the notice of assignment. The ACO shall acknowledge receipt by signing and dating all copies of the notice of assignment and shall—

(A) File the true copy of the instrument of assignment and the original of the notice in the contract file;

(B) Forward two copies of the notice to the disbursing officer of the payment office cited in the contract;

(C) Return a copy of the notice to the assignee; and

(D) Advise the contracting officer of the assignment.

(ii) To the surety or sureties, if any, a true copy of the instrument of assignment and an original and three copies of the notice of assignment. The surety shall return three acknowledged copies of the notice to the assignee, who shall forward two copies to the disbursing officer designated in the contract.

(iii) To the disbursing officer of the payment office cited in the contract, a true copy of the instrument of assignment and an original and one copy of the notice of assignment. The disbursing officer shall acknowledge and return to the assignee the copy of the notice and shall file the true copy of the instrument and original notice.

232.806 Contract clause.

(a)(2) The contracting officer shall use Alternate I with the clause at FAR 52.232–23, Assignment of Claims, unless otherwise authorized under 232.803(d).

Subpart 232.9—Prompt Payment

232.903 Policy.

DoD policy is to assist small disadvantaged business concerns by paying them as quickly as possible after invoices are received and before normal payment due dates established in the contract (see 232.905(2)).

232.905 Invoice payments.

(1) In most cases, Government acceptance or approval can occur within the 7 day constructive acceptance period specified in the FAR Prompt Payment clauses. Government payment of construction progress payments can, in most cases, be made within the 14 day period allowed by the Prompt Payment for Construction Contracts clause. While the contracting officer may specify a longer period because the period specified in the contract is not reasonable or practical, such change should be coordinated with the Government offices responsible for acceptance or approval and for payment. Reasons for specifying a longer period include but are not limited to: the nature of the work or supplies or services, inspection or testing requirements, shipping and acceptance terms, and resources available at the acceptance activity. A constructive acceptance period of less than the cited 7 or 14 days is not authorized.

(2) Designated payment offices are encouraged to pay small disadvantaged business (SDB) concerns as quickly as possible after invoices are received and before normal payment due dates established in the contract. The restrictions of FAR 32.903 prohibiting early payment do not apply to invoice payments made to SDBs. Contractors shall not, however, be entitled to interest penalties if invoice payments are not made before the normal payment due dates established in the contract.

(f)(6) DoD Manual 4000.25–5–M, Military Standard Contract Administration Procedures (MILSCAP), authorizes electronic signature of receiving reports.

232.906 Contract financing payments.

(a)(i) DoD policy is to make contract financing payments as quickly as possible. Generally, the contracting officer shall insert the standard due dates of 7 days for progress payments and 14 days for interim payments on cost type contracts in subparagraphs (b)(2) of the Prompt Payment clauses at FAR 52.232–25, 52.232–26, and 52.232–27.

(ii) The contracting officer should coordinate payment terms with offices that will be involved in the payment process to ensure that terms specified can be met. Where justified, the contracting officer may insert a due date greater than but not less than the standard. In determining payment terms, consider—

(A) Geographical separation;

(B) Workload;

(C) Contractor ability to submit a proper request; and

(D) Other factors that could affect timing of payment.

232.970 Payment of subcontractors.

232.970–1 Subcontractor assertions of nonpayment.

(a) In accordance with Public Law 102–190, title VIII, section 806(a)(4), upon the assertion by a subcontractor or supplier of a DoD contractor that the subcontractor or supplier has not been paid in accordance with the payment terms of the subcontract, purchase order, or other agreement with the prime contractor, the contracting officer may determine—

(1) For a construction contract, whether the contractor has made—

(i) Progress payments to the subcontractor or supplier in compliance with chapter 39 of title 31, United States Code (Prompt Payment Act);

(ii) Final payment to the subcontractor or supplier in compliance with the terms of the subcontract, purchase order, or other agreement with the prime contractor;

(2) For a contract other than construction, whether the contractor has made progress payments, final payments, or other payments to the subcontractor or supplier in compliance with the terms of the subcontract, purchase order, or other agreement with the prime contractor;

(3) For any contract, whether the contractor's certification of payment of a subcontractor or supplier accompanying its payment request to the Government is accurate.

(b) If, in making the determination in paragraphs (a) (1) and (2) of this subsection, the contracting officer finds the prime contractor is not in compliance, the contracting officer may—

(1) Encourage the contractor to make timely payment to the subcontractor or supplier; or

(2) If authorized by the applicable payment clauses, reduce or suspend progress payments to the contractor.

(c) If the contracting officer determines that a certification referred to in (a)(3) of this subsection is inaccurate in any material respect, the contracting officer shall initiate administrative or other remedial action.

[57 FR 42707, Sept. 16, 1992]

232.970–2 Subcontractor requests for information.

(a) In accordance with Public Law 102–190, title VIII, section 806(a)(1), upon the request of a subcontractor or supplier under a DoD contract, the contracting officer shall promptly advise the subcontractor or supplier as to—

(1) Whether the prime contractor has submitted requests for progress payments or other payments under the contract to DoD; and

(2) Whether final payment has been made by the DoD to the prime contractor.

(b) This subsection does not apply to matters that are—

(1) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy; and

(2) Properly classified pursuant to such Executive Order (see 5 U.S.C. 552(b)(1)).

[57 FR 42708, Sept. 16, 1992]

PART 233—PROTESTS, DISPUTES, AND APPEALS

Sec.

Subpart 233.2—Disputes and Appeals

233.204 Policy.
233.210 Contracting officer's authority.
233.214 Contract clause.

Subpart 233.70—Certification of Claims and Requests for Adjustment or Relief

233.7000 Policy.
233.7001 Contract clause.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36416, July 31, 1991, unless otherwise noted.

Subpart 233.2—Disputes and Appeals

233.204 Policy.

When it would be helpful in reviewing the current claim, the contracting officer should get information on claims previously filed by the contractor with other contracting officers.

233.210 Contracting officer's authority.

DFARS 243.105(a) limits contracting officer authority.

233.214 Contract clause.

Use Alternate I of the clause at FAR 52.233–1, Disputes, when—

(1) The acquisition is for—

(i) Aircraft

(ii) Spacecraft and launch vehicles

(iii) Naval vessels

(iv) Missile systems

(v) Tracked combat vehicles

(vi) Related electronic systems;

(2) The contracting officer determines that continued performance is—

(i) Vital to the national security, or

(ii) Vital to the public health and welfare; or

(3) The head of the contracting activity determines that continued performance is necessary pending resolution of any claim that might arise under or be related to the contract.

Subpart 233.70—Certification of Claims and Requests for Adjustment or Relief

233.7000 Policy.

(a) Before payment can be made on a claim (see definition in FAR 33.201), a request for equitable adjustment to contract terms, a request for relief under Public Law 85–804 (see FAR part 50), or another similar request that exceeds $100,000, 10 U.S.C. 2410e requires that—

(1) The contractor certify the claim or request as required by FAR 33.207; and

(2) The person certifying the claim or request be an individual who is authorized to bind the contractor and who has knowledge of—

(i) The basis of the claim or request;

(ii) The accuracy and completeness of the supporting data; and

(iii) The claim or request.

(b) The individual certifying the claim or request pursuant to paragraph (a) of this section may have knowledge based on direct involvement with the claim or knowledge gained by a review of contractor records or reports from more directly involved individuals.

(c) The certification required by this subpart is different from the certification required by FAR part 33, which is based on the Contract Disputes Act (CDA), 41 U.S.C. 601 *et seq.* When no certification under this subpart has been submitted prior to the inception of a contract dispute, a single certification will satisfy the requirements of both statutes. Such certification must use the language prescribed by the CDA and be executed by a person who meets the specific knowledge requirements found in paragraph (a)(2) of this section.

(d) The aggregate amount of both the increased and decreased costs shall be used in determining when the dollar threshold requiring certification is met (see example in FAR 15.804–2(a)(1)(ii)).

(e) If a certification required by paragraph (a) of this section is incorrect when originally submitted, and is resubmitted pursuant to paragraph (a), the resubmitted certification shall be deemed to have been submitted at the time the original certification was submitted.

[58 FR 28470, May 13, 1993, as amended at 59 FR 27673, May 27, 1994]

233.7001 Contract clause.

Use the clause at 252.233–7000, Certification of Claims and Requests for Adjustment or Relief, in all contracts expected to exceed $100,000.

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 234—MAJOR SYSTEM ACQUISITION

Sec.
234.001 Definitions.
234.003 Responsibilities.
234.005 General requirements.
234.005–70 Solicitation provision and contract clause.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

234.001 Definitions.

Systems means a combination of elements that will function together to produce the capabilities required to fulfill a mission need.

Systems acquisition means the design, development, and production of new systems. It also includes modifications to existing systems that involve redesign of the systems or subsystems.

[60 FR 61598, Nov. 30, 1995]

234.003 Responsibilities.

DoDD 5000.1, Defense Acquisition, and DoDI 5000.2, Defense Acquisition Management Policies and Procedures, contain the DoD implementation of OMB Circular A–109.

[56 FR 36416, July 31, 1991]

234.005 General requirements.

234.005–70 Solicitation provision and contract clause.

When the Government requires contractor compliance with DoD cost/schedule control systems criteria, use the provision at 252.234–7000, Notice of Cost/Schedule Control Systems, in solicitations and the clause at 252.234-7001, Cost/Schedule Control Systems, in solicitations and contracts.

[56 FR 36416, July 31, 1991]

PART 235—RESEARCH AND DEVELOPMENT CONTRACTING

Sec.
235.001 Definitions.
235.002 General.
235.006 Contracting methods and contract type.
235.007 Solicitations.
235.010 Scientific and technical reports.
235.015 Contracts for research with educational institutions and nonprofit organizations.
235.015–70 Special use allowances for research facilities acquired by educational institutions.
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235.016 Broad agency announcement.
235.017 Federally Funded Research and Development Centers.
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235.070 Indemnification against unusually hazardous risks.
235.070–1 Indemnification under research and development contracts.
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235.070–3 Contract clauses.
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Subpart 235.70—Research and Development Streamlined Contracting Procedures—Test

235.7000 Scope.
235.7001 Definitions.
235.7002 Applicability.
235.7003 Reporting requirements.
235.7004 The research and development streamlined solicitation (RDSS).
235.7004–1 General.
235.7004–2 Solicitation procedures.
235.7004–3 Proposal evaluation and contract award procedures.
235.7005 The research and development standard contract (RDSC).
235.7006 The research and development streamlined contracting format.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36416, July 31, 1991, unless otherwise noted.

235.001 Definitions.

The following terms are defined in DoD 7000.14–R, Financial Management Regulation. As used in this part—

Advanced development means all effort directed toward projects which have moved into the development of hardware for test. The prime proof of this type of effort is proof of design concept rather than the development of hardware. Projects in this category have a potential military application.

Basic research means all effort of scientific study and experimentation directed toward increasing knowledge and understanding in those fields of the physical, engineering, environmental, and life sciences related to long-term national security needs, It provides fundamental knowledge required for the solution of military problems. It forms a part of the base for—

(1) Subsequent exploratory and advanced developments in defense related technologies; and

(2) New or improved military functional capabilities in areas such as communications, detection, tracking, surveillance, propulsion, mobility, guidance and control, navigation, energy conversion, materials and structures, and personnel support.

Demonstration/validation means those efforts necessary to evaluate integrated technologies in as realistic an operating environment as possible to assess the performance or cost reduction potential of advanced technology. The demonstration/validation phase is system specific and also includes advanced technology demonstrations that help expedite technology transition from the laboratory to operational use.

Engineering and manufacturing development means those projects in full-scale engineering development but which have not yet received approval for production or had production funds included in the DoD budget submission for the budget or subsequent fiscal year. This area is characterized by major line item projects where program control is exercised by review of individual projects.

Exploratory development means all effort directed toward the solution of specific military problems, short of major development projects. This type of effort may vary from fairly fundamental applied research to quite sophisticated bread-board hardware, study, programming, and planning efforts. It would thus include studies, investigations, and minor development effort. The dominant characteristic of this category of effort is that it be pointed toward specific military problem areas with a view toward developing and evaluating the feasibility and practicability of proposed solutions and determining their parameters.

Management and support means all effort directed toward support of installations and operations required for general research and development use. This includes military construction of a general nature unrelated to specific programs, maintenance support of laboratories, operation and maintenance of test ranges, and maintenance of test aircraft and ships. Costs of laboratory personnel, either in-house or contracted, would be assigned to projects or as a line item in the research, exploratory development, or advanced development program areas, as appropriate. Management and support is not ''research and development'' except in exceptional cases. For example, construction of recreational facilities at an installation is not ''research and development'' work, even if the installation is used only for research and development work.

Operational system development means those projects still in full-scale engineering development, but which have received approval for production through Defense Acquisition Board or other action, or production funds have been included in the DoD budget submission for the budget or subsequent year. All items in this area are major line item projects which appear as RDT&E costs of weapons systems elements in other programs. Program control is exercised by review of the individual projects.

Research and development ordinarily covers only the following categories—

(1) Basic research;

(2) Exploratory development;

(3) Advanced development;

(4) Demonstration/validation;

(5) Engineering and manufacturing development; and

(6) Operational system development.

[60 FR 29499, June 5, 1995]

235.002 General.

Contracts for research and development may not be performed over a period exceeding ten years from the date of initial award, unless the department or agency notifies Congress (10 U.S.C. 2352).

(1) The head of the agency shall notify Congress whenever—

(i) It is expected, at the time of award, or as a result of a modification, that the period of performance will exceed ten years from the initial award date; or

(ii) Performance has extended beyond ten years from the initial award date and no notice has otherwise been provided to Congress.

(2) The notice shall—

(i) Identify the contract;

(ii) State the initial award date;

(iii) State the expected period of performance; and

(iv) Be submitted not later than 30 days after—

(A) The initial award date or date of modification, as applicable; or

(B) The date on which performance exceeds ten years if no prior notice was given.

[57 FR 14994, Apr. 23, 1992]

235.006 Contracting methods and contract type.

(a) All contracts under the Manufacturing Technology Program (see DoDI 4200.15, Manufacturing Technology Program) shall be awarded using competitive procedures (10 U.S.C. 2525).

(b)(i) A fixed-price type contract shall not be awarded for a development program effort unless—

(A) The level of program risk permits realistic pricing;

(B) The use of a fixed-price type contract permits an equitable and sensible allocation of program risk between the Government and the contractor; and

(C) A written determination that the criteria of paragraphs (b)(i)(A) and (B) of this section have been met is executed—

(*1*) By the Under Secretary of Defense (Acquisition and Technology) (USD(A&T)) for—

(*i*) Research and development for non-major systems, if the contract is over $25 million;

(*ii*) The lead ship of a class;

(*iii*) The development of a major system (as defined in FAR 34.001) or subsystem thereof, if the contract is over $25 million, or is over $10 million and is funded with FY90 funds (Pub. L. 101–165, section 9048), FY91 funds (Pub. L. 101–511, section 8038), FY92 funds (Pub. L. 102–172, section 8037), or FY93 funds (Pub. L. 102–396, section 9037).

(*2*) By the contracting officer for any development not covered by paragraph (b)(i)(C)(*1*) of this section.

(ii) The contracting officer must obtain USD(A&T) approval of the Government's prenegotiation position before negotiations begin and must obtain USD(A&T) approval of the negotiated agreement with the contractor before the agreement is executed for any action that is—

(A) An increase of more than $250 million in the price or ceiling price of a fixed-price type development contract, or a fixed-price type contract for the lead ship of a class;

(B) A reduction in the amount of work under a fixed-price type development contract or a fixed-price type contract for the lead ship of a class, when the value of the work deleted is $100 million or more; or

(C) A repricing of fixed-price type production options to a development contract, or a contract for the lead ship of a class, which increases the price or ceiling price by more than $250 million for equivalent quantities.

(iii) Notify the USD(A&T) of an intent not to exercise a fixed-price production option on a development contract for a major weapon system reasonably in advance of the expiration of the option exercise period.

(iv) A cost-sharing arrangement (see FAR 16.303) must be used for contracts awarded in support of the Manufacturing Technology Program, unless an alternative is approved by the Secretary of Defense (10 U.S.C. 2525). Approval by the Secretary of Defense to use other than a cost-sharing arrangement for the Manufacturing Technology Program must be based on a determination that the contract is for a program that—

(A) Is not likely to have any immediate and direct commercial application;

(B) Is of sufficiently high risk to discourage cost sharing by non-Federal Government sources; or

(C) Will be carried out by an institution of higher education.

[56 FR 36416, July 31, 1991, as amended at 57 FR 14994, Apr. 23, 1992; 58 FR 28471, May 13, 1993; 59 FR 27673, May 27, 1994; 60 FR 4570, Jan. 24, 1995; 60 FR 29500, June 5, 1995; 61 FR 50454, Sept. 26, 1996]

235.007 Solicitations.

(g) To ensure that prospective offerors fully understand the details of the work, the contracting officer may include the Government's estimate of the man-year effort under a research contract.

235.010 Scientific and technical reports.

(b) The Defense Technical Information Center (DTIC) is responsible for collecting all scientific or technological observations, findings, recommendations, and results derived from DoD endeavors, including both in-house and contracted efforts. The DTIC has eligibility and registration requirements for use of its services. Requests for eligibility and registration information should be addressed to DTIC–BCS, Cameron Station, Alexandria, VA 22304–6145.

[60 FR 29500, June 5, 1995]

235.015 Contracts for research with educational institutions and nonprofit organizations.

(b) *Basic agreements.*

(3) When using a basic agreement—

(i) Incorporate it by reference in section I of the contract; and

(ii) Incorporate any special clause requirements in section H.

[59 FR 27673, May 27, 1994]

235.015–70 Special use allowances for research facilities acquired by educational institutions.

(a) *Definitions.* As used in this subsection—

(1) *Research facility* means—

(i) Real property, other than land; and

(ii) Includes structures, alterations, and improvements, acquired for the purpose of conducting scientific research under contracts with departments and agencies of the DoD.

(2) *Special use allowance* means a negotiated direct or indirect allowance—

(i) For construction or acquisition of buildings, structures, and real property, other than land; and

(ii) Where the allowance is computed at an annual rate exceeding the rate which normally would be allowed under FAR subpart 31.3.

(b) *Policy.* (1) Educational institutions are to furnish the facilities necessary to perform Defense contracts. FAR 31.3 governs how much the Government will reimburse the institution for the research programs. However, in extraordinary situations, the Government may give special use allowances to an educational institution when the institution is unable to provide the capital for new laboratories or expanded facilities needed for Defense contracts.

(2) Decisions to provide a special use allowance must be made on a case-by-case basis, using the criteria in paragraph (c) of this subsection.

(c) *Authorization for special use allowance.* The head of a contracting activity may approve special use allowances only when all of the following conditions are met—

(1) The research facility is essential to the performance of DoD contracts;

(2) Existing facilities, either Government or nongovernment, cannot meet program requirements practically or effectively;

(3) The proposed agreement for special use allowances is a sound business arrangement;

(4) The Government's furnishing of Government-owned facilities is undesirable or impractical; and

(5) The proposed use of the research facility is to conduct essential Government research which requires the new or expanded facilities.

(d) *Application of the special use allowance.* (1) In negotiating a special use allowance—

(i) Compare the needs of DoD and of the institution for the research facility to determine the amount of the special use allowance;

(ii) Consider rental costs for similar space in the area where the research facility is or will be located to establish the annual special use allowance;

(iii) Do not include or allow—

(A) The costs of land; or

(B) Interest charges on capital;

(iv) Do not include maintenance, utilities, or other operational costs;

(v) The period of allowance generally will be—

(A) At least ten years; or

(B) A shorter period if the total amount to be allowed is less than the

construction or acquisition cost for the research facility;

(vi) Generally, provide for allocation of the special use allowance equitably among the Government contracts using the research facility;

(vii) Special use allowances apply only in the years in which the Government has contracts in effect with the institution. However, if in any given year there is a reduced level of Government research effort which results in the special use allowance being excessive compared to the Government research funding, a separate special use allowance may be negotiated for that year;

(viii) Special use allowances may be adjusted for the period before construction is complete if the facility is partially occupied and used for Government research during that period.

(2) A special use allowance may be based on either total or partial cost of construction or acquisition of the research facility.

(i) When based on total cost neither the normal use allowance nor depreciation will apply—

(A) During the special use allowance period; and

(B) After the educational institution has recovered the total construction or acquisition cost from the Government or other users.

(ii) When based on partial cost, normal use allowance and depreciation—

(A) Apply to the balance of costs during the special use allowance period to the extent negotiated in the special use allowance agreement; and

(B) Do not apply after the special use allowance period, except for normal use allowance applied to the balance.

(3) During the special use allowance period, the research facility—

(i) Shall be available for Government research use on a priority basis over nongovernment use; and

(ii) Cannot be put to any significant use other than that which justified the special use allowance, unless the head of the contracting activity, who approved the special use allowance, consents.

(4) The Government will pay only an allocable share of the special use allowance when the institution makes any substantial use of the research facility for parties other than the Government during the period when the special use allowance is in effect.

(5) In no event shall the institution be paid more than the acquisition costs.

[56 FR 36416, July 31, 1991, as amended at 60 FR 29500, June 5, 1995]

235.015–71 Short form research contract (SFRC).

(a) *Scope.* This section prescribes procedures for contracting within the U.S. for research on a cost-reimbursement basis with educational institutions or nonprofit organizations whose primary purpose is the conduct of scientific research.

(b) *Definitions.* As used in this section—

(1) *Educational institution* means an institution of higher learning which—

(i) Provides facilities for teaching and research; and

(ii) Is authorized to grant academic degrees.

(2) *Nonprofit organization* means—

(i) Organizations of the type—

(A) Described in section 501 (c)(3) and (d) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)); and

(B) Exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)); or

(ii) Any nonprofit scientific organization qualified under a state nonprofit organization statute.

(3) *Research* includes all effort described as research in 235.001, including that part of exploratory development applicable to applied research.

(c) *Applicability.* (1) Do not use the SFRC for any purpose other than as described in this section.

(2) The procedures in this section may be used if—

(i) The principal purpose of the acquisition is research from an educational institution or a nonprofit organization;

(ii) The effort will be on a cost-reimbursement basis;

(iii) The basis for award is—

(A) A basic research proposal responding to a broad agency announcement (FAR 6.102(d)(2)); or

(B) An unsolicited research proposal (FAR 6.302–1); or

(C) A proposal establishing or maintaining an essential engineering, research, or development capability (FAR 6.302–3); and

(iv) The contract requires the delivery of designs, drawings, or reports as end items.

(d) *Content of research proposal.* Research proposals submitted under this section must contain—

(1) All the information in FAR 15.505;

(2) A statement of work complying with FAR 35.005, and a breakdown of the time the principal investigator and any associates will devote to the contract (see FAR 35.015(a)). The breakdown will be by work-days, work-months, or work-years;

(3) The executed representations on DD Form 2222–1, Representations and Certifications from Offerors Submitting Proposals Under DFARS 235.70. (Representations and certifications submitted on a one-time basis to each contracting office are valid for all SFRC contract awards made by that office only if the offeror in each proposal references the one-time submission and confirms its validity.);

(4) A statement that the Government may award a contract under the procedures of this section;

(5)(i) Identification of property in the Contractor-Acquired Property clause by showing for each item, when possible—

(A) The description of the property; and

(B) The estimated or known cost;

(ii) The description of the property should be detailed enough to enable the contracting officer—

(A) To determine whether the Government will furnish such property under FAR 35.014 and FAR 45.302–1; and

(B) For property which may be contractor-acquired (versus Government-furnished)—

(*1*) To accept it as advance notification required by FAR 52.244–2; and

(*2*) To authorize acquisition at time of award;

(iii) If the offeror proposes to acquire facilities (FAR 45.301), the offeror shall include a written statement which—

(A) Explains why acquiring these items with contract funds is necessary; and

(B) Expresses the offeror's unwillingness or financial inability to acquire the items with the offeror's own resources;

(iv) Special test equipment or components proposed. Individual items of less than $1,000 may be grouped by category (FAR 45.307–2);

(6) A SF 1411, Contract Pricing Proposal Cover Sheet, or acceptable substitute. FAR 52.244–2(b) prescribes information required for subcontracts;

(7) Markings complying with FAR 15.509 on the title page and each restricted sheet if the proposal includes data that the offeror does not want disclosed for any purpose other than evaluation. In addition, the offeror should state in the offer or check Block A on page 2 of the DD Form 2222–2 if the offeror grants the Government permission to have nongovernment evaluators review the proposal;

(8) The following statement:

This proposal incorporates by reference, and makes a part thereof, all applicable clauses in DFARS 235.015–71(i) in effect on the effective date of the contract or such other dates as may be mutually agreed upon.

(9) Any other applicable FAR or DFARS clauses agreed to by the parties;

(10) Monthly expenditure estimates by which incremental funding periods may be calculated; and

(11) An executed DD Form 2222–2, Short Form Research Contract Research Proposal Cover Page.

(e) *Contracting procedures.*

(1) The contracting officer may award a SFRC under full and open competition (FAR Subpart 6.1) when the proposal—

(i) Is in response to a broad agency announcement under FAR 6.102(d)(2);

(ii) Contains the information required by 235.015–71(d); and

(iii) Has been recommended for award under the peer or scientific review procedures of FAR 6.102(d)(2).

(2) The contracting officer may award an SFRC under other than full and open competition (FAR subpart 6.3) when—

(i) The proposal is an unsolicited research proposal submitted, evaluated, and accepted under FAR subpart 15.5, which meets the criteria of FAR 6.302–1; or

(ii) Award is necessary to establish or maintain an essential engineering research or development capability under FAR 6.302–1.

(3) When a research proposal (solicited or unsolicited) is satisfactory to the Government, the contracting officer should accept the proposal by executing a SFRC incorporating—

(i) The proposal by reference, or

(ii) The statement of work by reference.

(4) When acceptance of the entire research proposal is not advantageous to the Government, the contracting officer should use the acceptable parts of the research proposal. These parts may be either attached or incorporated by reference to develop a contract for execution by both parties. In this event, the contractor must sign the SFRC before the Government signs.

(5) Use the DD Form 2222, Short Form Research Center (SFRC) Modification, to effect modifications.

(6) The initial dollar amount and period of performance specified in the award document shall include the initial research program only. The SFRC shall identify separately the options, periods of performance, and costs, if appropriate.

(7) FAR 35.014 applies to vesting of title in property to organizations defined in 235.015–71(b). DD Form 2222 shall identify property, title to which is not vested in the contractor, or for which a determination of title is deferred.

(8) The offeror's submission of its proposal under this section 235.015–71 constitutes the offeror's agreement to be bound by all terms and conditions of the resulting contract.

(f) *Advance payments.* The contracting officer shall ensure that SFRCs awarded to institutions and organizations authorized to receive advance payments under FAR subpart 32.4 are clearly marked to read ''Advance Payment Pool Contract.''

(g) *Method of funding.* If incrementally funded, the SFRC shall specify—

(1) The total estimated cost for the full period of the research program, both funded and unfunded; and

(2) The amount of funds currently obligated.

(h) *Uniform contract format.* The SFRC is exempt from uniform contract format requirements (FAR 15.406).

(i) *SFRC clauses.* (1) Include in the contract any FAR or DFARS clause agreed to by the parties and incorporate it by reference or full text, as appropriate.

(2) The following clauses should be incorporated by reference in all SFRC awards of $25,000 or more. Clauses with a single asterisk (*) apply to educational institutions only. Clauses with a double asterisk (**) apply to nonprofit organizations only.

FAR 52.202–1 Definitions
FAR 52.203–1 Officials Not to Benefit
FAR 52.203–3 Gratuities
FAR 52.203–5 Covenant Against Contingent Fees
FAR 52.203–6 Restrictions on Subcontractor Sales to the Government
FAR 52.203–7 Anti-Kickback Procedures
252.203–7001 Special Prohibition on Employment
**FAR 52.203–10 Price or Fee Adjustment for Illegal or Improper Activity
FAR 52.209–6 Protecting the Government's Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment
252.209–7000 Acquisitions from Subcontractors Subject to On-Site Inspection Under the Intermediate-Range Nuclear Forces (INF) Treaty
FAR 52.215–2 Audit and Records—Negotiation
FAR 52.215–26 Integrity of Unit Prices
**FAR 52.215–30 Facilities Capital Cost of Money (Applies if contract is subject to commercial cost principles, FAR Subpart 31.2)
**FAR 52.215–31 Waiver of Facilities Capital Cost of Money (Applies if contractor does not propose facilities capital cost of money.)
FAR 52.215–33 Order of Precedence
FAR 52.216–7 Allowable Cost and Payment
*FAR 52.216–15 Predetermined Indirect Cost Rates (Applies only when the contractor has an executed negotiation agreement with the cognizant contract administration office. Predetermined rate agreements in effect on the date of the contract shall be incorporated in the contract schedule.)
FAR 52.219–8 Utilization of Small Business and Small Disadvantaged Business Concerns
FAR 52.219–13 Utilization of Women-Owned Small Businesses
FAR 52.220–3 Utilization of Labor Surplus Area Concerns
FAR 52.222–3 Convict Labor

FAR 52.222–26 Equal Opportunity (Add Alternate I as a special provision when applicable.)
FAR 52.222–35 Affirmative Action for Special Disabled and Vietnam Era Veterans
FAR 52.222–36 Affirmative Action for Handicapped Workers
FAR 52.222–37 Employment Reports on Special Disabled Veterans and Veterans of Vietnam Era
FAR 52.223–6 Drug-Free Workplace
FAR 52.225–13 Restrictions on Contracting with Sanctioned Persons
252.225–7016 and Restriction on Acquisition of Foreign Machine Tools
and Alternate I (if applicable)
FAR 52.227–1 and Alternate I Authorization and Consent
FAR 52.227–2 Notice and Assistance Regarding Patent and Copyright Infringement
FAR 52.227–14 Rights in Data—General (Specify applicable Alternate in contract.)
252.227–7013 and Alternate I Rights in Technical Data and Computer Software
252.227–7018 Restrictive Markings on Technical Data
252.227–7029 Identification of Technical Data
**252.227–7030 Technical Data—Withholding of Payment
FAR 52.228–7 Insurance—Liability to Third Persons Alternates I and II, if applicable)
**252.231–7000 Supplemental Cost Principles (Applies to nonprofit institutions, when allowability of costs is determined under FAR Subpart 31.2)
FAR 52.232–23 Assignment of Claims
FAR 52.232–25 Prompt Payment
FAR 52.233–1 Disputes
FAR 52.233–3 and Alternate I Protest After Award
252.235–7004 Option to Extend the Term of the Contract
252.235–7005 Contractor-Acquired Property
252.235–7006 Title to Contractor-Acquired Property
252.235–7007 Advance Payments
252.235–7008 Inspection and Acceptance
252.235–7009 Restriction on Printing
FAR 52.242–1 Notice of Intent to Disallow Costs
252.242–7001 Certification of Indirect Cost
252.242–7004 Material Management and Accounting System
**FAR 52.243–2 and Alternate V Changes—Cost-Reimbursement
FAR 52.244–2 and Alternate I Subcontracts (Cost-Reimbursement and Letter Contracts)
FAR 52.244–5 Competition in Subcontracting
FAR 52.245–5 and Alternate I Government Property (Cost-Reimbursement, Time-and-Material, or Labor-Hour Contracts.)
FAR 52.247–63 Preference for U.S.-Flag Air Carriers
FAR 52.251–1 Government Supply Sources
252.251–7000 Ordering from Government Supply Sources
FAR 52.253–1 Computer Generation of Forms by the Public

(3) The following clauses should be incorporated by reference in all SFRC contracts of $100,000 or more. Clauses with a double asterisk (**) apply to nonprofit organizations only.

FAR 52.203–12 Limitation on Payments to Influence Certain Federal Transactions.
252.203–7000 Statutory Prohibitions on Compensation to Former Department of Defense Employees
FAR 52.222–2 Payment for Overtime Premiums (The word ''zero'' is inserted in the blank space indicated by an asterisk.)
FAR 52.223–2 Clean Air and Water Act (Applies if contract amount exceeds the dollar amount set forth in the preamble to the clause.)
**FAR 52.230–2 Cost Accounting Standards (If contract is not exempt under 48 CFR chapter 99 (appendix B, FAR looseleaf edition), subpart 9903.201.)
**FAR 52.230–3 Disclosure and Consistency of Cost Accounting Practices (If contract is not exempt under 48 CFR chapter 99 (appendix B, FAR looseleaf edition), subpart 9903.201.)
**FAR 52.230–5 Administration of Cost Accounting Standards (If contract is not exempt under 48 CFR chapter 99 (appendix B, FAR looseleaf edition), subpart 9903.201.)
252.231–7001 Penalties for Unallowable Costs.
252.233–7000 Certification of Claims and Requests for Adjustment or Relief.

(4) The following clauses should be incorporated by reference, if applicable.

FAR 52.215–22 Price Reduction for Defective Cost or Pricing Data
FAR 52.215–24 Subcontractor Cost or Pricing Data (Applies only if FAR 52.215–22 applies.)
FAR 52.215–27 Termination of Defined Benefit Pension Plans (Applies if certified cost and pricing data are required and cost determinations are subject to FAR Subpart 31.2.)
252.215–7000 Pricing Adjustments (Applicable if FAR 52.215–23, 24, or 25 applies.)
FAR 52.216–8 Fixed Fee (Applies in cost-plus-fixed-fee contracts.)
FAR 52.216–11 and Alternate I Cost Contract—No Fee
FAR 52.216–12 and Alternate I Cost Sharing Contract—No Fee
252.225–7000 Pricing Adjustments (Applies if FAR 52.215–23, 24, or 25 applies.)

252.225–7023 Reporting of Subcontracts (Applies only when contract action exceeds $500,000, or when any modification increases contract amount to more than $500,000.)
FAR 52.227–11 Patents Rights—Retention by the Contractor (Short Form)
252.227–7034 Patents—Subcontracts
252.227–7039 Patents—Reporting of Subject Inventions
FAR 52.232–9 Limitation on Withholding of Payments
FAR 52.232–17 Interest
FAR 52.232–20 Limitation of Cost (Applies only when contract is fully funded.)
FAR 52.232–22 Limitation of Funds (Applies only when contract is incrementally funded.)
FAR 52.232–28 Electronic Funds Transfer Payment Methods
FAR 52.246–23 Limitation of Liability
FAR 52.246–24 Limitation of Liability—High Value Items
FAR 52.246–25 Limitation of Liability—Services
FAR 52.249–5 Termination for Convenience of the Government (Educational and Other Nonprofit Institutions). (Applies if work is done on a no-profit or no-fee basis)
FAR 52.249–6 Termination (Cost Reimbursement) (Applies if work is performed on a fee or profit basis.)
FAR 52.249–14 Excusable Delays (Applies only to contracts in which FAR 52.249–6 applies.)

[56 FR 36416, July 31, 1991, as amended at 57 FR 53600, Nov. 12, 1992; 59 FR 27673, May 27, 1994; 60 FR 61598, Nov. 30, 1995]

235.016 Broad agency announcement.

To help achieve the goals of Section 1207 of Public Law 99–661 (see part 226), contracting officers shall—

(1) Whenever practicable, reserve discrete or severable areas of research interest contained in broad agency announcements for exclusive competition among historically black colleges and universities and minority institutions;

(2) Indicate such reservation—

(i) In the broad agency announcement; and

(ii) In the announcement synopsis (see 205.207(d)(v)).

235.017 Federally Funded Research and Development Centers.

(a) *Policy*.

(2) No DoD fiscal year 1992 or later funds may be obligated or expended to finance activities of a DoD Federally Funded Research and Development Center (FFRDC) if a member of its board of directors or trustees simultaneously serves on the board of directors or trustees of a profit-making company under contract to DoD, unless the FFRDC has a DoD-approved conflict of interest policy for its members (section 8107 of Pub. L. 102–172 and similar sections in subsequent Defense appropriations acts).

[58 FR 28471, May 13, 1993]

235.017–1 Sponsoring agreements.

(c)(4) DoD-sponsoring FFRDCs that function primarily as research laboratories (C3I Laboratory operated by the Institute for Defense Analysis, Lincoln Laboratory operated by Massachusetts Institute of Technology, and Software Engineering Institute) may respond to solicitations and announcements for programs which promote research, development, demonstration, or transfer of technology (Section 217, Public Law 103–337).

[60 FR 61598, Nov. 30, 1995]

235.070 Indemnification against unusually hazardous risks.

235.070–1 Indemnification under research and development contracts.

(a) Under 10 U.S.C. 2354 and if authorized by the Secretary concerned, or designee under 10 U.S.C. 2356, contracts for research and/or development may provide for indemnification of the contractor or subcontractors for—

(1) Claims by third persons (including employees) for death, bodily injury, or loss of or damage to property; and

(2) Loss of or damage to the contractor's property to the extent that the liability, loss, or damage—

(i) Results from a risk that the contract defines as ''unusually hazardous;''

(ii) Arises from the direct performance of the contract; and

(iii) Is not compensated by insurance or other means.

(b) Clearly define the specific unusually hazardous risks to be indemnified. Submit this definition for approval with the request for authorization to grant indemnification. Include the approved definition in the contract.

235.070–2 Indemnification under contracts involving both research and development and other work.

These contracts may provide for indemnification under the authority of both 10 U.S.C. 2354 and Public Law 85–804. Public Law 85–804 will apply only to work to which 10 U.S.C. 2354 does not apply. Actions under Public Law 85–804 must also comply with FAR subpart 50.4.

235.070–3 Contract clauses.

When the contractor is to be indemnified in accordance with 235.070–1, use either—

(a) The clause at 252.235–7000, Indemnification Under 10 U.S.C. 2354—Fixed Price; or

(b) The clause at 252.235–7001, Indemnification Under 10 U.S.C. 2354—Cost-Reimbursement, as appropriate.

235.071 Additional contract clauses.

(a) Use the clause at 252.235–7002, Animal Welfare, or one substantially the same, in solicitations and contracts awarded in the United States, its possessions, and Puerto Rico involving research on live vertebrate animals.

(b) Use the clause at 252.235–7003, Frequency Authorization, in solicitations and contracts for developing, producing, constructing, testing, or operating a device requiring a frequency authorization.

(c) Use the clause at 252.235–7010, Acknowledgement of Support and Disclaimer, in solicitations and contracts for research and development.

(d) Use the clause at 252.235–7011, Final Scientific or Technical Report, in solicitations and contracts for research and development.

[56 FR 36416, July 31, 1991, as amended at 60 FR 29500, June 5, 1995]

Subpart 235.70—Research and Development Streamlined Contracting Procedures—Test

SOURCE: 59 FR 52443, Oct. 18, 1994, unless otherwise noted.

235.7000 Scope.

This subpart prescribes streamlined acquisition procedures for use in support of DoD laboratories in acquiring research and development, as defined in 235.001 and FAR 35.001.

235.7001 Definitions.

As used in this subpart—

(a) *Research and development standard contract (RDSC)* means the contract that results from the use of the research and development streamlined solicitation (RDSS), or other solicitation procedures that meet the criteria for use of the RDSS.

(b) *Research and development streamlined solicitation (RDSS)* means the solicitation published in the Commerce Business Daily and a supplemental package, if necessary.

(c) *Supplemental package* is part of the streamlined solicitation, if appropriate. It contains any information that is too voluminous to be included in the solicitation published in the Commerce Business Daily.

235.7002 Applicability.

(a) Contracting offices that have been approved by the Director of Defense Procurement for participation in the test may use the procedures of this subpart in accordance with the approved test plan and paragraphs (b) through (d) of this section. The Director of Defense Procurement has approved—

(1) Army: Army Materiel Command contracting offices when contracting for Army Research Laboratory, Missile Research & Development Center, and the Medical Research & Development Command; Army Corps of Engineers contracting offices when contracting for the Waterways Experiment Station; Army Soldier Systems Command contracting office.

(2) Navy: Naval Research Laboratory contracting office; Naval Surface Warface Center contracting offices when contracting for the Carderock, Crane, Dahlgren, Indian Head and Port Hueneme divisions; Naval Undersea Warfare Center contracting office; Naval Command, Control and Ocean Surveillance Center contracting office.

(3) Air Force: Air Force Materiel Command contracting offices when contracting for Armstrong Laboratory, Phillips Laboratory, Rome Laboratory, Wright Laboratory.

(4) Defense Agencies: Armed Forces Radiobiology Research Institute contracting office, Defense Special Weapons Agency contracting office.

(b) Consider using the procedures in this subpart when the acquisition will result in a cost-reimbursement type contract that is valued at $10,000,000 or less and meets the criteria for research and development as defined in 235.001 and FAR 35.001.

(c) Do not use the procedures of this subpart to contract for ''engineering development,'' ''operational system development,'' or ''management and support'' as defined in 235.001; or for laboratory supplies and equipment, base support services, or other services identified in FAR 37.101 (a) through (h).

(d) Regardless of whether or not the RDSS is used, the contracting officer may use the RDSC format at 235.7006 for any acquisition that meets the criteria in 235.7002(b).

[59 FR 52443, Oct. 18, 1994, as amended at 60 FR 15690, Mar. 27, 1995; 60 FR 61598, Nov. 30, 1995; 61 FR 50454, Sept. 26, 1996]

235.7003 Reporting requirements.

(a) The reporting requirement in this subpart is exempt from licensing in accordance with paragraph E.4.c. of DoD 8910.1M, ''DoD Procedures for Management of Information Requirements.''

(b) Contracting offices that have been approved for participation in the test shall report the information required in paragraphs (c) and (d) of this subpart to their representatives on the Test Oversight Committee. These representatives are—

(1) Army: Mr. Chuck Boylan, Army Research Laboratory, Fort Monmouth, Phone: (908) 427–3471; DSN 987–3471; FAX: (908) 532–5188; DSN 992–5188

(2) Navy: Ms. Mary Ann Carpenter, Naval Research Laboratory, Phone: (202) 767–0066; DSN 297–0066, FAX: (202) 767–5896; DSN 297–5896.

(3) Air Force: Lt Col Bill Borchardt, Air Force Materiel Command, Wright-Patterson Air Force Base, Phone: (513) 257–8934; DSN 787–8934, FAX: (513) 476–1431; DSN 986–1431.

(4) Defense Agencies:

(i) Armed Forces Radiobiology Research Institute: Major Vikki Stocker, Logistics and Engineering, Phone: (301) 295–0454; DSN 295–0454, FAX: (301) 295–1863; DSN 295–1863.

(ii) Defense Special Weapons Agency: Mr. Tom McCabe, Acquisition Management Directorate, Phone: (703) 325–6961; DSN 221–6961, FAX: (703) 325–9291; DSN 221–9291.

(c) Each approved test contracting office shall collect the following aggregate data during the test period:

(1) Number of contract actions selected for the test.

(2) Number of claims related to the streamlined procedures and streamlined solicitation/standard contract.

(3) Contracting office feedback regarding—

(i) The streamlined procedures.

(ii) Use of the RDSC.

(4) Number of acquisitions processed that used the RDSC in conjunction with traditional solicitations.

(5) Number of solicitations and contracts in which clauses and provisions not listed in the format at 235.7006 are added.

(6) Number of actions removed from the test due to inability to comply with RDSS/C procedures, with a brief description of the reasons(s) for the inability to comply.

(d) Each approved test contracting office shall collect and provide the following data for each contracting action processed using the streamlined procedures:

(1) Activity processing the contracting action.

(2) Total value of the resulting contract.

(3) Brief description of the item/service acquired.

(4) Procurement action lead time for the specific action.

(5) Whether or not a supplemental package was used.

(i) Size (number of pages).

(ii) Contents.

(6) Use of RDSC in conjunction with traditional solicitations.

(7) If a protest is filed, the issues under protest, and the disposition.

(8) The rationale supporting any requests for replacement of RDSS with a traditional solicitation.

(9) At a minimum any request for modification of the research and development streamlined contracting format or procedures, and any request for

one time only use of FAR and DFARS provisions and clauses and nonstandard provisions and clauses approved for agency use, that are not in the research and development streamlined contracting format at 235.7006 must include the information required by 201.402(3) (i) through (ix).

[59 FR 52443, Oct. 18, 1994, as amended at 60 FR 15690, Mar. 27, 1995; 60 FR 61599, Nov. 30, 1995; 61 FR 7744, Feb. 29, 1996; 61 FR 50454, Sept. 26, 1996]

235.7004 The research and development streamlined solicitation (RDSS).

235.7004–1 General.

The RDSS process consists of:

(a) *Synopsis.* The synopsis required by FAR 5.203(a), in addition to providing the information set forth at FAR 5.207, must advise potential offerors that a conventional solicitation will not be issued but that the solicitation will appear in a subsequent edition of the Commerce Business Daily (CBD). The synopsis must also advise potential offerors to provide address information to the office indicated in order to be included on the mailing list for any supplemental packages and/or amendments.

(b) *Solicitation.* The solicitation is published in a second CBD notice. The solicitation consists of the information listed at 235.7006(d)(A.1), including the statement of work, and incorporates by reference the appropriate terms and conditions in the format at 235.7006. FAR 5.207 limits the submissions to the CBD to 12,000 textual characters (approximately 3½ single-spaced pages).

(c) *Supplemental package.* Use a supplemental package if the solicitation must exceed 3½ single-spaced pages, or to provide forms or other printed material to potential offerors. Send the supplemental package on the date the solicitation is published in the CBD to all interested parties that provide address information.

(d) *Amendments.* Amend the RDSS as set forth at 235.7004–2(f).

[59 FR 52443, Oct. 18, 1994, as amended at 60 FR 15690, Mar. 27, 1995]

235.7004–2 Solicitation procedures.

(a) Publish the synopsis as soon as the information required by FAR 5.207 is available.

(b) Publish the solicitation no earlier than 15 days after publication of the synopsis and include, as a minimum, the information required by 235.7006(d)(A.1) and a reference to the synopsis.

(c) Send any supplemental package on the date the solicitation is published in the Commerce Business Daily, to all interested parties that provided address information.

(d) In accordance with FAR 5.203(b), establish a due date for submission of offers that is no earlier than 45 days after publication of the synopsis.

(e) Request cost and technical proposals from all offerors. To encourage preparation of better cost proposals, consider allowing a delay between the due dates for technical and cost proposals.

(f) Amend the solicitation, if necessary, by forwarding an SF 30, Amendment of Solicitation/Modification of Contract, to all interested parties that provided address information in response to the synopsis.

(g) Post copies of all Commerce Business Daily notices in accordance with FAR 5.101(a)(2).

[59 FR 52443, Oct. 18, 1994, as amended at 60 FR 15690, Mar. 27, 1995]

235.7004–3 Proposal evaluation and contract award procedures.

(a) Evaluate proposals in accordance with FAR subpart 15.6, as supplemented by departmental procedures and this subpart.

(b) Select the proposal which offers the greatest value in terms of the evaluation factors set forth in the RDSS.

(c) Before award, require the apparent successful offeror to submit the representations and certifications set forth in 235.7006(d), Section K, Representations, Certifications and Other Statements of Offerors or Quoters.

(d) Whenever appropriate, award without discussion pursuant to FAR 52.215–16, Alternate (II).

[59 FR 52443, Oct. 18, 1994, as amended at 60 FR 15690, Mar. 27, 1995; 60 FR 61598, Nov. 30, 1995; 61 FR 7744, Feb. 29, 1996]

235.7005 The research and development standard contract (RDSC).

The RDSC is the standard contract that results from the use of the RDSS or other solicitation procedures that meet the criteria for use of the RDSS. Include the following in RDSCs:

(a) Standard Form (SF) 33, Solicitation, Offer and Award, or SF 26, Award/Contract;

(b) Sections B through J of the RDSS or other solicitation, with applicable fill-ins completed and clause dates added.

235.7006 The research and development streamlined contracting format.

(a) The clauses and provisions prescribed in the exhibit to paragraph (d) of this section are mandatory unless they are marked with an asterisk. Terms, clauses and provisions marked with an asterisk are for use as appropriate as prescribed elsewhere in FAR and DFARS. List the numbers of any asterisked terms, clauses and provisions that apply to the acquisition in the solicitation published in the Commerce Business Daily (See 235.7006(d)(A.1)(v)).

(b) At the time of contract award to educational or nonprofit institutions, delete those clauses and provisions that do not apply to such institutions, and, as necessary, replace with the appropriate alternatives. For example, FAR 52.203–10 will be included in all solicitations, but deleted in awards to educational institutions.

(c) Test Oversight Committee members may authorize for their respective agencies, on a one time only basis, the use of FAR and DFARS provisions and clauses, and nonstandard provisions and clauses approved for agency use, that are not in the research and development streamlined contracting format at 235.7006. Any other modification of the research and development streamlined contracting format or procedures requires approval of the Director of Defense Procurement. Each Test Oversight Committee member shall ensure that the supporting data is accurate and complete.

(d) The research and development streamlined contracting format is set forth in the following exhibit:

EXHIBIT—RESEARCH AND DEVELOPMENT STREAMLINED CONTRACTING FORMAT

PART I—THE SCHEDULE

Section A, Solicitation/Contract Form

(A.1) Research and development streamlined solicitation (RDSS). Include the following in the RDSS:

(i) Solicitation number;

(ii) A statement that award will be made in accordance with DFARS Subpart 235.70, Research and Development Streamlined Contracting Procedures;

(iii) A statement as to whether the RDSS includes a supplemental package.

(iv) Instructions for obtaining any supplemental package, including use of Electronic Bulletin Boards, as appropriate;

(v) A statement that all of the mandatory terms, clauses, and provisions, and certain asterisked terms, clauses, and provisions in DFARS 235.7006 are incorporated by reference. This statement must list the asterisked terms, clauses and provisions that apply. (For example: ''All of the mandatory terms, clauses and provisions at DFARS 235.7006, Research and development streamlined contracting format, and the following optional items are incorporated by reference: B.4, B.5, C.1, E.3, I.80'');

(vi) A statement that the clauses and provisions are those in effect through FAC ____ and DAC ____;

(vii) A statement that the standard evaluation factors at Section M of this subpart apply, or, if they do not apply, the applicable evaluation factors. If the standard evaluation factors are modified in any way, the modifications must be clearly expressed so that the result is unambiguous. Additions to and deletions from Section M must be clearly annotated in the RDSS.

(viii) Identification of data requirements by including either:

(A) A summary of the data requirements that identifies all deliverable data items, and specifies number of copies and frequency of delivery; or

(B) A notice that DD Form 1423, Contract Data Requirements List, is included in the supplemental package;

(ix) Type of cost contract contemplated;

(x) Estimated period of performance;

(xi) Notice of preproposal conference, if applicable, with location, date, and time;

(xii) Notice of small business or other set-aside, if applicable;

(xiii) Notice of place, date, and time technical and cost proposals are due;

(xiv) Number of copies of technical and cost proposals required;

(xv) Proposal page limitations;

(xvi) Whether multiple awards are contemplated;

(xvii) Name, address, and telephone number of contracting officer;

(xviii) Any applicable Commerce Business Daily numbered notes;

(xix) Statement that a DD Form 254, Contract Security Classification Specification, will be included in the supplemental package, if appropriate; and

(xx) The statement of work, or a statement that the statement of work is in the supplemental package.

(A.2) Research and development standard contract (RDSC). Use either Standard Form (SF) 33, Solicitation, Offer and Award, or SF 26, Award/Contract.

Section B, Supplies or Services and Prices/Costs

(Use appropriate CLIN structure. Include item descriptions.)

(B.1) Type of Contract.

This is a _____ contract.

(B.2)* Estimated Cost. (Use when no fee will be paid)

The total estimated cost for this contract is $_____.

(B.3)* Cost Plus Fixed Fee. (Applicable to fee-bearing contracts)

The total estimated cost for this contract is $_____.

The total fixed fee for this contract is $_____.

(B.4)* Award Fee. (Applicable to award fee-type contracts)

In addition to the fee set forth elsewhere in the contract, the Contractor may earn an award fee up to $_____ on the basis of performance during the performance periods, and in the amount specified in the award fee plan.

(i) Monitoring of performance. The contractor's performance will be monitored continually by the Award Fee Review Board.

(ii) Award fee plan. This plan provides necessary administrative information, including the evaluation criteria and schedule, for the purpose of implementing the award fee provision. Upon contract award, the Contractor will be provided the award fee plan subject to any withholdings autorized by the ___ (insert appropriate contracting official).

(iii) Modification of award fee plan. Before the start of an evaluation period the Government may unilaterally:

(A) Modify the award fee performance evaluation criteria and areas applicable to the evaluation period; and

(B) Redistribute the remaining award fee dollars among the remaining periods. The Contracting Officer will notify the Contractor in writing of the changes and modify the award fee plan accordingly.

(iv) The following standards of performance shall be used in determining whether and to what extent the Contractor has earned or may be entitled to receive any award fee:

(A) Excellent performance: Contractor performance of virtually all contract task requirements is uniformly well above standard and exceeds the standard by a substantial margin in numerous significant tangible or intangible benefits to the Government (i.e., improved quality, responsiveness, increased timeliness, or generally enhanced effectiveness of operations). There are few areas for improvement; these areas are all minor; there are no recurring problems; and management has initiated effective corrective action whenever needed.

(B) Very good performance: The contractor's performance of most contract task requirements is uniformly well above standard and exceeds the standard in many significant areas. Although some areas may require improvements, these are minor and are more than offset by better performance in other areas. Few, if any, recurring deficiencies have been noted in the Contractor's performance and the contractor has demonstrated/taken satisfactory corrective action. Innovative management actions have resulted in tangible or intangible benefits to the Government (i.e., improved quality, responsiveness, increased quantity, increased timeliness, or generally enhanced effectiveness of operations).

(C) Good performance: Contractor's performance of most contract task requirements meets the standard, and it exceeds the standard in several significant areas. While the remainder of the contractor's effort generally meets contract requirements, areas requiring improvement are more than offset by better performance in other areas. Management actions taken or initiated have resulted in some demonstrated benefits to the Government (i.e., improved quality, responsiveness, timeliness, or effectiveness of operations).

(D) Marginal performance: Contractor performance meets most contract standards. Although there are areas of good or better performance, these are more or less offset by lower rated performance in other areas. Little additional tangible benefit is observable due to contractor effort or initiative.

(E) Submarginal performance: Contractor performance is below standard in several areas. Contractor performance in accordance with requirements is inconsistent. Quality, responsiveness, timeliness, and/or economy in many areas require attention and action. Corrective actions have not been taken, or are ineffective. Overall submarginal performance shall not be given award fee.

(v) Maximum payable award fee. The maximum payable award fee in any evaluation period shall be determined based on the amount set forth in the applicable contract line items and a percentage based on the Government's evaluation on the Contractor's performance as follows:

Performance	Percent of maximum award fee payable
Excellent	___ to ___

Performance	Percent of maximum award fee payable
Very Good	___ to ___
Good	___ to ___
Marginal	___ to ___
Submarginal	0

(vi) Self-evaluation. The Contractor may submit to the Contracting Officer within five working days after the end of each award fee evaluation period, a brief written self-evaluation of its performance for the period. This statement may contain information which may be used to assist the Award Fee Review Board in its evaluation of the Contractor's performance during the period.

(vii) Disputes. The decision of the Fee Determining Official on the amount of award fee will not be subject to the ''Disputes'' clause.

(viii) Award fee payment.

(A) As determined by the Fee Determining Official, payment of any award fee will not be subject to the ''Allowable Cost and Payment'' and ''Termination (Cost Reimbursement)'' clauses of this contract.

(B) The Contractor may submit vouchers for the award fee immediately upon receipt of the Contracting Officer's written award fee notification.

(B.5)* Target Cost and Fee. (Applicable to incentive fee-type contracts.)

The target cost is $_____.

The target fee is $_____.

The minimum fee the contractor may receive $_____.

The maximum fee the contractor may receive $_____.

Share ration: _____. (Government/Contractor)

(B.6)* Payment of Fixed Fee on Cost-plus-fixed-fee (Completion) Contracts. The fixed fee shall be paid in monthly installments based upon the percentage of completion of work as determined by the Administrative Contracting Officer, subject to the withholding provisions of the Contract.

(B.7)* Payment of Fixed Fee on Cost-plus-fixed-fee (Term) Contracts. (Applicable to cost-plus-fixed-fee (term) contracts when the clause at FAR 52.216–8 is used.) Pursuant to the clause at FAR 52.216–8, ''Fixed Fee,'' and subject to withholding provisions contained in that clause or elsewhere in this contract, fixed fee shall be paid to the Contractor based upon the percentage of hours completed as related to the total hours set forth in the contract on each voucher. The Contractor shall certify to the level of effort expended during that period. The Government technical representative shall sign a statement on the certificate that the work performed during the period has been performed satisfactorily.

(B.8)* Options. (Applicable to contracts with options) The Government may require performance of the work required by CLIN _____. The Contracting Officer shall provide written notice of intent to exercise this option to the Contractor on or before _____. If the Government exercises this option by _____ (insert date), the Contractor shall perform at the estimated cost and fee, if applicable, set forth below.

Estimated Cost	$_____
or	
Estimated Cost	$_____
Fixed Fee	$_____
Total	$_____
or	
Estimated Cost	$_____
Base Fee	$_____
Maximum Award Fee	$_____
Total	$_____
or	
Target Cost	$_____
Minimum Fee	$_____
Target Fee	$_____
Maximum Fee	$_____
Share Ratio	$_____

Section C, Description/Specifications/Work Statements

(C.1)* Classified Work Statement. (Applicable if Section C is classified.) The description/specifications/work statement entitled, ''_____,'' classified _____, dated _____, is incorporated herein by reference. A copy may be obtained from the Contracting Officer, if a need-to-know is established and appropriate security clearance has been granted.

(C.2)* Unclassified Work Statement. (Applicable if Section C is unclassified and is attached to the contract.) The description/specifications/work statement is included as Attachment _____.

(C.3)* Contractor's Technical Proposal. (Applicable if portions of the Contractor's proposal are incorporated by reference. Include only those portions of the proposal that specifically describe the work to be performed.) The Contractor's proposal entitled, ''_____,'' pages _____, dated _____, is incorporated herein by reference.

Section D, Packing and Marking

(D.1) Commercial Packaging.

Preservation, packaging, and packing shall provide adequate protection against physical damage during shipment for all deliverable items in accordance with standard commercial practices.

Section E, Inspection and Acceptance

(1) Federal Acquisition Regulation clauses.

(E.1)* ...	52.246–8	Inspection of Research and Development—Cost Reimbursement
(E.2)* ...	52.246–8	Inspection of Research and Development—Cost Reimbursement (Alternate I)
(E.3)* ...	52.246–9	Inspection of Research and Development (Short Form)

(2) Defense Federal Acquisition Regulation Supplement clauses.

(E.4)* ...	252.246–7000	Material Inspection and Receiving Report

(3) Other provisions.

(E.5) Inspection and Acceptance

Inspection and acceptance of any and all deliverables under this contract will be accomplished by the contracting officer or a designated representative.

Section F, Deliveries or Performance

(F.1) FAR 52.212–13 Stop Work Order-Alternate I.

(F.2) Delivery of Reports.

(i) All data shall be delivered in accordance with the delivery schedule shown on the Contract Data Requirements List, attachments, or as incorporated by reference.

(ii) All reports and correspondence submitted under this contract shall include the contract number and project number and be forwarded prepaid. A copy of the letters of transmittal shall be delivered to the Procuring Contracting Officer (PCO) and the Administrative Contracting Officer (ACO). The addresses are set forth on the contract award cover page. All other address(es) and code(s) for consignee(s) are as set forth in the contract or incorporated by reference.

(F.3)* FAR 52.247–55 F.O.B. Point for Delivery of Government-Furnished Property

Section G, Contract Administration Data

(G.1)* Contractor Payment Address. (To be filled in at time of contract award. Applicable if the Contractor has specified a payment address other than the address shown on the cover page of the contract.)

Contract Payment Address:

_____

_____

_____

(G.2)* Incremental Funding. (Applicable to incrementally funded contracts.) This contract is incrementally funded pursuant to the ''Limitation of Funds clause, FAR 52.232–22. Funds are hereby obligated in the amount of $_____ and it is estimated that they are sufficient for contract performance through _____. From time to time, additional funds will be allotted to the contract in accordance with FAR 52.232–22.

(G.3)* Request for Equal Opportunity Preaward Clearance of Subcontracts. (Applicable to subcontracts over $1 million.) To provide the Contracting Officer with adequate time to process the Contractor's request for preaward clearance of subcontracts as required by FAR 52.222–28, the prime contractor shall request preaward clearance through the Contracting Officer at least 30 calendar days before the proposed award date, unless the cognizant Department of Labor Compliance Office agrees to a shorter time.

(G.4)* Contracting Officer's Representative. (To be filled in at time of contract award.) The Contract Officer's Representative for this contract is:

_____

_____

_____

Section H, Special Contract Requirements

(H.1) Incorporation of Section K by Reference. Pursuant to Federal Acquisition Regulation (FAR) 15.406–1(b), Section K of the solicitation is hereby incorporated by reference.

(H.2)* Rent-Free Use of Government Property. The Contractor may use on a rent-free, noninterference basis, as necessary for the performance of this contract, the Government property accountable under contract(s) _____. The Contractor is responsible for scheduling the use of all property covered by the above referenced contract(s) and the Government shall not be responsible for conflicts, delays, or disruptions to any work performed by the Contractor due to use of any or all such property under this contract or any other contracts under which use of such property is authorized.

(H.3)* Government-Furnished Property. The Government will furnish to the Contractor for use in the performance of the contract on a rent-free basis the Government-owned property listed in an attachment to this contract, subject to the provisions of the Government Property Clause of the Contract Clauses.

(H.4) Scientific/Technical Information. If not already registered, the Contractor is encouraged to register for Defense Technical